



Tenth National HIPAA Summit

HIPAA in the Real World:
The Application of HIPAA to Physician Practices

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Disclosure Difficulties

1. Law Enforcement

2. Legal

3. Personal Representatives



Disclosure Difficulties

1. Law Enforcement



Law Enforcement

- *Disclosure for law enforcement purpose to law enforcement official*
 - *As required by law; reporting of wounds/injuries*
 - *To comply with a court order or court-ordered warrant, a subpoena or summons*
 - *In response to a grand jury subpoena*
 - *To respond to an administrative request*
 - *Only Minimum Necessary*



Law Enforcement Official

- *Definition of Law Enforcement Official*
 - *Officer or employee of US, State, Tribe, or political subdivision*
 - *Empowered by law to investigate or*
 - *Prosecute or conduct criminal, civil, or administrative proceeding*
- *If requesting official unknown, Covered Entity must identify and verify authority of official*
 - *CE may reasonably rely upon official's representation that minimum necessary requested*



Required by Law

- *To report PHI to law enforcement when required by law to do so (45 CFR 164.512(f)(1)(i))*
 - *Example, state laws commonly require providers to report gunshot or stab wounds, or other violent injuries*
 - *Required by law*
 - *Mandate contained in law compelling disclosure which is enforceable in a court of law*



Real World

- Patient arrives for appointment/walk-in with gunshot wound
 - State law mandatory reporting of gunshot wounds
 - NOPP contains reference to mandatory gunshot wound reporting
 - To person or entity identified in statute/regulation (“law enforcement official”)
 - Only PHI identified in statute/regulation



Process

- *Court order, court-ordered warrant, or a subpoena or summons issued by a judicial officer (45 CFR 164.512(f)(1)(ii)(A))*
 - *The Rule recognizes the legal process in obtaining a court order protects the PHI*
 - *“Judicial Officer”*
 - *Preamble originally required “finding”*
 - *Term is not defined – look to state law?*
 - *Appears to be different than “court”*



Real World

- Receipt of subpoena or summons signed by Clerk of Court
 - Law enforcement purpose?
 - Clerk of Court = “Judicial Officer”?
 - May depend upon state law/rules governing
 - What type of protections granted?



Grand Jury Subpoena

- *To comply with a grand jury subpoena (45 CFR 164.512(f)(1)(ii)(B))*
 - *State or Federal Grand Jury*
 - *The Rule recognizes that the secrecy of the grand jury process provides protections for the individual's PHI*



Administrative Request

- *To respond to an administrative request, such as an administrative subpoena or summons, civil or authorized investigative demand or similar process authorized under law (45 CFR 164.512(f)(1)(ii)(C))*
 - *May be without judicial involvement*
 - *Must provide that:*
 - *PHI is relevant and material,*
 - *PHI is specific and limited in scope, and*
 - *De-identified information not sufficient*



Real World

- Receipt of administrative request from the Barbers and Hairstylists Board for information
 - Law Enforcement Official?
 - Is Barber Board empowered by law to investigate or prosecute potential violation of law?
 - Required by law?
 - Mandate contained in law compelling disclosure which is enforceable in a court of law
 - PHI relevant?
 - PHI specific and limited in scope?
 - De-identification not acceptable?



Identification and Location

- *Disclosure of limited information in response to request of law enforcement official for purpose of identifying or locating a suspect, fugitive, material witness, or missing person (45 CFR 164.512(f)(2))*
- *Only if “requested”*
 - *Request may be oral or written*
 - *Includes person acting on behalf of law enforcement*
 - *E.g., media making announcement seeking public’s assistance in identifying suspect or “Wanted” Poster*



Limited Information

- *Limited information to be disclosed:*
 - *Name and address*
 - *Date and place of birth*
 - *Social Security number*
 - *ABO blood type and rh factor*
 - *Type of injury*
 - *Date and time of treatment*
 - *Date and time of death*
 - *Distinguishing physical characteristics*
 - *Height, weight, gender, race, hair and eye color, facial hair, scars, and tattoos*



Information Not to be Disclosed

- *Except as otherwise permitted, following information not to be disclosed*
- *PHI relating to:*
 - *DNA or DNA analysis*
 - *Dental records*
 - *Typing, samples, or analysis of body fluids or tissue*



Real World

- Newspaper calls and asks for information on suspect sought in connection with homicide
- Request by law enforcement?
 - If acting on behalf of law enforcement
 - Oral request allowed
- Purpose to identify or locate?
 - If making a public announcement
- Limited information?
 - Only listed PHI



Victims of Crime

- *Disclosure of PHI in response to law enforcement official's request for information about victim or suspected victim of crime (45 CFR 164.512(f)(3))*
- *Only if individual agrees*
 - *Agreement may be oral or written*
- *If unable to obtain agreement, other factors must be satisfied*



Victims of Crime

- *Disclosure if individual agrees or*
- *Lack of agreement due to incapacity or emergency and*
 - *Law enforcement official represents PHI is needed to determine if violation of law by person other than victim and not intended to be used against victim*
 - *Law enforcement official represents that immediate action depends upon disclosure and would be materially and adversely impacted if waited; and*
 - *Disclosure is in the best interests of individual in professional judgment*



Real World

- Police officer asks for PHI of patient who is suspected to be victim of gang violence and victim calmly and directly states he will not agree
- No disclosure under this category
 - Inability to obtain agreement not result of incapacity or emergency
- Possible to disclose under other sections



Workforce Victims

- *No violation if workforce member who is the victim of a criminal act discloses PHI to a law enforcement official (45 CFR 164.502(j)(2))*
 - *PHI is about the suspected perpetrator*
 - *Only limited information (name, address, SSN#, date of treatment, etc.)*
 - *Crime does not need to occur on premises*



Real World

- Employee is attacked two blocks from physician's office where he/she works, later sees perpetrator in lobby of office waiting to be treated
- Disclose?
 - Criminal act – doesn't have to occur on premises
 - May disclose only limited information, but could be taken directly from medical file



Other Provisions on Victims

- *Child abuse victims or adult victims of abuse, neglect or domestic violence, other provisions apply:*
 - *Child abuse or neglect reported to law enforcement official authorized by law to receive such reports and agreement of individual is not required (45 CFR 164.512(b)(1)(ii))*
 - *Adult abuse, neglect, or domestic violence reported to law enforcement official authorized by law to receive such reports (45 CFR 164.512(c)):*
 - *If the individual agrees;*
 - *If the report is required by law; or*
 - *If expressly authorized by law, and based on professional judgment, the report is necessary to prevent serious harm to the individual or others, or in certain other emergency situations*
 - *Notice may be required*



Decedents

- *Disclosures of PHI about death for purpose of alerting law enforcement of the death if Covered Entity has a suspicion that death may have resulted from criminal conduct (45 CFR 164.512(f)(4))*
 - *Consent of individual not available (obviously!)*
 - *May be difficult to identify Personal Rep.*
 - *Allow for quicker investigation*



Real World

- Patient collapses and dies in lobby of apparent drug overdose
- Disclosure allowed?
 - Rule does not delineate between criminal conduct of patient or another
 - May disclose to law enforcement official if suspicion that death resulted from criminal conduct



Crime on the Premises

- *Covered Entity may disclose PHI to law enforcement official if the CE has good faith belief that PHI constitutes evidence of criminal conduct that occurred on the CE's premises (45 CFR 164.512(f)(5))*
- *If CE discloses in good faith, but is wrong in its belief that the PHI was evidence of violation of law, no HIPAA violation*



Real World

- Patient is suspected of stealing medication from exam room
- Disclose?
 - Good faith belief that is evidence of crime
 - Could identify patient and disclose Rx records to show that not prescribed meds which are missing
 - Good faith vs. minimum necessary



Reporting Crime in Emergencies

- *Covered health care provider providing emergency health care in response to medical emergency may disclose PHI to law enforcement official, if such disclosure appears necessary to alert law enforcement of certain information relating to crime (45 CFR 164.512(f)(6))*
 - **Not** on provider's premises
 - Not result of abuse, neglect or domestic violence (512(c))



Crime in Emergencies

- *Disclosure appears necessary to alert law enforcement to:*
 - *Commission and nature of crime*
 - *Location of crime*
 - *Victims of crime*
 - *Identity, description, and location of the perpetrator*
- *Section attempts to address EMT situations*



Real World

- EMT/Paramedic arrives at scene prior to police and notes person running away with gun in hand
- Disclose?
 - Not for abuse, neglect or domestic violence
 - Appears necessary to alert police
 - May disclose identity, description, and possible location of perpetrator



Disclosure Difficulties

2. Legal



Legal Proceedings

- *Disclosure allowed in the course of judicial or administrative proceedings in response to*
 - *Court or administrative tribunal's order, to the extent expressly authorized in order*
 - *Subpoena, discovery request, or other lawful process if satisfactory assurance*
 - *(45 CFR 164.512(e))*



Satisfactory Assurance

- *Satisfactory assurance:*
 - *Written statement and documentation from the party seeking the information that reasonable efforts have been made either:*
 - *To ensure that the patient has been notified of the request*
 - *To secure a qualified protective order (“QPO”)*
 - *CE itself makes reasonable effort to notify or secure QPO*
 - *Where the satisfactory assurances are in the form of notice to the individual, notice to the individual’s lawyer is considered to be notice to the individual*



Party to Legal Action

- *Where a covered entity is a party to a legal proceeding, such as a plaintiff or defendant, the covered entity may use or disclose protected health information for purposes of the litigation as part of its health care operations*
- *Example, a Covered Entity that is defendant in malpractice action may use or disclose PHI for litigation as health care operations*



Real World

- Defendant in medical malpractice action wants to disclose PHI of number of past medical problems not alleged in Complaint
- Disclose?
 - Legal proceedings part of health care operations
 - Minimum necessary
 - May in some cases limit disclosures more significantly than would be required to meet a relevance standard



Disclosure Difficulties

3. Personal Representatives



Personal Representatives

- *Covered Entity must treat Personal Representative as the individual/patient with respect to PHI relevant to acting as PR (45 CFR 164.502(g))*
- *Who is Personal Representative?*
 - *Person has authority to act on behalf of adult or emancipated minor in health care decisions*
 - *Parent, guardian, in loco parentis has authority to act on behalf of unemancipated minor in health care decisions*



Unemancipated Minors

- *No Personal Representative and minor makes own decisions if:*
 - *Minor consents to health care service*
 - *Minor could lawfully obtain health care service without PR consent and minor, court, or person authorized by law consents to health care service*
 - *Parent, guardian, or in loco parentis assents to confidentiality agreement*



Unemancipated Minors

- *Access to unemancipated minor's PHI*
 - *To extent permitted by State or other law, CE may disclose or provide access to parent, guardian, in loco parentis*
 - *To extent prohibited by State or other law, CE may not disclose or provide access to parent, guardian, in loco parentis*
 - *Where not Personal Representative and no applicable law granting access, CE may provide or deny access based upon licensed health care provider's professional judgment*



Decedents

- *Disclose if applicable law grants executor, administrator, or other person authority to act on behalf of deceased individual or the individual's estate (45 CFR 164.502(g)(4))*
 - *Not discretion of Covered Entity*
 - *“Must” treat such person as the Personal Representative*
 - *Only PHI relevant to representation*



Abuse, Neglect, Endangerment

- Covered Entity may refuse to treat person as Personal Representative (45 CFR 164.502(g)(5)):
 - Reasonable belief that
 - Individual has been or may be subjected to domestic violence, abuse, or neglect by person
 - Treating person as PR could endanger individual
 - Decides not in best interest of individual to treat as PR based upon exercise of professional judgment



Real World

- Non-custodial parent demands access to his/her child's medical records to see what custodial parent is spending child support on
- Disclose?
 - State law grant non-custodial parent access rights
 - Divorce decree provide for access rights
 - If none, professional judgment



Conclusion

1. Law Enforcement

Nuances of section require reference to the Regs

2. Legal

Recent FAQs clarified – and eased -- application

3. Personal Representatives

State law is the key to understanding



Questions?

- Please feel free to ask questions now, after the session, or contact me directly

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