

## PROCESS FOR DEVELOPING THE OPTION:

### Discussion

The IL and CA analyses discuss the development of two variations of Choice of Law COL – contractual and statutory.

### PROs

#### IL

- Contractual COL is easily executed by including a provision into an agreement specifying which state's law prevails
- A statutory choice of has the force of the law behind it

#### CA

- Contractual
  - Ease of negotiating terms
  - Many entities already doing it
  - Can customize it to fit unique situations
- Statutory
  - Uniform for state
  - More buy-in and open to the consumer and community
  - Easily understood process

#### OH

- Protects the justified expectations of the parties and clarifies what their rights and liabilities are in a given situation
- State laws have already been interpreted by the courts, thereby allowing a greater degree of certainty about what those laws mean

### CONs

#### IL

- Doesn't alter the legal framework of the states where the private parties exist
- States are likely to continue to want their laws to apply, notwithstanding a COL provision
- Passing a COL statute could be difficult and time-consuming, and could include undesired modifications and amendments during the legislative process

#### CA

- Contractual
  - May not resolve legal liability issues
- Statutory
  - Complexity of legislative process and non-uniformity in adoption by other states

- Less nimble than contracts
- If too California centric, may hinder exchange

OH

- Increased time for negotiation and development of an appropriate COLs provision

### **LENGTH OF TIME REQUIRED TO FORMULATE:**

#### Discussion

The CA analysis references HISPC collaborative efforts as a factor that might speed formulation. OH talks about a lengthy negotiations process, while IL notes that contractual would be quicker than a statutory approach.

#### PROs

IL

- A contractual COL provision could be negotiated rather quickly if the parties coming together have similar interests and positions.

CA

- Contractual provision less time consuming than legislation

OH

- Spending additional time on the “front end” establishing the applicable COLs will likely lead to less time on the “back end” deciding which laws apply to a given dispute

#### CONs

IL

- Negotiations for a contractual provision could be lengthy if parties to the agreement differ on which state law should prevail
- Legislatures may not be willing to move quickly to implement a statutory COL provision

CA

- Time consuming and will probably require additional regulations to implement

OH

- Writing a COLs provision might raise additional issues that the drafting committee or participating states may prefer to keep closed for the sake of getting the compact, model act, or uniform law finished

## IMPLEMENTATION REQUIREMENTS:

### Discussion

The OH analysis highlights the need for research to help drafters creating the COL provision, unless it simply establishes that the law of the requesting state (or responding state) applies in all circumstances. CA noted possible conflicts with statutorily mandated COL provisions among different states. IL discussed how the COL provision would be operationalized by stakeholders.

### PROs

#### IL

- Implementation via a central repository that was responsible for operationalizing the disclosure would be the easiest method if the technology would allow for the determination of whether the consent laws are met prior to disclosure.
- Providers will have less uncertainty about which form to use and what rules to apply once it is settled which state law applies.

#### CA

- Contractual
  - Easy to customize to situation
- Statutory
  - Uniformity through out state; unclear for interstate unless similar laws
  - More accessible, terms are available for research and adoption by other states, in contracts

#### OH

- With a properly defined COLs provision, future disputes can be resolved more expeditiously by the courts, or through a defined dispute resolution process.

### CONS

#### IL

- To the extent a COL provision indicates that another state's law applies, the process to repeatedly update providers (or a central repository) on existing laws in other states will be cumbersome. Given that health care laws change frequently, providers don't necessarily have the time to research any updated consent law changes in order to transfer the information in a timely manner. This could lead to confusion.

#### CA

- Statutory
  - May require regulations to implement

- Need to be consistent with other state’s COL so business practices can be uniform

#### OH

- Increased negotiation or drafting time, as this may be a major point of discussion while attempting to reach consensus among the stakeholder communities as to the appropriate guidelines for the HIE transaction.

### **LEGAL FRAMEWORK/RULES OF ENGAGEMENT:**

#### Discussion

In addition to describing IL law with respect to the release of PHI, the analysis looked at different approaches for how a compact may operate. These are: *Approach 1 – the laws of the “Responding State Prevails;”* and, *Approach 2 – the laws of the “Requesting State Prevails.”* IL also set up two sub groupings – scenarios defining how strict the consent laws of the responding or requesting state were – with Scenario 1 analyzing situations where the responding state’s laws were more stringent, and Scenario 2 discussing the reverse.

#### PROs

##### IL

- Examples of workable COL options:
  - Generically drafted provision adopted by each state, i.e. “requestors follow the consent laws of the responding states and responders follow the consent laws of the responding state”
  - A multi-state RHIO contractually agreeing to a more stringent disclosure, with providers in the less stringent states not violating their own law, just being overly compliant
- *Approaches*
  - Approach 1 easiest to implement because it is closest to the status quo
  - Scenario 1 likely to provide freer flow of needed health information
  - Scenario 2 privacy concerns are best protected

##### OH

- Status quo/current state of the law is known; allows parties to choose forum/gives parties more flexibility

#### CONs

##### IL

- Benefits not realized if the COL provision is not adopted consistently by all relevant states
- This complicates things exponentially given that there are currently 50 state consent laws which will then have an overlay of 50 COL provisions

- Contractual COL cannot overrule a statutory provision.

#### OH

- No guarantee that the parties' choice will be implemented/followed by courts
- Courts and attorneys applying laws of a different state may lack expertise in interpretation and application of that state's laws

### **IMPACT ON STAKEHOLDER COMMUNITIES:**

#### Discussion

The IL analysis discussed stakeholder involvement in the negotiation process. Stakeholders will also be involved in the legislative process. CA noted the burden of to implement a COL provision in accordance with the variances in the state laws. OH notes that the COL option may not eliminate barriers.

#### Positive Impact

##### IL

- A clearly drafted COL provision that is adopted by all parties can simplify things and result in the expedited exchange of health information.
- May help with stakeholder liability issues.

##### CA

- Contractual
  - Ease to create for Provider/payors
- Statutory
  - More transparent for everyone

##### OH

- Some Recognition of COL by Courts
- Reduced Litigation

#### Negative Impact

##### IL

- Conflict if different states adopt different COL provisions
- Privacy concerns may not be adequately addressed if the COL provision results in a less stringent environment
- Conversely a more stringent environment could inhibit the free flow of information need to care for patients

##### CA

- Contractual

- Not transparent for consumers, regulators or otherwise affected entities/persons
- Not helpful public health or research, unless contract provides
- Statutory
  - May make it harder to customize for unique situations; less influence over the results

#### OH

- Inconsistent Judicial Interpretation, Remaining Fear of Liability and Deterred Uptake
- Disparate Burden and Professional Ethics
- Consumers might be even less able to represent themselves adequately should a conflict arise
- Many consumers would be less informed in negotiating such terms - increases the risk that contractual COL provisions would be overturned

### **FEASIBILITY:**

#### Discussion

IL and CA overtly discussed feasibility in terms of “cost” and “political viability.” IL also raised the question as to whether the option was “technically possible.” CA added criteria for: foreseeable barriers to administering a COL provision; ease of enforceability; and uniformity with other states.

#### PROs

##### IL

- A COL is an inexpensive solution. A centralized repository may make implementation easier so long as the repository is aware of the requirements and how to apply the COL provision.

##### CA

- Contractual
  - Cost to develop language is more
  - Ease for parties to dispute, by terms of contract
  - Maybe more cost effective to enforce
  - Not open for public debate
- Statutory
  - Will still incur cost to develop customization to existing statutes, but easier
  - Statute can spell out enforcement, bring in regulatory oversight

##### OH

- Enacting a uniform statute to standardize the COL is the subject of separate inquiry. However it is feasible but would require an undetermined amount of

time for participating states to enact legislation. Regarding existing practices to address COL in contracts, or to resolve matters where contracts fail to address the issue, there is no feasibility issue since the status quo would continue and is well governed by decades of court rulings and probably adoption in every state of the Restatement (Second) of Conflict of Laws.

### CONs

#### IL

- Limited effectiveness of contractual COL provision because it does not supersede state consent laws
- Statutory COL may have limited benefit if other states adopt inconsistent provisions
- There will be a cost, as well as the need to conduct training of providers and patients
- Political concerns may arise over the application of other state laws
- Technical feasibility is difficult as providers will not have the time to fully research other states' laws in order to comply with the option

#### CA

- Contractual
  - Terms not accessible for development of similar contracts
  - State law enforceability may be questionable
- Statutory
  - Legislative process could delay enactment and implementation
  - Could become more political, tied to unrelated issues

#### OH

- COL would require an undetermined but probably lengthy amount of time for participating states to enact legislation
- Cost, delay and uncertainty of Ohio's COL practices
- In cases of disputes between or among parties, existing case law permits a party to litigate the issue and sometimes prevail for reasons more related to the forum in which the litigation is initiated than the strict application of COL principles or contractual language to the matter at hand.

### **DOES THE OPTION ADDRESS LIABILITY CONCERNS:**

#### Discussion

CA – “Neither method of implementing ‘choice of law’ will address the liability concerns of the parties, unless the state laws of the negotiating partners are similar and do not impose a dominance that conflicts with the other state’s laws.”

OH – “Choice of law provisions are routinely used in contracts involving parties located in more than one state in order to specify which state’s law applies in the event of

contractual dispute. Such clauses are often but not always upheld by judges. For reasons described below, resolution of interstate health information exchange liability concerns by use of choice of law clauses in contracts or other written instruments cannot be recommended unless state legislatures provide clear guidance through uniform statutory enactments (including participation in a multi-state compact).”

### PROs

#### IL

- A COL provision enacted as a state statute offers greater protection to the requesting and responding states as there would be no violation
- Compliance with a state statute might help avoid or reduce civil liability if compliance to the statute is considered fulfillment of the duty owed to the plaintiff
- If the state takes action, it increases the ability for others to get insurance for risks involved in the process.
- If a request is made by a requesting state, the responding state will likely lack the jurisdiction to enforce its statutes against the requesting party. As long as the requesting state has complied with the consent requirements of its state, there would be no barrier to the exchange of PHI
- Likewise, as long as the responding state has complied with the disclosure requirements of its state, there would be no barrier to the exchange of PHI. This simplifies the exchange process, as each party need only be familiar with, and compliant with, the laws of its own jurisdiction. The statutory approach to determining COL might offer some degree of protection from civil liability because the exchange would have been compliant with relevant law.

#### CA

- Contractual
  - Parties can make liability specific, with indemnity provisions
- Statutory
  - Can make liability specific
  - Can provide more protection to the parties with unequal bargaining powers

#### OH

- COL clauses are well understood and allow contracting parties to easily modify the provision as circumstances dictate

### CONs

#### IL

- Of the two approaches to COL, the contractual COL provision offers less protection against civil liability because the contractual provision only represents a binding agreement between the parties to the contract, not with

third parties. A contractual agreement for consenting may be in conflict with state law, which leaves people open to liability. Contractual provisions agreed upon by parties to a contract offer little or no protection from statutory liability. Even with a contractual COL provision, the requesting state and responding state would need to ensure that their respective conduct is compliant with the statutory requirements of their respective states. Vendors getting into the HIO business are likely not able to be insured for the consent liability, so having this be the responsibility of a central repository is not feasible at this time. Additionally, providers may be reluctant to participate in an HIO, because their professional liability insurance may not currently cover liability arising from unauthorized disclosure of protected health information made electronically. A COL provision is unlikely to reduce that barrier.

- Claims for civil liability for an appropriate use or disclosure of information are more likely to arise between an HIO member and the patient that is the subject of the information, rather than between the parties of the contract. The contractual provisions would likely not help to reduce civil liability.

#### CA

- Contractual
  - Tends to exacerbate the relative unequal bargaining powers of the parties: funding and sophistication
- Statutory
  - One size may not fit all, not meet all potential liability concerns

#### OH

- Unless legislatures adopt uniform language, relying on COL provisions in contracts and agreements (e.g., consent for HIE disclosure) would cause too much uncertainty and not satisfactorily resolve liability concerns. One can imagine that a party/entity active in health information exchange would need to know, or be able to determine, the applicable law in each of 50 states.
- Where parties have not specified which state's law controls, the guidance provided by the Restatement (Second) of Conflict of Laws provides too many opportunities to reach different conclusions on the same fact pattern
- When disputes inevitably arise, parties would be able to challenge the validity of the contractual COL provision on various grounds (e.g., public policy, unfair bargaining position, renvoi) and, even when the challenge is not technically appropriate, history demonstrates that courts would sometimes rule in favor of the challenger
- These reasons compel a recommendation not to rely on COL provisions to facilitate HIE unless legislatures in the affected states have enacted uniform statutes that provide certainty and satisfy liability concerns.

### **RAMIFICATIONS OF ACCEPTANCE/REJECTION:**

The state analyses identified the benefit of acceptance as an elimination or some mitigation of the barriers to HIE. Rejection will leave those barriers intact.

## CONFLICTS WITH STATE OR FEDERAL LAWS:

### Discussion

The state analyses highlighted the problem that contractually executed COL provisions have with respect to conflicts since state law would supersede the contract. Statutorily enacted approaches would be better able to address conflicts.

### PROs

#### CA

- Contractual
  - Nimble to address concerns
- Statutory
  - Best at addressing conflicts in own state law
  - Ease in complying with HIPAA

### CONs

#### IL

- There will be jurisdictional issues as a contractual agreement for consenting may be in conflict with state laws
- Similarly, unless all states enact the same COL provision and then the underlying laws of the states are consistent (which is not currently the case), a COL provision will not be a practical solution

#### CA

- Contractual
  - Not able to address laws that conflict
- Statutory
  - Conflicts with federal laws will not be cured if statute does not conform

#### OH

- Interstate access to medical records will continue to be impeded by conflicting requirements. Specifically, two states may each have statutes applying its own laws, rather than the laws of the other state. In these situations, COL provisions will make the process for interstate access to medical information less certain, and therefore more difficult

## PROCESS FOR WITHDRAWAL:

### Discussion

The analyses from the states noted the need for statutory COL provisions to be repealed while contractual provisions would subject to modification procedures set out in the agreement.

### PROs

IL

- A contractual provision is easier to withdraw from than a statute because it requires no legislative action.

CA

- Contractual
  - Ease, pursuant to terms of contract

OH

- To extent specified by parties, within parties' control

### CONs

IL

- The ease of which it is possible to withdraw from a contractual COL provision may not provide the parties with much of a mandate for robust health information exchange.

CA

- Statutory
  - Difficult to repeal a law
  - Urgency bills require 2/3 vote to amend, unintended consequences

OH

- Length of time; uncertainty

## **STATE RESPONSIBILITIES:**

### Discussion

CA and OH pointed to the state responsibilities with respect to enforcement of COL provisions. IL noted the need for state assistance in implementing COL efforts to remove barriers to HIE.

### PROs

CA

- Contractual
  - Minimal state responsibility
- Statutory

- Potential for regulatory oversight & regulations

OH

- Ambiguities created by the current state of affairs does allow for some flexibility to address unexpected circumstances without having to formally amend fixed or codified terms

### CONs

IL

- COL will not be helpful unless we have consistent adoption and application
- COL could be in conflict with both state and federal laws, as well as result in a contract dispute if there is a violation

CA

- Contractual
  - No oversight currently being performed; may need to develop
- Statutory
  - Integration of other state regulators

OH

- This being the present state of affairs, choosing this option continues the present uncertainty.

## **STATE'S RIGHTS:**

### Discussion

The state analyses noted that states are sovereign within their jurisdiction (except for certain defined claims that are reserved to the federal government) and have an interest in applying their own law and to protect their own citizens. The state may agree to permit the law of the requesting state to be the choice of law in matters of consent, but by so doing, the state is removing the protections of its own laws from its citizens. A state may not wish to have a choice of law provision that applies the law of another state. States are also likely to resist pre-emption of their state laws in favor of a federal statute that governs choice of law in consent matters.

### PROs

CA

- Statutory
  - State can preserve as much sovereignty as it wants, can preserve its police powers
  - Drafting will be very important

OH

- Statutory COL provisions or preferences preserve the rights of the state to govern the policies affecting the medical privacy of its citizens.

### CONs

#### IL

- A generic law may result in the state giving up some of its rights (e.g. “the disclosing state’s laws apply”).

#### CA

- Statutory
  - Business would not like different laws for each state

#### OH

- By preserving each state’s right to implement its own policies regarding access to medical records, COL mechanisms do not effectively address the barriers to interstate access created by differing laws.

## **ENFORCEMENT:**

### Discussion

The IL analysis indicated that “each state approves and enforces its own statutes, which are only applicable within the jurisdiction of that state. States develop statutes that they believe protect the interests of their residents, but state statutes are not enforceable beyond the proponent state’s jurisdiction.” OH noted that “enforcement is often a predetermined matter set forth in the terms of the agreement or transaction. Unless otherwise prohibited by law or judicially determined to be inequitable, courts will enforce the predetermined choice.

### PROs

#### IL

- A consistent COL provision could result in the state enforcing its own COL provision, rather than enforcing another state’s law.

#### CA

- Contractual
  - Ease for parties to dispute, by terms of contract
  - Maybe more cost effective to enforce
- Statutory
  - Statute can spell out enforcement, bring in regulatory oversight

#### OH

- Establishing which state’s laws will govern the agreement or transaction adds predictability to the Parties’ relationship.

## CONs

### IL

- An inconsistent COL provision could result in confusing enforcement. A COL provision could help to standardize the requirements and simplify compliance

### CA

- Contractual
  - State law enforceability may be questionable

### OH

- The failure to clearly establish a COL often leads to additional litigation prior to reaching the merits of the underlying dispute

## **OTHER CONSIDERATIONS:**

## **CONCLUSION:**

### IL

HISPC - Illinois determined that the COL mechanism is a very cumbersome approach and legally complicated. Specifying a COL in disclosure matters might be a difficult approach because of the interest of each state in allowing its statutes to govern all matters affecting its citizens. States may be reluctant to give up protections they have established for their residents' PHI, and to rely on other states' statutes with, potentially, varying degrees protection. Additionally, the interest groups within each state that advocated adoption of the protections will probably work to convince state lawmakers that there should be one standard of protection for PHI, and adhering to their own state statute, rather than selecting law based on circumstances of the request, best provides that uniformity.

Finally, the ability of a COL provision to work depends on its consistent adoption by numerous states (such as a "model" or "uniform" COL provision). This is unlikely to occur. Even if it were adopted uniformly, the underlying laws are inconsistent. Therefore, a COL provision that states that the laws of the "requesting" state or the "responding" state will apply will continue to provide an inconsistent approach to HIE since the current scheme of laws is already inconsistent.

### OH

COL is a legal concept that underlies all interstate transactions regardless of what is being transacted. As such, "COL" is not, in and of itself, an option for HIE. Instead, COL is a necessary discussion point for the remaining true options. The

failure to conceptually address COL would only serve to perpetuate the current ambiguities in interstate HIE; thereby, seriously undermining any attempt to standard interstate HIE. Accordingly, the Legal Working Group formally concludes that regardless of the option ultimately pursued (Model Law, Uniform Law, or Interstate Compact), “COL” must be a specific discussion point on any agenda and the concept must be specifically addressed within the text of the Model Law, Uniform Law, or Interstate Compact.