

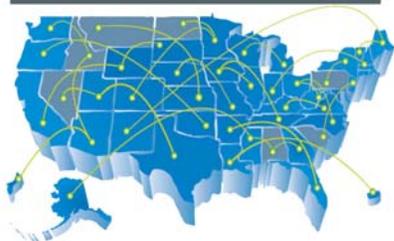
INTRASTATE AND INTERSTATE CONSENT POLICY OPTIONS COLLABORATIVE—FINAL REPORT

APPENDIX M: CONSOLIDATED SUMMARY—ANALYSIS OF INTERSTATE MECHANISMS

March 2009

Health Information Security & Privacy

COLLABORATION



1. Process for Developing the Option

For each of the four proposed mechanisms, identify the processes your state must complete in order to implement each proposed mechanism. The processes may help identify the pros and cons of using a particular mechanism and may well vary according to each state's law(s).

Interstate Compact

Legislatively authorized or appointed commissioners are chosen to develop a compact. Informal group with subject matter expertise. Eventually, need legislative support.

The Council of State Governments (CSG) defines an interstate compact as “a contract between two or more states. It carries the force of statutory law and allows states to perform a certain action, observe a certain standard, or cooperate in a critical policy area. Generally speaking, interstate compacts:

- establish a formal, legal relationship among states to address common problems or promote a common agenda;
- create independent, multistate governmental authorities (such as commissions) that can address issues more effectively than a state agency acting independently, or when no state has the authority to act unilaterally; and
- establish uniform guidelines, standards, or procedures for agencies in the compact's member states.”¹

CSG outlined the following key steps in the development process of a regulatory compact:

- *Advisory group:* Composed of state officials and other critical stakeholders, an advisory group examines the realm of the problem, suggests possible solutions, and makes recommendations as to the structure of the interstate compact. Typically, an advisory group is composed of approximately 20 individuals, each representative of various groups and states. An advisory group would likely meet one or two times over a period of 2 to 3 months, with their work culminating in a set of recommendations as to what the final compact product should look like.
- *Drafting team:* While an advisory group enjoys thinking about the issue from a macro-level, a drafting team pulls the thoughts, ideas, and suggestions of the advisory group into a draft compact. The drafting team, composed of five to eight compact and issue experts, will craft the recommendations, as well as their own thoughts and expertise, into a draft compact that will be circulated to state officials for comment. The document will also be open for comments from a wide swath of stakeholders and the public. Following these comment periods, the compact will be revised as needed and released finally back to an advisory group for final review to ensure it meets the original spirit of the group's recommendations. A drafting team

¹ Fact sheet, Council of State Governments, National Center for Interstate Compacts at <http://www.csg.org/> (keyword: interstate compacts).

would meet three to four times over a period of 10 to 14 months, with significant staff work and support between sessions.

- *Education:* Once completed, the interstate compact would be available to states for legislative approval. During this phase of the initiative, state-by-state technical assistance and on-site education are keys to rapid success. A majority of state legislators have limited knowledge about interstate compacts, and with such a major issue being addressed, legwork on the ground in each state is crucial. Previous interstate compact efforts have convened end-of-the-year legislative briefings for state officials to educate them on the solutions provided by the interstate compact. Education occurs before and during state legislative sessions.
- *Enactment:* A majority of interstate compacts did not become active right away. Rather, interstate compacts typically activate when triggered by a preset number of states joining the compact. For instance, the Interstate Compact for Adult Offender Supervision (Adult Compact) required 35 state enactments before it could become active. This number was chosen for two reasons. A membership of 35 ensures that a majority of states are in favor of the agreement and that a new compact would not create two conflicting systems. Moreover, a sense of urgency for states was created because the first 35 jurisdictions to join would meet soon thereafter and fashion the operating rules of the compact. Most interstate compacts take up to 7 years to reach critical mass. However, the most recent effort managed by CSG, the Adult Compact, reached critical mass just 30 months from its first date of introduction in 2000.
- *Transition:* Following enactment by the required minimum number of states, the new compact becomes operational and, dependent upon the administrative structure placed in the compact, goes through standard start-up activities such as state notification; planning for the first commission or state-to-state meetings; and, if authorized by the compact, hiring of staff to oversee the agreement and its requirements. A critical component of the transition will be the development of rules, regulations, forms, standards, etc. by which the compact will need to operate. Typically, transition activities run for between 12 and 18 months before the compact body is independently running.²

The process would begin with a negotiated agreement between the participating states. Initially, an advisory group composed of state officials, stakeholders, and issue experts will examine the issues and current policy. The group will work to identify best practices and alternative structures. Ultimately, the advisory group should establish recommendations for the content. Thereafter, a drafting team composed of a smaller number of officials, stakeholders, and experts will draft a compact based upon the advisory board recommendations. The committee's draft agreement may be circulated to representatives of the states and stakeholders any number of times for review, comment, and revisions. At each round, the drafting team will consider and incorporate the comments it receives, and will eventually send its final product back to the advisory board before the compact is released to the states for consideration.

² 10 Frequently Asked Questions, Council of State Governments, National Center for Interstate Compacts website. Available at <http://www.csg.org/programs/ncic/resources.aspx>.

Common characteristics of an interstate compact which would have to be negotiated include: (a) the creation of an independent joint regulatory organization or body; (b) uniform guidelines, standards, or procedures conditioned on action by the other states involved; (c) the states are not free to modify or repeal their laws unilaterally; and (d) statutes requiring reciprocation.

Lastly, consideration will have to be given to whether the interstate compact would require congressional approval. Article I, Section 10, Clause 3 of the U.S. Constitution provides that “No State shall, without the consent of Congress . . . enter into agreement or compact with another State. . . .”

This language appears to require that all interstate compacts require congressional approval, but the U.S. Supreme Court has clarified that congressional approval is not required in all instances: *Virginia v. Tennessee*, 148 U.S. 503, 518–522 (1893). Rather, to determine whether congressional approval is necessary, courts typically look to determine (a) whether the agreement affects the balance of power between the federal government and the states; or (b) intrudes on an area reserved or of interest to the federal government. Based upon these criteria, it appears that congressional approval would be necessary before the compact could take effect.

Congressional consent may take the form of an act or joint resolution of Congress stating that it consents. Or, Congress may consent in advance to the creation of an interstate compact.

Alternatively, congressional approval may be implied by its actions after the states have formally entered into the compact.

Congressional consent may have the effect of transforming the compact into federal law. In *Cuyler v. Adams*, 449 U.S. 433, 440 (1981), the U.S. Supreme Court concluded that “where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the State’s agreement into federal law under the Compact Clause.”

Education and enactment: The states will need to be educated on the necessity for and the terms of the compact. To that end, a comprehensive resource kit and other promotional materials, support documents, and Internet resources will likely need to be developed. In addition, a national symposium or briefing to educate state legislators and other key state officials may need to be convened.

State support will be created through a network of champions (officials, legislators, governors, etc.). Informational testimony will need to be offered to the state legislative committees considering the compact. Then, as each state enacts the compact, focus will need to shift toward transition and implementation of the compact.

Additional support and education efforts will also be required at the federal level if congressional approval is determined to be required.

Transition and operation: Once the enactment threshold is met, states should be notified that the compact has taken effect, and an interim executive board of the interstate commission will need to be appointed. Information systems will likely need development at this point (including the creation of standards, establishment of security procedures, and selection of vendors).

Once the compact is fully up and running, an eye must be kept on technological advancements, law changes, or other issues that may require reconvening the advisory committees and revising the compact language.

There are three foreseeable approaches where an interstate compact can address this conflict between the two states.

Approach 1—Responding State Prevails

Under this approach, the member states in the compact agree that health information that is properly consented in the responding state will be accepted by the requesting state, the requesting state's consent laws notwithstanding. Most state laws currently require providers in the responding state to comply with their own laws, so this approach is closest to the status quo. Under this approach, the requesting state with *less* stringent consent laws (Scenario 1 in "Assumptions") would receive and be permitted to use protected health information (PHI) if: (a) the responding state had already fulfilled its own consent laws that authorized a disclosure to the requesting state (i.e., the health information organization [HIO] received a "blanket" consent from patients that permitted disclosure for the purposes requested by the requesting state); or (b) the requesting state determined what the responding state's consent laws were and presented the responding state with a consent that fulfilled these more stringent laws. Under this approach, the requesting state with *more* stringent consent laws (Scenario 2 in "Assumptions") would receive and be permitted to use PHI if: (a) the responding state had already fulfilled its own consent laws that authorized a disclosure to the requesting state (i.e., the HIO received a "blanket" consent from patients that permitted disclosure for the purposes requested by the requesting state); or (b) the requesting state presented the responding state with a consent that fulfilled the responding state's consent laws, which could presumably be done by using a consent from the requesting state because its laws are more stringent.

Approach 2—Requesting State Prevails

This approach has the compact member states agreeing that the consent laws of the requesting state would prevail. Before PHI could be sent to the requesting state, a patient consent must meet the requirements of the requesting state. This approach requires

requesting states to be familiar with only their own state’s laws, instead of being prepared to obtain consents that satisfy various responding states’ laws.

Under this approach, the requesting state with *less* stringent consent laws (Scenario 1 in “Assumptions”) would receive and be permitted to use PHI if: (a) the requesting state presented the responding state with a consent that fulfilled the requesting state’s consent laws even if they were less stringent than the responding state; or (b) the responding state had already fulfilled its own consent laws that authorized a disclosure to the requesting state (i.e., the HIO received a “blanket” consent from patients that permitted disclosure for the purposes requested by the requesting state). Presumably, if the responding state’s laws were satisfied, the requesting state’s laws would also be satisfied. Under this approach, the requesting state with *more* stringent consent laws (Scenario 2 in “Assumptions”) would receive and be permitted to use PHI only if: (a) the requesting state presented the responding state with a consent that fulfilled the requesting state’s consent laws; or (b) the responding state obtains the information by voluntarily obtaining a more stringent consent that also fulfills the laws of the requesting state.

Approach 3—Compact Defined Consent

The third approach would be the adoption by compact of a consent policy that would apply to all member states. This policy would be incorporated in the terms of the compact that is enacted by member states. This could result in a compromise between the requirements of the requesting state and those of the responding states. PHI would be exchanged if the requirements of the compact were met.

Uniform Law

The process for creating a uniform law begins with the National Conference of Commissioners on Uniform State Laws (NCCUSL) Committee on Scope and Program. It receives suggestions from a variety of sources, such as the uniform law commissioners, state government entities, the organized bar, interest groups, and private individuals. This committee can then create a study committee to review the issue and report back or make recommendations to the Executive Committee.

Although another organization may refer to a legislative proposal as being “uniform,” uniform laws are generally understood to be those adopted by NCCUSL—also referred to as the Uniform Law Commission (ULC). NCCUSL’s standing as promulgator of uniform laws stems from the direct participation of every state in its deliberations.³ It was created more than 116 years ago when the state of New York invited other states to participate in a

³ Frequently Asked Questions about NCCUSL, National Conference of Commissioners on Uniform State Laws, 2002, <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=5&tabid=61>.

conference to draft uniform laws.⁴ Each state provides financial support to the organization and sends a contingent of “commissioners.” Illinois law⁵ provides for the appointment of nine commissioners to represent the state on the ULC. According to Katie Robinson, Communications Officer, NCCUSL, most states have 3 to 5 commissioners, while others have more than 10.

The process for creating a uniform law begins with the Committee on Scope and Program.⁶ It receives suggestions from a variety of sources, such as the uniform law commissioners, state government entities, the organized bar, interest groups, and private individuals. This committee can then create a study committee to review the issue and report back or make recommendations to the Executive Committee.⁷

With the approval of the Executive Committee, a drafting committee is selected or created. The drafting committee is appointed from the membership of the ULC. “Each draft receives a minimum of 2 years consideration, sometimes much longer. Drafting committees meet throughout the year. The open drafting process draws on the expertise of state-appointed commissioners, legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.”⁸ The drafting committee drafts the act and revisits the decision whether to designate the act as a uniform or model act.⁹

“Draft acts are submitted for initial debate of the entire Uniform Law Commission at an annual meeting.”¹⁰ “Each act must be considered section by section, at no less than two annual meetings, by all commissioners sitting as a Committee of the Whole. Once the Committee of the Whole approves an act, the final step is a vote by states—one vote per state. A majority of the states present, and no less than 20 states, must approve an act before it can be officially adopted for consideration by the states.”¹¹

Approval of an act as a uniform act obligates commissioners from each state to promote verbatim adoption by their respective legislatures.¹² Approval of an act as a model act

⁴ State of Illinois Report of the Illinois Delegation to the National Conference of Commissioners on Uniform State Laws (NCCUSL), November 28, 2007, Legislative Reference Bureau, p. 1, http://www.ilga.gov/commission/lrb/NCCUSL_2007.pdf.

⁵ Section 5.07 of the Legislative Reference Bureau Act, 25 ILCS 135/5.07.

⁶ Proposals and Criteria, National Conference of Commissioners on Uniform State Laws, 2002, <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=42>.

⁷ Ibid.

⁸ Frequently Asked Questions about the Uniform Law Commission, Uniform Law Commission website, <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=5&tabid=61>.

⁹ Proposals and Criteria, National Conference of Commissioners on Uniform State Laws, 2002, <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=42>.

¹⁰ Introduction, National Conference of Commissioners on Uniform State Laws, 2002, <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11>.

¹¹ Frequently Asked Questions about the Uniform Law Commission, Uniform Law Commission website, <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=5&tabid=61>.

¹² Proposals and Criteria, National Conference of Commissioners on Uniform State Laws, 2002, <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=42>.

obligates commissioners from each state to promote adoption to achieve necessary and desirable uniformity, but without as much emphasis on verbatim adoption.¹³

After a uniform law has been approved by the ULC, commissioners advocate for the adoption of the new act. Publication of a uniform act or model act is no guarantee of acceptance by individual state legislatures. Each uniform or model act undergoes the same legislative process as other bills. In fact, under the Illinois Bill Drafting Manual promulgated by the Legislative Reference Bureau, bill titles should not begin with the word “model” or indicate that an act may be cited as a model act, although use of the word “uniform” is permitted for NCCUSL Uniform Acts.¹⁴ There have been exceptional instances in which uniform or model acts have been overwhelmingly rejected by state legislatures. For example, the Uniform Computer Information Transactions Act (UCITA) was approved by NCCUSL as a uniform act but was adopted in only two states.¹⁵ A number of states rejected UCITA, and some even adopted measures contrary to UCITA.¹⁶ Ultimately, NCCUSL ceased promoting UCITA.¹⁷

Even if state legislatures incorporate a uniform or model act verbatim into their respective state statutes, the state courts may interpret the identical statutes very differently. Often, a court will emphasize prior case law more heavily than the terms of the statute. For example, even though the UCC has been widely adopted verbatim by various states, there are dramatic differences in application that affect the rights of parties under the UCC. One such area is the formation of warranties through representations by the seller, in which the buyer’s right to enforce a warranty varies widely from state to state under identical UCC provisions.

The ULC has established a Study Committee on Health Care Information Interoperability (W. Grant Callow, Chair). The Study Committee is to “study various state law impediments to the effective exchange of health care information (electronic and otherwise) between and among health care providers, insurers, government entities, and other actors within the health care system, and in coordination with ongoing state and federal efforts in this area will assess whether state statutory reform is needed.”¹⁸ At the July 19–20, 2008, Annual Meeting of the Committee on Scope and Program of the Uniform Law Commission, the Study Committee provided this report:

¹³ Ibid.

¹⁴ Illinois Bill Drafting Manual, Legislative Resource Bureau, §20.5.

¹⁵ A Few Facts about the Uniform Computer Information Transactions Act, National Conference of Commissioners on Uniform State Laws, 2002. Available at http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucita.asp.

¹⁶ What is UCITA? Americans for Fair Electronic Commerce Transactions. Available at http://www.ucita.com/what_history.html.

¹⁷ Letter from NCCUSL President to Commissioners dated August 1, 2003, Americans for Fair Electronic Commerce Transactions. Available at <http://www.ucita.com/pdf/Nccusl2003UcitaKingLetP1.pdf>.

¹⁸ Study Committees, Uniform Law Commission website. Available at <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=1&tabid=40>.

“Commissioner Nichols reported briefly on the committee’s work, noting that at midyear 2008 Scope decided to continue this committee until reports from outside organizations were released, including a report by the National Governor’s Association. Commissioner Grant Callow addressed the committee and confirmed that no report has been issued. Commissioner Callow noted that he has been in touch with a member of the ABA Privacy and Security Project which is working on a project to harmonize state privacy laws, and requested that the study committee be continued in order to receive additional input from interested groups. The Committee on Scope and Program agreed to continue the study committee, and expects a further report at its midyear meeting in January 2009.”¹⁹

Model Law

There are different processes for developing model laws, based upon the different drafting entities. The process for creating a model law could be a lengthy process. Then it is up to the states to determine what parts of the model laws they choose to enact. And the model law would go through the legislative process.

Unlike a “uniform law,” model acts can be those adopted by NCCUSL—or by other associations and interest groups. NCCUSL’s standing as promulgator of uniform laws and model acts stems from the direct participation of every state in its deliberations.²⁰ It was created more than 116 years ago when the state of New York invited other states to participate in a conference to draft uniform laws.²¹ Each state provides financial support to the organization and sends a contingent of “commissioners.” Illinois law²² provides for the appointment of nine commissioners to represent the state on the ULC. According to Katie Robinson, Communications Officer, NCCUSL, most states have 3 to 5 commissioners, while others have more than 10.

An example of another organization that has developed model acts is the Turning Point National Collaborative on Public Health Statute Modernization. “The Collaborative is a partnership between the Turning Point states of Alaska, Oregon, Nebraska, Wisconsin, and Colorado; and a number of federal agencies and national organizations, including the Centers for Disease Control and Prevention, the Health Resources and Services Administration, the American Public Health Association, the National Governors’ Association, the National Conference of State Legislatures, the National Indian Health Board, the Association of State and Territorial Health Officials, and the National Association of County

¹⁹ Scope and Program Committee, Uniform Law Commission website. Available at <http://www.nccusl.org/Update/Minutes/scope071908mn.pdf>.

²⁰ Frequently Asked Questions about NCCUSL, National Conference of Commissioners on Uniform State Laws, 2002. Available at <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=5&tabid=61>.

²¹ State of Illinois Report of the Illinois Delegation to the National Conference of Commissioners on Uniform State Laws (NCCUSL), November 28, 2007, Legislative Reference Bureau, p. 1. Available at http://www.ilga.gov/commission/lrb/NCCUSL_2007.pdf.

²² Section 5.07 of the Legislative Reference Bureau Act, 25 ILCS 135/5.07.

and City Health Officials.”²³ This collaborative developed the “Turning Point Model State Public Health Act to serve as a tool for state, local, and tribal governments to use to revise or update public health statutes and administrative regulations.”²⁴

Government, more specifically, the Centers for Disease Control and Prevention (CDC) has been the initiator of model acts, two of which have been reviewed for this paper. One proposal, the Model State Public Health Privacy Act, “was developed by Lawrence O. Gostin and James G. Hodge, Jr., in 1999 under the auspices of the CDC and with significant input from an expert advisory group.”²⁵ This model act addresses privacy and security issues regarding identifiable health information collected by public health agencies.

“In October 2001, CDC commissioned the Center for Law and the Public’s Health to produce the Model State Emergency Health Powers Act.”²⁶ This model act was completed in December 2001. The Center for Law and the Public’s Health’s website includes information on the state adoption of the model act up to July 15, 2006. According to the site, “thirty-eight (38) states . . . and DC have passed a total of 66 bills or resolutions that include provisions from or closely related to the Act.”²⁷

Because of the number of different entities that propose model acts, this paper will limit its discussion to the process used by NCCUSL. For that organization, the creation of a model act begins with the Committee on Scope and Program.²⁸ It receives suggestions from a variety of sources, such as the commissioners, state government entities, the organized bar, interest groups, and private individuals. When a party proposes an act, it is asked to demonstrate that the act will meet various NCCUSL criteria, including whether the subject matter is appropriate for state legislation in view of federal versus state jurisdiction; and whether the subject matter is consistent with NCCUSL’s objective to promote uniformity in state law on subjects where uniformity is desirable and practicable. Each act must: (1) have an obvious reason that makes it a practical step toward uniformity of state law or at least toward minimizing its diversity; (2) have reasonable probability of being accepted and enacted into law by a substantial number of jurisdictions, or, if not, will promote uniformity indirectly; and, (3) produce significant benefits to the public or avoid significant disadvantages arising from diversity of state law. The Committee on Scope and Program

²³ Turning Point National Collaborative on Public Health Statute Modernization. Available at http://www.hss.state.ak.us/dph/improving/turningpoint/the_collaborative.htm.

²⁴ Centers for Law and the Public’s Health website. Available at <http://www.publichealthlaw.net/ModelLaws/MSPHA.php>.

²⁵ Centers for Law and the Public’s Health website. Available at <http://www.publichealthlaw.net/ModelLaws/MSPHA.php>.

²⁶ James G. Hodge, Jr., and Lawrence O. Gostin, *The Model State Emergency Health Powers Act—A Brief Commentary* (January 2002), p. 3. Available at <http://www.publichealthlaw.net/MSEHPA/Center%20MSEHPA%20Commentary.pdf>.

²⁷ Centers for Law and the Public’s Health website. Available at <http://www.publichealthlaw.net/ModelLaws/MSEHPA.php>.

²⁸ *Proposals and Criteria*, National Conference of Commissioners on Uniform State Laws, 2002, <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=42>.

determines whether the proposed act merits consideration by NCCUSL and makes a recommendation to the Executive Committee. The Executive Committee refers the proposal to a Standing or Special Study Committee (the Study Committee) to review the issue and report back or make recommendations to the Executive Committee. The Study Committee recommends whether to draft an act and whether to designate it as a “uniform” act or a “model” act.²⁹

With the approval of the Executive Committee, a drafting committee is selected or created.³⁰ The drafting committee is appointed from the membership of the ULC. “Each draft receives a minimum of two years consideration, sometimes much longer. Drafting committees meet throughout the year. The open drafting process draws on the expertise of state-appointed commissioners, legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.”³¹ The drafting committee drafts the act and revisits the decision whether to designate the act as a uniform or model act.³²

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Approval of an act as a uniform act obligates commissioners from each state to promote verbatim adoption by their respective legislatures.³⁵ Approval of an act as a model act obligates commissioners from each state to promote adoption to achieve necessary and desirable uniformity, but without as much emphasis on verbatim adoption.³⁶

Publication of a uniform act or model act is no guarantee of acceptance by individual state legislatures. Each uniform or model act undergoes the same legislative process as other bills. In fact, under the Illinois Bill Drafting Manual promulgated by the Legislative Reference Bureau, bill titles should not begin with the word “model” or indicate that an act may be

²⁹ Ibid.

³⁰ Ibid.

³¹ Frequently Asked Questions about the Uniform Law Commission, Uniform Law Commission website. Available at <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=5&tabid=61>.

³² Proposals and Criteria, National Conference of Commissioners on Uniform State Laws, 2002. Available at <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=42>.

³³ Introduction, National Conference of Commissioners on Uniform State Laws, 2002. Available at <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11>.

³⁴ Frequently Asked Questions about the Uniform Law Commission, Uniform Law Commission website. Available at <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=5&tabid=61>.

³⁵ Proposals and Criteria, National Conference of Commissioners on Uniform State Laws, 2002. Available at <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=42>.

³⁶ Ibid.

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Generally, as compared to uniform acts, model acts are expected to be subject to greater variation when adopted (or not) by the various states. According to the ULC, an act may be designated as “model” if the principal purposes of the act can be substantially achieved even though it is not adopted in its entirety by every state. By comparison, a uniform act is one in which uniformity of the provisions of the act among the various jurisdictions is a principal and compelling objective. Legislatures are urged to adopt uniform acts exactly as written, to “promote uniformity in the law among the states.”⁴¹ Model acts are designed to serve as guideline legislation, which states can borrow from or adapt to suit their individual needs and conditions.

Proposals for new acts are considered by the ULC Committee on Scope and Program, which accepts suggestions from the organized bar, state governments, private interest groups, uniform law commissioners, and private individuals. It may assign a suggested topic to a study committee which studies the topic and reports back to the Committee. The Scope and Program Committee sends its recommendations to the Executive Committee. A proposed act need not be designated as “uniform” or “model” until a draft is actually submitted to the Executive Committee for consideration at its annual meeting. With the ULC Executive

³⁷ Illinois Bill Drafting Manual, Legislative Resource Bureau, §20.5.

³⁸ A Few Facts about the Uniform Computer Information Transactions Act, National Conference of Commissioners on Uniform State Laws, 2002. Available at http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucita.asp.

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⁴⁰ Letter from NCCUSL President to Commissioners dated August 1, 2003, Americans for Fair Electronic Commerce Transactions. Available at <http://www.ucita.com/pdf/Nccusl2003UcitaKingLetP1.pdf>.

⁴¹ About NCCUSL, Uniform Law Commission website. Available at <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11>.

Committee's approval, a drafting committee is selected from the membership, and a reporter/drafter—an expert in the field—is hired.

Each draft receives a minimum of 2 years' consideration, sometimes much longer. Drafting committees meet throughout the year. The open drafting process draws on the expertise of state-appointed commissioners, legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.

Draft acts are submitted for initial debate of the entire Uniform Law Commission at an annual meeting. Each act must be considered section by section, at no less than two annual meetings, by all commissioners sitting as a Committee of the Whole. Once the Committee of the Whole approves an act, the final step is a vote by states—one vote per state. A majority of the states present, and no less than 20 states, must approve an act before it can be officially adopted for consideration by the states.

The ULC has established a Study Committee on Health Care Information Interoperability (W. Grant Callow, Chair). The Study Committee is to "study various state law impediments to the effective exchange of health care information (electronic and otherwise) between and among health care providers, insurers, government entities, and other actors within the health care system, and in coordination with ongoing state and federal efforts in this area will assess whether state statutory reform is needed."⁴² At the July 19–20, 2008, Annual Meeting of the Committee on Scope and Program of the Uniform Law Commission, the Study Committee provided this report: "Commissioner Nichols reported briefly on the committee's work, noting that at midyear 2008 Scope decided to continue this committee until reports from outside organizations were released, including a report by the National Governor's Association. Commissioner Grant Callow addressed the committee and confirmed that no report has been issued. Commissioner Callow noted that he has been in touch with a member of the American Bar Association (ABA) Privacy and Security Project which is working on a project to harmonize state privacy laws, and requested that the study committee be continued in order to receive additional input from interested groups. The Committee on Scope and Program agreed to continue the study committee, and expects a further report at its midyear meeting in January 2009."⁴³

The American Law Institute (ALI) and the ABA also promulgate model acts. The ALI and ABA do not have the same procedures and timelines as the ULC. For the ALI, each proposed act is assigned to a "reporter" who prepares the various drafts to be reviewed by ALI subcommittees and ALI membership. Once a model act is approved, the reporter prepares ALI's official version for publication. The ABA, through its various sections, divisions,

⁴² Study Committees, Uniform Law Commission website. Available at <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=1&tabid=40>.

⁴³ Scope and Program Committee, Uniform Law Commission website. Available at <http://www.nccusl.org/Update/Minutes/scope071908mn.pdf>.

forums, and committees, pursues the improvement of various laws, including the drafting of model acts, via similar procedures.

We are not aware of any unusual processes, enablers, or quirks that would impact the adoption and implementation of a model act. As discussed above in the Process for Developing the Option and the Implementation Requirements, a number of hurdles will need to be overcome and ground rules will need to be established, but from a legal process standpoint, passage of a model act is possible.

Foreseeable barriers to administering and enforcing the model act will be operational in nature. The move to a model act could include the adoption of a uniform consent form. Given the vast number of health care providers and the wide variance of size and sophistication, ensuring that all health care providers adopt the uniform consent form will be a challenge. Also, part of the model act should address how to handle exchange of information with states that have not adopted the model act. This issue will undoubtedly arise, so states should be prepared how address it.

Unlike a “uniform law,” model acts can be those adopted by NCCUSL—or by other associations and interest groups.

NCCUSL’s standing as promulgator of uniform laws and model acts stems from the direct participation of every state in its deliberations. It was created more than 116 years ago when the state of New York invited other states to participate in a conference to draft uniform laws. Each state provides financial support to the organization and sends a contingent of “commissioners.” Illinois law provides for the appointment of nine commissioners to represent the state on the ULC. According to Katie Robinson, Communications Officer, NCCUSL, most states have 3 to 5 commissioners, while others have more than 10.

An example of another organization that has developed model acts is the Turning Point National Collaborative on Public Health Statute Modernization. “The Collaborative is a partnership between the Turning Point states of Alaska, Oregon, Nebraska, Wisconsin, and Colorado; and a number of federal agencies and national organizations, including the Centers for Disease Control and Prevention, the Health Resources and Services Administration, the American Public Health Association, the National Governors’ Association, the National Conference of State Legislatures, the National Indian Health Board, the Association of State and Territorial Health Officials, and the National Association of County and City Health Officials.” This collaborative developed the “Turning Point Model State Public Health Act to serve as a tool for state, local, and tribal governments to use to revise or update public health statutes and administrative regulations.”⁴⁴

⁴⁴ Turning Point Model State Public Health Act, Centers for Law and the Public Health website. Available at <http://www.publichealthlaw.net/ModelLaws/MSPHA.php>.

Government, more specifically, CDC, has been the initiator of model acts, two of which have been reviewed for this paper. One proposal, the Model State Public Health Privacy Act, “was developed by Lawrence O. Gostin and James G. Hodge, Jr., in 1999 under the auspices of the CDC and with significant input from an expert advisory group.”⁴⁵ This model act addresses privacy and security issues regarding identifiable health information collected by public health agencies.

“In October 2001, CDC commissioned the Center for Law and the Public’s Health to produce the Model State Emergency Health Powers Act.”⁴⁶ This model act was completed in December 2001.

The Center for Law and the Public’s Health’s website includes information on the state adoption of the model act up to July 15, 2006. According to the site, “thirty-eight (38) states . . . and DC have passed a total of 66 bills or resolutions that include provisions from or closely related to the Act.”⁴⁷

Because of the number of different entities that propose model acts, this paper will limit its discussion to the process used by the NCCUSL. For that organization, the creation of a model act begins with the Committee on Scope and Program. It receives suggestions from a variety of sources, such as the commissioners, state government entities, the organized bar, interest groups, and private individuals. When a party proposes an act, it is asked to demonstrate that the act will meet various NCCUSL criteria, including whether the subject matter is appropriate for state legislation in view of federal versus state jurisdiction; and whether the subject matter is consistent with NCCUSL’s objective to promote uniformity in state law on subjects where uniformity is desirable and practicable. Each act must: (1) have an obvious reason that makes it a practical step toward uniformity of state law or at least toward minimizing its diversity; (2) have reasonable probability of being accepted and enacted into law by a substantial number of jurisdictions, or, if not, will promote uniformity indirectly; and, (3) produce significant benefits to the public or avoid significant disadvantages arising from diversity of state law. The Committee on Scope and Program determines whether the proposed act merits consideration by NCCUSL and makes a recommendation to the Executive Committee. The Executive Committee refers the proposal to a Standing or Special Study Committee (the “Study Committee”) to review the issue and report back or make recommendations to the Executive Committee. The Study Committee recommends whether to draft an act and whether to designate it as a “uniform” act or a “model” act.

With the approval of the Executive Committee, a drafting committee is selected or created. The drafting committee is appointed from the membership of the ULC. “Each draft receives

⁴⁵ Ibid.

⁴⁶ Model State Emergency Health Powers Act, Centers for Law and the Public Health website. Available at <http://www.publichealthlaw.net/ModelLaws/MSEHPA.php>.

⁴⁷ Ibid.

a minimum of 2 years consideration, sometimes much longer. Drafting committees meet throughout the year. The open drafting process draws on the expertise of state-appointed commissioners, legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.”⁴⁸ The drafting committee drafts the act and revisits the decision whether to designate the act as a uniform or model act.

“Draft acts are submitted for initial debate of the entire Uniform Law Commission at an annual meeting. Each act must be considered section by section, at no less than two annual meetings, by all commissioners sitting as a Committee of the Whole. Once the Committee of the Whole approves an act, the final step is a vote by states—one vote per state. A majority of the states present, and no less than 20 states, must approve an act before it can be officially adopted for consideration by the states.”⁴⁹

Approval of an act as a uniform act obligates commissioners from each state to promote verbatim adoption by their respective legislatures. Approval of an act as a model act obligates commissioners from each state to promote adoption to achieve necessary and desirable uniformity, but without as much emphasis on verbatim adoption.

Publication of a uniform act or model act is no guarantee of acceptance by individual state legislatures. Each uniform or model act undergoes the same legislative process as other bills. In fact, under the Illinois Bill Drafting Manual promulgated by the Legislative Reference Bureau, bill titles should not begin with the word “model” or indicate that an act may be cited as a model act (although use of the word “uniform” is permitted for NCCUSL Uniform Acts). There have been exceptional instances in which uniform or model acts have been overwhelmingly rejected by state legislatures. For example, UCITA was approved by NCCUSL as a uniform act but was adopted in only two states. A number of states rejected UCITA, and some even adopted measures contrary to UCITA. Ultimately, NCCUSL ceased promoting UCITA.

Even if state legislatures incorporate a uniform or model act verbatim into their respective state statutes, the state courts may interpret the identical statutes very differently. Often, a court will emphasize prior case law more heavily than the terms of the statute. For example, even though the UCC has been widely adopted verbatim by various states, there are dramatic differences in application that affect the rights of parties under the UCC. One such area is the formation of warranties through representations by the seller, in which the buyer’s right to enforce a warranty varies widely from state to state under identical UCC provisions.

⁴⁸ Frequently Asked Questions, Uniform Law Commission website. Available at <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=5&tabid=61>.

⁴⁹ Ibid.

Health care providers, HIOs, and other health-related organizations must comply with applicable state and federal requirements when disclosing a person’s PHI. These requirements can create barriers or inefficiencies to disclosure of PHI, particularly when the organizations sharing the PHI reside in different states.

Before disclosing PHI to any entity (within or without the state), a disclosing organization must comply with the state and federal laws applicable to the disclosing organization. For instance, a disclosing organization in Illinois must comply with Illinois and federal laws, even if the request comes from another state. Similarly, a disclosing organization residing in another state must comply with federal laws and the laws of its state, even if an organization in Illinois requests the information. In effect, the current status of the law is that the responding state’s laws control the disclosure.

As a result, the requesting organization must be familiar with, and comply with, the state consent laws of each different jurisdiction from which it desires to obtain PHI. In practice, this is typically done by using forms or documents that the disclosing entity provides and has already determined comply with its law. Failure to provide a consent that complies with the laws applicable to the responding state will result in rejection of the request, unless the disclosure is otherwise permitted without a consent. Similarly, inconsistencies in state laws including, without limitation, restrictions on secondary disclosure of PHI could lead to potential liability.

Uses and disclosures of PHI by organizations located within the jurisdiction of the state of Illinois must satisfy the federal Health Insurance Portability and Accountability Act (HIPAA) and certain Illinois state statutes. These statutes include the following:

- **General Medical Records:** Physicians, health care providers, health services corporations, agents and employees of hospitals, and insurance companies are prohibited from disclosing the nature or details of services provided to patients, except to: (a) the patient; (b) the patient’s representative responsible for treatment decisions; (c) parties directly involved in *providing treatment* or *processing the payment* for such treatment; (d) parties responsible for peer review, utilization review, and quality assurance; and (e) parties required to be notified under certain other acts (such as for reporting child abuse or certain sexually transmitted diseases) or where otherwise authorized or required by law.
- **HIV/AIDS Test Results:** Illinois law prohibits persons from disclosing the identity of any person upon whom an HIV test is performed, or the results of such a testing in a manner which permits identification of the subject of the test, except to certain persons under certain conditions. These conditions include “[a]n authorized agent or employee of a health facility or health care provider if . . . the agent or employee *provides patient care* . . . , and the agent or employee has a need to know such information.”⁵⁰
- **Genetic Testing Information:** “[G]enetic testing and information derived from genetic testing is confidential and privileged and may be released only to the

⁵⁰ 410 ILCS 305/9 (2008).

individual tested and to persons specifically authorized, in writing . . . ,” with certain exceptions, including to “[a]n authorized agent or employee of a health facility or health care provider if . . . the agent or employee *provides patient care*, and the agent or employee has a need to know the information in order to conduct the tests or provide care of treatment.”⁵¹

- **Mental Health and Developmental Disabilities:** “Records and communications may be disclosed . . . only with the written consent of those persons who are entitled to inspect and copy a recipient’s record.”⁵² (Note: this list of people does not include a health care provider.)
- **Alcohol or Drug Abuse:** Records “may be disclosed only in accordance with the provisions of federal law and regulations concerning the confidentiality of alcohol and drug abuse patient records.”⁵³ These generally do not permit the disclosure of these records, except in emergencies, unless there is written consent.

In addition, each state may have inconsistent consent requirements, including those that apply specifically to certain individuals. For example, states may define minors differently by age or have different requirements for emancipation, which determines when they may legally consent.

For this analysis, there are two scenarios: (1) Scenario 1, in which the responding state has more stringent consent requirements for the release of PHI than that of the requesting state; and (2) Scenario 2, in which the requesting state has more stringent consent requirements for the release of PHI than that of the responding state. The difference in consent requirements establishes an impediment to the efficient delivery of health information needed to treat the patient because health providers in the responding and requesting state may not be able to disclose or access the information, respectively, without opening themselves up to civil or criminal liability.

The commissioners drafting a model act to address these conflicts between the two states may consider three possible approaches.

Approach 1—Responding State Prevails

The commissioners could recommend a model act that provides that health information properly consented in the *responding* state will be accepted by the requesting state, the requesting state’s consent laws notwithstanding. Most state laws currently require providers in the responding state to comply with their own laws so this approach is closest to the status quo.

Under this approach, the requesting state with *less* stringent consent laws (Scenario 1 in “Assumptions”) would receive and be permitted to use PHI if: (a) the responding state had already fulfilled its own consent laws that authorized a disclosure to the requesting state

⁵¹ 410 ILCS 513/15 (2008).

⁵² 740 ILCS 110/5 (2008).

⁵³ 20 ILCS 301/30-5(bb) (2008).

(i.e., the HIO received a “blanket” consent from patients that permitted disclosure for the purposes requested by the requesting state); or (b) the requesting state determined what the responding state’s consent laws were and presented the responding state with a consent that fulfilled these more stringent laws.

Under this approach, the requesting state with *more* stringent consent laws (Scenario 2 in “Assumptions”) would receive and be permitted to use PHI if: (a) the responding state had already fulfilled its own consent laws that authorized a disclosure to the requesting state (i.e., the HIO received a “blanket” consent from patients that permitted disclosure for the purposes requested by the requesting state); or (b) the requesting state presented the responding state with a consent that fulfilled the responding state’s consent laws, which could presumably be done by using a consent from the requesting state because its laws are more stringent.

Approach 2—Requesting State Prevails

The commissioners could recommend a model act that provides that the consent laws of the requesting state would govern the exchange of PHI (i.e., before PHI could be sent to the requesting state, a patient consent must meet the requirements of the requesting state). This approach requires requesting states to be familiar with only their own state’s laws, instead of being prepared to obtain consents that satisfy various responding states’ laws.

Under this approach, the requesting state with *less* stringent consent laws (Scenario 1 in “Assumptions”) would receive and be permitted to use PHI if: (a) the requesting state presented the responding state with a consent that fulfilled the requesting state’s consent laws even if they were less stringent than the responding state; or (b) the responding state had already fulfilled its own consent laws that authorized a disclosure to the requesting state (i.e., the HIO received a “blanket” consent from patients that permitted disclosure for the purposes requested by the requesting state). Presumably, if the responding state’s laws were satisfied, the requesting state’s laws would also be satisfied.

Under this approach, the requesting state with *more* stringent consent laws (Scenario 2 in “Assumptions”) would receive and be permitted to use PHI only if: (a) the requesting state presented the responding state with a consent that fulfilled the requesting state’s consent laws; or (b) the responding state obtains the information by voluntarily obtaining a more stringent consent that also fulfills the laws of the requesting state.

Approach 3—Uniform Consent

NCCUSL could determine that the best solution would be a uniform consent requirement that would govern the interstate exchange of PHI. PHI would be exchanged if the requirements of the model act were met.

Choice of Law

A choice of law provision in a contract, between entities that are exchanging PHI interstate, would require an analysis of the laws to the two states, and consistency. Statutory choice of law would require consensus building to develop an inclusive choice of law, or the choice of law could be designed to only support state law.

Choice of law provisions are a mechanism for eliminating uncertainty and can prevent potential disputes regarding the law that governs a particular transaction. Choice of law provisions might be simple or complex. For example, the provision may simply select one state's labor, discrimination, and similar laws to govern all disputes that may arise out of the transaction. Or, the drafters could establish a completely new set of such laws through negotiation and collaboration to address every aspect of the health information exchange (HIE) transaction. Alternatively, the provision may simply establish which state's (i.e., the responding state or the requesting state's) laws apply in a given situation. And of course, there are a myriad of options that span across a spectrum that includes these various options.

If one state's laws are chosen to govern all transactions, another important issue that will need to be addressed includes whether the law which is chosen is to remain static or if it will change as the chosen state's laws are amended. The choice of law provision could adopt an implicit or explicit modification of the applicable law if the underlying state's law is subsequently modified.

A contractual provision only governs conduct between the parties, and does not take precedence over statutory law. For example, if a state consent statute prohibits a disclosure, the parties to a contract cannot violate such prohibition in that state on the basis of having agreed contractually to apply a different state's laws that would permit the disclosure. The contractual choice of law provision would offer little or no protection from criminal or civil liability for violation of an applicable state statute.

A second approach to the choice of law option would be to have the states pass a statute specifying the choice of law in PHI exchanges. The statutory choice of law provision could work so long as both the responding state and the requesting state enact a consistent choice of law provision.

The choice of law provision (either by contract or by statute) could specify that the law of the requesting state should apply, which, per the scenarios in the "Assumptions," would mean that, in some cases, the more stringent consent laws would apply, and in others, that the less stringent consent laws would apply. In Scenario 1, the consent presented to the HIO member would be less stringent than the requirements of the HIO member's state, so the HIO member would want the assurance of a choice of law provision to make the disclosure without risk of civil or criminal liability. In Scenario 2, the consent presented to

the HIO member in the responding state for the release of PHI would be more stringent than the requirements of the HIO member's state, so the HIO member could make the disclosure confident that no civil or criminal liability would accrue.

Alternatively, the choice of law could specify that the responding state's law would apply. This approach is the current practice, as each responding party reviews disclosure requests and consent forms to ensure that they are compliant with the laws applicable to the responding party. Currently, if the consent does not satisfy the responding state's laws, the disclosure is delayed while the requesting party obtains and submits a satisfactory consent. To avoid such a delay, the requesting state would need to remain familiar with each responding state's laws and each change to them.

Note that the structure of the HIO also impacts the disclosure and consent process. If the HIO as an entity makes the disclosure, then it is also an actor that could potentially incur liability, and it may be located in, and subject to the laws of, a third state. In this situation, having an agreement among all the parties to use the requesting state's law avoids the added complexity of having a third state's laws apply to information collected under one state's laws and being requested for disclosure under a second state's laws.

Choice of law provisions are a mechanism for eliminating uncertainty and can prevent potential disputes regarding the law that governs a particular transaction. Choice of law provisions might be simple or complex. For example, the provision may simply select one state's labor, discrimination, and similar laws to govern all disputes that may arise out of the transaction. Or, the drafters could establish a completely new set of such laws through negotiation and collaboration to address every aspect of the HIE transaction. Alternatively, the provision may simply establish which state's (i.e., the responding state or the requesting state's) laws apply in a given situation. And of course, there are a myriad of options that span across a spectrum that includes these various options.

If one state's laws are chosen to govern all transactions, another important issue that will need to be addressed includes whether the law which is chosen is to remain static or if it will change as the chosen state's laws are amended. The choice of law provision could adopt an implicit or explicit modification of the applicable law if the underlying state's law is subsequently modified.

Interstate Compact—Pro

- + Informal development will foster expertise, and legislatively approved development will foster sponsors.
- + Allows the states (as opposed to the federal government) to draw the parameters, not only for participation in the compact, but also for developing dispute resolution procedures. This can lead to increased effectiveness and efficiency, as well as flexibility and autonomy. While the threat of federal preemption or mandates is

lessened, it is important to note (as set forth below) that congressional consent will likely transform the final product into federal law.

- + The process for developing interstate compacts, described by the CSG, was determined to be a reasonable and appropriate process by which standardization of disparate state consent processes could be achieved. Being able to work through a number of state legislatures would allow for the main relevant issues to surface during the drafting process. This process allows for the issues to be examined in depth during the process. The requirement for enacting an interstate compact only after a preset number of states join the compact may help to promote widespread adoption.
- + If an interstate compact is successfully adopted by multiple states, standard provisions could be used by a large number of states. The adoption of standard provisions would be a benefit to organizations attempting to disclose PHI across state lines to other organizations in an HIO network.

Approach 1—Responding State Prevails

- May be easiest to implement because it is closest to the status quo and does not require the responding state to be familiar with any other state’s requirements.
- Could be implemented by a responding state obtaining a consent at the time it collects the information from patients rather than at the time of the request from the requesting state. If consent obtained in the responding state allows for broad disclosure to other states for treatment (or even for other purposes), information could flow quickly once the requesting state submits a request that meets the responding state’s requirements.
- In Scenario 1 (the responding state has *more* stringent consent laws), if the consent was obtained at the time of collection, it would be irrelevant that the requesting state’s consent was not as robust because the responding state had already obtained a more stringent consent, thereby encouraging freer flow of information.
- In Scenario 1 (the responding state has *more* stringent consent laws), privacy is best protected because the information cannot be disclosed unless the requirements of the more stringent law are met.
- In Scenario 2 (the responding state has *less* stringent consent laws), information could flow easily and quickly if the requesting state complies with its own, more stringent laws, which are those with which it is most likely to be familiar.

Approach 2—Requesting State Prevails

- In Scenario 2 (the responding state has *less* stringent consent laws), privacy is best protected because the information cannot be disclosed unless the requirements of the more stringent law are met.
- In Scenario 1 (the responding state has *more* stringent consent laws), information will flow easily and quickly without the requirement that the responding state seek additional consent from the patients if the requesting state submits a consent that complies with its own laws. It would be irrelevant that the responding state’s laws would not have permitted the disclosure.

- This approach requires requesting states to be familiar with only their own state's laws, instead of being prepared to obtain consents that satisfy various responding states' laws.

Approach 3—Compact Defined Consent

- A uniform process enacted by the states will be easier to understand in the context of interstate exchange of PHI.
- A uniform consent form would be developed, and each state could become familiar with a consistent set of documentation to permit access and disclosure of information.

Uniform Law—Pro

- + NCCUSL is uniquely organized and qualified to draft any uniform or model state laws that might be recommended.
- + With the support of the State Alliance and National Governors Association (NGA), such acts could be efficiently and expediently produced and enacted by the states.
- + The process for the adoption of a uniform law, by including the opportunity for comment and feedback by representatives from all 50 states and the favorable vote by at least a majority of the states present (and not less than 20 states), makes it more likely that an act will receive favorable treatment when finally presented to each state legislature.
- + The NCCUSL has representation from every state, including Illinois, which currently has 11 commissioners participating. The process allows for the issues to be examined in depth by the commissioners, who work toward consensus. The requirement that the act is approved by a large number of states before being recommended may help to promote widespread adoption. In addition, the NCCUSL is a respected organization, and its endorsement of an act may influence states to adopt it.

In the current situation, working with the NCCUSL to draft and endorse a uniform act does provide an avenue by which standardization of disparate state consent processes could be achieved. If a uniform act is successfully drafted and supported by the NCCUSL, standard provisions could be adopted verbatim or in consistent principle by a large number of states. Such adoption of standard provisions would be a benefit to organizations attempting to disclose PHI across state lines to other organizations in an HIO network. Standardized provisions will be in place for all states that adopt the uniform act. Also, more effort might be made by other credible organizations, in addition to NCCUSL, as part of the drafting process and thus bring more opportunity to bring forward best possible solutions.

Model Law—Pro

- + NCCUSL is uniquely organized and qualified to draft any uniform or model state laws that might be recommended.
- + Different organizations can draft model laws.
- + States can adapt what best fits their needs.

- + The procedures for adoption of model acts, like those for the adoption of uniform laws, involve a significant amount of participation by state representatives and make it more likely that the model act will be well received by the individual states when submitted for adoption. In addition, if a proposed uniform law becomes too controversial to be adopted as a uniform law, it may find better success as a model act.
- + The NCCUSL has representation from every state, including Illinois, which currently has 11 commissioners participating. The process allows for the issues to be examined in depth by the commissioners, who work toward consensus. The requirement that the act is approved by a large number of states before being recommended may help to promote widespread adoption. In addition, the NCCUSL is a respected organization, and its endorsement of an act may influence states to adopt it.
- + In the current situation, working with the NCCUSL to draft and endorse a model act does provide an avenue by which standardization of disparate state consent processes could be achieved. If a model act is successfully drafted and supported by the NCCUSL, standard provisions could be adopted verbatim or in consistent principle by a large number of states. Such adoption of standard provisions would be a benefit to organizations attempting to disclose PHI across state lines to other organizations in an HIO network. Standardized provisions will be in place for all states that adopt the model act. Also, more effort might be made by other credible organizations, in addition to NCCUSL, as part of the drafting process and thus bring more opportunity to bring forward best possible solutions.
- + May be easiest to implement because it is closest to the status quo and does not require the responding state to be familiar with any other state's requirements.
- + Could be implemented by a responding state obtaining a consent at the time it collects the information from patients rather than at the time of the request from the requesting state. If consent obtained in the responding state allows for broad disclosure to other states for treatment (or even for other purposes), information could flow quickly once the requesting state submits a request that meets the responding state's requirements.
- + In Scenario 1 (the responding state has *more* stringent consent laws), if the consent was obtained at the time of collection, it would be irrelevant that the requesting state's consent was not as robust because the responding state had already obtained a more stringent consent, thereby encouraging freer flow of information.
- + In Scenario 1 (the responding state has *more* stringent consent laws), privacy is best protected because the information cannot be disclosed unless the requirements of the more stringent law are met.
- + In Scenario 2 (the responding state has *less* stringent consent laws), information could flow easily and quickly if the requesting state complies with its own, more stringent, laws, which are those with which it is most likely to be familiar.
- + In Scenario 2 (the responding state has *less* stringent consent laws), privacy is best protected because the information cannot be disclosed unless the requirements of the more stringent law are met.
- + In Scenario 1 (the responding state has *more* stringent consent laws), information will flow easily and quickly without the requirement that the responding state seek additional consent from the patients if the requesting state submits a consent that

complies with its own laws. It would be irrelevant that the responding state's laws would not have permitted the disclosure.

- + This approach requires requesting states to be familiar with only their own state's laws, instead of being prepared to obtain consents that satisfy various responding states' laws.
- + A uniform process enacted by the states will be easier to understand in the context of interstate exchange of PHI.
- + A uniform consent form would be developed, and each state could become familiar with a consistent set of documentation to permit access and disclosure of information.

Choice of Law—Pro

Contractual Provisions

- + Ease of negotiating terms.
- + Many entities already doing it.
- + Can customize it to fit unique situations.
- + A contractual choice of law provision is relatively simple to enact and does not require legislative action. The parties need only to write a suitably worded provision into their agreement after selecting the law.

Statutory Provision

- + Uniform for state.
- + More buy-in and open to the consumer and community.
- + Easily understood process.
- + A statutory choice of has the force of the law behind it and, if implemented appropriately, could be relied upon by parties exchanging PHI.
- + A choice of law provision will protect the justified expectations of the parties and make it possible for them to foretell with accuracy what will be their rights and liabilities in a given situation. This is even more true if one state's laws are selected, as there would be a complete and coherent set of norms that apply. In other words, rather than assimilating norms and provisions from various sources, a "single source" approach would bring with it a unitary and integrated set of laws to the table.
- + Regardless of whether a single state's laws are chosen, or if multiple states' laws are assimilated into a new framework, the selection could focus on state laws that have already been interpreted by the courts, thereby allowing a greater degree of certainty about what those laws mean.
- + By establishing a choice of law provision, each party presumably would be precluded from later arguing (or litigating) that the law of its own state is to apply. Without such a clause, the parties will need to be aware of the panoply of problems they are creating by having no legal norms and no means of defined, adequate redress for the affected parties.

Interstate Compact—Con

- California would need to have a strong presence to ensure development is consistent with California ideals.
- Congressional approval may have the effect of transforming the interstate compact into federal law. Accordingly, the compact’s language and interpretation could be at the mercy of the federal government, including the federal courts. Courts could hold unenforceable state laws that are inconsistent with federal and interstate interests.
- Enactment of an interstate compact requires working with a number of state legislatures, which could become difficult with a long negotiation process. For instance, issues such as privacy issues, identifying responsible parties, and other items related to compiling comments and research could be time consuming with various legislators. The education phase would require the building of buy-in, potentially across a number of very different state stakeholders. In addition to the work required for enactment, the transition process could also become bogged down if there is not early agreement on the development of rules, regulations, forms, standards, etc. by which the compact will need to operate.
- The process also seems like a lot of work which may not be ultimately successful if it does not get adopted by a majority of states. There is no requirement that states ultimately adopt an interstate compact so a significant amount of effort could be made to draft language that is ultimately not adopted by enough states. This would mean that a barrier to HIE would still exist between compact member states and nonmember states.

Approach 1—Responding State Prevails

- In Scenario 2 (the responding state has *less* stringent consent laws), there is a lesser focus on privacy concerns which could be objectionable to privacy advocates.
- In Scenario 1 (the responding state has *more* stringent consent laws), the responding state will require compliance with its own state laws before permitting the disclosure. This may delay the release of the PHI if the requesting state submits a consent that does not meet the higher standards of the responding state. A more stringent consent would need to be obtained from the patient unless the responding state has already obtained an appropriate consent at the time the information was collected.

Approach 2—Requesting State Prevails

- In Scenario 2 (the responding state has *less* stringent consent laws), access to PHI in the requesting state will be delayed while health care providers bring data collected in the less restrictive environment of the responding state into conformance with the requesting state’s higher standards. This may impede or delay the provision of needed health care.
- Health care providers in the responding state will be required to determine the requirements of the requesting state’s laws before they release the information, which could delay the release of data for HIE purposes.
- In Scenario 1 (the responding state has *more* stringent consent laws), this approach may raise objections from responding states that do not wish to release PHI under less demanding consent requirements.

- The approach cannot be implemented in advance because it is impossible to predict which state will request the information. Therefore, the determination of whether the requirements of the law have been met must occur at the time of disclosure of the information.

Approach 3—Compact Defined Consent

- The drafting group may have difficulty finding agreeable consensus language, drawing out the process and making buy-in more complicated. This also requires an additional layer of analysis for providers in all states that ratify the compact, rather than a subset of states in Approach 1 or 2.
- If the compact defined consent is not implemented properly, the failure to provide adequate education on new requirements would result in confusion by health care providers over required procedures.
- For states that have fairly lenient consent requirements, this approach could be objectionable if the compact defined consent imposes new, more stringent requirements.
- For states that have fairly robust consent requirements, this approach could be objectionable to privacy advocates if the compact defined consent imposes less stringent requirements and reduces the emphasis on privacy.

Uniform Law—Con

- States are not equally represented on the NCCUSL, given the range in the number of appointed commissioners. The process seems like a lot of work which may not be ultimately successful if it does not get adopted by a majority of states. There is no requirement that states ultimately adopt the uniform law so a significant amount of effort could be made to draft an act that is ultimately not enacted by enough states.
- By requiring so much participation by the representatives of each state, the act of promulgating a uniform law can be sidelined by opposition by several states and can be delayed if the act needs to be redrafted to meet various objections. In addition, because the uniform law is intended to be adopted without changes, it may meet more resistance to adoption by states than the more flexible model law.

Model Law—Con

- The process is lengthy and potentially contentious, even though NCCUSL is uniquely organized and qualified to draft any uniform or model state laws that might be recommended.
- The largest drawback to the model act approach is the greater likelihood that there will be significant variations from state to state—which although unlikely to be as diverse as the current situation, would not appear to be as useful as a uniform act in addressing the need for uniform standards for the electronic movement of health-related information among organizations.
- States are not equally represented on the NCCUSL, given the range in the number of appointed commissioners. The process seems like a lot of work which may not be ultimately successful if it does not get adopted by a majority of states. There is no requirement that states ultimately adopt the model act so a significant amount of effort could be made to draft an act that is ultimately not enacted by enough states.

- The lack of emphasis on verbatim adoption of the model act may result in confusion as even small word changes can make a big difference. The NCCUSL might recommend language for the model act, but there is no requirement for the act to contain certain terms. The process has also too much opportunity for states to adopt conflicting rules, since recommendations could potentially come from a wide variety of groups.
- In Scenario 2 (the responding state has *less* stringent consent laws), there is a lesser focus on privacy concerns which could be objectionable to privacy advocates.
- In Scenario 1 (the responding state has *more* stringent consent laws), the responding state will require compliance with its own state laws before permitting the disclosure. This may delay the release of the PHI if the requesting state submits a consent that does not meet the higher standards of the responding state. A more stringent consent would need to be obtained from the patient unless the responding state has already obtained an appropriate consent at the time the information was collected.
- In Scenario 2 (the responding state has *less* stringent consent laws), access to PHI in the requesting state will be delayed while health care providers bring data collected in the less restrictive environment of the responding state into conformance with the requesting state's higher standards. This may impede or delay the provision of needed health care.
- Health care providers in the responding state will be required to determine the requirements of the requesting state's laws before they release the information, which could delay the release of data for HIE purposes.
- In Scenario 1 (the responding state has *more* stringent consent laws), this approach may raise objections from responding states that do not wish to release PHI under less demanding consent requirements.
- The approach cannot be implemented in advance because it is impossible to predict which state will request the information. Therefore, the determination of whether the requirements of the law have been met must occur at the time of disclosure of the information.
- If the uniform consent is not implemented properly, the failure to provide adequate education on new requirements would result in confusion by health care providers over required procedures.
- For states that have fairly lenient consent requirements, this approach could be objectionable if the uniform consent imposes new, more stringent requirements.
- For states that have fairly robust consent requirements, this approach could be objectionable to privacy advocates if the uniform consent imposes less stringent requirements and reduces the emphasis on privacy.

Choice of Law—Con

Contractual Provisions

- May not resolve legal liability issues.

Statutory Provision

- Complexity of legislative process and nonuniformity in adoption by other states.

- Less nimble than contracts.
- If too California-centric, may hinder exchange.
- Passing a choice of law statute could be difficult and time consuming, and could include undesired modifications and amendments during the legislative process.
- Note that a statutory choice of law provision will only work if all parties to the exchange also enact a consistent choice of law. In addition, since the choice of law only determines which state's laws will apply to the exchange of PHI, it will also be crucial that the laws that already govern PHI exchange be consistent.
- Increased time for negotiation and development of an appropriate choice of law provision, particularly given each state's interest in protecting the health information of its citizens.

2. Length of Time Required to Formulate

Given that each state's legislative process is governed by different laws, rules, and procedures, what are the typical time frames for obtaining legislative or other governance approval to implement each proposed mechanism?

Interstate Compact

An advisory committee would be expected to take at least 1 year to draft compact language. Timing of the presentation to the states would be critical since some do not have annual legislative sessions. The language of the compact may require a minimum number of states to ratify before it can become effective. Depending upon the scope of the compact, congressional approval could be required.

Unfortunately, there is no clear answer regarding the length of time required to formulate a compact, but based upon past Ohio experience, it appears that from the initial meeting of the advisory committee to the time the compact takes effect could take several years.

CSG provided the following insight into the time frame for adopting interstate compacts:

"A study of 65 interstate compacts, conducted in the early 1960s, indicated that the average amount of time required to launch a new compact was almost 5 years. But that study was admittedly skewed by the unusually long time required for the approval of several compacts that dealt with controversial natural resource issues. In fact, the average time required to enact 19 compacts covering river management and water rights was almost 9 years.

More recently, however, interstate compacts have enjoyed great rapidity in their adoption. The Interstate Compact for Adult Offender Supervision was adopted by 35 states in just 30 months. Other recent compacts, including the new Interstate Insurance Product Regulation Compact are enjoying fast success, gaining quick adoptions over a period of 2–3 years.

In recent years, there have been some remarkable success stories. For example, in December 1989, a committee of the Midwestern Legislative

Conference approved draft language for the Midwestern Higher Education Compact and began circulating it to lawmakers in the 12 Midwestern states that were eligible to participate. Just 13 months later, the compact became effective.”⁵⁴

Only under the most ideal circumstances could adoption of an interstate compact relating to the interstate exchange of health information occur in 2 years. Three years would be an optimistic estimate for adoption.

An examination of PHI requests may reveal that the vast majority of requests involving Illinois providers are with entities in only a small number of states. The compact may wish to address a limited number of states initially, rather than attempt national acceptance.

Uniform Law

Drafting a uniform law generally takes 3 to 5 years, according to NCCUSL. This time frame would also be affected either way by the deliberations of a study committee. The NCCUSL created the Study Committee on Health Care Information Interoperability a few years ago to look at the issue.

Under the best of circumstances, adoption of the uniform law among a meaningful number of states will take at least another 2 years—for a total of 5 to 7 years. According to Katie Robinson, NCCUSL Communications Officer, if the NCCUSL drafts in an area where Congress does not draft, where there is a clear and timely need in states, there is a good chance for success.

Model Law

Depending on the group chosen to develop the model law, this process can take years to complete. Once the model law is formed, then it will take even more time for each state to figure out what part they want to adopt and then to go through the legislative process to adopt it. Further implementation may require the adoption of regulations.

None of the organizations which could promulgate a model act is likely to take less than several years. Once promulgated by an organization, a model act is officially offered for consideration by the states. Model acts are designed to serve as guideline legislation, which states can borrow from or adapt to suit their individual needs and conditions.

Drafting a model act generally takes 3 to 5 years, according to NCCUSL Communications Officer Katie Robinson. A longer formulation process would be expected if a study committee were established. The NCCUSL created the Study Committee on Health Care Information Interoperability a few years ago to look at the issue. According to W. Grant Callow, Chair, the committee has been waiting for the NGA to give them a report that

⁵⁴ Compacts as a Tool of the Game, Council of State Governments website. Available at <http://www.csg.org/programs/ncic/resources.aspx>.

summarizes NGA’s recommendation on the best legal mechanism to address electronic exchange of PHI.

In the Turning Point National Collaborative on Public Health Statute Modernization example discussed previously, that collaborative’s model act was “released on September 16, 2003 after 3 years of development and a national commentary period.”⁵⁵

Under the best of circumstances, adoption of the model act among a meaningful number of states will take at least another 2 years for a total of 5 to 7 years from the start of development until formal adoption.

Choice of Law

Health Information Security and Privacy Collaboration (HISPC) collaboratives have done research on commonality of the laws and contract language, which could speed up the formulation process.

A contractual agreement could be performed relatively quickly, depending on the amount of time the organization desires for review and execution by the approving authority. Potentially, a contractual agreement could be negotiated and reviewed in a matter of weeks or less. It should be noted, however, that if different parties to the contractual agreement have different interests to protect, the negotiation process could be longer.

A statute to address the issue would be subject to the legislative process and would be scheduled for review and action, the same as any other legislation. There is no method to estimate the time required to introduce and pass legislation. Potentially, legislation could be proposed, pass committee review, be scheduled for the required readings, approved, and promptly signed into law. More likely, the legislation would advance in fits and starts as more major bills, such as appropriations, command the attention of the legislature. Often, legislation is left incomplete at the end of the legislative term and dies without having been acted upon. As a result, the time required to obtain approval of a statute could exceed 1 year.

Deciding which laws should apply and drafting the appropriate language will obviously lengthen the negotiation and drafting processes and could delay agreement as the interested parties would need to come to decisions on a whole new set of issues. Because every state has its own health care laws, and often laws governing confidentiality and other HIE-related issues, this may be an extensive process.

Interstate Compact—Pro

- + The more that policy makers are interested, the quicker it will get done.

⁵⁵ Centers for Law and the Public’s Health website. Available at <http://www.publichealthlaw.net/ModelLaws/MSPHA.php>.

- + While formulating an effective interstate compact is expected to be a lengthy process, the end result will be a negotiated agreement among the participating states, which would hopefully offset later delays occasioned by individual states' objections to the provisions of the compact. In other words, presumably the states that agree to and execute the compact will not thereafter seek to challenge its terms.

Uniform Law—Pro

- + NCCUSL has successfully drafted and enacted many diverse laws.
- + Given the multiyear drafting and adoption timeline, multiple reviewers will have the opportunity to look at the model language and create the best solution. If the consent law drafted was simple, with a limited amount of revision to existing consent requirements, this might take less time to develop and be more quickly adopted by a majority of states.
- + The process for the adoption of a uniform law, by including the opportunity for comment and feedback by representatives from all 50 states and the favorable vote by at least a majority of the states present (and not less than 20 states), makes it more likely that an act will receive favorable treatment when finally presented to each state legislature. Ohio has been generally accepting of uniform laws.
- + One of the more recent examples is the adoption of the Uniform Electronic Transactions Act.

Model Law—Pro

- + The procedures for adoption of model acts, like those for the adoption of uniform laws, involve a significant amount of participation by state representatives, which make it more likely that the model act will be reasonably well received by the individual states when submitted for adoption.
- + There is the possibility that a model act can be moved through on an expedited basis (i.e., on about 1 year's timetable). For instance, in summer 2008, the Uniform Interstate Family Support Act was considered and approved on an expedited basis in order to effectuate the Hague Convention on Maintenance. The Convention's federal enacting legislation states that a version of this act must be passed by the states by 2010, and so the ULC agreed to create and pass a model act for states on an expedited basis.
- + The general subject of expedited review was the subject of some extended discussion at the ULC's annual meeting in July 2008. The conference has done a good job of being very efficient and nimble where time is of the essence for certain acts, but such review has occurred only a few times. The consensus was that, given the ever-quickening pace of change and advancements (particularly in the realms of technology and international transactions), there would likely be a need for the conference to be willing to consider expedited review more frequently.
- + Given the multiyear drafting and adoption timeline, multiple reviewers will have the opportunity to look at the model language and create the best solution. If the consent law drafted was simple, with a limited amount of revision to existing consent requirements, this might take less time to develop and be more quickly adopted by a majority of states.

Choice of Law—Pro

Contractual Provision

- + Significantly less time consuming than legislation.
- + Spending additional time on the “front end” establishing the applicable choice of law provision will likely lead to less time on the “back end” deciding which laws apply to a given dispute.

Interstate Compact—Con

- Resolution of the issue and effective transfer of health and medical information will not be immediate under this process. By way of example, the negotiation and approval of the Great Lakes–St. Lawrence River Basin Water Resources Compact took 7 years from the initial stages through congressional approval in August 2008.

Uniform Law—Con

- States have different legislative processes and calendars, so the time frame could be inconsistent and prolonged.
- Five to 7 years from development until adoption is a lengthy process, and multiple reviewers may also slow down the process more. Adoption by a significant number of states is not guaranteed. The process is lengthy and has the potential for limited success. Additional time will be required to bring state laws into alignment with the adopted uniform act. In addition, given the emphasis on patient privacy, it is likely that numerous interest groups would want input into the creation of a uniform act, thereby increasing the length of time for final adoption by states.

Model Law—Con

- Time estimates are unknown and variable.
- States have different legislative processes and calendars, so the time frame could be inconsistent and prolonged.
- As indicated by the report of the ULC’s Study Committee, the process can take several years before the decision is made to begin the process to promulgate a model act. The actual process of promulgating a model act will take an additional 2 years at a minimum. The process of adoption by individual states will likely take several more. Other approaches may be quicker.
- Five to 7 years from development until adoption is a lengthy process, and multiple reviewers may also slow down the process more. Adoption by a significant number of states is not guaranteed. The process is lengthy and has the potential for limited success. Additional time will be required to bring state laws in alignment with the adopted model act. In addition, given the emphasis on patient privacy, it is likely that numerous interests groups would want input into the creation of a model act, thereby increasing the length of time for final adoption by states.

Choice of Law—Con

Contractual Provision

- Writing a choice of law 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.

Statutory Provision

- Time consuming and will probably require additional regulations to implement.

3. Implementation Requirements

Identify the pros and cons for the steps required to implement each proposed mechanism. Completing this section will require a thorough understanding of the existing legislative and political or legal policy infrastructures in each state, as well as the resources that would appear necessary to implement each proposed mechanism.

Interstate Compact

Typically, implementation steps would include the work of:

- Advisory group
- Drafting team
- Education
- Enactment
- Transition

A state enters into an enforceable and binding interstate compact when it follows the entry provisions set out in the compact. States need to explicitly follow the procedures for entry that are stated in the compact language.

In Ohio, there appear to be two mechanisms for approving an interstate compact. The General Assembly may authorize the governor or other official to execute the compact. See, for example, R.C. 2151.56 (Interstate Compact on Juveniles); R.C. 5101.141 (authorizing the director of the department of job and family services to enter into interstate compacts for the provision of medical assistance and other social services to children in certain circumstances).

More commonly, the General Assembly enacts the compact's language as Ohio law. See, for example, R.C. 109.971 (National Crime Prevention and Privacy Compact); R.C. 921.60 (Pest Control Compact); R.C. 1503.41 (Middle Atlantic Interstate Forest Fire Protection Compact); R.C. 1514.30 (Interstate Mining Compact); R.C. 1522.01 (Great Lakes–St. Lawrence River Basin Water Resources Compact); R.C. 3301.48 (Interstate Compact for Education); R.C.

3747.01 (Midwest Interstate Compact and Commission on Low-level Radioactive Waste); R.C. 3915.16 (Interstate Insurance Product Regulation Compact); R.C. 5103.20 (Interstate Compact for the Placement of Children); R.C. 5119.50 (Interstate Compact on Mental Health); R.C. 5149.21 (Interstate Compact for Adult Offender Supervision). In either event, it appears the General Assembly has typically enacted the language of the compact and required that the final version be “substantially” the same as the language it has enacted. And the General Assembly may enact companion statutes at the same time as part of the legislation. See, for example, R.C. 3747.02-.03 (related to the Midwest Interstate Compact and Commission on Low-level Radioactive Waste); R.C. 1522.02-.08 (related to the Great Lakes–St. Lawrence River Basin Water Resources Compact).

In addition, the compact may include language setting forth many parameters, including: (a) the number of states that must agree to the compact before it will take effect; (b) the necessity for congressional consent; (c) the method by which a state must consent to the compact (e.g., signature or legislative enactment).

Uniform Law

The implementation requirements will be dependent on many variables. If the uniform law sets a specific consent policy, then implementation would require the review of any existing contracts that may be contrary to the uniform law. In drafting new agreements, a uniform law would alleviate the obligation to determine the consent policy and could be implemented when the other terms of the agreement are reached. If the negotiating partner comes from a state that has not adopted the uniform law, then the parties would be in the same position they are now.

Implementation of this mechanism requires the passage of the legislation by the Illinois General Assembly and the approval of the governor, or an override by the legislature if the governor would veto the bill. Illinois has enacted over 95 uniform and model acts according to NCCUSL.

Illinois Law Concerning PHI Disclosures: Health care providers, HIOs, and other health-related organizations must comply with applicable state and federal requirements when disclosing a person’s PHI. These requirements can create barriers or inefficiencies to disclosure of PHI, particularly when the organizations sharing the PHI reside in different states.

Before disclosing PHI to any entity (within or without the state), a disclosing organization must comply with the state and federal law applicable to the disclosing organization. For instance, a disclosing organization in Illinois must comply with Illinois and federal laws, even if the request comes from another state. Similarly, a disclosing organization residing in another state must comply with federal laws and the laws of its state, even if an

organization in Illinois requests the information. In effect, the current status of the law is that the responding state's laws control the disclosure.

As a result, the requesting organization must be familiar with, and comply with, the state consent laws of each different jurisdiction from which it desires to obtain PHI. In practice, this is typically done by using forms or documents that the disclosing entity provides and has already determined comply with its law. Failure to provide a consent that complies with the laws applicable to the responding state will result in rejection of the request, unless the disclosure is otherwise permitted without consent.

Similarly, inconsistencies in state laws including, without limitation, restrictions on secondary disclosure of PHI could lead to potential liability.

Uses and disclosures of PHI by organizations located within the jurisdiction of the state of Illinois must satisfy the federal HIPAA and certain Illinois state statutes. These statutes include the following:

General Medical Records: Physicians, health care providers, health services corporations, agents and employees of hospitals, and insurance companies are prohibited from disclosing the nature or details of services provided to patients, except to: (a) the patient; (b) the patient's representative responsible for treatment decisions; (c) parties directly involved in *providing treatment or processing the payment* for such treatment; (d) parties responsible for peer review, utilization review, and quality assurance; and (e) parties required to be notified under certain other acts (such as for reporting child abuse or certain sexually transmitted diseases) or where otherwise authorized or required by law.

HIV/AIDS Test Results: Illinois law prohibits persons from disclosing the identity of any person upon whom an HIV test is performed, or the results of such a testing in a manner which permits identification of the subject of the test, except to certain persons under certain conditions. These conditions include "[a]n authorized agent or employee of a health facility or health care provider if . . . the agent or employee *provides patient care* . . . , and the agent or employee has a need to know such information."⁵⁶

Genetic Testing Information: "[G]enetic testing and information derived from genetic testing is confidential and privileged and may be released only to the individual tested and to persons specifically authorized, in writing . . . ," with certain exceptions, including to "[a]n authorized agent or employee of a health facility or health care provider if . . . the agent or employee *provides patient care*, and the agent or employee has a need to know the information in order to conduct the tests or provide care of treatment."⁵⁷

⁵⁶ 410 ILCS 305/9 (2008).

⁵⁷ 410 ILCS 513/15 (2008).

Mental Health and Developmental Disabilities: “Records and communications may be disclosed . . . only with the written consent of those persons who are entitled to inspect and copy a recipient’s record.”⁵⁸

Alcohol or Drug Abuse: Records “may be disclosed only in accordance with the provisions of federal law and regulations concerning the confidentiality of alcohol and drug abuse patient records.”⁵⁹ These generally do not permit the disclosure of these records, except in emergencies, unless there is written consent.

In addition, each state may have inconsistent consent requirements including those that apply specifically to certain individuals. For example, states may define minors differently by age or have different requirements for emancipation, which determines when they may legally consent.

For this analysis, there are two scenarios:

- (1) Scenario 1, in which the responding state has more stringent consent requirements for the release of PHI than that of the requesting state; and
- (2) Scenario 2, in which the requesting state has more stringent consent requirements for the release of PHI than that of the responding state. The difference in consent requirements establishes an impediment to the efficient delivery of health information needed to treat the patient because health providers in the responding and requesting state may not be able to disclose or access the information, respectively, without opening themselves up to civil or criminal liability.

The commissioners drafting a uniform law to address these conflicts between the two states may consider three possible approaches.

Approach 1—Responding State Prevails

The commissioners could recommend a uniform law that provides that health information properly consented in the responding state will be accepted by the requesting state, the requesting state’s consent laws notwithstanding. Most state laws currently require providers in the responding state to comply with their own laws, so this approach is closest to the status quo.

Under this approach, the requesting state with *less* stringent consent laws (Scenario 1 in “Assumptions”) would receive and be permitted to use PHI if: (a) the responding state had already fulfilled its own consent laws that authorized a disclosure to the requesting state (i.e., the HIO received a “blanket” consent from patients that permitted disclosure for the purposes requested by the requesting state); or (b) the requesting state determined what the responding state’s consent laws were and presented the responding state with a consent that fulfilled these more stringent laws.

⁵⁸ 740 ILCS 110/5 (2008).

⁵⁹ 20 ILCS 301/30-5(bb) (2008).

Under this approach, the requesting state with *more* stringent consent laws (Scenario 2 in “Assumptions”) would receive and be permitted to use PHI if: (a) the responding state had already fulfilled its own consent laws that authorized a disclosure to the requesting state (i.e., the HIO received a “blanket” consent from patients that permitted disclosure for the purposes requested by the requesting state); or (b) the requesting state presented the responding state with a consent that fulfilled the responding state’s consent laws, which could presumably be done by using a consent from the requesting state because its laws are more stringent.

Approach 2—Requesting State Prevails

The commissioners could recommend a uniform law that provides that the consent laws of the requesting state would govern the exchange of PHI (i.e., before PHI could be sent to the requesting state, a patient consent must meet the requirements of the requesting state). This approach requires requesting states to be familiar with only their own state’s laws, instead of being prepared to obtain consents that satisfy various responding states’ laws.

Under this approach, the requesting state with *less* stringent consent laws (Scenario 1 in “Assumptions”) would receive and be permitted to use PHI if: (a) the requesting state presented the responding state with a consent that fulfilled the requesting state’s consent laws even if they were less stringent than the responding state; or (b) the responding state had already fulfilled its own consent laws that authorized a disclosure to the requesting state (i.e., the HIO received a “blanket” consent from patients that permitted disclosure for the purposes requested by the requesting state).

Presumably, if the responding state’s laws were satisfied, the requesting state’s laws would also be satisfied.

Under this approach, the requesting state with *more* stringent consent laws (Scenario 2 in “Assumptions”) would receive and be permitted to use PHI only if: (a) the requesting state presented the responding state with a consent that fulfilled the requesting state’s consent laws; or (b) the responding state obtains the information by voluntarily obtaining a more stringent consent that also fulfills the laws of the requesting state.

Approach 3—Uniform Consent

NCCUSL could determine that the best solution would be a uniform consent requirement that would govern the interstate exchange of PHI. PHI would be exchanged if the requirements of the uniform law were met.

In order to implement a uniform law in Ohio, we would need to identify General Assembly proponent(s), prepare and provide proponent testimony as necessary in both houses, obtain a majority in each house, and obtain the governor’s signature (or an override, if vetoed).

The implementation could use the existing connections between members of the Ohio HISPC and the Legal Work Group (LWG).

In working with the General Assembly, we could liaison with existing infrastructure for lobbying and analysis through medical and legal associations. For example, the General Assembly often turns to the Ohio State Bar Association (OSBA), the Ohio State Medical Association, the Ohio Hospital Association, and local medical and hospital societies for advice and counsel on health care legislation, so support and understanding from these groups would be key. The OSBA Health Care Law Committee would be a good forum to work within as that group includes many of our LWG members and is an existing vehicle for input to the OSBA, which in turn is highly regarded by the legislature for legal analysis.

In addition, our many LWG members from state agencies (Ohio Department of Health [ODH], Ohio Department of Job and Family Services [ODJFS], Ohio Bureau of Workers' Compensation [BWC]) and our members who sit on the governor's Health Information Partnership Advisory Board (HIPAB), a component of Governor Strickland's health information technology (IT) plan, could serve as liaisons to develop support at the executive branch strategy.

After adoption, the uniform law would need likely need implementing regulations, which would be handled by a government agency. The government agency would need to be sufficiently empowered and funded to ensure that the uniform law is appropriately implemented.

Model Law

The implementation requirements will be dependent on many variables. If the model law sets a specific consent policy, then implementation would require the review of any existing contracts that may be contrary to the model law. In drafting new agreements, a model law would alleviate the obligation to determine the consent policy and could be implemented when the other terms of the agreement are reached. If the negotiating partner comes from a state that has not adopted the model law, then the parties would be in the same position in which they are now.

In order to implement a model act in Ohio, we would need to identify General Assembly proponent(s), prepare and provide proponent testimony as necessary in both houses, obtain a majority in each house, and obtain the governor's signature (or an override, if vetoed). The implementation could use the existing connections between members of the Ohio HISPC and the LWG.

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After adoption, the model act would likely need implementing regulations, which would be handled by a government agency. The government agency would need to be sufficiently empowered and funded to ensure that the model act is appropriately implemented.

Implementation of this mechanism requires the passage of the legislation by the Illinois General Assembly and the approval of the governor, or an override by the legislature, if the governor would veto the bill. Illinois has enacted over 95 uniform and model acts according to NCCUSL.

Choice of Law

If the "choice of law" is determined statutorily, such as a provision that declares California privacy rights cannot be waived by contract or otherwise impinged; then implementation would require the review of any existing contracts that may be contrary to California law.

In the absence of statutorily mandated choice of law, the parties are free to negotiate terms that will permit them to customize the flow of information to accommodate the laws of their state and, if needed, with the consent of the individual.

Contractual provisions can be implemented immediately after approval, in the time required to disseminate modified policies and procedures for consents, and to train the responsible staff in their use.

Implementation of a statute requires passage of the legislation, after which the statute may be implemented anytime after its effective date. The HIOs can implement compliance measures at any time, provided that such compliance measures do not conflict with other applicable laws. Often, statutes include requirements for implementation activities such as the creation of a training program and development of forms and procedures that implement elements of the statute.

With respect to issues of consent, the implementation requirements should be forthright. The requesting party could generate a consent form that satisfied the statutes applicable in their state, and ensure that each patient completed it prior to requesting such patient's PHI. Alternatively, the HIO members could identify the state with the most stringent consent requirements, and agree contractually to implement a consistent system that is compliant with the most stringent criteria and compliant with all other HIO states' statutes as well. In

this case, all the HIO member states could use a single consent form that was mutually compliant with each of the other states' consent requirements. If a state from outside the HIO requested PHI and had more stringent consent requirements, that state could be responsible for obtaining such consent from the patient.

A choice of law provision may implement two possible approaches.

Approach 1—Responding State Prevails

The choice of law provision could provide that health information properly consented in the responding state will be accepted by the requesting state, the requesting state's consent laws notwithstanding. Most state laws currently require providers in the responding state to comply with their own laws, so this approach is closest to the status quo.

Under this approach, the requesting state with *less* stringent consent laws (Scenario 1 in "Assumptions") would receive and be permitted to use PHI if: (a) the responding state had already fulfilled its own consent laws that authorized a disclosure to the requesting state (i.e., the HIO received a "blanket" consent from patients that permitted disclosure for the purposes requested by the requesting state); or (b) the requesting state determined what the responding state's consent laws were and presented the responding state with a consent that fulfilled these more stringent laws. Under this approach, the requesting state with *more* stringent consent laws (Scenario 2 in "Assumptions") would receive and be permitted to use PHI if: (a) the responding state had already fulfilled its own consent laws that authorized a disclosure to the requesting state (i.e., the HIO received a "blanket" consent from patients that permitted disclosure for the purposes requested by the requesting state); or (b) the requesting state presented the responding state with a consent that fulfilled the responding state's consent laws, which could presumably be done by using a consent from the requesting state because its laws are more stringent.

Approach 2—Requesting State Prevails

The choice of law provision could provide that the consent laws of the requesting state would govern the exchange of PHI (i.e., before PHI could be sent to the requesting state, a patient consent must meet the requirements of the requesting state). This approach requires requesting states to be familiar with only their own state's laws, instead of being prepared to obtain consents that satisfy various responding states' laws.

Under this approach, the requesting state with *less* stringent consent laws (Scenario 1 in "Assumptions") would receive and be permitted to use PHI if: (a) the requesting state presented the responding state with a consent that fulfilled the requesting state's consent laws, even if they were less stringent than the responding state; or (b) the responding state had already fulfilled its own consent laws that authorized a disclosure to the requesting state (i.e., the HIO received a "blanket" consent from patients that permitted disclosure for

the purposes requested by the requesting state). Presumably, if the responding state's laws were satisfied, the requesting state's laws would also be satisfied.

Under this approach, the requesting state with *more* stringent consent laws (Scenario 2 in "Assumptions") would receive and be permitted to use PHI only if: (a) the requesting state presented the responding state with a consent that fulfilled the requesting state's consent laws; or (b) the responding state obtains the information by voluntarily obtaining a more stringent consent that also fulfills the laws of the requesting state.

Establishing a choice of law provision will first require a survey or research of the possible candidates for the applicable law, followed by negotiation and drafting by the stakeholders as they create the choice of law provision. Such a survey may be less necessary if the choice of law provision simply establishes that the requesting state's (or responding state's) law applies in all circumstances.

Interstate Compact—Pro

- + Many states have expressed interest in the development of a compact to resolve interstate exchanges of health information.
- + Because the implementation process is set out as part of the compact language, participating states should be able to reach some consensus in advance as to the most effective way to get state participation as early as possible. However, it is likely that not each state will have the same preferred process, which may make ratification by some states more difficult than others.
- + Legislatures are familiar with the process of developing interstate compacts, and the General Assembly in Illinois has successfully participated in a significant number.

Uniform Law—Pro

- + States can adopt those portions of the uniform law that fit their issues, especially if the state law is more stringent.
- + The proposed law must be enacted through the state legislature with public involvement.
- + If the uniform law is simple, the state will simply repeal the old language and replace it with the new act, limiting the amount of additional work.

Approach 1—Responding State Prevails

- May be easiest to implement because it is closest to the status quo and does not require the responding state to be familiar with any other state's requirements.
- Could be implemented by a responding state obtaining a consent at the time it collects the information from patients rather than at the time of the request from the requesting state. If consent obtained in the responding state allows for broad disclosure to other states for treatment (or even for other purposes), information could flow quickly once the requesting state submits a request that meets the responding state's requirements.

- In Scenario 1 (the responding state has *more* stringent consent laws), if the consent was obtained at the time of collection, it would be irrelevant that the requesting state's consent was not as robust because the responding state had already obtained a more stringent consent, thereby encouraging freer flow of information.
- In Scenario 1 (the responding state has *more* stringent consent laws), privacy is best protected because the information cannot be disclosed unless the requirements of the more stringent law are met.
- In Scenario 2 (the responding state has *less* stringent consent laws), information could flow easily and quickly if the requesting state complies with its own, more stringent laws, which are those with which it is most likely to be familiar.

Approach 2—Requesting State Prevails

- In Scenario 2 (the responding state has *less* stringent consent laws), privacy is best protected because the information cannot be disclosed unless the requirements of the more stringent law are met.
- In Scenario 1 (the responding state has *more* stringent consent laws), information will flow easily and quickly without the requirement that the responding state seek additional consent from the patients if the requesting state submits a consent that complies with its own laws. It would be irrelevant that the responding state's laws would not have permitted the disclosure.
- This approach requires requesting states to be familiar with only their own state's laws, instead of being prepared to obtain consents that satisfy various responding states' laws.

Approach 3—Uniform Consent

- A uniform process enacted by the states will be easier to understand in the context of interstate exchange of PHI.
- A uniform consent form would be developed and each state could become familiar with a consistent set of documentation to permit access and disclosure of information.

Model Law—Pro

- + Do not need all of the states to agree to have an exchange between states.
- + States can adopt those portions of the model law that fit their issues and especially if the state law is more stringent.
- + The proposed law must be enacted through the state legislature with public involvement.
- + A model act would allow any Ohio nuances to be taken into account to the extent not accounted for in a uniform law.
- + If the model act is simple, the state will simply repeal the old language and replace it with the new act, limiting the amount of additional work.

Choice of Law—Pro

Contractual Provision

- + Easy to customize to situation.
- + With a properly defined choice of law provision, future disputes can be resolved more expeditiously by the courts, or through a defined dispute resolution process.

Statutory Provision

- + Uniformity throughout state; unclear for interstate unless similar laws.
- + More accessible, terms are available for research and adoption by other states, in contracts.
- + 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.
- + It may be possible to have a generically drafted choice of law provision that is adopted by each state, such as “requestors follow the consent laws of the responding states and responders follow the consent laws of the responding state.” Another current example is a multistate regional health information organization (RHIO) that is contractually agreeing to a more stringent disclosure, with providers in the less stringent states not violating their own law, just being overly compliant. If (a) a contractual choice of law provision is consistently with the laws of all of the states that adopt the contractual choice of law provision; or (b) the statutory choice of law provision is enacted consistently by multiple states in a consistent manner and all of the states have consistent state laws that address use and disclosure of PHI, there are possible advantages.

Approach 1—Responding State Prevails

- May be easiest to implement because it is closest to the status quo and does not require the responding state to be familiar with any other state’s requirements.
- Could be implemented by a responding state obtaining a consent at the time it collects the information from patients rather than at the time of the request from the requesting state. If consent obtained in the responding state allows for broad disclosure to other states for treatment (or even for other purposes), information could flow quickly once the requesting state submits a request that meets the responding state’s requirements.
- In Scenario 1 (the responding state has *more* stringent consent laws), if the consent was obtained at the time of collection, it would be irrelevant that the requesting state’s consent was not as robust because the responding state had already obtained a more stringent consent, thereby encouraging freer flow of information.
- In Scenario 1 (the responding state has *more* stringent consent laws), privacy is best protected because the information cannot be disclosed unless the requirements of the more stringent law are met.

- In Scenario 2 (the responding state has *less* stringent consent laws), information could flow easily and quickly if the requesting state complies with its own, more stringent laws, which are those with which it is most likely to be familiar.

Approach 2—Requesting State Prevails

- In Scenario 2 (the responding state has *less* stringent consent laws), privacy is best protected because the information cannot be disclosed unless the requirements of the more stringent law are met.
- In Scenario 1 (the responding state has *more* stringent consent laws), information will flow easily and quickly without the requirement that the responding state seek additional consent from the patients if the requesting state submits a consent that complies with its own laws. It would be irrelevant that the responding state’s laws would not have permitted the disclosure.
- This approach requires requesting states to be familiar with only their own state’s laws, instead of being prepared to obtain consents that satisfy various responding states’ laws.

Interstate Compact—Con

- Will need to be enacted by a significant number of states to effectuate a nationwide exchange.
- Ohio’s experience has been that even when the proper “champions” are on board with the compact’s purpose and language, individual legislators can hold up the process by injecting their own concerns. For example, in considering the Great Lakes Water Compact, members of the Ohio Senate held up enactment of the compact in Ohio for months over concerns that the compact language could infringe upon private property rights. Thus, education efforts and support activities are critical at each stage of the process.
- The ratification process could delay implementation as we wait for either Illinois or the other states to trigger the effective date of the compact. If the minimum number of states required to adopt the pact is large, this could significantly delay implementation.
- During the transition period, providers will need to be educated, which will be both costly and time consuming. This will add another layer of analysis for the provider, as they will need to learn the requirements of the interstate compact in addition to understanding their current state consent law for release of PHI.

Uniform Law—Con

- Will need to be adopted by a significant number of states to effectuate a nationwide exchange.
- Depending on the makeup of the drafting committee, state representation may differ.
- If the uniform law is complicated, a state will have extra work to amend old laws to bring them up to date. Providers and patients will need to be educated about the requirements, which will be both costly and time consuming. There is no guarantee that courts in various jurisdictions will interpret a uniform law consistently, thereby reducing its effectiveness as a solution for inconsistent laws.

- A strategy to involve consumers must be developed to supplement the strong provider base that has developed. Again, using existing consumer advocacy groups and individuals from HIPAB, HISPC, and state agency ombudspersons would be an effective way to network with this important group. Developing a consensus for issues when strong (sometimes emotional) ideas are held will be challenging (e.g., use and disclosure of sensitive health information).

Approach 1—Responding State Prevails

- In Scenario 2 (the responding state has *less* stringent consent laws), there is a lesser focus on privacy concerns which could be objectionable to privacy advocates.
- In Scenario 1 (the responding state has *more* stringent consent laws), the responding state will require compliance with its own state laws before permitting the disclosure.
- This may delay the release of the PHI if the requesting state submits a consent that does not meet the higher standards of the responding state. A more stringent consent would need to be obtained from the patient unless the responding state has already obtained an appropriate consent at the time the information was collected.

Approach 2—Requesting State Prevails

- In Scenario 2 (the responding state has *less* stringent consent laws), access to PHI in the requesting state will be delayed while health care providers bring data collected in the less restrictive environment of the responding state into conformance with the requesting state's higher standards. This may impede or delay the provision of needed health care.
- Health care providers in the responding state will be required to determine the requirements of the requesting state's laws before they release the information, which could delay the release of data for HIE purposes.
- In Scenario 1 (the responding state has *more* stringent consent laws), this approach may raise objections from responding states that do not wish to release PHI under less demanding consent requirements.
- The approach cannot be implemented in advance because it is impossible to predict which state will request the information. Therefore, the determination of whether the requirements of the law have been met must occur at the time of disclosure of the information.

Approach 3—Uniform Consent

- If the uniform consent is not implemented properly, the failure to provide adequate education on new requirements would result in confusion by health care providers over required procedures.
- For states that have fairly lenient consent requirements, this approach could be objectionable if the uniform consent imposes new, more stringent requirements.
- For states that have fairly robust consent requirements, this approach could be objectionable to privacy advocates if the uniform consent imposes less stringent requirements and reduces the emphasis on privacy.

Model Law—Con

- Will need to be adopted by a significant number of states to effectuate a nationwide exchange.
- The states will need to adopt similar versions of the model law to effectuate a nationwide exchange.
- Depending on the drafting entity, state representation may differ.
- The implementation of a model act may allow for state variation that defeats the stated objective of uniformity. Developing a consensus for issues when strong (sometimes emotional) ideas are held will be challenging (e.g., use and disclosure of sensitive health information).

If the model act is complicated, a state will have extra work to amend old laws to bring them up to date. Providers and patients will need to be educated about the requirements, which will be both costly and time consuming. There is no guarantee that courts in various jurisdictions will interpret a model act consistently, thereby reducing its effectiveness as a solution for inconsistent laws. Significant work and time may have been spent to create a good model act, yet it can be rejected or changed by the states' legislatures.

Choice of Law—Con

Statutory Provision

- May require regulations to implement.
- Needs to be consistent with other states' choice of law so business practices can be uniform.
- May impact existing contracts.
- To the extent a choice of law 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 do not 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.
- Note that the majority of the advantages identified above assume that the choice of law provision is adopted consistently by all relevant states. This is unlikely to occur. Even if this is the case, a statutory choice of law provision would merely identify which state law applies in a particular situation and if the state laws are inconsistent, the statutory choice of law provision would not reduce the barriers to effective HIE.
- This complicates things exponentially given that there are currently 50 state consent laws which will then have an overlay of 50 choice of law provisions. Contractual choice of law cannot overrule a statutory provision. Unless all statutory provisions are consistent across states, a choice of law provision is not going to help. Also, if providers have to follow other state consent laws, they may worry that their data will get caught up in other states' rules. In addition, if a state elects to follow another state's consent law that is more stringent, this could unnecessarily slow the flow of information.

- 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.

4 Impact on Stakeholder Communities

This section recognizes that there are pros and cons of each proposed mechanism being considered that will affect the various stakeholder communities in different ways. The intent is to identify the stakeholders affected and the impact of adopting each proposed mechanism on each category of stakeholder.

Interstate Compact

Patients and advocates

- Providers
- Payers
- Public health
- Research
- Regulatory agencies

Interstate compacts have proven to be fairly effective in addressing a number of inconsistent policies among states, though their impact on stakeholders appears mixed at best. The range of problems stakeholders may experience, however, could ultimately deter support and participation.

The interstate compact option gives stakeholders an opportunity to provide input in the process for developing the terms of the compact, the legislative hearings on the ratification legislation, and the governor's decision on approving the bill. Stakeholders could engage paid or unpaid lobbyists to lobby for or against its passage.

Uniform Law

In the studying and drafting aspects, NCCUSL wants stakeholders involved from the very beginning, as much as possible, to get their input for the provisions contained in the act. Even now, stakeholders will also be involved in the legislative process considering the proposed uniform law.

The impact of the proposal on stakeholders will depend upon the approach selected by the commissioners. A uniform consent requirement would result in a change in procedures by many health care providers in states that previously had less stringent requirements.

Stakeholder communities will include consumers, providers (physicians, hospitals, labs, pharmacies, long-term care, home health, etc.), public health, payers, regional health

information organizations (RHIOs), quality improvement organizations (QIOs), and professional associations as well as particular types of professionals within health care who can provide needed expertise (chief information officers (CIOs), health information management (HIM), and risk management to name a few). All of these communities will be impacted, and a strategy to seek input from them would be helpful to ensure that any impacts, especially pertaining to patient care, are identified and addressed. The hearings that Ohio Health Information Technology (OHHIT) held in conjunction with developing the statewide IT plan would be a good forum to engage stakeholder communities, but broad-based buy-in will be necessary.

Model Law

Depending on the drafting entity, the stakeholders will most likely be involved in drafting the law, by providing input, direct drafting, or reviewing. State-level stakeholders will be responsible for choosing provisions for adoption and implementing the chosen provisions. Therefore, in the political process the stakeholders will be able to express their views. Although the laws may be complex, these will be laws that are uniform across the state and there should be ample opportunity to provide education to assist the consumer and practitioners in understanding these laws.

Stakeholder communities will include consumers, providers (physicians, hospitals, labs, pharmacies, long-term care, home health, etc.), public health, payers, RHIOs, QIOs, and professional associations as well as particular types of professionals within health care who can provide needed expertise (CIOs, HIM, and risk management to name a few). All of these communities will be impacted, and a strategy to seek input from them would be helpful to ensure that any impacts, especially pertaining to patient care, are identified and addressed. The hearings that OHHIT held in conjunction with developing the statewide health IT plan would be a good forum to engage stakeholder communities, but broad-based buy-in will be necessary.

NCCUSL wants stakeholders involved from the very beginning, as much as possible, to get their input for the provisions contained in the model act. One can expect that other groups would also seek stakeholder feedback in developing their proposal.

Stakeholders will also be involved in the legislative process considering the proposed model act and could engage paid or unpaid lobbyists to lobby for or against its passage.

The impact of the proposal on stakeholders depends upon the approach selected by the commissioners. A uniform consent requirement would result in a change in procedures by many health care providers in states that previously had less stringent requirements. Stakeholders concerned about privacy would advocate an approach that imposes the more stringent consent requirements. Stakeholders concerned mostly about promoting the free

flow of information would be more likely to advocate an approach that imposes less stringent consent requirements.

Choice of Law

- While contractual agreements as to choice of law may be easily created between trading partners, it lacks the transparency for the patient. Also, it places the burden on the parties to the agreement to implement in accordance with the variances in the state laws, with little to no assurances that they got it right, until after they have implemented.
- A statutorily defined choice of law has the potential to leave all the options open to the parties to decide (similar to Civil Code section 1646.5, which permits parties to choose their controlling law), or it can determine state law to be dominant and any agreement to the contrary is void and unenforceable.
- Stakeholders can be involved in the negotiation process to develop a choice of law provision that addresses their concerns. Stakeholders will also be involved in the legislative process considering the proposed choice of law provision and could engage paid or unpaid lobbyists to lobby for or against the passage.
- While no precedent was found directly on point, choice of law provisions may prove to be a prudent consideration but ultimately insufficient means to eliminate the existing barriers associated with interstate electronic information exchange.

Interstate Compact—Pro

- + Depends on the scope of the compact as to the impact it will have on each stakeholder.
- + An interstate compact may offer health care providers added certainty about what law to apply when exchanging information electronically across state lines. Such certainty could reduce disputes among providers, concerns surrounding liability, and professional hesitation due to patient confidentiality obligations. The adaptive structure of interstate compacts may give health care providers a more immediate remedy than would a national solution, should modifications become necessary in light of their experience. Larger health care providers that offer their services across states or regions could realize more exponential gains by consistency in law.
- + An interstate compact may similarly offer health plans and other third-party payers some added certainty as to which law they might apply when exchanging health information electronically between states. This may be especially beneficial to larger health plans that regularly do business in multiple, adjoining states and are otherwise subject to differing laws. Health plans and third-party payers will also be impacted by time, resources, and additional compliance requirements associated with an interstate compact for interstate exchange which may differ from intrastate exchange requirements. Larger health plans and third-party payers may be less negatively impacted, however, as a result of their size.
- + State governments may retain some of their traditional sovereignty by developing an interstate compact that reflects the needs and experiences of their citizens, though some of that traditional sovereignty would necessarily be reduced in reaching the collective's objectives. The range of stratification between participating states' laws may make consensus more or less difficult to achieve.

- + Larger employers that self-insure or provide in-house health care services may experience more of the benefits associated with an interstate compact and less of the associated burdens.
- + An interstate compact would impose the same rules on states which, once implemented, would result in great connectivity across providers. Providers could implement a consent process that complies with the interstate compact and feel fairly confident in disclosing information across state lines with certainty in complying with laws. This would also assist in protecting providers from inappropriate disclosures and help them with evidentiary documentation if they are required to defend the disclosure, especially in a litigious society. It will be important to have adequate education for providers and patients about what is in the interstate compact.
- + Once implemented, an interstate compact would increase the free flow of information. This could certainly improve the quality of health care for patients and assist in more efficient delivery of health care.
- + The process gives stakeholders a voice, which may lead to a better outcome and increase the likelihood of buy-in during the legislative process. It may also make implementation easier since providers will be getting educated about the issues during the advisory team and drafting phases, eliminating potential ambiguity.

Uniform Law—Pro

- + The proposed law must be enacted through the state legislature with public involvement and opportunity to comment.
- + Stakeholders can present to the NCCUSL drafting committee.
- + A uniform law would impose the same rules on states which, once implemented, would result in great connectivity across providers. Providers could implement a uniform consent and feel fairly confident in disclosing information across state lines with certainty in complying with laws since they are the same laws with which the providers are required to comply. This would also assist in protecting providers from inappropriate disclosures and help them with evidentiary documentation if they are required to defend the disclosure, especially in a litigious society. It will be important to have adequate education for providers and patients about what is in the uniform law.
- + Once implemented, a uniform law would increase the free flow of information. This could certainly improve the quality of health care for patients and assist in more efficient delivery of health care.
- + Engaging all of the stakeholder communities and understanding and cataloging their input would help expedite consensus.

Model Law—Pro

- + The proposed law must be enacted through the state legislature with public involvement and opportunity to comment.
- + Stakeholders could be the drafters of the model law.
- + To the extent Ohio presents any nuances not accounted for in a uniform law, a model act will allow for more stakeholder input.

- + A model act would impose the same rules on states which, once implemented, would result in great connectivity across providers. Providers could implement a uniform consent and feel fairly confident in disclosing information across state lines with certainty in complying with laws since they are the same laws with which the providers are required to comply. This would also assist in protecting providers from inappropriate disclosures and help them with evidentiary documentation if they are required to defend the disclosure, especially in a litigious society. It will be important to have adequate education for providers and patients about what is in the model act.
- + Once implemented, a model act would increase the free flow of information. This could certainly improve the quality of health care for patients and assist in more efficient delivery of health care.
- + There is a greater opportunity for stakeholder involvement given NCCUSL process, as well as the number of groups putting together model acts. The NCCUSL commissioners also have a role as advocates to bring this back to their legislatures.

Choice of Law—Pro

Contractual Provision

- + Ease to create for provider/payers.

Statutory Provision

- + More transparent for everyone.
- + A clearly drafted choice of law provision that is adopted by all members of the HIO, if by contract, or by all relevant statutes, if a statutory provision, can make things simplified and result in expedited exchange of health information.
- + Members of the HIO wish to exchange PHI while avoiding any liability for consent issues. To the degree that contractual provisions can regulate the consent requirements between parties to the contract, the impact would be a simplification and standardization of obtaining acceptable consent documentation.
- + Some recognition by courts—Choice of law provisions have been granted some deference by courts. Therefore, their inclusion may generally offer stakeholders support in their decision making and enhance their ability to predict the outcome of potential dispute(s).
- + Reduced litigation—Creating explicit provisions may allow stakeholders to reduce any unnecessary time and expenses associated with litigating procedural matters.

Interstate Compact—Con

- May make it harder to customize for unique situations; depending on state role, less influence over the results.
- Consumers will be impacted by whatever “consensus” is reached, as some states currently provide greater protection than other states and the federal government (e.g., whether disclosures for the purposes of payment or health care operations require authorization, the treatment of sensitive information, and access rights of minors and their parents).

- Consumers who experience diminished protections and rights may consequently decide to forgo necessary treatment or seek treatment from more consumer friendly states/regions.
- The uncertainty that state courts would interpret the interstate compact consistently, however, may still deter interstate exchange. The time, expense, and potential confusion experienced by health providers in complying with the interstate compact for interstate exchanges, in addition to state law for intrastate exchanges, would also be significant obstacles to interstate HIE. The negative aspects of interstate compacts may be experienced more acutely by smaller health care providers, whose resources, compliance programs, and liability concerns would all highlight the level of uncertainty an interstate compact would still allow.
- Governments which forgo their own state's traditional sovereignty may find their actions to be later questioned and politically opposed.
- Interstate compacts may also create some political tension between the various branches of state government. Tension may arise, for example, as a result of a participating state's lost ability to pass new and dissimilar laws, absent a subsequent compact or repeal with Congress's approval. Political tension may also result from executive branch appointments to the interstate council or advisory board which may be claimed by others to be unrepresentative of the state's constituency at large (Interstate Compact Analysis/HISPC-[Ohio] [Rev. 10/27/2008], pp. 7, 14). The distribution of funding requirements among participating states may be problematic, especially for those states with limited health care budgets. State agencies charged with the development and/or administration of an interstate compact would also require enhanced funding to take on the additional responsibilities associated with the interstate compact, and workforce investments would be required.
- State government health care providers and payers would likely experience the same advantages and frustrations with regard to resources, time, and compliance requirements as would their private counterparts. Health care providers and health plans may also seek reimbursement increases by the state to offset their own additional compliance costs.
- Employers may be financially impacted by the costs associated with an interstate compact through direct requests for contributions, an increase in taxes used by participating states to redistribute the costs, and potential increases in the billing and premiums used by health care providers and health plans to offset their own additional expenses.
- Statewide input may delay the approval process since a diversity of voices will be heard at multiple points. Some groups may organize against the compact and will use the process to give them ample opportunity to put their position forward. Additional negative impacts include the need for providers to adapt to the compact directives in order to ensure that information is available for patients and that providers are following the new privacy standards.
- If the interstate compact results in a less stringent environment for the exchange of information, privacy advocates' concerns may not be adequately addressed. If the interstate compact results in a more stringent environment for the exchange of information, this could inhibit the free flow of information. In addition, if the enactment of an interstate compact results in a dramatic difference between the current consent requirements and the requirements of the interstate compact,

providers and patients may not initially be familiar with the requirements to permit the exchange of data. This could result in increased confusion.

Uniform Law—Con

- May make it harder to customize for unique situations; depending on state role, less influence over the results.
- The length of time required to develop and adopt a uniform law would mean a longer period of uncertainty for health care providers. Expediting the process would be beneficial, but care needs to be taken to allocate sufficient time to address the various dimensions of the problem and create appropriate solutions. If the uniform law results in a less stringent environment for the exchange of information, privacy advocates' concerns may not be adequately addressed. If the uniform law results in a more stringent environment for the exchange of information, this could inhibit the free flow of information. In addition, if the enactment of a uniform law results in a dramatic difference between the current consent requirements and the requirements of the uniform law, providers and patients may not initially be familiar with the requirements to permit the exchange of data. This could result in increased confusion.
- Since a broad cross-section of the state would be represented in these stakeholder communities, it will take significant time and effort to address the many different perspectives raised. There is no guarantee that all stakeholders will be satisfied with a uniform approach.

Model Law—Con

- Again, a model act's allowance of this input may perpetuate state variances that a uniform law is better designed to address.
- The length of time required to develop and adopt a model act would mean a longer period of uncertainty for health care providers. Expediting the process would be beneficial, but care needs to be taken to allocate sufficient time to address the various dimensions of the problem and create appropriate solutions. If the model act results in a less stringent environment for the exchange of information, privacy advocates' concerns may not be adequately addressed. If the model act results in a more stringent environment for the exchange of information, this could inhibit the free flow of information. In addition, if the enactment of a model act results in a dramatic difference between the current consent requirements and the requirements of the model act, providers and patients may not initially be familiar with the requirements to permit the exchange of data. This could result in increased confusion.
- There is the possibility that a model act could be promulgated by a special interest group that does not recognize the broadest range of issues or need by all stakeholders. At the other end of the continuum, there could be multiple stakeholder groups trying to create a model act, which could result in a messy process.

Choice of Law—Con

Contractual Provision

- Not transparent for consumers, regulators, or otherwise affected entities/persons.
- Not helpful for public health or research, unless contract provides.

Statutory Provision

- May make it harder to customize for unique situations; less influence over the results.
- If different states adopt different choice of law provisions, there is a conflict among these provisions. Therefore, providers and the HIO will be uncertain as to which law applies. This inconsistency will further more confusion and will not promote the exchange of information. If the choice of law provision results in a less stringent environment for the exchange of information, privacy advocates' concerns may not be adequately addressed. If the choice of law provision results in a more stringent environment for the exchange of information, this could inhibit the free flow of information. In addition, if the choice of law provision results in a dramatic difference between the current consent requirements and the requirements under the choice of law provision, providers and patients may not initially be familiar with the requirements to permit the exchange of data. This could result in increased confusion.
- Inconsistent judicial interpretation, remaining fear of liability, and deterred uptake—absent explicit, statutory action, judicial interpretation of choice of law provisions could remain uncertain enough to deter stakeholders from exchanging health information electronically across state lines—for fear of liability.
- Disparate burden and professional ethics—such uncertainty may be especially problematic for some stakeholders. Smaller health care providers, for example, might be deterred by the potential time and expenses they might incur by exchanging the information as provided for. The health care provider may also be deterred by the focus such provisions may take away from the actual provision of health care. Consumers might be even less able to represent themselves adequately should a conflict arise. The likelihood that many consumers would be less informed in negotiating such terms also increases the risk that contractual choice of law provisions would be overturned.

5 Feasibility

Based on the legislative timetables, agenda, processes, and public interest for enacting legislation to implement the mechanisms, identify the likelihood that each proposed mechanism could be implemented successfully and in a timely manner.

Interstate Compact

- Unknown costs and sources of funding; if high costs, less likely to be implemented.
- Interests are high so long as it does not disadvantage rights.
- How much does the option cost?

The CSG provides the following overview of the cost to develop and operate an interstate compact:

- No two compacts are alike, and therefore, the issues addressed by one compact require different development considerations than do others. Some compacts have enjoyed massive federal support, such as the Adult Compact, which received more

than \$1.2 million from the National Institute of Corrections. However, a more recent compact revision of the Interstate Compact for the Placement of Children will have resulted in a final compact in 10 months for approximately \$100,000 (not counting education and transition costs). Cost depends largely upon the desired timelines, the level of external stakeholder involvement, and the level of education desired within each state.

- For an interstate compact focused on addressing consent requirements for transferring health information across state lines, it is expected the only cost would be to support the developmental process. This developmental cost could be higher under Approach 3—Compact Defined Consent to support the process of drafting an agreed consent policy. Ongoing operational cost would only occur if the drafters of the compact felt the need to establish some oversight or arbitration entity.
- There is also an implementation cost to be considered. Most of this cost would fall upon the provider community. Providers would incur expenses relating to the implementation of new procedures and educational efforts. Whether government would help with this cost is an open question.

Is the option politically viable?

- Interstate compacts are mechanisms that enable states to address issues without federal interference. With respect to HIOs, it may be politically preferable to join an interstate compact rather than have a federal standard for consent that would supersede state consent laws.

Is the option technically possible?

- Regarding the creation of interstate compact relating to interstate HIE, Keith Scott of the CSG National Center for Interstate Compacts indicated that no subject matter is prohibited, everything is fair game, so difficulty as far as subject matter is not as much of an issue. He noted that difficulty does vary depending on, for instance, how regulated the subject matter already is at state and federal levels, how territorial states are regarding the subject matter (regional policies, state-to-state policies, etc.), and how many states are entering into a compact—the more states involved, the more differences there are to work out.

Uniform Law

There are several elements to take into consideration when considering the feasibility of the option.

- How much does it cost?

A typical 1-year study and 2-year drafting process for creating a uniform law or model act cost approximately \$100,000. All the study and drafting meetings are in person, and the NCCUSL reimburses commissioners for expenses. This expense is covered by the NCCUSL, which is supported by contributions from the states.

The cost of considering/adopting the uniform law would be minimal, given that this would likely be done during a normal legislative session. However, there could be considerable cost to implementing a uniform consent requirement.

Health care providers would be expected to change forms and information systems to conform to the new consent standards. There will also be a cost associated with informing the public about the change.

- Is the option politically viable?

According to Katie Robinson, Communications Officer, NCCUSL, it is not the level of complexity that determines successful adoption but rather the level of need in the states. The approach adopted by the commissioners would be the major determinant of the political viability of the uniform law. States with less stringent consent laws may be reluctant to accept a uniform law based on a scenario where a more stringent law could apply because it could impede the free flow of information and require providers to implement additional mechanisms to obtain such consents. Similarly, states with more stringent consent laws may be reluctant to accept a uniform law based on a scenario where a less stringent law could apply because it would reduce privacy protections for patient data. Approach 3, the development of a uniform consent requirement, could be the most problematic because it would impose new requirements on the most states.

- Is the option technically possible?

One could argue that to be technically possible, the uniform law proposed by NCCUSL would need to be passed with few changes. To have the NCCUSL proposal approved by states with significant variations could defeat the purpose of overcoming conflicting consent laws to enable the efficient exchange of PHI.

On its website, Cornell University Law School's Legal Information Institute discusses the issue of the uniformity of the uniform laws proposed by NCCUSL.

"Uniform Laws: aspiration rather than reality

The phrase 'Uniform Laws' can be misleading. Upon approval by the National Conference a Uniform Law is not law anywhere in the United States. It is simply a legislative proposal addressed to fifty state legislatures. During the history of the Conference, roughly half its proposals have not been adopted by a single state.

(Examples include the Uniform Construction Lien Act (1987), the Uniform Franchise and Business Opportunities Act (1987), the Uniform Putative and Unknown Fathers Act (1988).) In addition, most of those that have enjoyed reasonable success have fallen way short of the goal of adoption by all or even a majority of the states. Furthermore, the versions of the 'Uniform Laws' passed by the states are rarely uniform. Variations occur at the outset since prior law or other special local conditions lead states to make changes; rarely do states adopt Uniform Laws verbatim. A second source of variance is the Conference itself. Having adopted a successful Uniform Law, the Commissioners are prompted, just as true legislators are, to revise it from time to time in the light of changing conditions and policies. This results in multiple versions of some Uniform Laws, and unless and until the states that adopted an earlier version enact the Commissioners' revisions in multiple

versions in effect in the states. There are, for example, at least two versions of the Uniform Probate Code in force in the states, the original code and 1989-1990 revisions which some states have not adopted and others have adopted only in part. . . . In short, uniformity has proven an elusive goal.”⁶⁰

The above discussion notwithstanding, some uniform laws enjoy wide acceptance, such as: (1) the UCC, Article 9 “Secured Transactions,” adopted by 50 states, the District of Columbia, and the U.S. Virgin Islands; (2) the Uniform Electronic Transactions Act, adopted by 46 states, the District of Columbia, and the U.S. Virgin Islands; and, (3) the Uniform Transfers to Minors Act, adopted by 48 states and the District of Columbia. The 2007 legislative year was considered very successful by the Uniform Law Commission, as 105 uniform laws were enacted and 215 introduced into the legislative process. Other uniform laws that are less widely adopted are still useful in shaping legislative activity by educating lawmakers and stakeholders. Some commentators tally the number of provisions enacted by states, rather than the adoption of uniform laws verbatim, as a measure of a uniform law’s success.

Uniform laws can surface issues and considerations that would otherwise be overlooked by the various states, resulting in more complete bodies of law than would have resulted if the uniform law were not available. Even when refusing to adopt a uniform law, a state’s legislature will typically articulate its objections to the uniform law, and, as a result, such objections may be more easily addressed by the stakeholders.

A uniform law is more likely to minimize diversity of content, and therefore, the goal of sharing of information should be promoted by a uniform law rather than a model act. There is typically a 1-year study process and 2-year drafting process with no guarantee that the uniform law will be adopted by all state legislatures. This could be an expensive and ultimately unsatisfying approach.

Model Law

A model act will not achieve the goals of a uniform law that will allow the sharing of information. In a model act, there is often variability in the final product which may result in some of the same roadblocks to sharing of information that the states face now.

There are several elements to take into consideration when considering the feasibility of the option.

- How much does it cost?

A typical 1-year study and 2-year drafting process for creating a uniform law or model act cost approximately \$100,000. All the study and drafting meetings are in person, and the

⁶⁰ Uniform Laws, Cornell University Law School Legal Law Information Institute website. Available at <http://www.law.cornell.edu/uniform/uniform.html>.

NCCUSL reimburses commissioners for expenses. This expense is covered by the NCCUSL, which is supported by contributions from the states.

The cost of considering/adopting the model act would be minimal given that this would likely be done during a normal legislative session. However, there could be considerable cost to implementing a uniform consent requirement. Health care providers would be expected to change forms and information systems to conform to the new consent standards. There will also be a cost associated with informing the public about the change.

- Are there any foreseeable barriers to administering a model law provision?
- Is the option politically viable?

The approach adopted by the commissioners would be the major determinant of the political viability of the model act.

States with less stringent consent laws may be reluctant to accept a model act based on a scenario where a more stringent law could apply because it could impede the free flow of information and require providers to implement additional mechanisms to obtain such consents. Similarly, states with more stringent consent laws may be reluctant to accept a model act based on a scenario where a less stringent law could apply because it would reduce privacy protections for patient data.

Approach 3, the development of a uniform consent requirement, could be the most problematic because it would impose new requirements on the most states.

- Is it easily enforceable?
- Uniformity with other states?
- Is the option technically possible?

One could argue that to be technically possible, the “model act” proposed by NCCUSL would need to be passed with few changes. To have the NCCUSL proposal approved by states with significant variations could defeat the purpose of overcoming conflicting consent laws to enable the efficient exchange of PHI. On the other hand, model acts are designed to serve as guideline legislation, which states can borrow from or adapt to suit their individual needs and conditions. This flexibility can be useful for implementation.

Choice of Law

There are several elements to take into consideration when considering the feasibility of the option.

- How much does it cost?

The cost of including a choice of law provision in a contractual agreement or the enactment of choice of law legislation would be minimal. There will be a cost for educating health care

providers to the ramifications of a scenario that requires providers to be familiar with the requirements of another state.

- Are there any foreseeable barriers to administering a “choice of law” provision?
- Is the option politically viable?

Since HIE generally involves bilateral transactions, it is possible that there could potentially be a significant hurdle to overcome in the form of the state’s attitude toward protecting its citizens. For example, if “State A” had a strong consent requirement, and “State B” had a comparatively weak consent requirement, then each time “State B” requested PHI from an HIO in “State A,” the PHI of “State A” citizens would be disclosed under the weaker consent requirement. Having seen a need for a strong consent requirement, “State A” is less likely to agree to let the lower standards apply to disclosures to entities outside the state. This objection would need to be addressed during the legislative process or negotiation process.

Choice of law provisions are generally contractual. In the absence of contractual provisions, courts apply conflict of law principles to determine which forum’s law applies. A state could enact a uniform choice of law statute, as has been done with the UCC, to govern HIE.

Interstate Commerce—Pro

- + Federal participation could add additional revenues.
- + Would create a uniform law for all of the states that join the compact.
- + Cost considerations should not be an issue based upon historical data from the CSG showing modest expenditures, particularly when the federal government provides financial support.⁶¹
- + *Costs*—Approach 1 would be the least costly approach to use. Providers would not be required to learn new procedures.
- + *Political viability*—An interstate compact is a state-driven mechanism familiar to legislatures. The support by the federal government to encourage adoption of electronic health records (EHRs) by 2013 may encourage state legislatures to act on health IT legislation. Approach 1 is more politically feasible because providers in the responding state are familiar with their own consent laws.
- + *Technically possible*—In the absence of a federal solution, an interstate compact may be one of the best ways to address the barrier caused by different state consent laws.

Uniform Law—Pro

- + Of the 99 uniform laws identified, California enacted or adopted substantially similar laws in 40 instances, or about 50% of the time.
- + NCCUSL costs are picked up by the states that are members, as part of their dues. Each state has to absorb the costs of putting legislation through the process. The

⁶¹ 10 Frequently Asked Questions, Council of State Governments, National Center for Interstate Compacts website. Available at <http://www.csg.org/programs/ncic/resources.aspx>.

group responsible for developing a uniform act would be best able to provide training and potentially reduce overall costs. Approach 1 would be the least costly approach to use. Providers would not be required to learn new procedures.

- + The support by the federal government to encourage adoption of EHRs by 2013 may encourage state legislatures to act on health IT legislation. Approach 1 is more politically feasible because providers in the responding state are familiar with their own consent laws.
- + The NCCUSL website specifically states that an act should be designated as uniform rather than model if:
 - (a) there is a substantial reason to anticipate enactment in a large number of jurisdictions, and
 - (b) “uniformity” of the provisions of the proposed enactment among the various jurisdictions is a principal objective.

Further, the NCCUSL indicates that act shall be designated as a Uniform Law Commissioners’ Model Act if:

- (a) “uniformity” may be a desirable objective, although not a principal objective;
- (b) the act may promote uniformity and minimize diversity, even though a significant number of jurisdictions may not adopt the act in its entirety; or
- (c) the purposes of the act can be substantially achieved, even though it is not adopted in its entirety by every state.

Model Law—Pro

- + Of the model laws proposed by NCCUSL, California has only adopted one that was substantially similar to the proposed law; however, California has adopted many model laws.
- + A model act will provide needed guidance through its example even if states enact it with some modifications. The approach might work best if it is less expansive and does not cover certain special categories of PHI (such as mental health records).
- + *Costs*—NCCUSL costs are picked up by the states that are members, as part of their dues. Each state has to absorb the costs of putting legislation through the process. The group responsible for developing a model act would be best able to provide training and potentially reduce overall costs. Approach 1 would be the least costly approach to use. Providers would not be required to learn new procedures.
- + *Political viability*—This is a step in the right direction and likely to be more helpful than what we have now. The support by the federal government to encourage adoption of EHRs by 2013 may encourage state legislatures to act on health IT legislation. Approach 1 is more politically feasible because providers in the responding state are familiar with their own consent laws.
- + *Technically possible*—Creates a standard for states to follow.

Choice of Law—Pro

Contractual Provision

- + Cost to develop language is more.

- + Ease for parties to dispute, by terms of contract.
- + May be more cost effective to enforce.
- + Not open for public debate.

Statutory Provision

- + Will still incur cost to develop customization to existing statutes, but easier.
- + Statute can spell out enforcement, bring in regulatory oversight.
- + A choice of law provision 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 choice of law provision.
- + Enacting a uniform statute to standardize the choice of law provision 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 choice of law 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.

Interstate Compact—Con

- California has so many laws that cover health information, such as breach notification and mental health protections, that developing a compact to be in accordance with California law could be difficult.
- Federal participation could add additional delays.
- It is difficult to predict how elected officials will respond to an interstate HIE compact. Issues such as the confidentiality of mental health and infectious disease status may challenge feasibility, but the history of adoption of controversial compact legislation such as the recent Great Lakes–St. Lawrence River Basic Water Resources Compact suggests bipartisan support would develop because of the recognized return on investment resulting from HIE between and among the states.⁶²
- *Costs*—The cost of implementing an education effort may be difficult to cover due to state budget problems. There is also a cost to providers, yet we do not have a basis to determine what it will be and who will bear those costs. Providers were not given funds to implement HIPAA.

Given the likelihood of significant costs to both develop and implement the interstate compact, states may be discouraged from pursuing this option. Questions will arise as to who should bear the costs for both the development stage and the implementation stage—the government or the stakeholders? Will this become an unfunded mandate on providers by the state? Education costs will be significant. If the compact requires infrastructure to handle administration, this will require on-going operational costs.

Approach 2 could be viewed as the costliest of the three discussed. Providers and HIOs in responding states would need to become familiar with the consent

⁶² Am. H.B. 416, posted at http://www.legislature.state.oh.us/bills.cfm?ID=127_HB_416.

requirements of multiple requesting states. Approach 3 would be less of a burden on providers and HIOs in that they would be learning one new process.

- *Political Viability*—If we try to adopt an interstate compact that covers all health information, this will make it harder to pass. In addition, the wide variation in state consent laws today makes it likely that it will be difficult to draft an interstate compact that is politically feasible to a high number of states. For instance, responding states in Scenario 2 (the responding state has less stringent consent laws) may object to Approach 2, where the requesting state’s law prevails because it would require them to learn another state’s laws and implement more robust consent requirements before disclosing information.

On the other hand, responding states in Scenario 1 (the responding state has more stringent consent laws) may also object to Approach 2, where the requesting state’s law prevails, but for different reasons. In this case, a requesting state’s less stringent consent requirements would prevail, and this could reduce the level of privacy protection for patient information.

- *Technically Possible*—Approach 3 will force health care providers in all states to adapt to the interstate compact’s consent standards.

Uniform Law—Con

- Lack of uniformity may make enforcement and use of law difficult in an interstate exchange.
- The cost of implementing an education effort may be difficult to cover due to state budget problems. There is also a cost to providers, yet we do not have a basis to determine what it will be and who will bear those costs. Providers were not given funds to implement HIPAA. Approach 2 could be viewed as the costliest of the three discussed. Providers and HIOs in responding states would need to become familiar with the consent requirements of multiple requesting states. Approach 3 would be less of a burden on providers and HIOs in that they would be learning one new process.
- If we try to implement a law that covers all health information, this will make it harder to pass. The potential that the act could be enacted with significant variation reduces its feasibility as a solution to varying consent laws. In addition, the wide variation in state consent laws today makes it likely that it will be difficult to draft a uniform law that is politically feasible to a high number of states. For instance, responding states in Scenario 2 (the responding state has *less* stringent consent laws) may object to Approach 2, where the requesting state’s law prevails because it would require them to learn another state’s laws and implement more robust consent requirements before disclosing information.
- On the other hand, responding states in Scenario 1 (the responding state has *more* stringent consent laws) may also object to Approach 2, where the requesting state’s law prevails, but for different reasons. In this case, a requesting state’s less stringent consent requirements would prevail, and this could reduce the level of privacy protection for patient information.
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Model Law—Con

- Lack of uniformity may make enforcement and use of law difficult in an interstate exchange.
- The NCCUSL website specifically states that an act should be designated as uniform rather than model if: (a) there is a substantial reason to anticipate enactment in a large number of jurisdictions, and (b) “uniformity” of the provisions of the proposed enactment among the various jurisdictions is a principal objective. Further, the NCCUSL indicates that an act shall be designated as a Uniform Law Commissioners’ Model Act if: (a) “uniformity” may be a desirable objective, although not a principal objective; (b) the act may promote uniformity and minimize diversity, even though a significant number of jurisdictions may not adopt the act in its entirety; or (c) the purposes of the act can be substantially achieved, even though it is not adopted in its entirety by every state.
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- *Technically possible*—Approach 3 will force health care providers in all states to adapt the interstate compact’s consent standards.

Choice of Law—Con

Contractual Provision

- Terms not accessible for development of similar contracts.
- State law enforceability may be questionable.

Statutory Provision

- Legislative process could delay enactment and implementation.

- Could become more political, tied to unrelated issues.
- A contractual choice of law provision may have limited benefit because it does not supersede state consent laws and could lead to conflicts in the states whose laws were not elected. A statutory choice of law provision may have limited benefit if other states adopt inconsistent choice of law provisions.
- If providers will be required to change existing policies and procedures based upon the choice of law, there will be a cost, as well as the need to conduct training of providers and patients. By drafting a consistent but neutral adoption, this could also result in political concerns, since this may mean that another state's laws apply. For example, if your state is very concerned about privacy rights and you are asked to follow the laws of a less stringent state, this may not be politically feasible. Technical feasibility is difficult as providers will not have the time to fully research other states' laws in order to comply with the option. Inconsistent adoption will also hinder success. A choice of law provision that is contractual would not have the force of law behind it. Therefore, it may be seen as an option that is not endorsed by the state, thereby reducing its political feasibility.

6 Does the Option Address Liability Concerns?

Liability issues appear to be one of the biggest obstacles to agreeing upon any standard approach to consent. Identify how issues of liability for inappropriate release of health information have been resolved within your state. Identify the relative merits of each mechanism in resolving these liability concerns.

Interstate Compact

Health care providers handling PHI in a manner consistent with the terms of the compact should not be in jeopardy of criminal or civil liability.

Since an interstate compact is enacted in statute by states participating in the compact, and assuming the language of the interstate compact statutes is sufficient, all liability concerns should be addressed in a satisfactory fashion. Such compact language must be carefully drafted so it protects HIE parties from civil and criminal liability as well as adverse administrative actions such as those related to provider (e.g., physician, nurse, hospital, nursing home) licensing and regulatory oversight from all pertinent state agencies (e.g., provider licensing boards, pharmacy board, mental health and workers' compensation agencies).

State constitutional issues also must be a consideration in addressing liability concerns. State court application of state constitutional provisions involving such issues as immunity, damage caps, and privacy rights are examples.

Attention must also be given to federal requirements (e.g., HIPAA) that preempt state and therefore interstate compact law. It may be determined that federal recognition through federal legislative enactment or resolution, or perhaps administrative rule promulgation, will be necessary to ensure that liability does not arise from federal quarters.

Finally, cursory review of some interstate compact language suggests that liability has been addressed. Examples include the International Emergency Management Assistance Compact and Northeastern American/Canadian Emergency Management Assistance Compact.⁶³ The interstate compact has the force of law in the member states. This would supersede any existing conflicting state law. Health care providers handling PHI in a manner consistent with the terms of the compact should not be in jeopardy of criminal or civil liability, because the applicable law within their jurisdiction would be the compact. As long as the disclosures were being made between entities in states that executed the compact, the relative stringency of the other state's consent laws would be immaterial, and the terms of the compact would prevail. However, disclosures to or requests by states that had not executed the compact would still be subject to the laws in effect in the jurisdictions where such disclosures were being made. The interstate compact would not address liability considerations in that case.

Uniform Law

Several factors would affect the ability of the uniform law to adequately address liability concerns.

- The content of the proposal would have the greatest impact. It will need to address how the new law would relate to existing consent requirements.
- How uniformly the states adopt the proposal would be another major factor.
- Another factor would be whether the legislature includes concomitant changes in other consent laws as part of the legislation enacting the uniform law.
- Statutory rules of construction would also be a factor. These rules generally provide that in the case of an irreconcilable conflict between two laws, the language of the most recently enacted would prevail.
- State court interpretation of the uniform law will also affect its success. Certain identical laws, such as provisions of the UCC, are implemented very differently by different state courts. Courts tend to preserve their own state's case law unless the statute clearly demonstrates a break with precedent.

If the uniform law is adopted in every state, the option could address liability concerns. The uniform law content would need to address any concerns relating to existing consents, the need for new consents, etc. Thus as the uniform law is developed, liability concerns should be considered and addressed.

⁶³ Voit, W., Vickers, N., & Gavenonis, T. (2003). *Interstate Compacts and Agencies 2003*. Lexington, KY: Council of State Governments, pp. 188, 212.

Model Law

Each state will have the option of adopting any provisions that the state chooses. This will affect uniformity. Another issue would be whether the legislature in the adopting state changes other laws that might relate to the proposed model law.

Similar to the uniform law, the model act could address liability concerns. The model act content would need to address any concerns relating to existing consents, the need for new consents, etc. Thus, as the model act is developed, liability concerns should be considered and addressed.

A model act becomes the law in adopting states. Several factors would affect the ability of the model act to adequately address liability concerns.

- The content of the proposal would have the greatest impact. It will need to address how the new law would relate to existing consent requirements and supersede them, if necessary, to avoid conflicting obligations.
- How uniformly the states adopt the proposal would be another major factor. Each state must comply with the laws of its jurisdiction. As long as the disclosures were being made between entities in states that adopted the model act, information should be exchanged relatively freely because the model act would address the exchange and access by both the responding and the requesting states. However, disclosures to or requests by states that had not adopted the model act would still be subject to the laws in effect in the jurisdictions where such disclosures were being made. The model act would not address liability considerations in that case.
- Another factor would be whether the legislature includes concomitant changes in other consent laws as part of the legislation enacting the model act.
- Statutory rules of construction would also be a factor. These rules generally provide that in the case of an irreconcilable conflict between two laws, the language of the most recently enacted would prevail.
- State court interpretation of the model act will also affect its success. Certain identical laws, such as provisions of the UCC, are implemented very differently by different state courts. Courts tend to preserve their own state's case law unless the statute clearly demonstrates a break with precedent.

Choice of Law

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.

A properly drafted contractual choice of law provision could allocate liability among the parties to the agreement. To further protect the parties, an indemnification provision could be incorporated into a contractual choice of law provision along with the choice of law provisions, such that the requesting party would agree in advance to reimburse fines and

damage awards against the responding state’s provider or HIO for actions taken on the basis of the requesting party’s consent.

With respect to determining which state’s statutes apply to a statutory violation, the determining factor is generally the state in which the violation occurred. State statutes, except for exceptional situations, are not applicable to parties acting outside of the boundaries of the state. A responding state with a prohibition against a certain use of PHI generally cannot apply its statutes to an organization outside of the state. This applies to both uses and disclosures. So, for instance, a request for PHI by a requesting state that is lawful in the requesting state but unlawful in the responding state will not subject the requesting state to liability under the responding state’s laws. Similarly, a disclosure of PHI by a responding state that is lawful in the responding state but unlawful in the requesting state will not subject the responding state to liability under the requesting state’s laws.

Civil liability could also arise from the exchange of PHI if the subject of the PHI or another affected party claimed that he or she suffered damages as a result of the exchange. This type of claim would be brought by a private individual. When determining which state’s laws apply for such a claim, most states either give precedence to the laws of the state in which the wrong occurred, or require the court to examine the facts of the claim to determine the appropriate law to apply. The court might consider facts such as the policies and interests underlying the claim, the dominant contacts among the affected states, the government interests, and other considerations. The choice of law determines the rights of the parties and may limit or preclude recovery for damages.

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 HIE 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 multistate compact).

States have adopted choice of law statutes to provide greater certainty to parties and reviewing courts. For example, R.C. 1304.85 addresses bank fund transfers:

“(A) All of the following apply unless the affected parties otherwise agree or division (C) of this section applies:

(1) The rights and obligations between the sender of a payment order and the receiving bank are governed by the law of the jurisdiction in which the receiving bank is located.

(2) The rights and obligations between the beneficiary’s bank and the beneficiary are governed by the law of the jurisdiction in which the beneficiary’s bank is located.

(3) The issue of when payment is made pursuant to a funds transfer by the originator to the beneficiary is governed by the law of the jurisdiction in which the beneficiary's bank is located.

(B) If the parties described in division (A) of this section have made an agreement selecting the law of a particular jurisdiction to govern rights and obligations between each other, the law of that jurisdiction governs those rights and obligations, whether or not the payment order or the funds transfer bears a reasonable relation to that jurisdiction.

(C)(1) A funds-transfer system rule may select the law of a particular jurisdiction to govern either of the following: (a) The rights and obligations between participating banks regarding payment orders transmitted or processed through the system; (b) The rights and obligations of some or all parties to a funds transfer any part of which is carried out by means of the system.

(2) A choice of law made pursuant to division (C)(1)(a) of this section is binding on participating banks. A choice of law made pursuant to division (C)(1)(b) of this section is binding on the originator, other sender, or a receiving bank having notice that the funds-transfer system might be used in the funds transfer and of the choice of law by the system when the originator, other sender, or receiving bank issued or accepted a payment order. The beneficiary of a funds transfer is bound by the choice of law if, when the funds transfer is initiated, the beneficiary has notice that the funds-transfer system might be used in the funds transfer and of the choice of law by the system. The law of a jurisdiction selected pursuant to division (C)(1) of this section may govern, whether or not that law bears a reasonable relation to the matter in issue.

(D) In the event of inconsistency between an agreement under division (B) of this section and a choice-of-law rule under division (C) of this section, the agreement under division (B) of this section prevails.

(E) If a funds transfer is made by use of more than one funds-transfer system and there is inconsistency between choice-of-law rules of the systems, the matter in issue is governed by the law of the selected jurisdiction that has the most significant relationship to the matter in issue."

Another Ohio example can be found in R.C. 1305.15 regarding choice of law for letters of credit.

Interstate Compact—Pro

- + State law should dominate.
- + If requires consent, then it would alleviate other concerns.
- + Depending on the provisions, could be uniform.
- + Momentum for decades, seemingly accelerating in recent years, has favored uniform state law on matters of regional or national importance. This momentum has been especially visible in the area of data exchange as a result of technological advances (e.g., computers, cell phones, Internet, satellite communication). There appears to be a wide consensus that unimpeded but secure HIE has sufficient societal value to

justify formation of an interstate compact—especially if the federal government is unable to act in a timely and appropriate manner.

- + These general comments are pertinent because they suggest that liability concerns would be appropriately addressed in order to accomplish higher ranked political and social goals.
- + The interstate compact mechanism is neutral and plainly stated, with no increased or decreased risk of liability to providers. The interstate compact could have a provision that directly addresses liability. Any of the approaches would clarify and minimize health care provider liability concerns by providing a clear mandate with regard to consent requirements. Education is the central issue, and as long as the interstate compact is followed, there should not be any different liability concerns.

Uniform Law—Pro

- + NCCUSL drafting committee gets input from experts and is likely to solve liability issues if that is the objective of the uniform law.
- + The additional guidance afforded by the adoption of a uniform law will be beneficial in addressing liability concerns, particularly if the uniform law enjoys widespread adoption. This is a mechanism to address liability, but it will depend on the specifics in the law, which could have less lenient provisions than what is current law in some states.

Model Law—Pro

- + State law concerns should dominate.
- + The additional guidance afforded by the adoption of a model act will be beneficial in addressing liability concerns, particularly if the model act enjoys widespread adoption. This is a mechanism to address liability, but it will depend on the specifics in the law, which could have less lenient provisions than what is current law in some states.

Choice of Law—Pro

Contractual Provision

- + Parties can make liability specific, with indemnity provisions.
- + Choice of law clauses are well understood and allow contracting parties to easily modify the provision as circumstances dictate. Choice of law provisions and considerations are so commonly used that a Google search resulted in more than 6 million hits. As probably is the case with all other states, the Ohio Supreme Court has adopted the Restatement (Second) of Conflict of Laws as the principles governing resolution of choice of law disputes in cases where the parties to a contract have not specified the controlling forum (*Ohayon v. Safetco Ins. Co. of Illinois*, 91 Ohio St.3d 474, 747 N.E.2d 206 [Ohio 2001]).

Statutory Provision

- + Can make liability specific.
- + Can provide more protection to the parties with unequal bargaining powers.

- + 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 choice of law might offer some degree of protection from civil liability because the exchange would have been compliant with relevant law.

Interstate Compact—Con

- If not protective of privacy rights, not likely to succeed in California.
- It remains to be seen if there are local or state issues or constituencies that would prevent satisfactory standardized liability protection in multistate compact language. Issues related to HIV, mental health, and substance abuse, or states with unreasonable privacy advocates or self-serving plaintiff attorney associations (without minimizing the legitimacy of mainstream privacy advocates and plaintiff attorney associations) might lead to compact language sufficiently unsatisfactory to defeat successful implementation of HIE.
- An interstate compact may result in more litigation being heard in federal courts. In addition, the adoption of new standards could increase the liability for some health care providers if the interstate compact imposes a level of consent that is more restrictive than some states' current consent requirements. Requiring providers to learn and implement new requirements could initially lead to increased liability for providers that do not understand them and implement them in an incorrect fashion.

Uniform Law—Con

- Lack of uniformity may make liability issues uncertain.
- Will need each legislature to identify conflicting state laws and resolve the predominance of the uniform law.
- Liability concerns are different in the paper versus electronic transfer of information, so any uniform law would need to address special concerns. For instance, concerns regarding errors or security violations are higher with electronic transfer, since, for example, the liability of sending something electronically to the wrong web address and it getting posted online is significantly different from sending paper to a wrong street address.
- The adoption of new standards could increase the liability for some health care providers if the uniform law, as adopted, imposes a level of consent that is more restrictive than some states' current consent requirements. Requiring providers to learn and implement new requirements could initially lead to increased liability for providers that do not understand them and implement them in an incorrect fashion.
- Unless the uniform law is adopted consistently in various states, the law would be unlikely to be able to address liability concerns when a state that has not adopted the uniform law is involved in HIE.

Model Law—Con

- Lack of uniformity may make liability issues uncertain.
- Will need each legislature to identify conflicting state laws and resolve the predominance of the model law.
- Liability concerns are different in the paper versus electronic transfer of information, so any model act would need to address special concerns. For instance, concerns regarding errors or security violations are higher with electronic transfer, since, for example, the liability of sending something electronically to the wrong web address and it getting posted online is significantly different from sending paper to a wrong street address.
- In addition, the adoption of new standards could increase the liability for some health care providers if the model act, as adopted, imposes a level of consent that is more restrictive than some states' current consent requirements. Requiring providers to learn and implement new requirements could initially lead to increased liability for providers that do not understand them and implement them in an incorrect fashion.
- Finally, unless the model act is adopted consistently in various states, the law would be unlikely to be able to address liability concerns when a state that has not adopted the model act is involved in HIE.

Choice of Law—Con

Contractual Provision

- Tends to exacerbate the relative unequal bargaining powers of the parties: funding and sophistication.

Statutory Provision

- One size may not fit all, not meet all potential liability concerns.
- Of the two approaches to choice of law, the contractual choice of law 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 choice of law 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 PHI made electronically. A choice of law 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 who 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.
- Unless legislatures adopt uniform language, relying on choice of law 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 HIE 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. Section 188 provides that, in the absence of an effective choice of law by the parties, their rights and duties under the contract are determined by the law of the state that, with respect to that issue, has "the most significant relationship to the transaction and the parties" (Restatement at 575, Section 188(1)). Section 188(2)(a) through (d) more specifically provides that courts should consider the place of contracting, the place of negotiation, the place of performance, the location of the subject matter, and the domicile, residence, nationality, place of incorporation, and place of business of the parties.
- When disputes inevitably arise, parties would be able to challenge the validity of the contractual choice of law 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. Nonmeritorious challenges, even though unsuccessful, would also cause expense and delay. An example of a party challenging the choice of law—resulting in expenses and delayed resolution—is *Scanlon v. Pfaller*, 2006 WL 1064051 (Ohio App. 12 Dist. 2006).
- These reasons compel a recommendation not to rely on choice of law provisions to facilitate HIE unless legislatures in the affected states have enacted uniform statutes that provide certainty and satisfy liability concerns.

7 Ramifications of Acceptance/Rejection

Based upon the anticipated impact upon your state of acceptance or rejection of each proposed mechanism, identify the pros and cons of accepting and of rejecting each proposed mechanism.

Interstate Compact

Acceptance

A number of beneficial ramifications arise from the enactment of an interstate compact. The major one is the establishment of a regulated and standardized system to secure patient consent for electronic exchange of PHI among compact member states regardless of varying consent requirements. Based on this process within the compact, PHI arguably can be exchanged by providers more confidently while protecting patients' privacy rights. This may result in an increase in the authorized interstate exchange of PHI among the member states. A favorable outcome has been realized through another health care related interstate compact. Specifically, an evaluation study of the Nurse Licensure Compact, sponsored by the National Council of State Boards of Nursing, reflected increases in active

licenses based on the benefits offered through the compact⁶⁴ There are also several legal ramifications that stem from the utilization of the compact. These ramifications provide added protections for the compact and the compact member states. Of note, the interstate compact becomes statutory law when adopted by each of the member state legislators and has precedence over conflicting statutes of member states (*C.T. Hellmuth & Assoc. v. Wash. Metro. Area Transit Auth.* [D.Md. 1976], 414 F.Supp. 408, 409). Along these same lines, no unilateral action taken by a member state that is in conflict with the compact terms and conditions can be imposed upon the other member states without the approval of the other member states.^{65,66} Acceptance of an interstate compact has the potential to create uniformity with respect to how member states require health care entities to obtain a patient’s consent to allow their PHI to be exchanged electronically. It could also resolve the question of whether or not patient consent is required to enter or share PHI in an electronic health exchange. States will need to have a process for making patients aware of exchanges of PHI and obtaining patients’ permission to share health information.

Rejection

Without the use of the compact or adoption of standardized choice of law statutes, uniform laws, or model acts, there would continue to be discordant requirements for sharing PHI, causing unnecessary burdens for the patient and health care system to determine when sharing of information is legally permitted.

Health information may not be available because providers will not know how to respond to another state’s request. The current barriers will continue:

- The inconsistent, cumbersome, and inefficient processes for requesting patient information between states which currently lack privacy and security standards;
- The inconsistent application of multiple and redundant consent forms for patient confidentiality;
- Misuse, mismanagement, and inappropriate disclosure of patients’ health information by providers, payers, researchers, and emerging HIOs; and
- Inappropriate and inconsistent interpretations of state laws related to consent for release of health information issues, and the potential provider risks or liabilities associated with failure to comply with such laws.

⁶⁴ Multistate Licensure Compact Impact Evaluation. (2003). National Council of State Boards of Nursing website. Available at <http://www.ncsbn.org>.

⁶⁵ Buenger, M. & Masters, R. (2003). The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems. 9 Roger Williams U.L. Rev. 71, 94.

⁶⁶ *Nebraska v. Cent. Interstate Low-Level Radioactive Waste Comm.* [C.A.8, 2000], 207 F.3d 1021, 1026.

Uniform Law

Acceptance

Acceptance of the NCCSUL Uniform Law has the potential to create uniformity with respect to how adopting states require health care entities to obtain a patient’s consent to allow his or her PHI to be exchanged electronically. It could also resolve the question of whether or not patient consent is required to enter or share PHI in an electronic health exchange. States will need to have a process for making patients aware of exchanges of PHI and obtaining patients’ permission to share health information.

Rejection

Health information may not be available because providers will not know how to respond to another state’s request. The current barriers will continue:

- The inconsistent, cumbersome, and inefficient processes for requesting patient information between states which currently lack privacy and security standards; and
- The inconsistent application of multiple and redundant consent forms for patient confidentiality.

Model Law

The ramifications of acceptance and rejection will largely depend on how other states react to the model act and the number of changes that states make to a model act.

Choice of Law

Based on research of pertinent databases for Ohio cases and statutes, no information was found regarding the treatment of PHI for choice of law purposes. As such, noted below are some key questions that it will be necessary to address:

- How is PHI to be characterized?
- Is it to be treated as tangible or intangible?
- Should the choice of law rule for treatment of PHI be the place from where the records are being transferred or the domicile of the patient at the time of the transfer?

Interstate Compact—Pro

- + Potential to resolve conflicts with an agreed-upon mechanism.

Uniform Law—Pro

- + Adoption of the NCCUSL Uniform Law has the potential of creating uniformity with respect to how adopting states require health care entities to obtain a consumer’s consent to allow his or her personal health information to be exchanged electronically. It will also resolve the question of whether or not patient consent is required to enter or share personal health information in an electronic health exchange. States will have a process for making patients aware of exchanges of

personal health information and obtaining patients' permission to share health information.

- + The obvious benefit of adopting a uniform law is that Ohio would have a common legal structure with other states that adopt the uniform law. Having the common legal structure will streamline the information exchange process because states would not need to constantly be analyzing and monitoring other states' laws with respect to consents for the use and disclosure of health information. In addition, adoption of a uniform law would cause Ohio to have a specific and detailed approach to handling consents to the use and disclosure of health information. A uniform law is an opportunity to address issues that may be unclear in the law and (presumably) would allow health care providers to look to a single source to determine the type of consent that may be needed, whether it is a single consent for all health information or separate consents for different types of health information. It should be noted, however, that although the intent is for uniform laws to be adopted without change, in reality the states that adopt a "uniform law" may make modifications.

Model Law—Pro

- + Would clarify statewide exchanges.
- + *Acceptance*—The benefit of adopting a model is that it would create common framework from which states could create a consent law. Having the common legal structure could streamline the information exchange process because states would not need to constantly be analyzing and monitoring other states' laws with respect to consents for the use and disclosure of health information. However, acceptance of a model act will have limited impact if there is a wide variation among the states in the language used to implement the consent law. In addition, adoption of a model act would cause Ohio to have a specific and detailed approach to handling consents to the use and disclosure of health information. A model act is an opportunity to address issues that may be unclear in the law and (presumably) would allow health care providers to look to a single source to determine the type of consent that may be needed—whether it is a single consent for all health information or separate consents for different types of health information.
- + *Adoption*—Adoption of the NCCSUL Model Act has the potential to create uniformity with respect to how adopting states require health care entities to obtain a patient's consent to allow their PHI to be exchanged electronically. It could also resolve the question of whether or not patient consent is required to enter or share PHI in an electronic health exchange. States will need to have a process for making patients aware of exchanges of PHI and obtaining patients' permission to share health information.

Choice of Law—Pro

Contractual Provision

- + Is occurring right now.
- + Adoption of the choice of law mechanism has the potential to create uniformity with respect to how adopting states require health care entities to obtain a patient's consent to allow his or her PHI to be exchanged electronically. It could also resolve the question of whether or not patient consent is required to enter or share PHI in an electronic health exchange. States will need to have a process for making patients

aware of exchanges of PHI and obtaining patients' permission to share health information.

- + Typically, the utilization of a formal choice of law provision noted by statute or included in a contract affords predictability, efficiency, and uniformity in the adjudication process by the courts. Of note, contract choice of law provisions also maintain the intent of the parties, regarding contemplated considerations if litigation should arise (e.g., choice of forum, location, nature of information). Courts have rendered added weight for choice of law contract provisions (*Schulke Radio Productions, Ltd. v. Midwestern Broadcasting Co.* [1983], 6 Ohio St.3d 436, 438, 453 N.E.2d 683).
- + Although there are notable benefits with the utilization of formal choice of law provisions, there can be some challenges with them, as well. Specifically, there could be conflicting choice of law provisions among the states involved in a case as to which state's choice of laws should govern the subject matter. The law that would apply would be determined by the court on a case-by-case basis.
- + Uniformity and predictability would be compromised. Also, given the complexities of the exchange of PHI, personal and political sensitivities regarding patient confidentiality and security could be issues. With these potential issues, there arguably is a greater likelihood that patients adversely affected by a choice of law statute will file lawsuits, resulting in an increase in litigation costs (time and expense).
- + Lastly, without a uniform choice of law statute, lack of certainty and predictability will exist. To continue to move forward without any change is not a logical option for Ohio.

Interstate Compact—Con

- The more standards that the compact imposes, the less number of states will join; needs an agreed-upon mechanism to resolve conflicts.
- Overriding state rights is a potential problem with compacts.

Uniform Law—Con

- Health information may not be available because providers will not know how to respond to another state's request. The current barriers will continue.
- The inconsistent, cumbersome, and inefficient processes for requesting patient information between states which currently lack privacy and security standards.
- The inconsistent application of multiple and redundant consent forms for a patient's confidentiality.
- Misuse, mismanagement, and inappropriate disclosure of consumers' health information by providers, payers, researchers, and emerging HIOs.
- Inappropriate and inconsistent interpretations of state laws related to consent for release of health information issues, and the potential provider risks or liabilities associated with failure to comply with such laws.
- The impact of rejection of a uniform law will leave the status quo, which is an inconsistent array of laws that is difficult to manage and interpret. Rejection of a uniform law will have a larger negative impact on Ohio if a uniform law is established

and Ohio does not join other states in the passage of the uniform law. Inconsistencies and inefficiencies will arise for both requests made from other states for health information in Ohio and made by Ohioans for health information in other states. For example, it could lead to patients having to sign multiple consent forms. Inconsistent state laws also increase the probability of misinterpretation or inconsistent interpretation of laws related to the disclosure of health information. These problems could lead to liability for health care providers who improperly disclose health information.

Model Law—Con

- The impact of rejection of a model act will leave the status quo, which is an inconsistent array of laws that is difficult to manage and interpret. Rejection of a model act may have a larger negative impact on Ohio if a model act is established and Ohio does not join other states in the passage of the model act. Inconsistencies and inefficiencies will arise for both requests made from other states for health information in Ohio and made by Ohioans for health information in other states. For example, it could lead to patients having to sign multiple consent forms. Inconsistent state laws also increase the probability of misinterpretation or inconsistent interpretation of laws related to the disclosure of health information. These problems could lead to liability for health care providers who improperly disclose health information. Note, however, that even if a model act is adopted, these same issues will arise if there is not uniformity in how the model act is adopted.
- Health information may not be available because providers will not know how to respond to another state's request. The current barriers will continue:
 - The inconsistent, cumbersome, and inefficient processes for requesting patient information between states which currently lack privacy and security standards;
 - The inconsistent application of multiple and redundant consent forms for a patient's confidentiality;
 - Misuse, mismanagement, and inappropriate disclosure of patients' health information by providers, payers, researchers, and emerging HIOs; and
 - Inappropriate and inconsistent interpretations of state laws related to consent for release of health information issues, and the potential provider risks or liabilities associated with failure to comply with such laws.

Choice of Law—Con

- Health information may not be available because providers will not know how to respond to another state's request. The current barriers will continue:
 - The inconsistent, cumbersome, and inefficient processes for requesting patient information between states which currently lack privacy and security standards;
 - The inconsistent application of multiple and redundant consent forms for a patient's confidentiality;
 - Misuse, mismanagement, and inappropriate disclosure of patients' health information by providers, payers, researchers, and emerging HIOs; and
 - Inappropriate and inconsistent interpretations of state laws related to consent for release of health information issues, and the potential provider risks or liabilities associated with failure to comply with such laws.

- Absent a formal choice of law mechanism or a mechanism that would offer more certainty and predictability, the courts would be required to determine which of the state's choice of law rules would be applicable based on a common law analysis. This could be a very time-consuming process as it is subject to judicial interpretation. In Ohio, there are several approaches a court could choose in selecting which state's choice of law rules would govern, including identification of the state that has had the most significant relationship to the subject matter (*Bobb Chevrolet, Inc. v. Jack's Used Cars*, L.L.C. [2002] 148 Ohio App.3d 97, 100-101, 772 N.E.2d 171).

8 Conflicts With State or Federal Laws

Initial review should focus on conflicts between each proposed mechanism and existing state laws, followed by an evaluation of potential conflicts between each proposed mechanism and federal law. As we have seen on numerous occasions, there is wide berth applied when interpreting federal law, and we hope to once again recognize differences in opinion/interpretation.

Interstate Compact

It is critical that the interstate compact have the ability to either supersede state consent laws or create a system that designates in which situations whose state law will prevail.

Once a state enters into a compact, the terms of the compact control over the laws of the state, regardless of whether those laws are statutory, regulatory, or common law. In the case of medical records, Ohio has specific and detailed statutes regarding access to certain mental health records, certain records regarding AIDS and HIV tests, and drug and alcohol treatment records (Ohio Rev. Code §5122.3; Ohio Rev. Code §3701.243), regulations pertaining to drug and alcohol treatment records (Oh. Admin. Code §3793:2-01-06), and regulations on the use of Medicaid and other public assistance information (R.C. 5101.27). In addition, by case law, Ohio has recognized a privacy right in general medical records and a cause of action for violation of that privacy right (*Biddle v. Warren General Hospital* [1999], 86 Ohio St.3d 395). The terms of a compact regarding access to medical records would take priority over these laws in any situation in which the compact applies (i.e., if the compact applies only to interstate access to medical records, then Ohio law would continue to apply to intrastate access, while the compact terms would supersede those laws and apply to interstate access).

A compact, however, cannot preempt federal law. Therefore, existing federal law regarding access to medical records, and any future federal laws, would apply rather than the terms of the compact.

Specifically, federal regulations restrict the access to drug and alcohol treatment records from any entity receiving federal assistance. The federal assistance can be in any form, such as funding, reimbursement for services, or federal tax-exempt status (42 C.F.R. Part 2). These federal restrictions will apply regardless of any compact terms. Furthermore, the

federal government could, particularly in connection with Medicare and Medicaid funding, enact or promulgate restrictions pertaining to other types of medical records. Any future laws at the federal level would also apply over the terms of a compact.

Federal law also provides confidentiality protections to certain categories of persons, such as the protection 42 C.F.R. Part 2 provides to individuals in substance abuse treatment programs.

To eliminate the barriers to HIOs caused by conflicting consent laws, it is critical that the option has the ability to supersede at least one state's laws. "A compact is superior in force and effect to both prior and subsequent statutory law. Conflicting statutes in different states, therefore, present no obstacles."⁶⁷

The U.S. Supreme Court has examined interstate compacts and has resolved conflicts among participating states. In the case of *Dyer v. Sims*, 341 U.S. 22, the Supreme Court prevented Virginia from pulling out of an interstate compact when Virginia asserted the compact violated the Virginia Constitution. The Supreme Court stated that interstate compacts cannot be unilaterally nullified or given meaning by an organ of one of the contracting states. To do so would be to allow a state to be its own judge in a conflict with another state. Instead, the Supreme Court asserted that the Supreme Court has the final power to judge the meaning and validity of interstate compacts. The Supreme Court described interstate compacts as analogous to the treaty-making power of sovereign states, an observation it had previously made in *Hinderlider v. LaPlata Co.*, 281 U.S. 176, and in *Rhode Island v. Massachusetts*, 37 U.S. 657.

Uniform Law

NCCUSL through the study process will work to harmonize the uniform act with existing federal laws and with the input of representatives from the states, and will review and consider critical state laws. Before enacting a uniform act, each state will have to reconcile the proposed act with its laws to determine if any conflicts will exist and whether the uniform act is the preferred law for its state.

HIPAA sets minimum standards regarding the release of PHI. Therefore, no state has consent requirements less stringent than federal law. More stringent state laws would continue to supersede HIPAA. Therefore, to the extent that the uniform law invokes a more stringent requirement than HIPAA, it would continue to apply.

Federal law also provides confidentiality protections to certain categories of persons, such as the protection 42 C.F.R. Part 2 provides to individuals in substance abuse treatment programs.

⁶⁷ What Makes an Interstate Compact? Council of State Governments, National Center for Interstate Compacts website. Available at <http://www.csg.org/programs/ncic/resources.aspx>.

With respect to any possible conflict with state laws, the rules of statutory construction would generally provide that the newly enacted uniform law would prevail. Care should be taken so the uniform law is drafted in a way that is clear whether it is superseding the law.

HIPAA permits providers, insurance companies, and other health care entities to exchange information necessary for treatment, payment, or operations of health care business (TPO). Although HIPAA established strict guidelines for the use and disclosure of PHI by covered entities, those protections must be read in conjunction with the privacy protections for an individual's health information set out in each state. In general, states have more stringent laws regarding certain types of records related to mental health, addiction, HIV, and genetics.

Conflicts with federal laws: Under the Supremacy Clause of the U.S. Constitution, no state law can take precedence over federally imposed requirements. However, in enacting HIPAA, Congress did not desire to supersede state laws that are not contrary to and impose more stringent standards with respect to privacy of individually identifiable health information. In other words, this preemption exception furthers the principle that the HIPAA Privacy Rule will defer to any state privacy law that is not contrary to the HIPAA Privacy Rule (meaning that a covered entity can comply with both the state and federal rules) and provides individuals with greater privacy protection (45 C.F.R. 160.202 and 45 C.F.R. 160.203(b)).

Conflicts with state laws: Since a uniform law is an "unofficial law proposed as legislation for all the states to adopt as exactly as written."⁶⁸ Therefore, if fully adopted by all states, there would be no conflict between states. In reality, however, unless all jurisdictions adopt the uniform law, there will be conflicting laws among the states, which will lead to the problems discussed above in Ramifications of Acceptance/Rejection. The uniform law would need to contain a provision that it supersedes existing state law that conflicts with the uniform law.

Alternatively, steps would need to be taken to harmonize existing state law that may conflict with the uniform law.

Model Law

The drafter of the model law will have to compare the model law provisions to federal law. Also, each adopting state will have to review the laws of its state to determine which portions of the model law to adopt and which portions of its own laws might need to be changed. However, if the entity preparing the model law does not sufficiently review the federal law, any potential conflicts in the model law could be inadvertently adopted by the states. If there is a direct conflict, then the federal preemption may be an issue.

HIPAA permits providers, insurance companies, and other health care entities to exchange information necessary for TPO. Although HIPAA established strict guidelines for the use and

⁶⁸ Garner, B. A. (Ed.). (2004). *Black's Law Dictionary* (8th ed.), p. 1566.

disclosure of PHI by covered entities, those protections must be read in conjunction with the privacy protections for an individual’s health information set out in each state. In general, states have more stringent laws regarding certain types of records related to mental health, addiction, HIV, and genetics.

Conflicts with federal laws: Under the Supremacy Clause of the U.S. Constitution, no state law can take precedence over federally imposed requirements. However, in enacting HIPAA, Congress did not desire to supersede state laws that are not contrary to and impose more stringent standards with respect to privacy of individually identifiable health information. In other words, this preemption exception furthers the principle that the HIPAA Privacy Rule will defer to any state privacy law that is not contrary to the HIPAA Privacy Rule (meaning that a covered entity can comply with both the state and federal rules) and provides individuals greater privacy protection (45 C.F.R. 160.202 and 45 C.F.R. 160.203(b)).

Conflicts with state laws: A model act is “a statute . . . proposed as a guideline legislation for the states to borrow from or adapt to suit their individual needs.”⁶⁹

Since a model act permits each state to amend the act, there is potential for conflict between state laws. In order to resolve the conflict between state laws, the choice-of-law principles may apply.

Under the choice of law principles:

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability, and uniformity of result; and (g) ease in the determination and application of the law to be applied.

As stated under section (1) of choice of law principles, the statute itself may direct the choice of law. Therefore the model act of each state should provide a provision that directs the process and consent to release of patient information across state lines. The directive should indicate that the requesting state is subject to the laws of the responding state.

Conflict with existing state laws: The model act would need to contain a provision that it supersedes existing state law that conflicts with the model act. Alternatively, steps would need to be taken to harmonize existing state law that may conflict with the model act.

⁶⁹ Garner, B.A. (Ed.). (2004). *Black’s Law Dictionary* (8th ed.), p. 1025.

HIPAA sets minimum standards regarding the release of PHI. Therefore, no state has consent requirements less stringent than federal law. More stringent state laws would continue to supersede HIPAA. Therefore, to the extent that the model act invokes a more stringent requirement than HIPAA, it would continue to apply.

Federal law also provides confidentiality protections to certain categories of persons, such as the protection 42 C.F.R. Part 2 provides to individuals in substance abuse treatment programs.

With respect to any possible conflict with state laws, the rules of statutory construction would generally provide that the newly enacted model act would prevail. Care should be taken so the model act is drafted in a way such that it is clear whether it is superseding the law. According to Katie Robinson, NCCUSL, relevant federal law is followed as closely as possible in drafting model acts.

Choice of Law

HIPAA sets minimum standards regarding the release of PHI. Therefore, no state has consent requirements less stringent than federal law. More stringent state laws would continue to supersede HIPAA. Therefore, to the extent that the uniform law invokes a more stringent requirement than HIPAA, it would continue to apply.

Federal law also provides confidentiality protections to certain categories of persons, such as the protection 42 C.F.R. Part 2 provides to individuals in substance abuse treatment programs.

A contractual choice of law provision, presumably in an agreement between a health care provider and a patient, may conflict with specific Ohio statutes. For example, by statute, Ohio restricts access to certain mental health records and to certain records regarding AIDS and HIV tests (Ohio Rev. Code §5122.3; Ohio Rev. Code §3701.243). These laws were enacted to protect the privacy of Ohio citizens with regard to information that could be particularly sensitive or damaging. In light of this, if an Ohio patient were to sign an agreement with a provider that the less protective laws of another state apply to the transfer of records, the courts would need to determine if the patient is able to waive the statutory protections and whether, in the particular situation, the patient effectively did waive those protections.

Specifically, under Ohio law, a person may waive rights and privileges conferred by statute, if the waiver does not violate public policy (*Hess v. Akron* [1937], 132 Ohio St. 305).

A statutory choice of law provision, on the other hand, would presumably address the effect it has on specific Ohio medical records protections, thus avoiding the potential conflict with other state laws.

Currently, federal regulations apply regarding access to records pertaining to drug and alcohol treatment from an entity receiving any type of federal assistance (42 C.F.R. Part 2). Because the access restrictions are tied to the entity's continued federal assistance, neither contractual nor state statutory choice of law provisions will supersede the federal restrictions.

Interstate Compact—Pro

- + Has the potential to be the federal law.
- + One of the primary benefits of a compact is the fact that it supersedes the application of contrary state laws. In other words, the benefit is that it makes the rules between the states to the compact uniform, thereby making it easier to access medical information across state lines. This, by nature, means that conflicting state laws must not apply. This results in a collaborative approach among the states to resolving issues created by conflicting state laws and may encourage the federal government to also collaboratively resolve differences with federal law. In addition, the process of entering into a compact may result in individual states reviewing and revising their current privacy laws and statutes.
- + This mechanism provides for consistency in addressing the interstate transfer of health information among member states and removes conflict among differing state laws.

Uniform Law—Pro

- + Although discouraged, it allows states to take those parts of the proposed law that are consistent with existing state law.
- + The process of creating the uniform law could adequately address concerns about conflict with federal law. The study committee will be able to explore any potential conflicts with federal law, or whether the federal government would need to take any additional action regarding electronic transmission of personal health information. As more and more personal health information becomes electronic, states will need universal privacy acts and be looking for models on how to handle interstate transmission. This may naturally occur as part of the combined efforts at the federal and state level to adopt EHRs.
- + The uniform law may impose more stringent laws than the current federal standards, as long as they are not contrary to the current HIPAA laws. Therefore, the uniform law must be no less stringent than HIPAA. The question is whether the uniform law should adopt provisions that include the most stringent state laws, in order to provide the greatest level of privacy to patients.

Model Law—Pro

- + Allows states to take those parts of the proposed law that are consistent with existing state laws.
- + In order to prevent conflict, the model act should include a section that provides that the law of the responding state be applied. This permits the responding entity and/or state to consistently comply with the applicable laws of its state.
- + The group agreed that the process of creating the model act could adequately address concerns about conflict with federal law. The study committee will be able to

explore any potential conflicts with federal law, or whether the federal government would need to take any additional action regarding electronic transmission of personal health information. As more and more personal health information becomes electronic, states will need universal privacy acts and be looking for models on how to handle interstate transmission. This may naturally occur as part of the combined efforts at the federal and state level to adopt EHRs.

Choice of Law—Pro

Contractual Provision

- + Nimble to address concerns.

Statutory Provision

- + Best at addressing conflicts in own state law.
- + Ease in complying with HIPAA.

Interstate Compact—Con

- California has so many laws that cover health information, such as breach notification and mental health protections, that developing a compact to be in accordance with California law could be difficult.
- The downside of a compact's preemption of state laws is the fact that it does not permit a state to enact policies that reflect unique cultures or climates that exist in that state.
- The more state laws are in conflict with the interstate compact, the more likely the adoption process will not succeed.

Uniform Law—Con

- Will need each legislature to identify conflicting state laws and resolve the predominance of the uniform law.
- Drafters and those who will implement will have to be diligent in their analysis of federal and state laws for conflicts.
- If too complex to implement, those with less funding may not be able to participate.

Model Law—Con

- Will need each legislature to identify conflicting state laws and resolve the predominance of the model law.
- Drafters and those who will implement will have to be diligent in their analysis of federal and state laws for conflicts.
- If too complex to implement, those with less funding may not be able to participate.
- It may be difficult for the requesting state to obtain the information that it desires, if the responding state prohibits such release. Also, if a state that adopts the model act does not provide a choice of law directive, then in the event of a conflict between states, the courts will have to intervene and conduct an analysis under the seven factors listed above. This can result in costly and time-consuming litigation.

- If the model act is not uniformly adopted across the states, it is uncertain as to whether or not it will conflict with state and federal laws. The more state laws are in conflict with the model act, the more likely the adoption process will not succeed.

Choice of Law—Con

Contractual Provision

- Not able to address laws that conflict.
- 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, choice of law provisions will make the process for interstate access to medical information less certain, and therefore more difficult.

Statutory Provision

- Conflicts with federal laws will not be cured if statute does not conform.
- 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 choice of law provision and then the underlying laws of the states are consistent (which is not currently the case), a choice of law provision will not be a practical solution.

9 Process for Withdrawal

Assuming the mechanism is implemented, for each proposed mechanism, what is the corresponding process for withdrawal/repeal of the mechanism should it be deemed necessary?

Interstate Compact

Compacts normally include provisions for a party state to withdraw.

These may include the repeal of the state's ratification law and some notification to other party states.

Withdrawal or modification may be accomplished only in compliance with the terms of the compact or by mutual consent and necessary (usually legislative) action by all members. Usually requires legislative enactment, but compact terms may additionally provide for delay in effective date of withdrawal (i.e., 2 years) and require notice of withdrawal to all other member states. For example, the Interstate Compact on Mental Health, ORC 5119.50, allows for withdrawal by passing legislation repealing the compact and provides that the withdrawal will become effective 1 year after formal notice to all other member states. Additionally, the withdrawal shall not change the status of patients previously transferred between states according to the terms of the compact.

Uniform Law

Withdrawal from a uniform law simply is accomplished by the legislature passing and the governor approving the repeal of the law.

Model Law

A model law would be enacted through the legislative process, and the law would need to be amended, repealed, or declared unenforceable for it not to bind Californians.

In Ohio and Illinois, withdrawal from a model act is accomplished by the legislature passing the law and the governor approving the repeal of the law.

Choice of Law

A statutory “choice of law” would govern until it was repealed or declared unenforceable.

Depending on the terms of their agreement, the parties should be able to terminate the exchange. The agreement should make provisions as to the data already transmitted.

Contractual provisions can be withdrawn or modified by amendment to the contract. Statutes can be superseded or modified by the passage of another statute. If choice of law is specified by parties to a transaction or claim, withdrawal would need to be in accordance with the rules relating to the transaction or claim, either as specified in agreement or by common law. This element is not applicable to nonparty/state law determinants about choice of law other than withdrawal from statute with regard to: choice of law would be by legislative enactment.

Interstate Compact—Pro

- + Not easily renounced by other members.
- + It is essential to adapt to changes in circumstance over time. Interstate compacts do permit states to withdraw if needed, which is an important clause in order to increase buy-in by stakeholders.

Uniform Law—Pro

- + The ability to repeal or modify a uniform law gives states control over consent policies.
- + Promotes the ability to get the law passed initially, as states are not definitely locked in, they can later change their minds. There is some limitation on withdrawal in that the executive branch in the state may veto legislative attempts at later change.

Model Law—Pro

- + Promotes the ability to get the law passed initially, as states are not definitely locked in, they can later change their minds. There is some limitation on withdrawal in that the executive branch in the state may veto legislative attempts at later change. Might be more attractive for quick acceptance if states could modify the terms of the act (which, of course, would have the problem of destroying uniformity).

- + The ability to repeal or modify a model act gives states control over consent policies.

Choice of Law—Pro

Contractual Provision

- + Ease, pursuant to terms of contract.
- + A contractual provision is easier to withdraw from than a statute because it requires no legislative action.

Interstate Compact—Con

- Will need to cover the impact on exchanges that occurred previous to the withdrawal.
- Complex and potentially lengthy process to modify terms or withdraw.
- The withdrawal from the interstate compact would create uncertainty over the handling of PHI and create problems for health care providers as well as undermine patient assurance regarding privacy, particularly if prior consent laws were also repealed as part of the adoption of the interstate compact. Keeping track of which states have adopted or withdrawn from the uniform law will be difficult. Questions may arise as to what prevails if a state has withdrawn and whether the date of the consent is the deciding factor.

Uniform Law—Con

- Difficult to repeal a law, and until repealed, the law would be binding.
- Urgency bills require two-thirds vote to amend, to fix unintended consequences.
- The repeal of the uniform law would create uncertainty over the handling of PHI and create problems for health care providers as well as undermine patient assurance regarding privacy, particularly if prior consent laws were also repealed as part of the adoption of the uniform law. Keeping track of which states have adopted or withdrawn from the uniform law will be difficult. Questions may arise as to what prevails if a state has withdrawn and whether the date of the consent is the deciding factor.
- Allows for the possibility that the whole uniform system can fall apart at any time. Uniformity is dependent on 50 state legislators and governors.

Model Law—Con

- Difficult to repeal a law, and until repealed, the law would be binding.
- Urgency bills require two-thirds vote to amend, to fix unintended consequences.
- Allows for the possibility that the whole system can fall apart at any time. Consistency is dependent on 50 state legislators and governors. Withdrawal could destroy commonality.
- The repeal of the model act would create uncertainty over the handling of PHI and create problems for health care providers as well as undermine patient assurance regarding privacy, particularly if prior consent laws were also repealed as part of the adoption of the model act. Keeping track of which states have adopted or withdrawn

from the model act will be difficult. Questions may arise as to what prevails if a state has withdrawn.

Choice of Law—Con

Contractual Provision

- The ease with which it is possible to withdraw from a contractual choice of law provision may not provide the parties with much of a mandate for robust HIE.

Statutory Provision

- Difficult to repeal a law.
- Urgency bills require two-thirds vote to amend, to fix unintended consequences.

10 State Responsibilities

What would state government or policy makers have to do to promote adoption and enforcement of each mechanism? How likely is this to occur?

Interstate Compact

Responsible for educating stakeholders regarding the consent requirements that would apply under the interstate compact.

If the compact envisions a governing or administrative body, the member states may incur a fiscal responsibility to support the administrative body.

State government officials and policy makers would have to promote the compact and enact legislation authorizing the state to join the compact. In the same legislation, the state legislature will have to designate a lead governmental agency. The lead governmental agency and any subsequent statutes and administrative regulations will have to serve both to promote and educate potential users and other governmental entities as to the expectations created by the compact.

Uniform Law

States would be responsible for enacting the uniform law or one substantially similar. During and after enactment, states would need to educate stakeholders regarding the new consent requirements.

States would be responsible for educating stakeholders regarding the consent requirements that would apply after the adoption of the uniform law.

State government would have to enact the uniform law without change. To the extent any uniform law was consistent with current status of consent law in a state, there should not be significant obstacles to adoption. If the uniform law were significantly different from current state law, passage might be more difficult.

Model Law

Each state is responsible for comparing its current law to the model law. Each state would then have to decide which portions of the model law to adopt and whether that state has any laws that need to be changed. Then that state would have to pass all or only portions of the model law through the legislative process. Finally, the state may need to create regulations to implement the statute.

State government would have to enact model act legislation, either “as is” or with changes. To the extent any model act was consistent with current status of consent law in a state, there should not be significant obstacles to adoption “as is.” If a model act were significantly different from current state law, passage with changes would be more likely.

States would be responsible for educating stakeholders regarding the consent requirements that would apply after the adoption of the model act.

Choice of Law

The adoption of agreements that are consistent with a state law that specifies California law as the prevailing law would predominately be undertaken by private entities, and only in a dispute, through the court system, would the state undertake any responsibilities.

State responsibilities include the enforcement of the applicable statutes, within the discretion of the enforcement authority. The state may assist with implementation efforts concerning new statutes and will sometimes publish compliance guidance and other materials such as Frequently Asked Questions databases. The state also enforces contractual provisions when raised by litigation.

Generally, states have only the responsibility to enforce their own laws. For this reason, courts will often go to great length to avoid applying or interpreting foreign laws. Conversely, courts will, on occasion, make significant efforts to apply the laws of their jurisdiction. These inclinations are motivated by preferences and familiarity rather than formal legal theories. Nevertheless, the expression of this preference is effectively a choice of law.

Interstate Compact—Pro

- + Will need to ensure transparency on the decision-making process.
- + By serving as the primary driver of a compact, state government injects a higher level of stability and predictability into the expectations of HIE. This stability and predictability can be bolstered by the force of law as each member state insures compliance with the processes and mechanisms established through the compact.
- + The education of stakeholders regarding the consent requirements will result in buy-in.

Uniform Law—Pro

- + Potential for regulatory oversight and regulations to ensure uniformity and ease of implementation.
- + Providers prefer a mandate rather than a discretionary or permissive approach to consent.
- + A uniform law would potentially offer greater consistency among states and greater ease of information transfer across states than a model act.

Model Law—Pro

- + State has responsibility in deciding which portions of the law to enact.
- + Potential for regulatory oversight and regulations to ensure uniformity and ease of implementation.
- + Potentially easier acceptance by states of model act over a uniform law, due to ability to make changes, or to adopt part but not all of model act.
- + Providers prefer a mandate rather than a discretionary or permissive approach to consent.

Choice of Law—Pro

Contractual Provision

- + Minimal state responsibility.
- + The ambiguities created by the current state of affairs do allow for some flexibility to address unexpected circumstances without having to formally amend fixed or codified terms.

Statutory Provision

- + Potential for regulatory oversight and regulations.

Interstate Compact—Con

- Lack of resources may impact implementation.
- Education will be needed.
- As with all governmental programs or involvement, there will be a certain amount of bureaucracy accompanying compact-sanctioned transactions. Additionally, due to variations in governmental structures from state to state, there will be some inconsistencies as to the specific governmental entity managing compact issues or concerns; however, the impact of these variations should be minimal.
- An interstate compact may be pursued without providing adequate funding and content analysis to support an initiative to educate stakeholders on the compact's consent procedures. The group estimated that it might cost providers \$120,000 to educate their staff and patients. Funding support by the state will be a critical component for increasing buy-in by providers.

Uniform Law—Con

- Lack of resources may impact implementation.
- Education will be needed.
- If there are variations in the law, it could lead to conflicting interpretations and differences in implementation.
- This will impose additional mandates on providers, which will have a cost. If the uniform law is only an overlay to the laws concerning paper, then providers will have to figure out if they need two processes in place to handle the difference between EHR transfer versus paper transfer. The drafters should consider cost to providers when creating the legislation. In addition, the drafters should consider cost to patients when creating the legislation.
- A uniform law offers much less flexibility; there is a greater likelihood that states would refuse to enact uniform law than a model act.

Model Law—Con

- Lack of resources may impact implementation.
- Education will be needed.
- If there are variations in the law, it could lead to conflicting interpretations and differences in implementation.
- Greater likelihood of inconsistency among states due to potential multiple variations of model act being adopted.
- This will impose additional mandates on providers, which will have a cost. If the model act is only an overlay to the laws concerning paper, then providers will have to determine if they need two processes in place to handle the difference between EHR transfer versus paper transfer. The drafters should consider cost to providers when creating the legislation. In addition, the drafters should consider cost to patients when creating the legislation.

Choice of Law

Contractual Provision

- No oversight currently being performed; may need to develop.
- This being the present state of affairs, choosing this option continues the present uncertainty.

Statutory Provision

- Integration of other state regulators.
- Choice of law will not be helpful unless we have consistent adoption and application. There is a possibility that the choice of law could be in conflict with both state and federal laws, as well as result in a contract dispute if there is a violation.

11 State's Rights

How does the proposal impact issues related to importance of maintaining state sovereignty and adhering to state constitutional limitations?

Interstate Compact

A state can retain as much of its primary sovereignty as the terms of the compact will allow.

A compact is used in matters affecting the interests of multiple states or, in the case of access to medical records, the individual citizens of multiple states. As such, it permits states to work together to address the mutual practical and policy issues. This reinforces the rights of the state to address such issues. Nevertheless, because the compact supersedes the application of an individual state's laws, it also limits the ability of a state to unilaterally establish policy in the area covered by the compact.

As noted by CSG, "compact language is usually drafted with state constitutional requirements common to most state constitutions such as separation of powers, delegation of power, and debt limitations in mind. The validity of the state authority to enter into compacts and potentially delegate authority to an interstate agency has been specifically recognized and unanimously upheld by the U.S. Supreme Court in *West Virginia v. Sims*, 341 U.S. 22 (1951)."⁷⁰

States join the interstate compact only after going through the legislative process. Once a member, the state has the rights stated in the terms of the compact. Under the approaches considered in this document, there is not an administrative or arbitration process that would affect a state's rights. One right states would be expected to retain is the right to withdraw from the compact.

Uniform Law

The uniform act, having been developed through the NCCUSL process, will have had experts and state representatives provide input in the drafting of the act. States retain the ability to establish requirements that are more responsive to their needs, but if the changes are substantially dissimilar, the benefit of uniformity maybe lost.

The uniform law mechanism sets forth a state solution to the issue of the interstate exchange of PHI, instead of a federal mandated approach. States retain the ability to establish requirements that are more responsive to their needs.

State government has little to no control over text of a uniform law to be adopted; "take it or leave it" is only option to exercise state sovereignty.

⁷⁰ Frequently Asked Questions: Compacts Generally, Council of State Governments—National Center for Interstate Compacts. Available at http://online.nwf.org/site/DocServer/Compact_FAQs.pdf?docID=701.

Model Law

Each state will have the authority to adopt whatever portions of the model law it chooses to adopt and can adopt alternative language to the model law. Therefore, each state retains the complete right to enact the law as it decides it should be. In this manner, a state's rights are not implicated.

However, as stated above, if federal law does control and a provision is somehow adopted that does not comply with federal law, then federal preemption questions could arise.

State government has greater control over text of model act to be adopted.

The model act mechanism sets forth a state solution to the issue of the interstate exchange of PHI, instead of a federal mandated approach. States retain the ability to establish requirements that are more responsive to their needs.

Choice of Law

If California were to enact a "choice of law" that made its rules concerning privacy rights dominant over all health information covered under California law, such a law would be the ultimate exercise of sovereignty; however, there may be concerns over the impact of the Commerce Clause.

States generally 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 protecting 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' PHI, given that HIO members located in a given state probably have a preponderance of PHI from residents of that state. 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 preemption of their state laws in favor of a federal statute that governs choice of law in consent matters.

Interstate Compact—Pro

- + Need a strong presence in the drafting.
- + The establishment of a compact makes it less likely that the federal government will enact or promulgate preemptive laws or regulations. In other words, an effective compact will lessen or eliminate the need for federal government intervention. Thus, a compact will assist in preserving the rights of the states to have control over the policies governing access to medical records.
- + An interstate compact is a reasonable, state-directed solution to the problem of conflicting state laws.

Uniform Law—Pro

- + Need a strong presence in the drafting.

- + States retain the ability to establish requirements that are more responsive to their needs.
- + A uniform law would potentially offer greater consistency among states and greater ease of information transfer across states than a model act.

Model Law—Pro

- + States maintain their ability to choose or not to choose which provisions to adopt.
- + Offers greater deference to individual states and state sovereignty, due to ability to make changes, or to adopt part but not all of model act.
- + States retain the ability to establish requirements that are more responsive to their needs.

Choice of Law—Pro

Statutory Provision

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

Interstate Compact—Con

- Need to ensure retention of jurisdiction for disputes involving state laws.
- A compact will limit the rights of the individual compact states to alter the policies or procedures to access medical records. In other words, a state may enact new laws pertaining to privacy or access to specific health records, but the compact provisions will supersede those laws in any situation in which the compact applies. Thus a state cannot unilaterally alter the process for access to medical records in any situation in which the compact applies.
- An interstate compact does not ensure a solution for every state. This would require a federal standard. An interstate compact will also require another layer of legal analysis for providers.

Uniform Law—Con

- If all states do not adopt the act with similar language, it might work well for only those states whose acts are in alignment. This may detract from the consistency of the overall impact of the uniform law.
- A uniform law offers less deference to individual states and state sovereignty.

Model Law—Con

- Less likely to reach objective of facilitating exchange of information across states; end result could be similar to current situation (status quo).
- If all states do not adopt the act with similar language, it might work well for only those states whose acts are in alignment. This may detract from the consistency of the overall impact of the model act.

Choice of Law—Con

Contractual Provision

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

Statutory Provision

- Businesses would not like different laws for each state.

12 Enforcement

How difficult will it be to enforce each proposed mechanism if enacted, and which state agency or organization will assume enforcement responsibilities? How are the state’s laws regarding inappropriate release of information or failure to obtain appropriate consent to release information currently enforced, and how, if at all, would the implementation of each proposed mechanism modify enforcement authority?

Interstate Compact

Since compacts are agreements between states, the U.S. Supreme Court is the usual forum for the resolution of disputes between member states.

Compacts frequently include provisions to resolve disputes through arbitration or other means.

As an interstate compact is essentially a congressionally approved contract among the member states, with its remedies best set forth within the terms of compact. The enforceability compact is directly tied to congressional approval; without such approval, the compact is nonbinding and legally unenforceable upon the members. Thus, disputes within an approved compact are matters between the states and within federal subject-matter jurisdiction. However, federal courts are often reluctant to apply certain contract remedies as the parties and the compact are atypical (*Waterfront Com’n of New York Harbor v. Construction and Marine Equipment Co., Inc.*, 928 F.Supp. 1388 [D.N.J. 1996]). For example, federal courts will refrain from the equitable remedy of reforming the compact even in the face of unforeseen circumstances (*Texas v. New Mexico*, 462 U.S. 554, 103 S.Ct. 2558, 77 L.Ed.2d 1 [1983]; *New Jersey v. New York*, 118 S.Ct. 1726 [1998]). While the remedy of monetary damages is complicated by the Tenth Amendment, specific performance is a reasonable alternative (*Texas v. New Mexico*, 462 U.S. 554). However, when the terms of the compact set forth a dispute resolution mechanism, the courts generally prefer deference to that mechanism even when the mechanism is not efficient or necessarily effective (see *Texas v. New Mexico*, 462 U.S. 554; *Waterfront Com’n of New York Harbor*, 928 F.Supp. 1388). A compact, in and of itself, does not directly alter the intrastate legal expectations. That is, a potential interstate compact on HIE across state

boundaries can be limited only to the management of that exchange setting. It is only when the compact terms address the specific issue addressed by the compact that the effect of joining the compact serves to create a cognizable exception to the standard or usual expectations. However, even a well-crafted compact term cannot create an exception to a constitutional expectation if the state legislature does have specific authority to create the exception. Nevertheless, the pressure that standardized interstate exchange expectations create on intrastate exchanges to match those expectations will be proportional to the amount or reutilization of the interstate exchange through the established interstate compact protocols. In other words, the more the health care system uses the interstate compact mechanisms, the more likely the health care system will look to those mechanisms as the generalized standards for all exchange. For these reasons, the compact should carefully set out the enforcement mechanisms that arbitrate concerns and divergent understanding in a timely fashion (e.g., governing bodies, mediation board, dispute board, etc.). Additionally, given the potential pressure to standardize intrastate HIE by the standardization of interstate HIE, it is potentially advisable for the compact to specifically address the matter in its construction and terms.

Enforcement in the context of interstate compacts is normally viewed from the prospective of ensuring compliance with their provisions. In addressing this issue, CSG states:

A violation of compact terms, like a breach of contract, is subject to judicial remedy. Since compacts are agreements between states, the U.S. Supreme Court is the usual forum for the resolution of disputes between member states. However, compacts can, and frequently do, include provisions to resolve disputes through arbitration or other means.⁷¹

In the context of crafting an interstate compact that addresses consent issues for the release of PHI, enforcement of unauthorized releases of information can lead to criminal or civil sanctions. State consent laws typically include some form of penalty for the unauthorized release of information. For example, violation of Illinois’s Mental Health and Developmental Disabilities Confidentiality Act is a Class A misdemeanor. The act also authorizes a person “aggrieved by a violation” to sue for “damages, an injunction, or other appropriate relief.”

With respect to Approaches 1 and 2, the statutory authority for the criminal or civil sanctions in the requesting or responding state will presumably still exist under the auspices of the interstate compact.

The ramifications of sanctioning persons for violating the consensus consent requirements developed by compact members under Approach 3 would have to be addressed in the drafting process. One option would be the creation of an arbitration process.

⁷¹ Council of State Governments, p. 2. Available at <http://ssl.csg.org/compactlaws/Introoverview.doc>.

Uniform Law

Under the terms of the uniform act, enforcement will probably be based on state laws, incorporating the terms of the act.

Under the uniform law mechanism, enforcement issues fall within the purview of the adopting states.

States generally 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 protecting their own citizens. 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. A state with a restrictive consent requirement has no authority in most situations to enforce its statute against an HIO or provider that operates outside of the state's boundaries, even if the violation involved the PHI of a resident of that state. In the scenario of an HIO that is exchanging PHI, the actions affecting the PHI are being performed in two or more states. The responding state will have jurisdiction over the initial collection of the PHI, while the requesting state will have jurisdiction over the subsequent use of that PHI. The issue of where the disclosure occurred will likely decide which state's law is applicable to the disclosure, and may even involve a third state where the data is physically stored or where the HIO operates. The use of a uniform law could help to standardize the statutes, while allowing each state to maintain its own statutes and to use its existing enforcement agencies and processes.

Model Law

Under the terms of the model law, enforcement will probably be based on state laws, incorporating the terms of the law.

Under a model act, the enforcement mechanism could defer these decisions to the states, or it could specify a uniform enforcement mechanism, determining which state's law would apply, and providing remedies.

Under the model act mechanism, enforcement issues fall within the purview of the adopting states. States generally 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 protecting their own citizens. 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. A state with a restrictive consent requirement has no authority in most situations to enforce its statute against an HIO or provider that operates outside of the state's boundaries, even if the violation involved the PHI of a resident of that state. In the scenario of an HIO that is exchanging PHI, the actions

affecting the PHI are being performed in two or more states. The responding state will have jurisdiction over the initial collection of the PHI, while the requesting state will have jurisdiction over the subsequent use of that PHI. The issue of where the disclosure occurred will likely decide which state’s law is applicable to the disclosure, and may even involve a third state where the data is physically stored or where the HIO operates. The use of a model act could help to standardize the statutes, while allowing each state to maintain its own statutes and to use its existing enforcement agencies and processes.

Choice of Law

Enforcement could be problematic under “choice of law” for the consumer. If the choice of law agreement is between providers, without real knowledge and participation by the consumer, the consumer may not be aware of which law is controlling and may not be bound by any third-party agreement.

Under the choice of law approach, enforcement issues fall within the purview of the adopting states.

States generally 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 protecting their own citizens. 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. A state with a restrictive consent requirement has no authority in most situations to enforce its statute against an HIO or provider that operates outside of the state’s boundaries, even if the violation involved the PHI of a resident of that state. In the scenario of an HIO that is exchanging PHI, the actions affecting the PHI are being performed in two or more states. The responding state will have jurisdiction over the initial collection of the PHI, while the requesting state will have jurisdiction over the subsequent use of that PHI. The issue of where the disclosure occurred will likely decide which state’s law is applicable to the disclosure, and may even involve a third state where the data is physically stored or where the HIO operates. The use of a choice of law provision could help to clarify which statute to apply, while allowing each state to maintain its own statutes and to use its existing enforcement agencies and processes. The requesting and responding states are obligated to comply with the statutes of the state in which they reside. If a state passes a choice of law statute that requires compliance with the requesting state’s law, the state would still be enforcing its own statute, although it may have to interpret and apply the requesting state’s applicable law. The states would likely use the existing enforcement agencies and methods that they currently apply.

Interstate Compact—Pro

- + Can design flexibility with enforcement.

- + Possible to create a certification process to ease implementation.
- + Uniformity will ease enforcement.
- + By addressing enforcement, the compact remains the master of its own fate.
- + Enforcement is necessary to achieve compliance and gives the compact a sense of importance.

Uniform Law—Pro

- + Can be specifically addressed in the provisions of the uniform law.
- + Each state retains the ability to decide enforcement issues, and may set up a mechanism as it sees fit, unless directed by the uniform law. The formation of a quick, deliberative advisory body to enforce the law will circumvent time delays, as well as define parameters to avoid having tort litigation define the law.
- + If there is no enforcement mechanism specified, then it would probably make passage by the states easier and faster since states will not be locked into a mechanism they may not like.

Model Law—Pro

- + Can be specifically addressed in the provisions of the model law.
- + If there is no enforcement mechanism specified, then it would probably make passage by the states easier and faster since states will not be locked into a mechanism they may not like.
- + Each state retains the ability to decide enforcement issues, and may set up a mechanism as it sees fit, unless directed by the model act. The formation of a quick, deliberative advisory body to enforce the law will circumvent time delays, as well as define parameters to avoid having tort litigation define the law.

Choice of Law—Pro

Contractual Provision

- + Ease for parties to dispute, by terms of contract.
- + May be more cost effective to enforce.

Statutory Provision

- + Statute can spell out enforcement, bring in regulatory oversight.
- + A consistent choice of law provision could result in the state enforcing its own choice of law provision, rather than enforcing another state's law.

Interstate Compact—Con

- Cannot depend on the Office of Inspector General (OIG)-Civil Rights for enforcement; will need each state's enforcement to be on top of it.
- If the standards are permissive, may lack enforceability.
- Failing to address enforcement within the terms of the compact fosters litigation and ambiguity within the compact processes.

- Without a clearly defined enforcement provision, federal courts are confounded as to the appropriate remedies. However, it is important to note that Ohio cannot, under current law, agree to arbitration clauses.
- States will be required to coordinate their state law with what the compact dictates. There will be additional costs if an arbitration process is created. This may also create third-party rights where none previously existed.

Uniform Law—Con

- Lack of uniformity can cause major problems with a uniform enforcement program.
- If not drafted appropriately, the uniform law could create additional confusion over enforcement issues and lead to competing legal jurisdictions ruling on consent policies. A judicial remedy for enforcement might arise which would take a longer time period. Providers requiring quick action may be delayed in getting needed information. Uniform laws could help to standardize the requirements and simplify compliance. However, uniform laws are not required to be implemented verbatim, so some variation will remain. Additionally, jurisdiction will determine which state's statute will be applied. The applicable state statute will likely change during the life cycle of the PHI. One state's statute will apply while the PHI is initially collected and added to the HIO. A second state's statute will apply to the request for disclosure and to the subsequent uses of the PHI. Possibly, a third state's statute will apply to the disclosure, depending on the actual mechanism of disclosure and where the disclosure is deemed to have taken place.

Model Law—Con

- Lack of uniformity can cause major problems with a uniform enforcement program.
- If there is no enforcement mechanism specified, then there may be widely varying enforcement mechanisms from state to state. Unless there is some resolution on which state's law applies with regard to enforcement (i.e., the receiving or the responding state's laws) then there may be forum shopping, conflicting state decisions, and varying remedies.
- If not drafted appropriately, the model act could create additional confusion over enforcement issues and lead to competing legal jurisdictions ruling on consent policies. A judicial remedy for enforcement might arise which would take a longer time period. Providers requiring quick action may be delayed in getting needed information. Model acts could help to standardize the requirements and simplify compliance. However, model acts are not required to be implemented verbatim, so some variation will remain. Additionally, jurisdiction will determine which state's statute will be applied. The applicable state statute will likely change during the life cycle of the PHI. One state's statute will apply while the PHI is initially collected and added to the HIO. A second state's statute will apply to the request for disclosure and to the subsequent uses of the PHI. Possibly, a third state's statute will apply to the disclosure, depending on the actual mechanism of disclosure and where the disclosure is deemed to have taken place.

Choice of Law—Con

Contractual Provision

- State law enforceability may be questionable.

Statutory Provision

- Choice of law provisions are not required to be implemented verbatim, so some variation may remain. The applicable state statute will likely change during the life cycle of the PHI. One state’s statute will apply while the PHI is initially collected and added to the HIO. A second state’s statute will apply to the request for disclosure and to the subsequent uses of the PHI. Possibly, a third state’s statute will apply to the disclosure, depending on the actual mechanism of disclosure and where the disclosure is deemed to have taken place.

13 Other Considerations

Interstate Compact

Must consider need for congressional approval of compact and effect thereof—affects whether compact will be considered federal law, and aspects of jurisdiction and enforcement; should consider careful design of compact administration to be effective and efficient.

One of the overarching issues to be resolved for an interstate compact attempting to address the conflict of varying consent laws on the interstate transfer of health information is whether congressional consent is required. The requirement for congressional consent for interstate compacts is set forth in the U.S. Constitution, Article I, Section 10: “No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State. . . .” A literal reading of the provision suggests that congressional consent is required for every interstate compact; however, in *Virginia v. Tennessee*, 148 U.S. 503, 13 S.Ct. 728, 37 L.Ed. 537 (1893), the U.S. Supreme Court held that only those agreements which affect the power of the national government or the “political balance” within the federal government require the consent of Congress. Under the *Virginia v. Tennessee* rule, just because an agreement by two or more states is called a “compact,” that does not automatically mean that it must obtain congressional consent.

If an interstate compact does affect a federal interest, the absence of congressional consent renders it void as between the states. Generally, if an interstate compact merely accomplishes what the states are otherwise empowered to do unilaterally, then no federal interest arises. Some state compacts have addressed the issue of congressional consent by including provisions that the respective states’ attorneys general will seek congressional consent if they deem such consent necessary. The Illinois and Iowa Quad Cities Interstate Metropolitan Authority Compact is an example of that approach. It contains the following provision that addresses the issue of congressional consent:

Article 19. Consent of Congress. The Attorneys General of the states of Iowa and Illinois shall jointly seek the consent of the Congress of the United States

to enter into or implement this compact if either of them believes the consent of the Congress of the United States is necessary.⁷²

Furthermore, the compact terms provided that it was “binding on the states of Illinois and Iowa to the full extent allowed without the consent of Congress.”⁷³

An interstate compact concerning consent requirements for the release of PHI does not appear to affect federal interests. The interstate compact does not shift power between the states and federal government; in fact, the intent is to remain compliant with federal consent law, such as HIPAA. The interstate compact does not encroach on a power reserved to Congress; instead, it seeks to rationalize laws that individual states currently enforce. Certainly, the states are already empowered to pass laws concerning privacy protections for their citizens and persons within their jurisdiction. It appears likely that the contemplated interstate compact to standardize the application of state law to PHI requests would not require congressional consent. In the event that congressional consent is deemed appropriate, such consent has been implied after the fact and explicitly given after the fact. The drafting and legislation of the interstate compact could proceed, and consent could be sought, if needed, after a final version of the interstate compact has been adopted. Alternatively, congressional consent could be obtained preemptively, such as by passing an act, but seeking such an advance consent is likely outside the scope of this project.

Congressional approval, or lack thereof, can be expected to be an issue in litigation challenging the exchange of PHI in a manner consistent with the interstate compact, but not with the requesting state’s consent laws.

Uniform Law

The Illinois General Assembly will likely try to improve a uniform law that is introduced.

Model Law

Federal action is currently underway with respect to consent management in the context of electronic prescribing systems and EHRs. The American Health Information Community, an advisory group to the U.S. Department of Health and Human Services on HIE, has published a Use Case for Consent Management, which can be expected, over the next several years, to generate criteria for the Interoperability Certification performed by the Certification Commission for Health Information Technology, a nonprofit organization established to certify health care IT products. Such certification is a means by which e-prescribing and EHR systems can be certified as interoperable, and therefore eligible for Stark Exceptions and

⁷² Interstate Compacts (45 ILCS 30/), Quad Cities Interstate Metropolitan Authority Compact Act, Illinois General Assembly website. Available at <http://www.ilga.gov/LEGISLATION/ILCS/ilcs3.asp?ActID=647&ChapAct=45%26nbsp%3BILCS%26nbsp%3B30%2F&ChapterID=10&ChapterName=INTERSTATE+COMPACTS&ActName=Quad+Cities+Interstate+Metropolitan+Authority+Compact+Act>.

⁷³ Ibid.

Anti-Kickback Safe Harbors if used in a health IT donation program. At a minimum, the model act should at least consider maintaining consistency or at least compatibility with the Consent Management Use Case.

Choice of Law

HISPC-Illinois determined that the choice of law mechanism is a very cumbersome approach and legally complicated. Specifying a choice of law 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 of 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 choice of law provision to work depends on its consistent adoption by numerous states (such as a "model" or "uniform" choice of law provision). This is unlikely to occur. Even if it were adopted uniformly, the underlying laws are inconsistent. Therefore, a choice of law 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.

Pro

None.

Con

None.