

Health Records: Coordination of Care Issues and State Policies

Coordination of Care

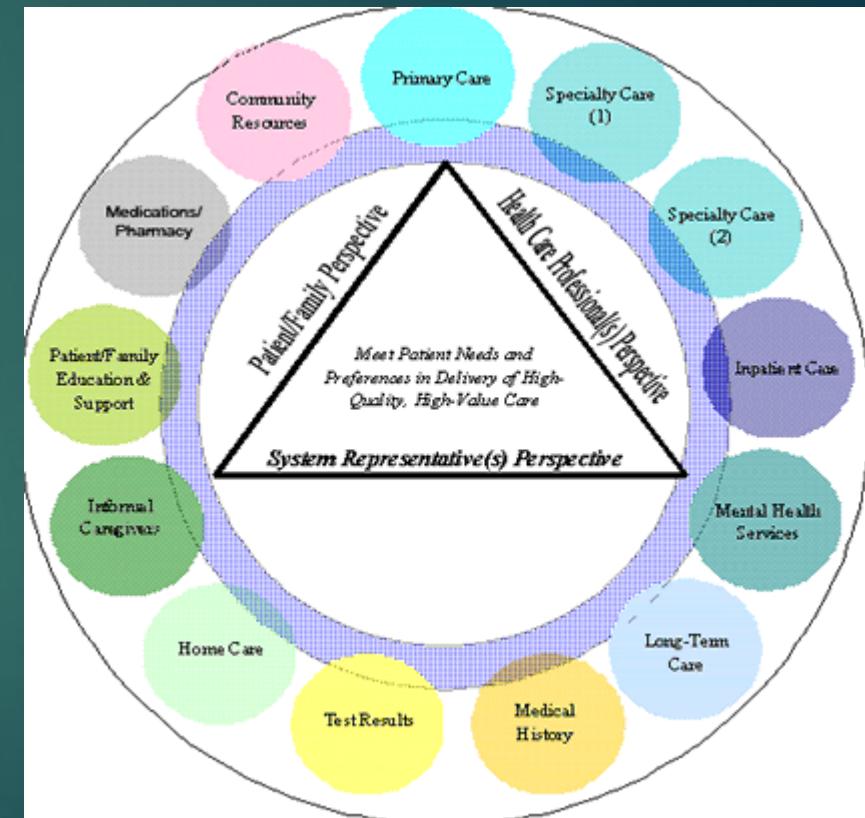
- ▶ There is no universal definition for coordination of care.
- ▶ U.S. Dept. of Health and Human Services has used the following definition:
 - ▶ “the deliberate organization of patient care activities between two or more participants (including the patient) involved in a patient's care to facilitate the appropriate delivery of health care services. Organizing care involves the marshalling of personnel and other resources needed to carry out all required patient care activities and is often managed by the exchange of information among participants responsible for different aspects of care”

The Primary Problem with Health Records during Coordination of Care

- ▶ Exchanging Information during Points of Transition
 - ▶ Points of Transition:
 - ▶ Exchanging information between multiple covered entities;
 - ▶ Exchanging information over a large span of time either within the same entity or among multiple entities.

The Primary Problem with Health Records during Coordination of Care

- ▶ Most often a breakdown in the coordination of care occurs when barriers prevent an easy exchange of information.
- ▶ Patients, Professionals, and System Representatives experience this breakdown differently.
 - ▶ Patients – exerting more effort than they feel they should
 - ▶ Health Care Professionals – experiencing delays or refusals to exchange information
 - ▶ System Representatives – systems not functioning as intended or are not adaptable to changes



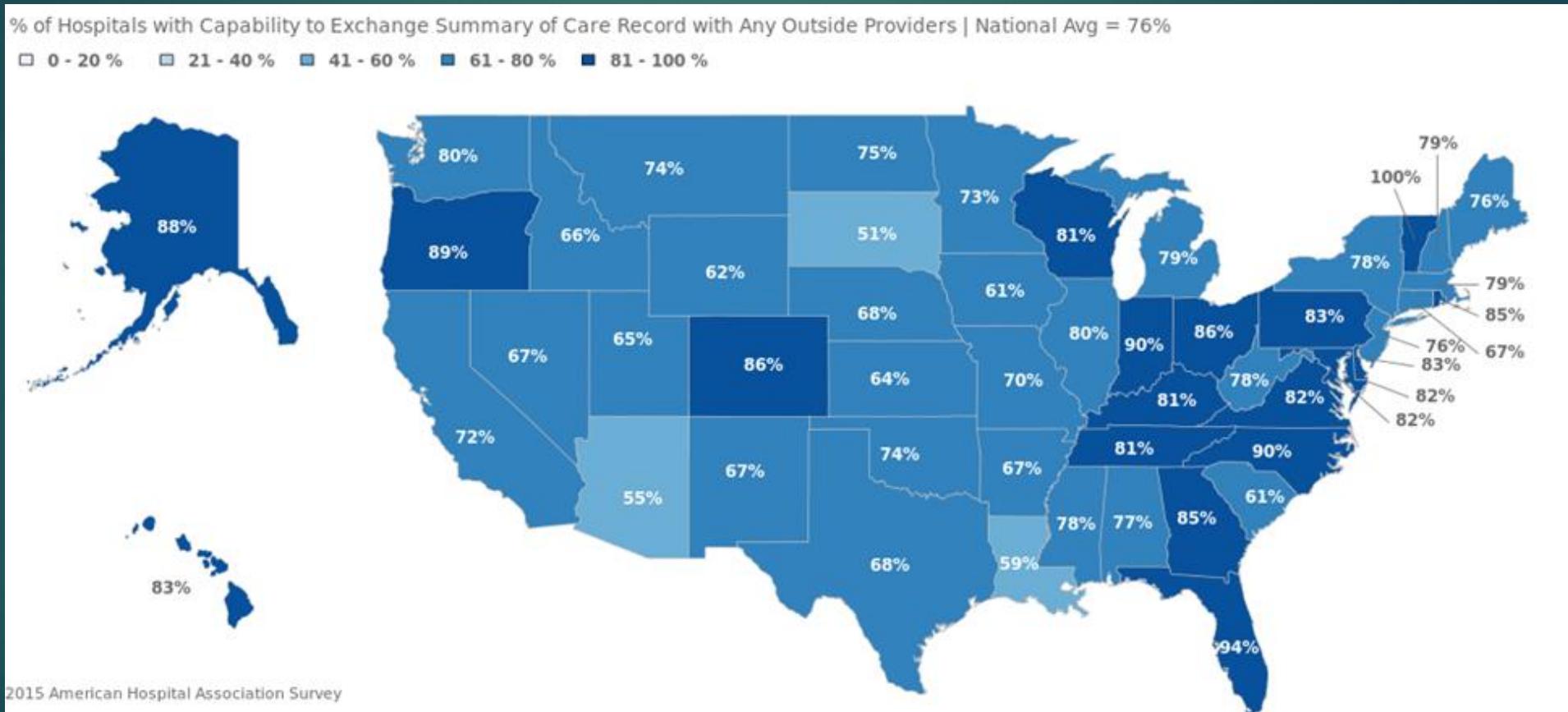
Barriers during the Exchange of Information

- ▶ Some barriers in exchanging information are the state and federal laws designed to protect health records and patient privacy.
 - ▶ This includes the Minnesota Health Records Act (MHRA) and the Health Insurance Portability and Accountability Act (HIPAA).
- ▶ HIPAA's Privacy Rule allows for the exchange of information without patient consent for the purpose of treatment, payment, and health care operations.
- ▶ Stringent state laws, like MHRA, do not allow for exceptions to consent as HIPAA does. As a result stringent state laws may slow or prohibit the exchange of information without patient consent.

Is MHRA a Barrier in the Exchange of Information?

- ▶ IBM Watson Study of Health Systems
 - ▶ Evaluated 338 health systems and 2,422 health system member hospitals
 - ▶ Evaluation is based on public data, including patient satisfaction data from the Centers for Medicare & Medicaid Services (CMS) Hospital Compare website
 - ▶ Mayo Clinic ranks in the top 5 of large health systems
 - ▶ HealthPartners ranks in the top 5 of medium health systems
- ▶ According to Office of National Coordinator for Health IT (ONC), on average 76% of hospitals have the capability to exchange a summary of care record with any outside provider.
 - ▶ Minnesota is only 3% below national average with 73% of hospitals having ability to exchange summary with any outside provider.

Is MHRA a Barrier in the Exchange of Information?



Is HIPAA a Barrier in the Exchange of Information?

- ▶ Professionals have complained that the complexities of HIPAA hinder their ability to understand the law and easily exchange information.
 - ▶ Testimony of Mark Rothstein (Dir of Health Policy and Law at U of Louisville)
 - ▶ “Additional efforts to increase understanding of the privacy rule by the public and covered entities . . . will enhance the effectiveness of the Privacy Rule.”
- ▶ Others believe that fear of liability for HIPAA violations prevent professionals from disclosing information that they otherwise may be permitted to disclose.
 - ▶ Dr. Cassidy (Former Rep., Current Sen. R-La) Testimony on Physician Liability
- ▶ Some have raised concern about professionals hiding behind confusion of HIPAA, allowing them to only speak to patients and not with family members or other parties with the right to access information.
 - ▶ Dr. Gingrey (Former Representative R-Ga) Testimony

What happens if Minnesota eliminates MHRA?

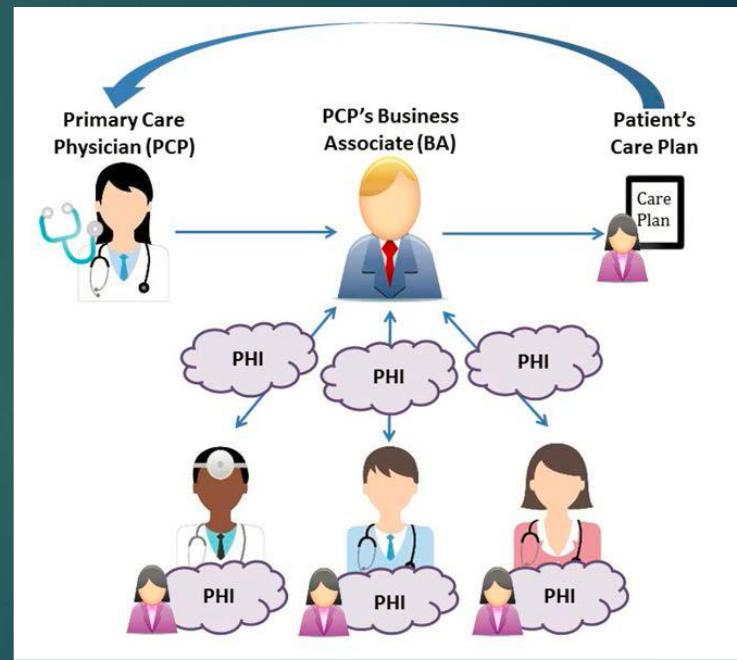
- ▶ Eliminating MHRA does not necessarily alleviate issues with coordination of care. As described at the 2013 Congressional Hearing on HIPAA, there are still problems with coordinating care under HIPAA.
- ▶ Eliminating MHRA affects the following four areas:
 - ▶ Patient consent would no longer be required in order to disclose a patient's protected health information (PHI) for the purpose of treatment, payment, and health care operations.
 - ▶ HIPAA's Privacy Rule allows for disclosures, without patient consent, for the purpose of treatment, payment, and health care operations.

What happens if Minnesota eliminates MHRA?

- ▶ Disclosures made without patient consent, for the purpose of **payment** and **health care operations** are limited by the minimum necessary standard.
- ▶ The **minimum necessary standard** requires a covered entity to limit the use, disclosure, and requests for PHI to the minimum necessary information needed to accomplish the intended purpose.
- ▶ The minimum necessary standard requires covered entities to make their own assessment of what PHI is **reasonably necessary** for a particular purpose, given the characteristics of their business and workforce; and requires covered entities to implement policies and procedures accordingly.
- ▶ Disclosures, without patient consent, for the purpose of **treatment** are NOT limited by the minimum necessary standard.

What happens if Minnesota eliminates MHRA?

- ▶ Not limiting treatment disclosures under the minimum necessary standard allows the following entities or persons, among others, to disclose unlimited PHI without patient consent:
 - ▶ Health care providers, lab technicians, nursing homes, pharmacists, outpatient treatment facilities, EMTs, social service agencies coordinating patient care, Business Associates (BA) assigned with managing aftercare, etc.
 - ▶ Additionally Business Associates may disclose PHI to their subcontractors.
- ▶ This is problematic because patients cannot prohibit or control disclosures of their PHI to anyone under the treatment exception.



What happens if Minnesota eliminates MHRA?

- ▶ Beyond the Privacy Rule, by reverting to HIPAA patients would continue to lose control over their PHI.
- ▶ 45 CFR § 164.522(a) provides patients a right to request a covered entity to restrict the “Uses or disclosures of protected health information about the individual to carry out treatment, payment, or health care operations . . .”
- ▶ However, the covered entity is not required to agree to such a request/restriction.
- ▶ Patients consent would not be required to use PHI for external research purposes.
 - ▶ Currently, under Minn. Stat. § 144.295 providers must provide patients the opportunity to object to their records being released for the purpose of research.
 - ▶ HIPAA allows covered entities to use PHI, without a patients consent, for the purpose of research, so long as PHI is de-identified.

What happens if Minnesota eliminates MHRA?

- ▶ Minnesotans would lose their right to private action for violations of MHRA
 - ▶ Currently, under Minn. Stat. § 144.298, violations of MHRA may result in disciplinary action by the licensing board or agency, and compensatory damages, plus costs and reasonable attorney fees.
 - ▶ The only recourse will be filing a complaint with the Office of Civil Rights, or relying on the State Attorney General to bring a civil action
- ▶ Problems with OCR complaints
 - ▶ Small scale violations are typically not investigated, the violator may be terminated, but often the provider faces no punishment by the OCR.
 - ▶ Example: the details of a woman's son's attempted suicide was shared at school, leading to bullying, which he previously did not experience. Seeking redress the mother's best option was to file a lawsuit, which is allowed in NJ only under a common law invasion of privacy claim, which may place a higher burden of proof on the plaintiff.

What happens if Minnesota eliminates MHRA?

- ▶ Problems with OCR complaints continued:
 - ▶ Even large scale and consistent violations do not always result in sanctions.
 - ▶ VA from 2011 to 2014 violated HIPAA 220 times.
 - ▶ Wife checking ex-husbands records over 260 times.
 - ▶ Employee searching a patients records over 61 times and posting details on Facebook.
 - ▶ Employee providing patient health information to parole officer.
 - ▶ VA did not receive public reprimand, or sanctions.
 - ▶ Instead, they were given corrective action plans or provided technical assistance by the OCR on how to comply with HIPAA.

How do other states handle health care privacy?

- ▶ Most states have adopted HIPAA or legislation that parallels HIPAA.
- ▶ California—Confidentiality of Medical Information Act (CMIA)
 - ▶ According to PrivacyRights.Org CMIA provides more privacy protection than HIPAA. However, like many states, CMIA provides for the same exceptions to consent as HIPAA.
 - ▶ Generally, a patient's written authorization is required for the use and disclosure of medical records.
 - ▶ Exceptions to consent under CMIA include, de-identified PHI for research purposes, treatment, health care operations, payment.
- ▶ Florida—Fl. Stat. § 456.057
 - ▶ Law allows for disclosures, without patient consent, for the purpose of treatment.
 - ▶ There is no exception to consent for the purpose of payment or health care operations.

How do other states handle health care privacy?

- ▶ Georgia—Good Faith Exception
 - ▶ Ga. Stat. § 31-33-2, paragraph (e) “Any provider or person who in good faith releases copies of medical records in accordance with this Code section shall not be found to have violated any criminal law or to be civilly liable to the patient, the deceased patient's estate, or to any other person.”
- ▶ Maryland—Criminal Penalties
 - ▶ Maryland law generally follows HIPAA. However, there are criminal penalties for the wrongful disclosure or obtaining of medical records.
 - ▶ A knowing and willful violation is a misdemeanor, punishable by imprisonment up to one (1) year, and/or fines up to \$50,000.00.
 - ▶ Penalties increase If:
 - ▶ Disclosure is made under false pretenses
 - ▶ Disclosure is done with the intent to sell, transfer, or use for commercial advantage, personal gain, or malicious harm.

How do other states handle health care privacy?

- ▶ Massachusetts—PATCH Act
 - ▶ Signed by Governor on March 30, 2018
 - ▶ Focuses on privacy of medical records throughout the payment process.
 - ▶ Provides patients the ability to select a physical and e-mail address, separate from the policyholder's.
 - ▶ Patients can opt out of receiving payment forms if no money is due.
 - ▶ Protects privacy of adult dependents.

How do other states handle health care privacy?

- ▶ Rhode Island—Confidentiality of Health Care Communications and Information Act
 - ▶ RI Gen L § 5-37.3-4 allows for the disclosure of medical records, without patient consent, for the purpose of treatment in **emergency** circumstances, and requires requests be made in **good faith**.
 - ▶ (a) Provides that any person who violates the Act can be liable for actual and punitive damages plus reasonable attorneys fees, and may face criminal charges.
 - ▶ (c) Outlines security requirements for third parties receiving medical records.
 - ▶ (d) Outlines requirements of consent forms for the release or transfer of medical records.
- ▶ South Carolina—Physicians' Patient Records Act
 - ▶ SC Code § 44-115-60 allows physicians right to refuse to release a copy of the patient's entire medical record in circumstances where release is otherwise prohibited by law, and allows physicians to instead provide a summary or portion of the record.