



MEMORANDUM

To: Sen. Floyd Prozanski, Chair, Senate Committee on Judiciary
Sen. Kim Thatcher, Vice-Chair, Senate Committee on Judiciary
Members of the Senate Committee on Judiciary

From: Mark Bonanno, OMA General Counsel and Vice President of Health Policy

Date: February 19, 2019

Re: SB 703

Chair Prozanski, Members of the Committee, thank you for the opportunity to testify on SB 703 and provide input from the Oregon Medical Association (OMA) mainly as it relates to patient care and the privacy and security of health information.

OMA clearly supports the privacy of the clinician-patient relationship and the security of the health information created by our front-line clinicians that is used to: treat patients; ensure patient health benefit plans are efficiently utilized; and support overall improvement of the health of our community through research of health outcomes. Many of the legal standards about the privacy and security of health information flow from the federal Health Insurance Portability and Accountability Act of 1996 (“HIPAA”).

The OMA would like to add the following points for the Committee to consider: (1) while SB 703 appears to be a more stringent standard than HIPAA, it will act as a potential barrier to patient access to health care; (2) the bill will create needless cost and liability exposure for clinicians, who would be required to collect a brand new statement from patients about whether they want to receive remuneration related to downstream use of their health information; and (3) the bill appears to create a property right in a patient’s health information and somehow monetizes that property right for the benefit of what we presume are third parties seeking to extract value from the flow of health information.

Adding a new more restrictive state standard will act as a barrier to care

When HIPAA’s privacy (2003) and security regulatory standards (2005) came online, there was much confusion about how patient information could be shared. Many so-called HIPAA myths emerged and one of them was that a clinician’s office could not share patient information without a written authorization from the patient, ever – this was not true. HIPAA permits the flow of patient information

in many instances without a need for written authorization because that flow benefits the patient through quick access to care from multiple health care providers and quicker authorization and payment of health care services. Another principle of HIPAA was to allow for access to health information to improve the delivery of care overall. Such access was limited to de-identified information, which cannot be tied back to the individual patient. De-identified data is essential to health research and the public health; it is used to identify and develop cures for diseases, epidemiological studies on health trends and outcomes, and is a primary source for claims databases which help create formulary changes and reimbursement schedules. This does not require a written authorization from a patient because HIPAA balanced access to good population-based information with privacy of the individual. SB 703 recreates those potential barriers to the flow of health information if every patient encounter with a clinician requires a separate authorization to share that information with anyone else.

Imposing a new state standard will create needless cost and liability exposure for front-line clinicians

SB 703 adds a new separate statement to HIPAA's written authorization process that will add cost for clinicians to adjust electronic health records (EHRs) and office procedures to ensure compliance. Further, the failure to obtain this statement is added to the list of violations under Oregon's Unlawful Trade Practices Act ("UTPA") which exposes those clinicians to investigation and fines as well as private lawsuits and the payment of attorney fees. Using the UTPA as a tool for compliance in health care is burdensome for providers and will stagnate the flow of health information in Oregon; providers will not want to share health information they obtain without assurance they have the new authorization in place. The risk failing to obtain a new authorization or document a patient's refusal to sign could be detrimental to practices legally and financially.

Creating an apparent property right in health information is confusing

SB 703 touts that patients should have a property interest in health information and allows the patient to obtain remuneration, which we interpret as the payment of money. Notably, such payments would even come from health information that is de-identified. How the money is paid to patients and who pays it are unclear. The practical effect of the bill seems to be that providers are enlisted as gatekeepers to obtain an authorization from patients. How authorizations or refusals to sign authorizations will be tracked and the actual effect of the flow of health information if a patient refuses to sign an authorization also are unclear. Again, this confusion could lead to unintended consequences and slow down the flow of critical patient information. This sort of barrier was not intended under HIPAA.

Thank you for your time. We are glad to respond to questions and provide further information to the Committee as needed.

The Oregon Medical Association serves and supports over 8,000 physicians, physician assistants and student members in their efforts to improve the health of all Oregonians. Additional information can be found at www.theOMA.org.