



Health IT Legal Reform: Coming Soon to a State Near You

By John R. Christiansen, JD

For all that HIPAA has done to reform American healthcare privacy and security law—and you have to admit it's done a lot—I think it's time to start paying attention to another important set of legal players: the states.

HIPAA wasn't really supposed to be about privacy and security. In fact much of it was not about healthcare IT. Most provisions of the lengthy legislation had to do with health insurance reforms, and enhanced healthcare fraud prosecutions. The acronym stands for Health Insurance Portability and Accountability Act, and at first very few understood the implications of the innocuously named Administrative Simplification section.

For most readers at the time this section was opaque at best, more likely intimidating, and apparently of only esoteric interest: how important can electronic claims transactions standards be? Only later, after the regulations started coming out, Administrative Simplification seemed ironic, and people started misreading the HIPAA acronym as referring to the Health Information Privacy and Accountability Act.

This little bit of history shows that major unheralded legal changes can creep in via unanticipated consequences of seemingly unrelated reforms. HIPAA meant to reform health claims transactions, but brought wholesale privacy and security reform in its wake. The same kind of process looks like it could happen soon in the field of electronic health records (EHRs) and health information exchange (HIE).

You should already be familiar with the federal EHR/HIE initiatives

being spearheaded by the Health and Human Services Office of the National Coordinator for Health Information Technology (ONC) and a few other federal agencies. You are also probably familiar with one or more HIE initiatives, happening through a group of healthcare organizations in regional health information organizations or networks (RHIO or RHIN). These are perhaps not very formally organized or far along.

The ONC and other EHR/HIE initiatives are part of, and in many ways are also catalyzing, a nationwide shift in the ways medical records and health information are managed. This is in and of itself an important change, and one that every healthcare organization should be following. But I'm beginning to be concerned about a secondary wave of change, which may actually interfere with HIE if we are not careful.

A Difference in Federal and State Roles

This unintended consequence is the reform of state medical records and health information laws. HIPAA was a federal initiative with all regulations coming out of a single federal agency. The federal role in EHR/HIE activity is that of facilitator and catalyst, not regulator. The states are where the action will be in EHR/HIE regulation.

Every state has at least one HIE and/or EHR initiative going on; most have a few and some have several—California alone has 17 RHIOs! — And most states have governmental HIE projects as well. At the same time, in a recent meeting of the Health Information Security and

Privacy Collaboration, a thirty-three state and one-territory study of HIE barriers funded by the ONC and the Agency for Healthcare Research and Quality ("AHRQ"), most states reported that their laws were one of the principal HIE obstacles. Some laws are antiquated and obsolete; some are confusing or ambiguous, and in many cases the fact that no laws addressed HIE issues is an obstacle.

Many states are therefore convening efforts to review and revise state laws applicable to EHR/HIE issues, and that is a good thing. Problems will arise, however, if and — more likely when — states start going off in different directions. Relatively few healthcare markets are limited to a single state, and seriously divergent laws among the states could complicate or prevent HIE between states. We could end up lowering the legal barriers to EHR/HIE adoption within states, but at the cost of raising new barriers at state lines. Of course, nobody wants this to happen. But reforms do have a way of causing unintended consequences, especially if no one is looking. I think where state reform of medical records and health information laws are concerned it is time to start taking a hard look. **NP**

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