Integrating Physical and Behavioral Health

Strategies for Overcoming Legal Barriers to Health Information Exchange

William S. Bernstein
Manatt, Phelps, & Phillips, LLP

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State Perspective

- Many states are interested in supporting the delivery of high-quality, cost-effective integrated physical and behavioral health care by providers.

- Electronic exchange of individuals’ physical and behavioral health information among providers is a critical prerequisite to such care.

- Legal and operational considerations may pose obstacles to health information exchange.

- Strategies are available to states to overcome these obstacles in order to facilitate integrated care delivery.
A Framework to Facilitate Integrated Care by Addressing Obstacles to HIE

1. Ask key programmatic and legal questions to inform state policy decisions

2. Identify legal and operational obstacles to electronic health information exchange among physical and behavioral health providers

3. Convene stakeholders to understand real-world obstacles to implementation

4. Identify and implement strategies for overcoming obstacles—uniformity, consistency, and safe harbors can encourage innovation and limit risk
Key Questions

What types of integrated care programs are operating in the state and require the ability to electronically exchange physical and behavioral health data?

Which providers are included in the data exchange system?
- Are providers subject to 42 CFR Part 2 participating?
- Are other providers subject to stringent state privacy laws involved?
- If such providers are participating, is their full participation critical to the initiative’s success?

What types of data are being exchanged?
- Are all of the data coded or structured, or does the exchange include free text?
- Can elements of the data sets be effectively filtered or segregated?

Is data being accessed in hospital emergency rooms or in other settings where immediate access to records without advance notice is essential?

Are providers accessing records in situations or settings where obtaining patient consent is feasible?

Have all of the relevant state privacy laws been catalogued and analyzed? Is there a consensus among providers on the applicable legal requirements?
Common Obstacles to Data Exchange

Misconceptions about privacy law
- Providers often interpret the requirements of federal and state privacy laws as more restrictive than they actually are

Ambiguities in the law
- Laws rarely include detailed standards, and even when they do, the application of those standards to the dynamic world of electronic data exchange is often unclear

Concerns about reliance on other providers
- Providers engaged in health information exchange are, to some degree, placing their trust in one another; if one provider engages in inappropriate conduct or employs lax privacy safeguards, other providers could face liability or negative publicity

Obstacles to obtaining patient consent
- Obtaining patient consent may be time consuming and costly
- Providers may be reluctant to make intensive efforts to obtain patient consent when there is no immediate clinical benefit to them in doing so
- Lackluster efforts by providers to obtain patient consent may create a cycle of non-participation
Strategies for States to Facilitate Effective Data Exchange

Clarification of State Law Through Agency Guidance
- Provides opportunity to correct misconceptions or eliminate ambiguities regarding the meaning of state privacy laws, allowing providers to exchange data without fear of regulatory enforcement

State Legislation to Streamline Privacy Standards
- Allows states to replace the patchwork of state privacy laws with a single, more flexible set of requirements
- Addresses provider concerns about costly, operationally complex consent processes

Standardized Consent Forms
- Eliminate concerns about legal validity of disparate forms used by different providers
- Allow providers to obtain a one-time consent for the exchange of all physical and behavioral health information
- Allow multi-provider consent
Strategies for States to Advance Effective Projects (cont.)

**Implementation Advice**
- Allows states to set forth minimum standards for exchange of data
- Helps providers formulate a strategy for obtaining patient consent while minimizing operational burdens
- Helps communicate the value of even smaller scale information exchange efforts

**State Immunity Laws**
- Address concern about malpractice liability based on a provider’s reliance on another provider’s inaccurate or incomplete medical records
- May apply to providers relying on information obtained through state health information exchanges

**Promoting Technological Solutions to Data Segmentation**
- Allows providers to separate highly protected information from less restrictively regulated data, and to withhold information from exchange until consent is obtained
- Could provide incentives or mandates for providers to adopt electronic health record systems with data filtering capacity
Appendix
## Key Legal Principles

### Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule
- Permits covered entities to use and disclose protected health information for “treatment,” “payment,” and “health care operations”
- “Treatment” includes provision, coordination, or management of care
- HIPAA should not serve as a legal impediment to robust health information exchange

**Exception:** Psychotherapy notes may be disclosed only with written patient authorization

### 42 CFR Part 2 (Federal Alcohol and Drug Abuse Treatment Confidentiality Rules)
- Applies to “federally assisted alcohol and drug abuse programs” (e.g., those receiving Medicare or Medicaid payments, federal grants, registration to dispense controlled substances, and tax exempt status)
- Does not apply to general medical facilities or offices, except for any identified alcohol or drug abuse unit contained therein
- Requires patient consent to disclose records for treatment, care coordination, or quality improvement purposes
State Health Information Privacy Laws

- Are not preempted by HIPAA if they are more stringent than the HIPAA Privacy Rule
- May apply to the entire industry (e.g., in California) or to specific types of health information or providers (e.g., in New York State)

California Confidentiality of Medical Information Act

- Like HIPAA, largely permits physical and behavioral health providers to share patient information for treatment purposes without patient authorization
- Like HIPAA, provides special protection for information on participation in psychotherapy—requires written requests to patients and providers with information on intended use and timeframe for destruction or disposal

New York Mental Hygiene Law § 33.13

- Applies only to facilities licensed or operated by the NYS Office of Mental Health or Office for People with Developmental Disabilities (not general hospitals or independent practitioners)
- Requires patient consent for release of information, with some exceptions (e.g., exchange among licensed mental health facilities, or between mental health facilities and ERs)
## Key Misconceptions About Privacy Law

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<thead>
<tr>
<th>Misconception</th>
<th>Actual Legal Rule</th>
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<tbody>
<tr>
<td>HIPAA requires patient authorization for disclosures for treatment purposes</td>
<td>No patient authorization is required</td>
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<tr>
<td>HIPAA’s minimum necessary provision forces providers to determine which part</td>
<td>The minimum necessary rule does not apply to disclosures for treatment purposes</td>
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<td>of the medical record they can share with other providers for treatment</td>
<td></td>
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<td>purposes</td>
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<tr>
<td>A provider may not disclose information to another provider for treatment</td>
<td>No preexisting relationship is required to receive information for treatment purposes (A prior relationship is required to receive information for quality</td>
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<td>purposes unless the receiving provider has a preexisting relationship with the</td>
<td>improvement purposes)</td>
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<td>patient</td>
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<tr>
<td>HIPAA’s restriction on the disclosure of psychotherapy notes applies to all</td>
<td>A clinician’s notes qualify as psychotherapy notes under HIPAA only if they are maintained separately from the patient’s medical record</td>
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<td>notes of counseling sessions that are part of the patient’s medical record</td>
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<td>The Part 2 Regulations restrict the disclosure of all substance abuse treatment</td>
<td>The Part 2 Regulations apply only to specialized substance abuse providers, not general medical providers who deliver substance abuse services</td>
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<td>information</td>
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<td>A consent for the release of a Part 2 Provider’s records must be a separate</td>
<td>A Part 2 consent can be combined with another patient consent form if the form contains all of the elements required under the Part 2 Regulations</td>
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<td>document and cannot be combined with any other type of patient consent</td>
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