

Legal Working Group Meeting Minutes **Wednesday, November 7, 2007**

Participants: Nancy Gillette, Stephanie Jursek, Janice Franke, Pete Mihaly, Terri-Lynn Smiles, Darrell Rannum, William Mitchin

Phone: Jeff Kapp, April Smith, Sue Yoder, Socrates Tuch, Jim Lapczynski, Michele Shuster, Ted Munsell, Deborah Bahnsen, Amy Leopard, Katie Ellinger, Sarah Plake, Karen Smith, April Smith

WELCOME & INTRODUCTIONS

Nancy Gillette welcomed the group, and attendees introduced themselves.

APPROVAL of September 26, 2007 MINUTES

A motion to approve the September 26, 2007 minutes as written was made. The motion passed unanimously.

HISPC/OHHIT UPDATE

HISPC

Stephanie Jursek provided a brief summary to the Legal Working Group (LWG) of updates concerning the HISPC project. She indicated that RTI held a meeting for the national collaboratives on November 1-2. Bill Mitchin and Nancy Gillette represented Ohio for the consent collaborative. Each of them commented on key information for planning next steps. Nancy shared with the LWG notes from other states that are focused on consent issues. She indicated that twelve states presented a summary of the consent projects by the legal work groups. It was noted that all these states had antiquated law(s) that did not take into account the electronic exchange of patient health information. To address these issues, states took a variety of approaches. These approaches included drafting legislation, developing model consent/authorization forms, or crafting a data use agreement in addition to consent/authorization forms. She also noted that the North Carolina legal work group planned to draft a model consent/authorization form and a data use agreement. Additionally, North Carolina had similar challenges to those in Ohio related to state statutes and pre-HIPAA case law pertaining to consent for use and disclosure of patient health information. Inquires were made as to advocating changes at the federal level. In response, Nancy commented that there was no discussion of having federal legislation preempt state consent statutes to establish more uniformity amongst the states. However, representatives from the Office of the National Coordinator for Health Information Technology were at the national meeting and were requested to be more proactive in coordinating efforts of organizations that are addressing these issues.

With respect to the interstate compact efforts for the Phase III of the HISPC project, Bill Mitchin informed the group that inclusion of the development of an interstate compact to address privacy and security variations for health information exchange amongst states was approved. It would be an added segment of work for Option 2. Ohio would take the lead in creating the compact proposal. The focus of Option 2 in addition to the interstate compact is to track national efforts for consent and review 5 models for an opt in or opt out approach, regarding health information exchange. Of note, the scope of the work for the interstate compact in 2008 would be limited to justifying why the interstate compact is the recommended approach in addressing the privacy and security variations amongst the states. As part of that process, the LWG would be required to discuss the risk and benefits of the use of uniform laws, model state laws, choice of laws, and conflict of laws as legislative approaches. In 2009, the terms of the compact would be outlined by the LWG. This was disappointing news. It was anticipated that the terms of the compact

would be developed in 2008. There was a good exchange of information by LWG representatives, regarding interstate compacts wherein Ohio is a member and promoting the compact as a viable solution to Congressional representatives.

OHHIT

Stephanie informed the LWG again that the Governor signed the executive order (Executive Order 2007-30S) on September 17 that was crafted by the Health Policy Institute of Ohio in conjunction with the Ohio Department of Health and Ohio Office of Information Technology. A key aspect of the Advisory Board role is the development of the Ohio Health Information Partnership (OHIP). She also reported that Governor Strickland was a presenter at the 4th Annual Health Information Technology and Health Information Exchange Summit. Senator Stivers, Representative Raussen, and Representative Celeste served on a legislative panel, and a breakout session for review of the model permission form was held.

DRAFT OHIO MODEL PERMISSION FORM REVIEW

Terri-Lynne Smiles indicated that subsequent to the September 26 meeting, significant feedback on the form had been received. The feedback from the Summit breakout session was particularly noteworthy. She explained that stakeholders indicated they were having difficulty discerning when to complete the authorization section and when to complete the consent section for TPO. A number of stakeholders believed that portions of the authorization section applied in seeking permission for TPO. To clarify it was decided to divide up the form and create two separate forms. The consent section for TPO is now a separate form from the authorization section.

With respect to the consent form for TPO, inquiries were made as to whether consent is required to use and disclose patient health information. It was noted that frequently healthcare providers disclose to other providers treatment information without obtaining prior patient consent. In response, Nancy Gillette commented that seeking patient consent for TPO is not to take place at every stage of treatment where patient information may be exchanged. Consent is to be obtained at the initial contact between the physician and the patient. The LWG representatives agreed that HIPAA does not require that consent be obtained for TPO. However, Ohio case law is stricter than HIPAA and requires that consent be obtained prior to the use and disclosure of patient health information for TPO. Proactive dialogue ensued. From the discussion, consensus was secured amongst the LWG representatives that there would be a consent form and an authorization form and this two-part form would serve as a model form in Ohio. The model form will not be mandated.

In addition, Pete Mihaly recommended that the consent form for TPO be revised to comply with HIPAA. Others did not concur since the consent form is governed by Ohio law not HIPAA. If HIPAA language were included to the consent form, a false expectation to the public could be created. It was decided not to include HIPAA language in the consent form for TPO. However, a provision regarding the patient's right to revoke permission would be included based on statutory requirements along with a worker's compensation provision, outlining the parties that would have access to the injured worker's claim. Also, a provision concerning the re-release of information would be added.

With respect to the authorization form, in-depth discussion ensued regarding the list of component parts of the medical record. The general consensus by the LWG was that the types of categories to be listed were not mandated by statute. It was decided that broad categories of health information would be listed and blank lines provided, so a patient could add categories

to the list. Janice Franke indicated that she would determine if mental health laws required certain categories to be listed. Additionally, Nancy informed the LWG that Ohio law has recently been changed pertaining to the time period as to how long an authorization can remain in effect. The time period is now one year unless the authorization involves mental health information. In that case, the time frame is 6 months.

Of note, Nancy Gillette informed the LWG that the LWG Co-Chairs sent a letter to the Office of Civil Rights to determine if consent for use and disclosure could be included with an authorization in the same form. The Office of Civil Rights had not yet responded. However, with the current use of two separate forms, this has become a mute issue.

Further, the Kentucky representative commented that, in review of the form, a consumer from the HISPC Kentucky team recommended that the form be modified to reflect that a patient has the right to “opt out “ for signing the consent form for TPO.

NEW BUSINESS

Stephanie Jursek informed the LWG of the eHealth Initiatives Blueprint report and its purpose. She suggested the LWG review the privacy, security, and confidentiality section of the report and provide feedback on the application of that section on the work of the LWG.

NEXT MEETING

The next meeting is tentatively scheduled for Thursday, November 29, 2007, from 10:00 a.m. to 12:00 p.m. at the HPIO office.