

Follow Up Regarding Ohio Health Information Partnership Privacy Summit

The Ohio Health Information Partnership (the "Partnership," formerly known as "OHIP") had a busy summer. The Partnership worked, and continues to work, hard to develop, revise, finalize, and implement various policies and procedures for Ohio's health information exchange ("HIE") known as CliniSync. The Partnership appears to have finalized a key policy for CliniSync – the policy concerning patient consent. This policy is critically important to the success of CliniSync and has the potential to transform the way healthcare providers share health information in Ohio. Recognizing this significance, AMCNO has monitored and remained actively involved with the Partnership concerning the patient consent policy.

Last month, the Partnership convened a privacy summit to discuss the development of the CliniSync patient consent policy, and discuss whether a need exists for legislative initiatives to clarify and update Ohio law regarding the electronic exchange of health information. Over 30 attendees, consisting of privacy and compliance officers, in-house and outside counsel, participated in the summit. AMCNO was also present and provided useful feedback on the health information sharing practices of physicians in Northern Ohio.

Attendees of the summit were treated with an educational overview and demonstration of CliniSync. Representatives of Medicity (the vendor of CliniSync) and the Partnership fielded numerous questions from attendees regarding the infrastructure, mechanics and operation of CliniSync. Representatives also discussed the role and expectation of the participants (*i.e.*, healthcare providers, hospitals, physicians, etc.) in establishing administrative access to CliniSync.

As a brief overview, CliniSync is the electronic infrastructure (or software) that will enable the electronic exchange of health information between healthcare providers in Ohio. CliniSync is not a repository of health information. CliniSync is more akin to a records locator. Electronic health information is never transferred to CliniSync and will remain stored at the participant level. CliniSync is a portal that allows participants to access health information maintained by other participants.

To accomplish this task, CliniSync must build and maintain a community master patient index (CMPI), which is a database of demographic information on patients. CliniSync will populate and create the CMPI using the patient demographic information that participants upload into CliniSync. Populating and creating the CMPI will take time but once complete CliniSync will be capable of locating the health information of specific patients maintained by participants across the state.

From a workflow standpoint, participants will access CliniSync via a web-based portal or, depending on functionality, participants' existing EHR system.

One of the most important functions of CliniSync is its ability to track on a patient-by-patient basis whether a patient has opted in or opted out of the HIE. This is important because the Partnership introduced the revised patient consent policy for CliniSync at the summit. This revised, and final, patient consent policy is an opt-in model of consent. Simply put, a patient must affirmatively consent to the sharing of the patient's health information via CliniSync. Consequently, without a way to track and monitor the status of patient consent, CliniSync would be an unworkable system from the start.

The revised and final patient consent policy is the culmination of months of committee work and a public comment process. AMCNO and other healthcare stakeholders in Northern Ohio have been involved from the beginning providing detailed insight into the health information sharing practices in Northern Ohio and comments to the Partnership's position regarding patient consent.

Throughout the process, AMCNO focused on two main areas. First, the desire for the Partnership not to take a position regarding the necessity under Ohio law of patient consent for the sharing of health information for treatment purposes. Second, the practical workflow barriers that exist with an opt-in model and the obligation to obtain express patient consent.

The Partnership considered these two areas in great length and ultimately decided to finalize a patient consent policy that, while not exactly in line with the requested proposal from AMCNO and others in Northern Ohio, may provide a manageable framework without too many collateral consequences. The revised policy is guided by the Partnership's interpretation of

existing Ohio law regarding patient consent. The revised policy though is strictly policy based and risk management focused. The Partnership does not appear to take the position that Ohio law affirmatively requires express written consent from patients to share health information for treatment purposes.

In addition, to reduce the burdens on operational workflows, the revised policy requires only a one-time patient consent. This consent is valid indefinitely until the patient revokes it.

These aspects of the patient consent policy are critically important. By not taking a position on Ohio law, the Partnership implicitly recognizes that healthcare providers may elect not to participate in the CliniSync. While participating in CliniSync is encouraged, a healthcare provider may determine that the burden of obtaining patient consents for treatment purposes outweighs the operational efficiencies and other desires of current practice. That current practice being the permissible sharing of health information for treatment purposes among treatment providers without an express written consent from the patient.

This concept was discussed at length during the summit. Representatives from hospitals throughout the state acknowledged in some fashion that health information is shared between treatment providers without the express written authorization from the patient. In fact, several provider representatives indicated that patients oftentimes expect their treating healthcare provider to share health information with other treating providers without the need for the patient to sign an express authorization. Many representatives, specifically attorneys, argued that a contrary position from the Partnership would not only curtail workflow efficiencies with respect to health information sharing, but also put healthcare providers at significant liability risk for unauthorized disclosure of health information.

Another aspect that was discussed during the summit and is addressed by the Partnership is the desire for a robust public awareness and patient education campaign. A theme that was present with several of the attendees at the summit was that the requirement of an express patient consent furthers or strengthens public awareness and patient education. To the extent that this theme is a major foundation for the patient consent policy, it may be a bit misguided.

There is no question that patients and the public have the right, and need, to know how their health information is being shared. But using the requirement that each patient affirmatively sign a CliniSync consent form is probably not the most effective way to educate patients and increase public awareness.

The requirement for express patient consent is more focused and serves to protect CliniSync participants from the legal liability that would flow from any unauthorized disclosure or use of a patient's health information. Given the circumstances in which most patients will be requested to sign the consent form, many patients are unlikely to acknowledge and appreciate the benefits and risk of participating in the CliniSync System. Patients that present for medical treatment are generally concerned about one thing, their medical care. Requiring patients to also comprehend the significance of their decision to participate in CliniSync at the same time is unlikely to contribute to patient education and awareness.

The Partnership has indicated that it will conduct a public awareness and education campaign. Nevertheless, the Partnership should embrace an opportunity to educate patients in ways that permit the patient to fully appreciate and acknowledge the benefits and risks of their decision to participate in CliniSync. Relying heavily on patient consent is not the best way to make the public aware of CliniSync.

Now that the revised patient consent policy appears to be final and healthcare providers will be required to obtain affirmative consents from patients before sharing health information via CliniSync, a change to the revised patient consent policy may require legislative response. Several states have addressed this issue and have taken legislative action. For example, Nevada, Tennessee and Virginia each have enacted statutes that expressly permit the electronic sharing of health information for treatment purposes. In essence, these states have statutorily declared to follow an opt-out approach to HIE implementation.

Then there is Kansas, which has passed legislation that defers to HIPAA as the standard governing the use and disclosure of health information. Accordingly, in Kansas healthcare providers are permitted to share health information for treatment, payment and healthcare operations purposes without any express consent from the patient. It is interesting to note also

that based on the research of the Partnership, Ohio is in the clear minority of states that have elected to implement an opt-in system for HIE development.

Maybe legislative action, similar to Nevada, Tennessee and Virginia, or even Kansas, is appropriate for Ohio. Any legislative response in Ohio must affirmatively address electronic sharing of health information via CliniSync. Otherwise, policy-based positions and decisions, some of which are extremely compelling, may support and justify an opt-in system.

If legislative action is desirable, timing considerations exist that must be addressed. Right now may not be the best time to approach a legislative solution. With the revised patient consent policy, and given an opportunity for implementation and operation, participants in CliniSync may find that the legal and practical concerns are less significant than initially anticipated. Alternatively, nothing prevents the Partnership from re-evaluating the patient consent policy at a later time and deciding to change the policy in favor of an opt-out approach. This scenario would certainly exist if CliniSync experiences significant lack of participation.

Ultimately healthcare providers must embrace the concept of a state-wide, and national HIE. CliniSync appears to be a solid technical platform. The Partnership has worked, and continues to work, hard to develop policies and procedures that will contribute to the success of CliniSync. The revised patient consent policy should not stand in the way, and if it does, workable legislative solutions should be considered.

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