

Case Study: HIPAA for Governmental Entities

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The 5 Stages of HIPAA

- ◆ Denial
- ◆ Anger
- ◆ Bargaining
- ◆ Depression
- ◆ Acceptance

Governmental Entities

- ◆ Focus of discussion will be:
 - ❖ County governments
 - ❖ County-sponsored Medicaid managed care plans.

Governmental Entities

- ◆ The following types of governmental programs are health plans under HIPAA:
 - ❖ Parts A and B of Medicare
 - ❖ Health care program for active military personnel (tit. 10 U.S. Code)
 - ❖ Veterans health care program (38 U.S.C. Chapter 17)
 - ❖ Civilian Health and Medical Program of the Uniformed Services (CHAMPUS)
 - ❖ Indian Health Service Program

Governmental Entities

- ◆ Federal Employees Health Benefits Program
- ◆ An approved state child health plan
- ◆ Medicare+Choice program
- ◆ Medicaid program

Programs as Covered Entities

- ◆ What does it mean to say that the Medicaid program is a health plan covered entity?
 - ❖ Centers for Medicare and Medicaid Services
 - ❖ California Dept. of Health Services
- ◆ Many agencies are likely to be hybrid covered entities
 - ❖ Ex.: Administering the Medi-Cal program is probably not Cal. DHS's primary function

Other Health Care Programs

- ◆ Government programs that
 - ❖ do not have as their principal purpose the provision of, or payment for, the cost of health care
 - ❖ but which incidentally provide health care services
 - ❖ are NOT health plans.

- ◆ Example: Special Supplemental Program for Women, Infants and Children (WIC) (nutritional services), Food Stamp Program

Other Health Care Programs

- ◆ County governments and other public health programs typically deal with a variety of public health programs.
- ◆ GEs should consider whether these programs that they transact business with are health plan covered entities.
 - ❖ May determine whether business associate agreement is needed.
 - ❖ May determine use of HIPAA standard transactions.

Multiple Covered Functions

- ◆ Governmental entities may have multiple covered functions, such as:
 - ◆ group health plan
 - ◆ provider
 - ◆ clearinghouse
 - ◆ health plan

Creating Firewalls

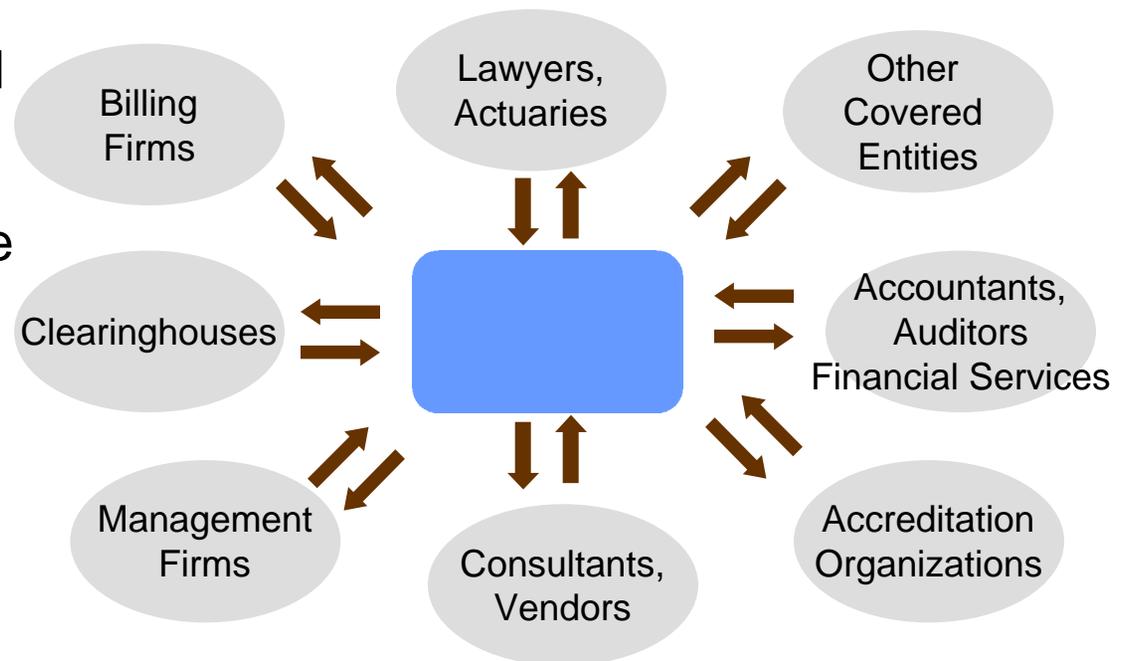
- ◆ GEs with multiple covered entity functions must segregate covered from non-covered functions
 - ❖ Use policies and procedure regarding use and disclosure of PHI to create institutional firewalls
 - ❖ Example: Public agency Medicaid managed care plan with group health plan for employees
 - Training the group health plan's administrative staff

Relationships Between GEs

- ◆ Look for the overlap in performing HIPAA covered functions
 - ❖ Example: county-sponsored Medicaid plan
 - Separate agency from the county
 - Does the county assist in plan administration functions?
 - Limited county oversight of plan probably isn't sufficient to cause county to be a covered entity

Use and Disclosure — Who Is a Business Associate?

- ◆ A person who receives protected health information (PHI) and —
 - ❖ On behalf of a covered entity performs or assists with a function or activity involving use or disclosure of PHI
 - ❖ Provides certain identified services to a covered entity
- ◆ May be a covered entity



GE Business Associate Rules

- ◆ Special rules for business associate relationships among governmental entities (164.504(e)(3))
 - ❖ GEs may enter into a memorandum of understanding instead of a business associate contract so long as the MOU accomplishes the objectives of the BA contract.
 - Privacy Rule commentary recognizes that it's not always feasible for one GE to contract with another.
 - May also be incorrect to view on GE as “acting on behalf of” the other -- under law, each GE may be required to fulfill its own statutory mission.

GE Business Associate Rules

- ◆ Covered entity must terminate a business associate agreement when breached
 - ❖ May not be possible in relationship between two GEs that is mandated by law.
 - ❖ Example: Medicaid program and Medicaid managed care plan (California's statutory Medi-Cal managed care program).
- ◆ When a GE can't terminate a BA agreement, may be required to report the other agency to DHHS.

GE Business Associate Rules

- ◆ GEs may not be required to enter into a business associate agreement if other laws contain requirements applicable to the BA that accomplish each of the objectives of the BA agreement.
 - ❖ Example: In the relationship between Cal. DHS and Medi-Cal managed care plan, Cal. laws relating to the privacy of Medi-Cal beneficiary data may accomplish the objectives (See Cal. Welf. & Inst. C. Section 14100.2)

GE Business Associate Rules

- ◆ When two GEs jointly administer a public health plan they are not business associates.
- ◆ Examples:
 - ❖ State Medicaid agency and Medicaid managed care plan
 - ❖ CMS and Medicare+Choice plan

GE Business Associate Rules

- ◆ A county government typically deals with a wide array of public health programs.
 - ❖ Are they your business associates?
 - ❖ In many cases, probably not.
 - ❖ Consider whether the public program is “acting on behalf of” the county in accomplishing its covered functions.
 - ❖ Often other public programs will have statutory mandates that are distinct from the county’s mission.

Uses and Disclosures of PHI

- ◆ County governments typically share PHI across departments and with a range of programs, providers and law enforcement authorities as part of the continuum of care to indigent and special needs patients.
- ◆ How do counties and other GEs manage this flow of PHI without impeding patient care?
- ◆ A maze of rule relating to uses and disclosures.

Public Health Authorities

- ◆ Is the county or other GE a public health authority?
 - ❖ Public health authority includes:
 - An agency or authority of the federal or state govt.
 - A person or entity acting under a grant of authority or contract with the public agency, including employees and contractors
 - Responsible for public health matters as part of its official mandate.

Public Health Authority Disclosures

- ◆ A covered entity may disclose PHI for public health activities to a public health authority for:
 - ❖ preventing or controlling disease, injury or disability
 - ❖ reporting of disease, injury, birth, death
 - ❖ public health surveillance
 - ❖ public health investigations
 - ❖ public health interventions

Public Health Authority Uses

- ◆ If the covered entity is also a public health authority, then it is permitted to use PHI for all of the public health activities described on previous slide.
 - ❖ 164.512(b)(2)
- ◆ When a county is a public health authority, this provision may provide basis for use of certain PHI across departments and with business associates.

Health Oversight Agencies

- ◆ Health oversight agencies are:
 - ❖ An agency or authority of the U.S., a state, Indian tribe, etc.
 - ❖ Authorized by law to oversee:
 - the health care system (whether public or private)
 - government programs in which health information is necessary to determine eligibility or compliance

Health Oversight Agencies -- Examples

- ◆ State insurance commissions
- ◆ State health professional licensure agencies
- ◆ State Medicaid fraud control units
- ◆ Does not include private organizations, such as accrediting bodies

Health Oversight Agencies

- ◆ If a covered entity is also a health oversight agency, the covered entity may use PHI for health oversight activities.
 - ❖ 164.512(d)(4)
- ◆ This provision is important for justifying the agency's use of PHI.

Government Programs, Public Benefits

- ◆ A health plan that is a government program providing public benefits may disclose PHI relating to eligibility for, or enrollment in the health plan to another agency administering a government program providing public benefits IF
 - ❖ the sharing of data is required or expressly authorized by statute or regulation.
- ◆ May apply to sharing of PHI through access to eligibility databases for Medicaid and other programs.

Government Programs, Public Benefits

- ◆ A covered entity that is a government agency administering a public program providing public benefits may disclose PHI relating to the program to another covered entity
 - ❖ that is also a government agency providing public benefits IF
 - Programs serve the same or similar populations
 - Disclosure of PHI is necessary to coordinate the covered functions of the programs or to improve administration and management of the programs

California Medi-Cal Law

- ◆ For California agencies, all individual medical records of Medi-Cal beneficiaries are confidential and may not be released without written consent of the beneficiary or his personal representative.
 - ❖ Cal. Code of Regs., Tit. 22, Section 51009
- ◆ However, exchange of information is permitted between individuals or institutions providing care, fiscal intermediaries and state or local official agencies.
 - ❖ County governments, Medi-Cal plans are probably “local official agencies”

Threats to Health or Safety

- ◆ Covered entity may use or disclose PHI if the covered entity, in good faith, believes the disclosure is necessary to prevent or lessen a threat to the health or safety of a person or the public.
 - ❖ 164.512(j)

- ◆ Disclosures for law enforcement purposes
 - ❖ 164.512(f)

Correctional Institutions

- ◆ A covered entity may disclose to a correctional institution or a law enforcement official with custody of an inmate for provision of health care, etc.
 - ◆ 164.512(k)(5)

Preemption - - The Nightmare Begins

- ◆ The HIPAA rules relating to use and disclosure of PHI must be reconciled with state privacy laws.
- ◆ California Healthcare Association's Patient Privacy Manual

The Privacy Puzzle

- ◆ County counsel and attorneys for other GEs must chart the flow of PHI among departments, other agencies and providers.
- ◆ Because of the unique nature of each state's programs and laws, no "cookie cutter" approach is available.
- ◆ State healthcare associations are scrambling to develop preemption analyses.

HIPAA Notice of Privacy Practices

- ◆ GEs that are covered entities will need to describe the manner in which they use or disclose PHI in the HIPAA Notice of Privacy Practices.
- ◆ This will be a complex task for many agencies given the framework of agencies and providers they interact with.

Authorization

- ◆ GE obtains an individual's authorization to receive PHI from "all providers who have seen the individual in the past year" to disclose PHI to the GE to determine eligibility for benefits.
 - ❖ Individual revokes authorization.
 - ❖ Agency is not required to track down all the covered entities and tell them.
 - ❖ If individual tells the covered entity, even orally, then the covered entity must act on the revocation.

Educational Agencies/Institutions

- ◆ The Family Educational Rights and Privacy Act
 - ❖ 20 U.S.C. 1232g
 - ❖ provides parents of students and eligible students (18 or older) with privacy protection and rights for records of students IF
 - ❖ educational agency or institution receives federal funds.
- ◆ Education records covered by FERPA are excluded from HIPAA definition of PHI.

Educational Agencies/Institutions

- ◆ Students under age 18:

- ❖ Individually identifiable health information obtained by a nurse in a school clinic
- ❖ Is an education record under FERPA
- ❖ Is not PHI under HIPAA

Educational Agencies/Institutions

- ◆ Students over age 18 in post-secondary educational institutions:
 - ❖ Individually identifiable health information obtained by a physician in a school clinic

 - ❖ Is not subject to FERPA or HIPAA protection IF:
 - maintained by a physician or licensed professional
 - available only for use by the professional

Where's the Money?

- ◆ California S.B. 456: Approx. \$45 million for state HIPAA implementation, including creation of Office of HIPAA Implementation
- ◆ Bush's proposed 2003 federal budget: \$64 million for federal government HIPAA compliance
- ◆ For providers and plans: **\$0,000,000.00**