

HIPAA & Employers & Employees: Health Plan Challenges

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think*results*

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Who Am I

- **Lawyer & teacher**
- **Goulston & Storrs, 1967-present**
- **Past Pres., American Health Lawyers**
- **American Bar Association e-Health**
- **Adjunct Professor of Law**

Univ. of Maryland School of Law

Suffolk University Law School

Professor Goldberg's Honest Lawyer Privacy Policy

- **Nothing I say in this teleconference is private**
- **Everything you say in this teleconference is public**
- **We have zero privacy in this teleconference: get over it!**

We Have Lots of Law

**Federal
Law**

**Professional
Obligations**

**State
Law**

Privacy Before HIPAA

HCFA (CMS) Internet Security Policy

- **1997 – Drop Dead Internet**
- **1998 - Internet Communications Security & Appropriate Use Encryption, authentication**
- **Temporary pre-HIPAA**

Health Insurance Portability & Accountability Act of 1996

- HIPPA

- HIPA

- HIPPAA

- HIPAA It's Powerful

And Awesome

*Privacy Added To End of
Employee Benefits Law*

AAdministrative

Simplification Subtitle

HIPAA Pledge

“I pledge to preserve, protect, and defend the privacy and security of individually identifiable health information, to the best of my ability, and in furtherance of the best interests of more than 282,000,000 patients.”

HIPAA Applicability

- **Health plan**
- **Health care clearinghouse**
- **Health care provider that transmits health information electronically in connection with covered transaction**

Standard Transaction

- **Transmission of information between two parties to carry out financial/administrative activities related to health care**

Standard Transaction

- **(1) Health care claims or equivalent encounter information.**
- **(2) Health care payment & remittance advice.**
- **(3) Coordination of benefits.**
- **(4) Health care claim status.**
- **(5) Enrollment & disenrollment in health plan.**

Standard Transaction

- **(6) Eligibility for health plan.**
- **(7) Health plan premium payments.**
- **(8) Referral cert. authorization.**
- **(9) First report of injury.**
- **(10) Health claims attachments.**
- **(11) HHS prescribed transactions.**

Health Care Provider

- **Provider of medical or health services**
- **Any other person or organization who furnishes, bills, or is paid for health care in normal course of business**

Workforce

- **Employees, volunteers, trainees, & others who work under direct control of a covered entity, whether or not paid**
- **Must train & oversee**

Business Associate

- **Financial, actuarial, accounting, consulting, claims, data aggregation, management, administrative, legal, accreditation, financial services**
- **Must have individually identifiable health information**

Business Associate Criteria

- **What you do**
- **Not who you are**

Protected Health Information

- Any individually identifiable health information transmitted by or maintained in electronic media or in any other form or medium

Individually Identifiable

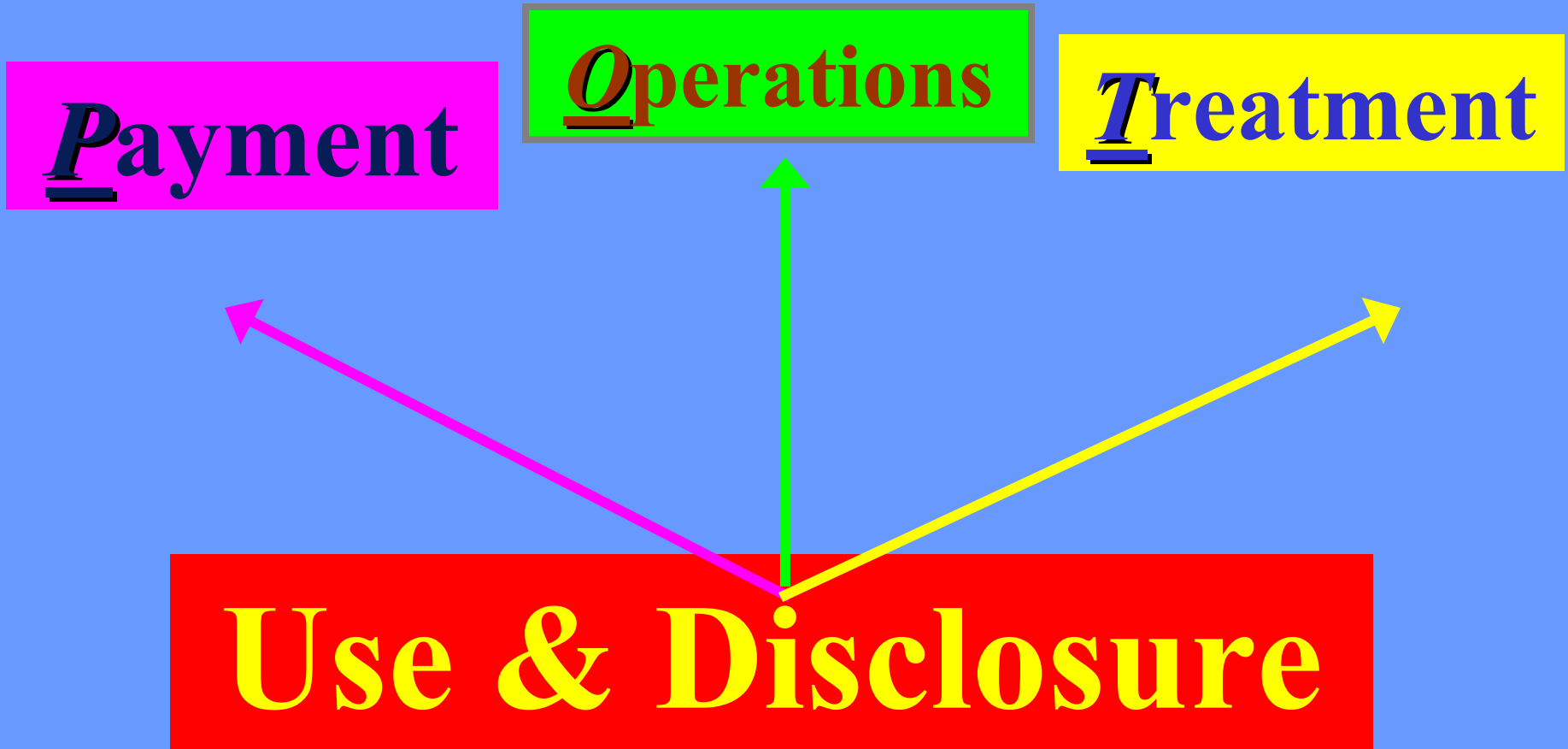
- ID of patient, relatives, employers, household
- (A) Names; (B) Geographic subdivisions smaller than a State, including street address, city, county, precinct, zip code, & geocodes; (C) birth date, admission date, discharge date, date of death; (D) E-mail addresses; (E) Telephone, Fax, Social Security, Medical record, Health Plan Beneficiary, Account, Certificate/license, Vehicle, License Plate; (F) Full face photo

HIPAA Privacy

- *Protected health information:* individually identifiable health information transmitted by or maintained in electronic media or in any other form or medium
- *Consent:* use/disclose for payment, treatment, healthcare operations
- *Authorization:* outside use or disclosure

Direct Provider Needs

Consent



Authorization Beyond Consent

- **Covered entity may not use or disclose protected health information without valid written & time-limited authorization**

Minimally Necessary

- Using/disclosing/requesting protected health information from another covered entity
- Covered entity must make *reasonable efforts* to limit protected health information to minimum necessary to accomplish intended purpose

Except for Treatment

- No “minimally necessary” for disclosures to or requests by (but not use by) a health care provider for treatment

Covered Health Plans

Group Health Plan

- **ERISA Emp. Wel. Ben. Plan**
- **=>50 participants or TPA**
- **Insurer, HMO, 'Care, 'Caid**
- **Or any other individual or group plan that pays for cost of medical care**

Sponsor Requirements

- **Don't use information for employment-related actions/decisions or other benefit plans**
- **Report inconsistent disclosures**
- **Show internal practices/books/records on PHI use/disclosure to HHS for compliance**

Sponsor Requirements

- **Destroy/return PHI when no longer needed**
- **Provide for adequate separation from plan**
- **Restrict employee access/use**
- **Lawyer/client privilege**

Sponsor vs. Plan

- **Fiduciary responsibilities: ERISA**
- **Cost allocations**
- **Insurance**
- **Personnel additions**

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Disclosures to Sponsor

- **Plan documents restrict use/disclosure**
- **May disclose summary health info.**
- **To obtain premium bids & modify, amend, terminate plan**
- **Amend plan to establish permitted & required uses/disclosures**
- **Ensure agents/subs. getting PHI agree to same restrictions/conditions as plan sponsor**

Disclosures to Sponsor

- To carry out administration
- Restrict insurer/HMO disclosures
- No disclosure for employment-related actions/decisions or in connection with other benefit plan of sponsor
- Sponsor not covered entity or business associate or workforce

Enrollee Rights

- **Notice from plan OR**
- **Notice from insurer/HMO**
- **But plan must maintain/provide limited notice**
- **“This notice describes how medical information about you may be used & disclosed & how you can get access to this information....”**

Special Plan Notice

- **On compliance date to all covered individuals**
- **Thereafter at time of enrollment**
- **Within 60 days of material revisions to notice**
- **At least every three years tell them how to get notice of rights**

Exceptions for Plans

- **Benefits solely thru insurer/HMO**
- **Do not create/receive PHI other than summary or participation information**

Not Covered Entities

- **Employers**
- **Third Party Administrators**
- **Property/casualty/disability/auto plans event if pay for health care**
- **Workers compensation**
- **Stop-loss carriers & reinsurers**

Psychotherapy Is Special under HIPAA

Psychotherapy Notes

- **Notes recorded (in any medium) by health care provider who is a mental health professional documenting or analyzing contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record**

NOT Psych. Notes

- **Prescription & monitoring, counseling session start & stop times, modalities & frequencies of treatment furnished, results of clinical tests**
- **Summary of diagnosis, functional status, treatment plan, symptoms, prognosis, & progress to date**

Health Plans & Psych. Notes

- **Health plans may not condition payment, eligibility, or enrollment on the receipt of an authorization for the use or disclosure of psychotherapy notes, even if the health plan intends to use the information for underwriting or payment purposes**

Office for Civil Rights
Enforcer With a Heart

HIPAA Corporate Compliance Program

- **DOJ Sentencing
Guidelines**
- **Can abate costs/penalties
& enforcement actions**

Chief Privacy Official

HIPAA NOTICE

- **“THIS NOTICE DESCRIBES HOW MEDICAL INFORMATION ABOUT YOU MAY BE USED AND DISCLOSED AND HOW YOU CAN GET ACCESS TO THIS INFORMATION. PLEASE REVIEW IT CAREFULLY.”**

Guidance Overview

- **17 “reasonable(ly)”** steps, criteria, reliance, efforts, safeguards, precautions
- **18 “professional(ly)”**
- **7 “professional judgment”**
- **23 “appropriate(ly)”**

Which Way Are We Going?

BE A HIPAA HERO ^(R)



BE A HIPAA HEROINE *(sm)*



Professor Goldberg's

Year 3000 Readiness Disclosure

- **To the best of my knowledge, this presentation will not cause the interruption or cessation of, or other negative impact on, business or other operations, attributable directly or indirectly to the processing (including but not limited to calculating, comparing, sequencing, displaying, or storing), transmitting, or receiving of date data from, into, and between the 20th and 22nd centuries, and during the calendar year 1998 and thereafter (including but not limited to the calendar years 1999-3000), and leap year calculations, or give rise to the inability of one or more computer software or hardware programs, machines or devices accurately to receive, store, process or transmit data on account of calendar information applicable to such programs, machines or devices, including without limitation calendar information relating to dates from and after June 12, 2002.**

That's All Folks!

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