GARFUNKEL WILD, P.C.
ATTORNEYS AT LAW

350 BEDFORD STREET • STAMFORD, CONNECTICUT 06901
TEL (203) 316-0483 • FAX (203) 316-0493
www.garfunkelwild.com

TO: Fairfield County Medical Association
Hartford County Medical Association

FROM: Barry B. Cepelewicz, Esq.
Stacey L. Gulick, Esq.

RE: CONNIE Model Agreements

We have been requested to review the proposed model agreements between Health Information Alliance, Inc. d/b/a CONNIE and the participating providers. According to CONNIE there are two forms of model agreement: 1) the Simple Data Sharing Organization Agreement ("SDSOA") and 2) the Qualified Data Sharing Organization Agreement ("QDSOA"). We have been informed by CONNIE that it anticipates most physician practices will sign the SDSOA. The QDSOA is intended for large health systems or other participants that will participate in the CONNIE governance or policy making.

By way of background, CONNIE is the Connecticut state-wide health information exchange ("HIE"), to which Connecticut-licensed health care providers with electronic health records are required to connect no later than two years after the commencement of CONNIE. *See* CGSA §17b-59e. The proposed SDSOA is fifty-one (51) pages long with over fifteen (15) pages of definitions, making it incredibly dense. Most the content relates to the security and functionality requirements for participation with CONNIE. There are however some legal considerations of which the participants should be aware and that we discuss below. This is not intended to be a comprehensive analysis of each and every term of the SDSOA/QDSOA, but rather a high-level summary of the most significant legal issues. Even though it seems that CONNIE will not negotiate the SDSOA, we do believe that in some instances revisions should be requested.

A. SDSOA

1. Disclosure of Security Risk Analysis ("SRA"). Section 3.7.1 requires the participant to turn over its SRA to CONNIE. There is an alternative in 3.7.3 (i.e., to have a meeting with CONNIE to discuss security concerns), but there is no indication of who can initiate such option in lieu of 3.7.1. We would recommend that the participants strongly object to disclosing their SRAs An SRA is a confidential document that included a discussion of the vulnerabilities of each participant's electronic systems. A more reasonable approach would be to require the participant to certify that it has conducted a HIPAA Security Risk Analysis or for the participant to be able to unilaterally elect to the option set forth in Section 3.7.3. Note below that the QDSOA does not require release of the SRA.

2. Policy Amendments. Section 3.9 provides that the participant is required to comply with CONNIE policy, and CONNIE can revise such policy at any time upon 120 days' notice. This is a typical approach for HIEs; however, physician practices in Connecticut are required to

participate with CONNIE, and therefore, cannot terminate the relationship if the policy amendment presents undue hardship (which is the typical option). The participant may want to discuss with CONNIE options if the participant does not agree, or cannot comply with, a policy change.

3. Remuneration. Section 3.14 prohibits the participant from receiving remuneration for information received through CONNIE (i.e., sale of PHI is impermissible). There are instances under HIPAA in which such remuneration is permissible. For example, it is not considered to be a "sale of PHI" if a disclosure of PHI is made and remuneration is received for the "sale, transfer, merger, or consolidation of all or part of the covered entity and for related due diligence." *See* 45 CFR §164.502. This Agreement should not prohibit the participant from using its information as permitted by law.

4. Warranty Disclaimer.

a. In Section 4.6, the participant warrants that it is entitled to receive the Message Content. Whereas, Section 4.5 which requires the participant to warrant that it is entitled to send the content, it seems impractical to warrant that the participant can receive the content as that is somewhat out of the participant's control.

b. In Section 4.13, CONNIE disclaims all warranties, except that the System will operate. Although this seems extreme, this is typical HIE language and it is extremely unlikely that CONNIE could change it.

5. Indemnification. Section 8 describes the mutual indemnification of the parties. In this Section the participant is required to indemnify CONNIE for misuse of the System or for the participant's negligence. This is standard language. CONNIE is required to indemnify the participant for third party claims resulting from Intellectual Property ("IP") infringement or CONNIE's intentional misconduct or negligence. In regard to infringement, it appears that the only options to address an infringement claim are for CONNIE to obtain rights to use the infringing software or to stop using such software. It is suggested that if these options are not available, the participant's only option is to terminate the agreement, which is not permissible under State law. There does not appear to financial recovery under this indemnification provision if the participant incurs costs as a result of CONNIE's infringement activities.

6. Limitation on Liability. Section 9 states that each party's limitation on liability is either fees paid or in the case of CONNIE's infringement or violation of the BAA, $1 million. This is inadequate given the enormous amount of PHI that CONNIE will have. At the very least, we recommend that the limitation on liability be the "greater of $1 million or the available limits of CONNIE's cyberliability insurance." Note below that the QDSOA contains a different limitation on liability tied to insurance limits.

7. Dispute Resolution. Section 11.4 describes the dispute resolution process. As a result of Connecticut law and this Agreement, the dispute resolution process is the only way to object to actions taken by CONNIE. Dispute resolution is handled by a subcommittee of CONNIE. In our experience, subcommittees such as this have little motivation to disagree with the parent organization (i.e., CONNIE); thereby allowing CONNIE practically unfettered decision making authority. Furthermore, it is required to engage in dispute resolution before seeking a remedy in court.

8. Insurance. Section 11.11 pertains to insurance and merely states that each party will maintain such insurance, and in such amounts, as is customary. It is extremely important for the participant to receive assurances from CONNIE that it has adequate amounts of cyberliability insurance. We recommend that a minimum amount (e.g., $10 million) be specified. We note below that the QDSOA requires CONNIE to maintain $5 million. This amount is low for an HIE. Nevertheless, we recommend that the SDSOA include a minimum amount.

9. Patient Consent. Section 8.1.9 in Exhibit A discusses patient consent. We have been informed that CONNIE intends to develop an opt-out model (i.e., the patient does not need to consent to disclosure of information for treatment purposes or other purposes permitted by applicable law); however, it is up to the participant to determine if any laws require consent (e.g., substance abuse treatment records) and withhold such records or obtain consent for disclosure. In addition, pursuant to Section 8.1.14, the participant must include a "Privacy Tag" with such information.

10. Business Associate Agreement. The Business Associate Agreement is consistent with HIPAA. It contains a mutual indemnification which is standard in these types of agreements.

B. **QDSOA**. We discuss below the terms in the QDSOA that differ from the SDSOA. Once again, this is not intended to be a comprehensive analysis of the QDSOA but rather a summary of the significant differences to the SDSOA.

1. SRA/Vulnerability Assessment. Section 3.5.1 allows CONNIE to conduct penetration and vulnerability testing of the participant or requires the participant to turn over the results of its penetration or vulnerability testing. This is less intrusive than requiring a copy of the Participant's Risk Analysis such as is required above but will still allow for a third party to have significant information regarding the vulnerabilities in the Participant's IT system.

2. Advisory Committee. Section 4.2 allows a participant who signs the QDSOA to appoint one individual to the advisory board.

3. Termination. Section 8.3 provides that CONNIE will assist – financially – if the QDSOA terminates and it is necessary for the participant to transition to another vendor. This option is not offered in the SDSOA.

4. Limitation on Liability. Section 10.2 provides that the limitation on liability is the greater of the fees paid or the insurance limits.

5. Insurance. Section 18.12 addresses the insurance question and requires each party to carry $5 million in cyberliability insurance. In our experience this is somewhat high, and potentially expensive, coverage for a small to medium size physician practice and inadequate coverage for a state-wide HIE.

* * *

Please let us know if you would like to discuss any of these issues further. You can contact us as follows:

Barry B. Cepelewicz	bcepelewicz@garfunkelwild.com	203-316-0483
Stacey L. Gulick	sgulick@garfunkelwild.com	203-316-0483