

Overcoming Barriers to PHI Access While Protecting Patients' Rights

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Overcoming Barriers to PHI While Protecting Patients' Rights

- **Understanding Patients' Rights**
- **Common Barriers to PHI**
- **Permitted Communications**
- **Effective Use of Minimum Necessary**
- **Special Situations**

Understanding Patients' Rights

- **Patients have the right to expect and receive quality care**
- **Patients have the right to know about their care/condition**
- **Patients have the right to expect you to protect their privacy**

Patients have the right to expect and receive quality care

- **Never sacrifice the care of the individual:**
 - **From December 20, 2000 NPRM (pg. 82463)**
Purpose of the Administrative Simplification Regulations
This regulation has three major purposes: ...
(2) to improve the quality of health care in the U.S.
by restoring trust in the health care system among consumers, health care professionals, and the multitude of organizations and individuals committed to the delivery of care; ...

Patients have the right to expect and receive quality care

- **Never sacrifice the care of the individual:**

- **From December 20, 2000 NPRM** (pg. 82625 & 82626)
Treatment

Response: ... Today, health care providers consult with one another, share information about their experience with particular therapies, seek advice about how to handle unique or challenging cases, and engage in a variety of other discussions that help them maintain and improve the quality of care they provide. **Quality of care improves when providers exchange information about treatment successes and failures. These activities require sharing of protected health information. We do not intend this rule to interfere with these important activities.** We therefore define treatment broadly and allow use and disclosure of protected health information ...

Patients have the right to expect to know about their care/condition

- **From OCR Privacy Guidelines (Dec. 3, 2002)**
- The HIPAA Privacy Rule ...
 - gives patients more control over their health information
 - for patients – it means being able to make informed choices when seeking care ...
- **From Privacy Regulation (NPRM Dec 28, 2000)**
- § 164.524 Access of individuals to protected health information.
 - ... individual has a right of access to inspect and obtain a copy of protected health information about the individual in a designated record set, for as long as the protected health information is maintained in the designated record set ...

Patients have the right to expect you to protect their privacy

- Receive notice of information practices
- See and copy own records
- Request corrections
- Obtain accounting of disclosures
- Request restrictions and confidential communications
- File complaints

Common Barriers to PHI

- **Understanding what is Protected Health Information (PHI)**
- **Misunderstanding of the regulation**
- **Invalid authorization form**
- **Over restrictive privacy procedures**
- **Fear of litigation**

Understanding What Is PHI

- **PHI is any identifiable information:**
- related to the “past, present or future physical or mental health condition” of a person
- “in any form or medium”
- PHI includes:
 - names
 - telephone numbers
 - certificate/license numbers
 - social security numbers
 - medical records numbers
 - health plan beneficiary numbers
 - URLs (web locators)
 - full face photograph or any comparable images
 - elements of dates related directly to an individual
 - any other unique identifying number, characteristic or code
 - geographic data
 - fax numbers
 - e-mail address
 - IP addresses
 - account numbers
 - biometrics identifiers

Understanding What Is PHI

- **PHI is not information:**
 - related to the “past, present or future physical or mental health condition” of a person
 - “in any form or medium”
- **that is voluntarily shared with you by the individual outside your professional responsibility**
- **that cannot be used to identify the individual**
- **that is obvious (i.e. Joe’s wearing a cast, Sue is pregnant)**

Misunderstanding of HIPAA regulation

- Excellent source of what is allowed under HIPAA is the OCR Privacy Guidance
 - Original release (December 3, 2002):
<http://www.hipaa.state.sc.us/ocr-hip.pdf>
 - Revised release (April 3, 2003):
<http://www.hhs.gov/ocr/hipaa/guidelines/guidanceallsections.pdf>

Over restrictive privacy procedures

From HHS Questions and Answers on HIPAA

Question: Generally, what does the HIPAA Privacy Rule require the average provider or health plan to do?

Answer: For the average health care provider or health plan, the Privacy Rule requires activities, such as:

- Notifying patients about their privacy rights....
- Adopting and implementing privacy procedures...
- Training employees...
- Responsible health care providers and businesses already take many of the kinds of steps required by the Rule to protect patients' privacy ...

Over restrictive privacy procedures

From HHS Questions and Answers on HIPAA (continued)

Question: Generally, what does the HIPAA Privacy Rule require the average provider or health plan to do?

Answer: For the average health care provider or health plan, the Privacy Rule requires activities, such as:

- To ease the burden of complying with the new requirements, the Privacy Rule gives needed flexibility for providers and plans to create their own privacy procedures, tailored to fit their size and needs. ...
- The scalability of the Rule provides a more efficient and appropriate means of safeguarding protected health information ...

Over restrictive privacy procedures

- Don't over burden your office with privacy policies and procedures.
- As much as possible, design your privacy policies and procedures around how your office currently functions.
- Remember, once you establish a policy you are required to comply with that policy.
- If you establish policies that are more stringent than what HIPAA requires you are creating additional risks for your organization.

Fear of litigation

"Enforcement activities will focus on obtaining voluntary compliance through technical assistance. The process will be primarily complaint driven and will consist of progressive steps that will provide opportunities to demonstrate compliance or submit a corrective action plan." (HHS Press Release Oct. 15, 2002)

§ 160.304 Principles for achieving compliance.

(a) Cooperation. The Secretary will, to the extent practicable, seek the cooperation of covered entities in obtaining compliance ...

(b) Assistance. The Secretary may provide technical assistance to covered entities to help them comply voluntarily with the applicable requirements ...

Permitted Communications

- **Treatment, payment, and health care operations**
- **Valid authorizations**
- **Health oversight**
- **Subpoenas/judicial proceedings**

Treatment, payment, and health care operations

- From August 14, 2002, NPRM
 - § 164.506 Uses and disclosures ...
a covered entity may use or disclose protected health information for treatment, payment, or health care operations ...
 - § 164.506 (c) Implementation specifications:....
 - (2) A covered entity may disclose protected health information for treatment activities of a health care provider.
 - (3) A covered entity may disclose protected health information to another covered entity or a health care provider for the payment activities of the entity that receives the information
 - (4) A covered entity may disclose protected health information to another covered entity for health care operations activities of the entity that receives the information, if each entity either has or had a relationship with the individual who is the subject of the protected health information being requested, the protected health information pertains to such relationship ...

Valid authorizations

- § 164.508 Uses and disclosures for which an authorization is required.
 - (a) Standard: authorizations for uses and disclosures.
 - (1) Authorization required: general rule. Except as otherwise permitted or required by this subchapter, a covered entity may not use or disclose protected health information without an authorization that is valid under this section. When a covered entity obtains or receives a valid authorization for its use or disclosure of protected health information, such use or disclosure must be consistent with such authorization.

Note: A covered entity may release information if it receives a valid authorization

Valid authorizations

- § 164.508(c) (1) defines the following core elements for an authorization to disclose protected health information (PHI):
 - Description of the PHI to be disclosed
 - The identification of the persons or class of persons authorized to make the disclosure of PHI
 - The identification of the persons or class of persons to whom the covered entity is authorized to make the disclosure
 - Description of each purpose of the disclosure
 - An expiration date or event
 - The individual's signature and date, and if signed by a personal representative, a description of his or her authority to act for the individual

Valid authorizations

- § 164.508(c)(2) requires these statements for an authorization to disclose PHI:
 - A statement that the individual may revoke the authorization in writing, and either a statement regarding the right to revoke, and instructions on how to exercise such right or, to the extent this information is included in the covered entity's notice, a reference to the notice
 - A statement that treatment, payment, enrollment, or eligibility for benefits may not be conditioned on obtaining the authorization if such conditioning is prohibited by the Privacy Rule or, if conditioning is permitted, a statement about the consequences of refusing to sign the authorization
 - A statement about the potential for the PHI to be redisclosed by the recipient and no longer protected by the Privacy Rule

Health oversight

- From § 164.512(d) Standard: uses and disclosures for health oversight activities.
 - (1) Permitted disclosures. A covered entity may disclose protected health information to a health oversight agency for oversight activities authorized by law, including audits; civil, administrative, or criminal investigations; inspections; licensure or disciplinary actions; civil, administrative, or criminal proceedings or actions; or other activities necessary for appropriate oversight of:
 - (i) The health care system;
 - (ii) Government benefit programs for which health information is relevant to beneficiary eligibility;
 - (iii) Entities subject to government regulatory programs for which health information is necessary for determining compliance with program standards; or
 - (iv) Entities subject to civil rights laws for which health information is necessary for determining compliance.

Health oversight

- *Health oversight agency* means an agency or authority of the United States, a State, a territory, a political subdivision of a State or territory, or an Indian tribe, or a person or entity acting under a grant of authority from or contract with such public agency, including the employees or agents of such public agency or its contractors or persons or entities to whom it has granted authority, that is authorized by law to oversee the health care system (whether public or private) or government programs in which health information is necessary to determine eligibility or compliance, or to enforce civil rights laws for which health information is relevant.

Subpoenas/judicial proceedings and law enforcement

- **From § 164.512(e) Standard: disclosures for judicial and administrative proceedings.**
 - (1) Permitted disclosures. A covered entity may disclose protected health information ... :
 - (i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or
 - (ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:
 - (A) The covered entity receives satisfactory assurance, ... from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or
 - (B) The covered entity receives satisfactory assurance, ... from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order...

Subpoenas

- **Compliance Checklist:**

- Court Order or Subpoena Signed by Judge - An order or subpoena signed by a judge of a court or administrative tribunal requires no further assurances or notification to the individual. The signature can be a stamp of the judge's signature. Workers' Compensation Appeals Board subpoenas are always signed by a judge. Civil subpoenas are usually signed by an attorney.

Subpoenas

- **Compliance Checklist:**
 - Subpoena or Discovery Request Signed by Attorney- Further assurance is necessary:
 - NOTICE
 - Proof of service showing that the individual (or his/her attorney) was served a copy of the subpoena or discovery request and a reasonable time to object has expired, or
 - A declaration ... showing that reasonable efforts have been made ... to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request.

Subpoenas

- **Compliance Checklist:**

- Subpoena or Discovery Request Signed by Attorney- Further assurance is necessary:

- **QUALIFIED PROTECTIVE ORDER**

An order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that :

(1) prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and

(2) requires the return or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

Subpoenas/judicial proceedings and law enforcement

- **From § 164.512** Uses and disclosures for which consent, an authorization, or opportunity to agree or object is not required.
 - (a) Standard: Uses and disclosures required by law.
 - (1) A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.
 - ...
 - (f) Standard: Disclosures for law enforcement purposes.
 - (i) As required by law including laws that require the reporting of certain types of wounds or other physical injuries, ... or
 - (ii) In compliance with and as limited by the relevant requirements of:
 - (A) A court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer;
 - (B) A grand jury subpoena; or
 - (C) An administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, ...

Law Enforcement

- **Permitted Disclosures:**
 - For identification and/or location of certain individuals (§ 164.512(f)(2))
 - In connection with crime victims (§ 164.512(f)(3))
 - In connection with decedents (§ 164.512(f)(4))
 - For reporting crime that occurs on the covered entities premises (§ 164.512(f)(5))
 - For reporting crime in emergencies (§ 164.512(f)(6))

Effective Use of Minimum Necessary

- **Why you should be concerned**
- **Limiting the release of PHI**
- **When minimum necessary does not apply**
- **Provide for emergencies**

Why you should be concerned

From the Preamble discussion of § 164.514(d)

Disclosure of the entire medical record without documented justification is considered a “presumptive violation of this rule.”

Limiting the release of PHI

§ 164.502(b) of the HIPAA Privacy Rule establishes the general standard for minimum necessary:

“When using or disclosing protected health information or when requesting protected health information from another covered entity, a covered entity must make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request.”

Limiting the release of PHI

§ 164.514(d)(1) Standard:

minimum necessary requirements.

A covered entity must reasonably ensure that the standards, requirements, and implementation specifications of § 164.502(b) and this section relating to a request for or the use and disclosure of the minimum necessary protected health information are met

[i.e. limit the release of PHI to what is necessary to accomplish the purpose of the use, disclosure, or request]

Limiting the release of PHI

§ 164.514(d)(4) ...

A covered entity must limit any request for protected health information to that which is reasonably necessary to accomplish the purpose for which the request is made, when requesting such information from other covered entities

When minimum necessary does not apply

- disclosure or request by health care provider for treatment
- disclosure made to or by individual or individual's personal representative (§ 164.528, Accounting of Disclosures; and § 164.524, Access to Individual's PHI)
- disclosures as authorized in accordance with § 164.508 (requires individual's OK to release PHI)
- disclosures to the Secretary of HHS
- disclosures required by law § 164.512(a) and for public health purposes § 164.512(b)
- other uses or disclosures required to comply with or allowed by the HIPAA Privacy Rule § 164.510 (Individual is given opportunity to agree or prohibit or restrict the use or disclosure - e.g. inclusion in a hospital directory)

Provide for Emergencies

Break the Glass (Emergency Procedures)

Ensure that a person with limited access who has a need to know in an emergency situation can easily access required information. There is generally a special audit function associated with this emergency access that notifies the person's supervisor, patient's attending physician, or other individual with designated authority to review such accesses for their applicability.

(see § 164.312(a)(2)(ii))

Special Situations

- **Red Cross**
- **Military**
- **Minors**

Red Cross

- Chapter 3001 of the U.S. Code of Laws established the American Red Cross
 - Section 300102(3) under the heading "Purposes" states that the American Red Cross is, "to act in matters of voluntary relief and in accordance with the military authorities as a medium of communication between the people of the United States and the Armed Forces of the United States."

Red Cross

§ 164.510(b)(1)(ii) states:

- A covered entity may use or disclose protected health information to notify, or assist in the notification of (including identifying or locating), a family member, a personal representative of the individual, or another person responsible for the care of the individual of the individual's location, general condition, or death....

§ 164.510(b) (2) states in summary:

- ... the covered entity may use or disclose the protected health information if it:
 - (i) obtains the individual's agreement;
 - (ii) provides the individual with the opportunity to object to the disclosure, and the individual does not express an objection; or
 - (iii) reasonably infers from the circumstances, based upon the exercise of professional judgment, that the individual does not object to the disclosure.

Red Cross

§ 164.510(b)(3) states in summary:

- that if the use or disclosure cannot practicably be provided because of the individual's incapacity or an emergency circumstance, the covered entity may, in the exercise of professional judgment, determine whether the disclosure is in the best interests of the individual. A covered entity may use professional judgment and its experience with common practice to make reasonable inferences of the individual's best interest in allowing a person to act on behalf of the individual.
- The previously quoted or referenced statements from the Privacy Rule allow a covered entity to release information to the American Red Cross for the purpose of advising military commanders on the need for emergency leave of military personnel.

Military

§ 164.512(k)(1) of the HIPAA Privacy Regulation states:

- (1) *Military and veterans activities.*

(i) *Armed Forces personnel.* A covered entity may use and disclose the protected health information of individuals who are Armed Forces personnel for activities deemed necessary by appropriate military command authorities to assure the proper execution of the military mission, if the appropriate military authority has published by notice in the Federal Register the following information:

- (A) Appropriate military command authorities; and
- (B) The purposes for which the protected health information may be used or disclosed.

Military

From the April 9, 2003, NPRM:

- **SUMMARY:** Under 45 CFR part 164, “Standards for Privacy of Individually Identifiable Health Information” and DoD 6025.18–R, “DoD Health Information Privacy Regulation” provisions are made to allow appropriate uses and disclosures of protected health information concerning members of the armed forces to assure the proper execution of the military mission, provided that the Department of Defense publishes in the **Federal Register** a notice describing implementation of these provisions. This notice implements those provisions.

Military

From the April 9, 2003, NPRM:

- 1. *General Rule.* A covered entity (including a covered entity not part of or affiliated with the Department of Defense) may use and disclose the protected health information of individuals who are Armed Forces personnel for activities deemed necessary by appropriate military command authorities to assure the proper execution of the military mission.
- 2. *Appropriate Military Command Authorities.* For purposes of paragraph 1, appropriate Military Command authorities are the following:
 - 2.1. All Commanders who exercise authority over an individual who is a member of the Armed Forces, or other person designated by such a Commander to receive protected health information in order to carry out an activity under the authority of the Commander.
 - 2.2 The Secretary of Defense, the Secretary of the Military Department responsible for the Armed Force for which the individual is a member, or the Secretary of Homeland Security when a member of the Coast Guard when it is not operating as a service in the Department of the Navy.
 - 2.3. Any official delegated authority by a Secretary listed in subparagraph 2.2 to take an action designed to ensure the proper execution of the military mission.

Military

- In the April 9, 2003, Federal Register (Vol. 68, No. 68) the Department of Defense issued a notice identifying: the "appropriate military command authorities" and "the purposes for which the protected health information may be used or disclosed." This met the requirement of § 164.512(k)(1)(i) that is "the appropriate military authority has published by notice in the Federal Register."
- Therefore, PHI can be released to the "appropriate military authority" as stated in the April 9, 2003, Federal Register.

Minors

- Laws/Rules concerning minors remain under the domain of the State
 - According to the Privacy Rule, 45 C.F.R § 164.502(g)(3), the general rule is that a parent, guardian, or other person in loco parentis with authority under local law to make health care decisions about an unemancipated minor shall be treated as the minor's personal representative, except in three specific circumstances.

Minors

- The three exceptions to the general rule:
 - when the parent consents to such independence
 - when the applicable state/local law permits the minor to exercise independent consent (and the minor exercises such authority)
 - when applicable law permits a third party such as a court to grant consent on the minor's behalf and does so

Minors

- Who is an Unemancipated Minor?
 - A minor is a person who is under the age of majority, and an unemancipated minor is a minor who has not exercised his or her right to independence from parental authority, if any, under applicable state law behalf and does so
 - For a listing of state laws concerning minors go to <http://www.hipaa.state.sc.us/minors.doc>

QUESTIONS

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