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Health Information Security and Privacy Collaborative

HSPLC Milestone Report: Analytical Framework for Best Practices

Prepared for

RTI International
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Chicago, IL 60606

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Harmonizing State Privacy Law Collaborative
Florida, Kansas, Kentucky, Michigan, Missouri, New Mexico, Texas

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Contents

1. INTRODUCTION AND BACKGROUND

The goal of the Harmonizing State Privacy Law Collaborative (HSPLC) is to advance the ability of states to analyze and reform laws related to the privacy and security of health information exchange. Our objective is to assist and enable state efforts to adopt legislation to modernize and provide a sound legal framework for electronic health information exchange. The HSPLC is developing the analytical tools and a guide to assist states in this process with the end goal being greater alignment of laws among the states.

Based on extensive discussions with stakeholders during Phase I (2006–2007), the Health Information Security and Privacy Collaborative (HISPC) found myriad barriers to health information exchange in law and common practice. In some cases, barriers are beneficial because they protect people's privacy. However, barriers can be problematic when they prevent the timely exchange of information needed for treatment. There are many inconsistencies in state and federal laws and among state statutes in their definitions, organizational structure, and content. Over time, as new statutes on the use of patient health records have been added, the related statutes have become increasingly fragmented across many topic areas in the state statute and regulations. Furthermore, in recent years some states have adopted new legislation that affects the exchange of health information that may further exacerbate differences among states.

The HSPLC will produce an *analytical framework,* which may be used by states to review and revise privacy laws with respect to electronic health information exchange and to identify areas of law that need new or amended legislation. The goal is to protect health information while removing barriers that impede the exchange of vital information.

2. PURPOSE OF BEST PRACTICES REVIEW

A primary objective of the HSPLC is to develop a common framework for the categorization of state laws related to the disclosure of health information and for the comparison, analysis, and reform of these state laws. As part of the analytical framework, the HSPLC has developed two interrelated tools:

1. The Comparative Analysis Matrix (CAM)—A subject matter guide to identify and organize relevant state laws. This matrix can also be used to identify and analyze individual statutes and locate problematic areas of law that may need changes. The collaborative also conducted a "gaps and differences" analysis of other state laws to begin the process of identifying subject matter categories.
2. Guidelines for ranking/prioritizing—The CAM can subsequently be used to rank the importance of the change and the ease of making the proposed legislative changes.

In developing the analytical framework, the HSPLC initially reviewed legal analysis documents obtained from both HISPC member and nonmember states to identify best practices and common themes. These documents included Health Insurance Portability and Accountability Act (HIPAA) preemption analyses, HISPC deliverables, and content reports in addition to online legal search tools and, in some cases, the state codes.

The purpose of the best practices analysis was to assist the HSPLC in creating a user-friendly analytical framework. The collaborative has and will continue to draw on the lessons learned through the best practices analysis to guide and critique the development of the various components of the comparative analytical matrix and ranking tool. The process of adapting well-functioning components from the states' best practices will help us avoid "reinventing" our legal analysis tools. The aim of this review process is to create a framework that facilitates analysis of significant legislative issues related to health information exchange.

3. DESCRIPTION OF "BEST PRACTICES" ANALYSIS PROCESS

The HSPLC decided to collect existing legal analysis data related to health information exchange and HIPAA from both HISPC member and nonmember states to the extent possible. The collaborative assigned the 50 states and some territories to HSPLC members based on geographic proximity, preference, and known contacts. The HSPLC used HISPC and other contact information in the outreach and drafted a standard e-mail request. The collaborative sought to minimize work effort among fellow HISPC member peer states by collecting only existing documents. Documents from 39 states and territories were collected and uploaded to the HSPLC work space on the RTI Privacy and Security portal.

After collecting the documents from the other states, collaborative members prepared an analysis of the materials and state statutes. The collaborative developed a short form to identify, source, describe, and briefly evaluate the documents reviewed in terms of comprehensiveness and ease of use. The form also included a section for reporting structure or elements that might be adopted by the HSPLC for its analytical framework. HSPLC members completed a review for each assigned state.

In addition to the best practices review, the HSPLC conducted a gaps and differences analysis of state laws. First, the collaborative developed a listing of categories and topics related to privacy and security provisions in law. Beginning with an initial listing, the members reviewed and revised the set of categories and topics. Next, HSPLC members reviewed available legal documents and state statutes to determine whether the state law addresses the topics identified by the collaborative. Although the initial analysis produced partial results, this process served to identify gaps from the list of categories and topics and resulted in the addition of several topic areas to the analytical framework.

Once the best practices forms were completed and compiled, collaborative members discussed their findings and noteworthy examples. At a second collaborative meeting, members formally nominated documents from eight states as examples of best practices. These documents were reviewed by the group and discussed in depth. The discussion led to the identification of common themes with desirable features that the collaborative could use as a point of reference in developing its comparative analytical matrix, ranking tool, and the accompanying narrative descriptions and supplemental materials.

3.1 Analytical Framework for "Best Practices"

Desirable features in a well-crafted legal analysis are (1) orientation, (2) purposeful comprehensiveness, (3) simple navigation and maintenance, and (4) features that facilitate problem solving. The collaborative identified several related elements in each of these areas, which are described below.

A. Orientation—The analytical framework does not assume that the user is highly familiar with the state's legal code or structure or legal terminology.

   a. Descriptive table of contents—The table of contents is designed to provide an initial introduction to the design of the analytical framework.

   b. Clear and concise explanation of the tool's logic and rationale—Given the abstract nature of health information exchange, the analytical framework needs to include sufficient narrative (1) to explain the problem, (2) to describe how the framework contributes to the solution, (3) to identify underlying assumptions, and (4) to clarify the logic of approaching issues as outlined within the analytical framework.

   c. Definitions of ambiguous categories—Emerging concepts need to be defined. If possible, the framework should provide links to standard definitions.

   d. Avoid using organization units of state government to address public health—Because of the organizational variation of state governments, the framework should identify public health functions and laws related to population health information exchange in the public and the private sector without reference or state organization units to the extent possible.

   e. Use HIPAA comparisons effectively—HIPAA provides a common basis for both substantive analysis and as an organizational framework. However, the framework should not be limited to HIPAA or a HIPAA preemption analysis, and should encourage new modes of analysis that best meet the needs of electronic health information exchange.

B. Purposeful Comprehensiveness

   a. A focus on important health information exchange issues—The framework should assist the user in identifying important issues or barriers related to health information exchange and provide sufficient breadth of content to cover all areas that may impact health information exchange.

   b. Clear and concise explanations of the applicability of law (i.e., providers or situations covered by law) and its relevance—The framework should provide for sufficient depth of content regarding applicability of law to the types of information to be exchanged, in addition to the applicability of the law to various types of facilities, providers, and information exchange interactions or scenarios.

   c. Address key questions and issues—The use of key questions emphasizes the important issues for health information exchange.

   d. Options for appendices—There may be unique issues or interests that are best addressed in a separate worksheet or appendix.

C. Simple Navigation and Maintenance

   a. Use a format that is easy to manipulate for searching and sorting—The design of the layout should anticipate search and sort needs of the user such as key topics, dates, or titles the user is likely to know or will want to use for an initial search.

   b. Good use of graphics—The layout should be uniform to the extent possible with some use of graphics to assist in clarifying the organizational structure of the framework. The design should be clean and clear.

   c. Use a standard and easy-to-use format (e.g., Microsoft Word, Excel)—The framework should not require the purchase of specialized software and should be

easy to update to maintain the currency of content. Use of the framework should be readily self-taught.

D. Facilitates problem solving (e.g., identifies salient issues and suggests possible solutions, identifies relationships)—The framework should assist the user in identifying possible solutions by identifying relationships and commonalities. It should generally support an overview of the legal landscape related to health information exchange.

4. SELECTED "BEST PRACTICES" STATE DOCUMENTS

This section contains a brief description of the best practices examples and the rationale for their selection. The collaborative did not find any one analytical tool that encompassed all desirable features for an analysis of health information exchange, although all examples were suitable to their particular purposes.

Maintenance of document currency is a major challenge observed in this review. It is unlikely that any tool can flag areas that need to be updated without manual oversight; however, at a minimum, the analytical framework can facilitate the process by identifying related citations. Appendix A provides a listing by state indicating the best features of each.

4.1 Arizona—Health-e Connection Legal Working Group Document

The Legal Working Group of the Arizona Health-e Connection prepared a memorandum dated October 10, 2007, outlining identified barriers to e-health data exchange in Arizona and setting out proposed statutory and regulatory amendments to fix the barriers. The memorandum can be accessed on the RTI Portal in the Arizona folder as the document titled *CGSB Memo to LWG on Statutory and Regulatory Amendments 10 10 2007.pdf*.

The format of the document clearly details Arizona's current laws and regulations, how those laws and regulations constitute barriers to health information exchange, proposed amendments, and the reasoning behind the proposals. The memo is organized by subject matter area (e.g., communicable disease information, mental health, etc.). Each area includes a narrative description of the relevant laws, the identified barriers, and a proposed solution, including a copy of the statute in question redlined to show the proposed change. This narrative gathers all the relevant information and makes it easy to see the problem and the proposed solution.

4.2 Florida—Statutory Analysis

On January 4, 2008, Florida completed its *Analysis of Florida Statutes Related to Health Information Exchange*. The 69-page document contains a detailed table of contents which divides the document by subject headings. Each major subject heading has subheadings to allow easier review of particular issues and topics. The Executive Summary gives additional guidance to the issues considered by Florida HISPC Legal Work Group. Specifically, the *Analysis* examines (1) issues of ownership and control of medical records, (2) patient consent and access, (3) redisclosure and emergency access to health care information, and (4) provisions related to electronic transmission and use of electronic signatures in both private and public sector health care delivery and payment systems. The *Analysis* also lists exemptions for individuals' health information collected in the administration of publicly funded programs or for public health purposes and Florida's equivalent of Freedom of Information statutes for public records.

The HSPL collaborative considers the *Analysis* an example of best practices because it contains clear, concise narrative information about relevant state law that is easily searched and is understandable to those who do not have legal backgrounds. Each subheading also includes statutory citations should a reader wish to review the original source.

4.3 Indiana—Title 16 of the Indiana Code

Indiana was nominated as an example of a "Best Practice" because of the state's existing statutory framework both in format and online presentation. From an organizational perspective, the Indiana Code has been structured in a manner that does not "hide the ball," but rather facilitates legal research. For example, in Title 16 of the Indiana Code, http://www.in.gov/legislative/ic/code/title16/ar36/, the subject of medical consent is clearly presented. Consequently, the simplistic structure of the online version of the Indiana Code would appear to be valuable to health care providers seeking to engage in health information exchange. As states continue to review their health information exchange laws, they may wish to consider a format similar to Indiana's for the online presentation and organization.

4.4 Kansas—Catalog of Laws Spreadsheet

The Kansas Catalog of Laws can be accessed on the RTI Portal in the Kansas folder as the document titled *Catalog of Laws November 2007.xls.* It is a comprehensive spreadsheet in Excel format, which facilitates electronic access. The Kansas statutes and regulations are set out on separate sheets accessible by tabs in six categories: public health; insurance; minors, mentally ill, and probate; domestic relations and civil procedure; criminal procedure and law enforcement; and other. On each separate sheet, each statute from those categories is then further characterized as being related to treatment, payment, public health reporting, and other relevant areas.

This is an excellent example of how a spreadsheet might be used to convey information. It includes not only information normally included on a spreadsheet (lists), but also narrative descriptions and analysis. Statutory and other references on the spreadsheet are hyperlinked to the source document, making it easy to access additional relevant information. The only aspect that is not user-friendly is that it is difficult to use as a printed document.

4.5 Maryland—Preemption Analysis

Maryland's preemption analysis provided several examples of best practices. Specifically, the document is titled *Maryland Confidentiality of Medical Records Act Compared with HIPAA Privacy Statute & Regulation.* It was prepared by the Maryland Office of the Attorney General, Maryland Health Care Commission, Department of Health and Mental Hygiene, the State Advisory Council on Medical Privacy and Confidentiality, with assistance from the

Maryland State Bar Association Health Law Section HIPAA Subcommittee, and issued in March 2003.

Because Maryland already had a Medical Records Privacy Act when the HIPAA regulations were issued, the comparison with HIPAA is more complete and nuanced than most. Maryland law covers original disclosures from health care providers and facilities and applies to all parties in possession of confidential health information with regard to redisclosure. The analysis includes a general discussion of the approach to preemption analysis and article-by-article analyses. Narrative sections provide useful syntheses of issues and findings.

4.6 North Carolina—Preemption Analysis

North Carolina's HIPAA preemption analysis appears in three formats: by HIPAA provision, by state law provision, and by summary conclusion. The summary conclusion categories are "beyond scope," "consistent," "consistent in part," "further analysis required," and "inconsistent." The alternative ordering process makes it easier to use for those not familiar with North Carolina laws. The title of the document is *Analysis of the HIPAA Privacy Rule and Selected North Carolina Statutes*. It was prepared by the NCHICA State Law Work Group and issued in December 2001.

4.7 Pennsylvania—HIPAA Privacy Rule Comparison

The Collaborative nominated Pennsylvania's "Best Practice" because it provided a simple but effective example of a preemption analysis format as it relates to medical practice. The Pennsylvania preemption analysis is organized by relevant state law including general requirements, HIV-related information, mental health treatment records, and drug and alcohol abuse treatment records. Column headings provide for the identification of the covered health care provider, covered information, key provisions, and potential HIPAA conflicts. Although limited in its scope, the Pennsylvania preemption analysis is especially noteworthy because it addresses the applicability of the provisions of law to types of medical record information. It also provides an example of a well-conceived organizational structure to address key concerns related to medical practice.

4.8 South Carolina—Full Text Search of the Code

Comparable to Indiana as a "Best Practice" state, South Carolina should also be considered, for the online format of its laws, which include its health information exchange laws. While most states make their statutes available online, the usability of many of these online resources varies. The South Carolina Code of Laws, found online at http://www.scstatehouse.net/CODE/statmast.htm, provides an example of user-friendly online resources for both researchers of health information exchange laws and health care providers. South Carolina's online resource search tool provides relevant search results with a brief description of the law including the title and chapter of the law. Unlike many online

statutory resources that produce search results based on the volume of the search term, the South Carolina online resources presents search results in a more organized fashion. For example, a search query for the term "medical record" on the South Carolina online resource would produce 31 results or "hits." The hits are presented to allow the searcher to clearly ascertain the relevancy of the link and therefore avoid reading through irrelevant paragraphs of statutory language. Such a feature would be particularly desirable for health care providers.

5. CONCLUSION

As previously identified during HISPC Phase I, the patchwork of various state laws has been highlighted as a barrier to the interstate exchange of health information. Often the organizational structure of the laws within states further complicates a deeper understanding of the different state laws. Specifically, in many states health information exchange laws are scattered throughout various sections of the respective states' statutes or codes, making a survey of such laws extremely difficult, even for persons with backgrounds in statutory research. Additionally, while most states make their laws available online, there is great variation among the states in the ability to conduct an online search and to access statutory information.

To assist states in their effort to adopt or amend legislation related to the promotion of health information exchange, the HSPLC researched best practices and identified features of common frameworks for categorizing state laws related to the disclosure of health information. This process helped the HSPLC to recognize well-crafted legal analyses of state laws. The best practices analysis included frameworks that provided ease of orientation, coverage of content, ability to navigate and maintain, and the ability to problem solve. From a review of all the states' information the HSPLC identified eight states, which featured at least one outstanding component of the best practices.

The information that HSPLC gathered from identifying the best practices helped to facilitate the development of the collaborative's CAM and ranking tool. The intent is that the CAM and ranking tool can be used by states regardless of where they are in their legislative process to review and revise their own privacy laws as they relate to health information exchange.

APPENDIX A:
BEST PRACTICE FEATURES OF SELECTED LEGAL ANALYSIS

Table A-1. Feature: User Orientation

State	Good Table of Contents	Adequate Explanation of Logic	Provides Definitions of Ambiguous Categories	Distinguish Public and Private Sector Functions	Uses HIPAA Categories Effectively
Arizona	—	—	—	—	—
Florida	x	x	—	x	—
Indiana [a]	—	—	—	—	—
Kansas	—	—	x	x	—
Maryland	—	—	—	—	x
Pennsylvania	—	—	—	—	x
North Carolina	—	—	—	—	x
South Carolina [b]	—	—	—	—	—

[a] Organization of health records statutes reviewed.

[b] Online code search tool reviewed.

Table A-2. Feature: Purposeful Comprehensiveness

State	Focus on Important Health Information Exchange Issues	Explains Applicability of Law (e.g., providers or situations covered by law); Relevance	Key Issues or Questions Highlighted	Allows for Other Issues to Be Appended
Arizona	x	—	x	—
Florida	x	—	x	—
Indiana [a]	x	—	—	—
Kansas	—	—	—	x
Maryland	—	x	x	—
Pennsylvania	—	x	—	—
North Carolina	—	—	—	—
South Carolina [b]	—	x	—	—

[a] Organization of health records statutes reviewed.

[b] Online code search tool reviewed.

Table A-3. Feature: Navigation and Maintenance

State	Easy to Manipulate for Search & Sort	Good Use of Graphics	Standard or Easy to Use Format	Easy to Update
Arizona	—	—	—	—
Florida	—	—	—	—
Indiana [a]	—	—	—	—
Kansas	x	x	x	—
Maryland	—	—	—	—
Pennsylvania	—	—	—	—
North Carolina	x	—	—	x
South Carolina [b]	x	—	—	—

[a] Organization of health records statutes reviewed.
[b] Online code search tool reviewed.

Table A-4. Feature: Facilitates Problem Solving

State	Suggests Possible Solutions, Highlights Relationships
Arizona	x
Florida	x
Indiana [a]	—
Kansas	x
Maryland	—
Pennsylvania	—
North Carolina	—
South Carolina [b]	—

[a] Organization of health records statutes reviewed.
[b] Online code search tool reviewed,