

Physician Organizations



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Physicians and RHIOs— Understanding the Use, Disclosure, and Maintenance of Patient Information

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Slowly but surely physician practices across the country are in the process of implementing or considering the implementation of an electronic medical record (EMR). Recently, the National Center for Health Statistics reported that almost one-quarter of all physicians are utilizing a full or partial EMR in their practices.¹ As physicians move their practices into the electronic age, the opportunity will exist for these physicians to engage in electronic health information exchange (HIE) with others in the healthcare community. One such opportunity will be via participation in an electronic HIE organization in the physician's geographic region. Such organizations are known by several different names with one of the more common names being a Regional Health Information Organization (RHIO).

There are a number of legal issues related to physician participation in a RHIO including the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the federal physician self-referral prohibitions (the Stark Law), antitrust issues, and others. This article briefly

addresses some of the relevant issues related to the use, disclosure and maintenance of protected health information that a physician practice should consider prior to participating in a RHIO. For those who wish to have a more comprehensive understanding of all the major issues involved in participating in a RHIO, the AHLA publication, *The Quest for Interoperable Health Records: A Guide to Legal Issues in Establishing Health Information Networks*, provides an excellent review.

Although the concept of sharing electronic health information has been around for some time,² the concept became a reality for many in the healthcare community on April 27, 2004, when President George W. Bush expressed his desire to have a fully interoperable national health information network by 2014 and created the Office of the National Coordinator for Health Information Technology (ONC).³ As would be expected, there has been a great deal of activity during the last two years, including the creation of many new RHIOs.⁴

The facilitation of electronic HIE among regional participants in the healthcare arena allows for an extensive array of benefits for both the participants and their patients.⁵ One of the most commonly thought of benefits of participation in a RHIO is the ability to provide its participants with accurate and timely access to a patient's medical

information for treatment purposes. For example, suppose a patient presents to a local hospital emergency room with an emergent condition, that the patient is unconscious, and that there is no emergency contact information available. If the hospital participated in a RHIO, the attending emergency doctor would be able to send an electronic query to the RHIO seeking any available information regarding the patient. If the patient's primary care provider was also a participant in the RHIO, the emergency doctor potentially would be able to access relevant information about the patient, including current medications, allergies, and recent illnesses.

While the benefits of physician participation in a RHIO are obvious from a patient care perspective, there are issues that physicians and the attorneys representing them will need to address prior to participation in the RHIO. One such issue is having a basic understanding of how a RHIO will use, disclose, and maintain patient information.

As mentioned above, a RHIO is an organization that facilitates electronic HIE among its participants. A RHIO may have a wide range of participants including, but not limited to, local physician practices, hospitals, laboratories, state governments, and payers. While a RHIO, depending on its structure, may be a covered entity⁶

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—from a declaration of the American Bar Association

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under HIPAA, it is likely that the RHIO will be an independent organization that falls outside the definition of a covered entity. In most instances the RHIO will likely be considered to be a business associate⁷ of its participants. In either case, RHIO participants must ensure that the RHIO operates in compliance with the applicable requirements under the HIPAA privacy and security rules. Additionally and somewhat less clear of an issue, RHIO participants will also need to ensure that they, as well as the RHIO, are in compliance with applicable state law. It should be noted that compliance with state law will most likely be based upon the requirements imposed on the individual participants of the RHIO rather than the RHIO itself.⁸

A potential RHIO participant must understand how the electronic HIE will take place. RHIOs can generally be categorized as falling into one of two models: centralized and decentralized. Briefly, in the centralized model the RHIO would function as a centralized repository holding patient information provided by participants and making such information available to other participants as appropriate. In the decentralized model the participants maintain their own patient information and the RHIO functions as sort of an internet post office, taking participant requests for patient information and forwarding them to the participants that maintain the requested information. Upon receipt of an appropriate request for information, the RHIO participant that maintains the desired information

would make the information available to the requestor. Depending upon the model utilized by the RHIO—centralized, decentralized, or a hybrid of the two—potential participants should clearly understand the flow of information among the parties as well as which party is legally responsible for the maintenance of the information.

Physician participants in a RHIO utilizing the centralized model or a similar variant should determine which entity (the RHIO or the participant) will maintain the legal record or designated record set.⁹ If the RHIO will take on the responsibility of maintaining the legal record, the physician participant should thoroughly understand how patient information may be used or disclosed by the RHIO. Specifically, the use, disclosure, and maintenance of patient records should comply with the applicable requirements of HIPAA and relevant state laws, including those state laws that may be more stringent than HIPAA. The physician participating in this type of RHIO should understand how the RHIO will handle common occurrences including, but not limited to, requests for accounting of disclosures,¹⁰ requests for restrictions,¹¹ requests for amendments,¹² requests for access,¹³ disclosures of information required by law,¹⁴ and disclosures of information not requiring patient authorization.¹⁵

Additionally, the physician must determine if the maintenance of the record by a RHIO is allowed under applicable state law governing the maintenance of medical records. In Florida, for example, physicians are required

to develop policies and procedures to ensure the confidentiality and security of medical records,¹⁶ as well as maintain a record of disclosure of information contained in the medical record.¹⁷ While Florida law does not address the specific issue of maintenance of a physician's medical records by a RHIO, the responsibility of the physician to ensure compliance ultimately remains with the physician.¹⁸

There are also several issues common to both the centralized and decentralized models that must be considered. As a RHIO under either model will, at a minimum, possess some amount of patient information, there should be clearly-defined information access and authorization protocols. For example, under what circumstances may a RHIO participant utilize the RHIO to access patient information maintained by the RHIO in a centralized model or maintained by another participant in a decentralized model? Questions such as who is authorized to access the information must be addressed. For example, are only physicians authorized to access information via the RHIO, or may members of the physician's staff have such privileges? From a security standpoint the physician participant should understand what mechanisms the RHIO has in place to maintain the confidentiality, integrity, and availability of the information that is under the RHIO's control.

Another issue affecting HIE in the RHIO setting is the need for patient consent to use and disclose patient information among RHIO participants. While the HIPAA privacy rule allows for

the use and disclosure of patient information for treatment, payment, and healthcare operations,¹⁹ many state laws are more stringent than HIPAA and may require the specific consent of the patient to use or disclose information. Florida, as an example, has several laws that are more restrictive than HIPAA and that require the written consent of the patient prior to the use or disclosure of information.²⁰

Physician participation in a RHIO can be a positive event for all involved by, among other things, providing physicians with timely access to patient information that otherwise may not be immediately available to them. The access to patient information afforded by participation in a RHIO has the potential to improve patient care, reduce medical errors, and reduce costs. However, prior to joining a RHIO, physicians and their attorneys should have a thorough understanding of how their patients' information will be used, disclosed, and maintained.

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Endnotes

¹ National Center for Health Statistics, *Electronic Medical Record Use by Office Based Physicians: United States 2005*, available at www.cdc.gov/nchs/products/pubs/pubd/hestats/electronic/electronic.htm#1.

² As far back as the mid-1990's there were attempts to create

RHIO-like organizations called Community Health Information Networks (CHINs).

³ Executive Order 13335 (April 27, 2004).

⁴ Currently there are more than 100 regional projects underway that are receiving federal funds. *See* www.hhs.gov/healthit/rhio.html, last viewed November 21, 2006.

⁵ It is believed that that the widespread adoption of an interoperable HIE will lead to benefits ranging from a reduction in medical errors to a lowering of healthcare costs. *See*, <http://answers.hhs.gov/>, FAQ #7 under category "Health Information Technology," subcategory, "American Health Information Community."

⁶ 45 C.F.R. § 160.103.

⁷ *Id.*

⁸ Florida law, for example, does not specifically address RHIOs or electronic HIE.

⁹ 45 C.F.R. § 164.501.

¹⁰ 45 C.F.R. § 164.528.

¹¹ 45 C.F.R. § 164.522.

¹² 45 C.F.R. § 164.526.

¹³ 45 C.F.R. § 164.524.

¹⁴ 45 C.F.R. § 164.512(a).

¹⁵ 45 C.F.R. § 164.512.

¹⁶ Fla. Stat. Ann. § 456.057(11).

¹⁷ Fla. Stat. Ann. § 456.057(12).

¹⁸ Fla. Stat. Ann. § 456.057.

¹⁹ 45 C.F.R. §§ 164.502 & 164.506.

²⁰ For example, Fla. Stat. Ann. § 381.004(3)(e)(2) (HIV test results); Fla. Stat. Ann. § 394.4615 (mental health records); Fla. Stat. Ann. § 397.501(7) (substance abuse records) and Fla. Stat. Ann. § 760.40 (genetic testing).

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