

SB 251
TASK FORCE TO STUDY ELECTRONIC HEALTH RECORDS

May 14, 2007

MINUTES – Revised June 18, 2007

Task Force Members in Attendance √, Absent x, Representative *:

√ Thomas Allen	x Paul Fowler	x*Shane Pendergrass
x*Stephanie Amey	x David Gens	x Victor Plavner
√ Peter Basch	x Mary Hendler	√ Jack Schwartz
x Beverly Collins	x Paula Hollinger	√ Kevin Sexton
x Barbara Cook	x Aubrey Knight	√ Dorothy Snow
x Jimmie Drummond	√ Carey Leverett	x Angelo Voxakis
√ Rex Cowdry	√ Thomas Lewis	x James Wieland
√ John Eichensehr	x Gina McKnight-Smith	√ Ken Yale
x Michael Flores	√ Susan Newbold	

*DeWayne L. Oberlander for Shane Pendergrass

*Elaine Frazier for Stephanie Amey

Pre-Session Presentation

Task Force Chairman Peter Basch, M.D. welcomed attendees to the University of Maryland, Robert H. Smith School of Business in College Park. The Chairman thanked representatives from the School of Business for the use of their auditorium. The Task Force invited two well known attorneys to participate in a panel discussion on the liability implications of electronic health information. Mr. Gerald DeLoss, Vice Chair of the HIT Practice Group of the American Health Lawyers Association, and Chris Messerly, President of the Minnesota Trial Lawyers Association discussed the potential impact of health information technology and health information exchange on medical liability. Key points mentioned by Mr. DeLoss and Mr. Messerly included:

- Electronic health records (EHRs), in and of themselves, do not elevate a standard of care. EHRs do expand the scope of the information that the physician is responsible (and liable) for which may increase the malpractice liability risk in the short term but may reduce it longterm if it results in better care.
- Courts will not adversely view a physician's decision not to acquire an EHR system as a lapse in standard of care.
- Delaying the use of pop-ups or prompts in clinical decision support systems (CDS) of an EHR will not increase physician liability.
- The CDS is not the standard of care, but may be evidence of the standard of care. Physicians have an obligation to review the integrity of the information presented in the CDS.
- Courts do not require physicians to acquire technology.
- While there is no obligation to purchase or use any particular technology, duty is expanded with the existence of readily available electronic medication history, or

a health information exchange, as what was deemed unreasonable and/or not readily available previously, would likely be seen as reasonable and/or readily available. This expanded duty exists for information that is downloaded from an electronic medication history source or HIE – and imported into an EHRs; for information that is viewed from an electronic medication history source or HIE and not imported into an EHRs; and for information that exists but is not viewed or imported.

- Both attorneys acknowledged that sources of readily available electronic patient information will add more work, particularly for primary care physicians, and that as strategies to mitigate duty would likely not be successful, a better approach for be for physicians and other providers to seek added payment for their new responsibilities.

I. Meeting Call to Order

Chairman Basch called the Task Force meeting to order at 3:45 p.m.

II. Approval of the Minutes

Approval of the April minutes was postponed until the June Task Force meeting absent a quorum.

III. Discussion

Chairman Basch said that he appreciated the presentation by Mr. DeLoss and Mr. Messerly. The Chairman believes their information will be useful to the Task Force as it continues its work. Chairman Basch proposed the Task Force forgo workgroup breakout sessions and discuss issues raised during the pre-session. The Task Force agreed and the Chairman announced that workgroup activities would resume at the June Task Force meeting.

Chairman Basch asked members if they believed that CDS prompts constitute the standard of care. Several members shared their perspective on CDS prompts. The overriding concern was that prompts create additional liability for physicians if they are not followed. The Task Force seemed to think that two possibilities exist for minimizing liability. One approach is to treat prompts as suggestions, while the other would be to treat prompts as peer-review material, exempt from discovery. The Chairman said the prompt itself does not constitute the standard of care, but that the information within the prompt might represent the standard of care. Chairman Basch also stressed the need for accuracy in these prompts and noted that today information from these prompts can be extremely variable.

The Task Force discussed increased physician reimbursement as one way to increase EHR adoption. Dr. Rex Cowdry mentioned the Task Force on Health Care Access and Reimbursement, which was authorized by Senate Bill 107 during the 2007 legislative session. This Task Force will study and make recommendations on a variety of issues related to the adequacy of physician reimbursement, including the advisability of using

payment methods which are linked to quality of care or outcomes. Dr. Cowdry suggested that this group might be able to evaluate how physician reimbursement can be linked to quality improvements that are enabled by EHR adoption. The Chairman asked if the Task Force should make a recommendation in its report that the Task Force on Health Care Access and Reimbursement include a pay for performance component.

The Chairman also reported that the IRS issued a ruling on May 11, 2007 regarding the Stark anti-kickback provisions. In general, the ruling removed the threat to hospitals and health systems of losing their non-profit tax exemption status if they provide EHR software and technical support to their medical staff physicians.

V. Closing Remarks by the Chair

Chairman Basch asked the public for any comments, and none were received. The next Task Force meeting will be held on June 11, 2007. Mr. Daniel Wilks, Vice President of Information Technology at the Erickson Retirement Community, is scheduled to discuss Erickson's development and implementation of EHRs at a 2:00 p.m. pre-session meeting. The Task Force meeting will begin following the pre-session at 3:00 p.m. There being no further business, the Task Force meeting was adjourned at 5:00 p.m.