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Double Take: How HIPAA and State Law Affect Your Response to Requests for Protected Health Information

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Dr. Smith, an internist, treated Mary Bennett for the last 20 years. Starting in 2011, Mary's daughter Tracy always brought Mary in for regular checkups with Dr. Smith. Tracy not only drove Mary to the appointments, but she also came into the exam room with Mary and asked Dr. Smith questions about Mary's health and medications. Mary was able to make her own healthcare decisions but told Dr. Smith that she appreciated having Tracy with her as a second set of eyes and ears. Mary executed a healthcare power of attorney, allowing Tracy to make healthcare decisions for Mary if Mary became unable to make those decisions for herself. Mary gave a copy of the executed healthcare power of attorney to Dr. Smith's office.

Three years ago, Mary developed Alzheimer's disease. Mary, Tracy and Dr. Smith talked at length about whether Mary would need long-term care. Last year, Mary was admitted to a nursing home. Dr. Smith continued to treat Mary at the nursing home. Tracy frequently visited Mary and was present for most of Dr. Smith's visits with Mary at the nursing home. Occasionally, Mary's son Paul was also present at the nursing home when Dr. Smith arrived, but Paul would leave the room while Dr. Smith examined Mary.

When Mary passed away last month, Paul told some members of the nursing home staff that he thought Mary would have lived longer at the nursing home if she had received better care while there. Paul also told the staff that he had spoken to a lawyer and he planned to sue the nursing home. The nursing home's executive director told Dr. Smith about Paul's statements.

Last week, Dr. Smith's office received a letter from an attorney. In the letter, the attorney wrote that he was representing Paul in a potential wrongful death claim against Mary Bennett's nursing home. The attorney requested all of Mary's medical records from Dr. Smith. Along with the letter, the attorney sent an authorization signed by Paul. Dr. Smith knows that he is bound by HIPAA and the physician/patient privilege to keep Mary's health information confidential, even after Mary's death. Dr. Smith and his staff also know that under certain circumstances, a patient's family members can obtain the patient's medical records. Before Dr. Smith's office can send Paul's attorney the records, important questions need to be answered.

At First Glance: Is There a Court Order or HIPAA-Compliant Authorization?

Under the HIPAA privacy rule, Dr. Smith cannot release Mary's protected health information (PHI) to Paul's attorney without a court order or HIPAA-compliant authorization.[1] This rule is in effect for 50 years after Mary's death.[2]

Continued on page 2

Continued from page 1

If Paul's attorney has obtained a court order allowing the production of Mary's PHI, then Dr. Smith may release Mary's records.

However, Dr. Smith must be very careful to follow the terms of the court order. Does the court order identify who can receive the records? If the order states that Mary's medical records can be produced to Paul's attorney (but does not mention anyone else), then Dr. Smith should not produce the records directly to Paul. Does the order say that only certain records can be produced? If the order says that Dr. Smith can only produce Mary's records from the last five years, then Dr. Smith should not produce records that were made more than five years before the date of the order.

In this case, there is no court order. Dr. Smith cannot release the records to Paul's attorney without a HIPAA-compliant authorization. The HIPAA regulations require a number of elements for an authorization to be valid. (For a checklist of the required elements, see pages 5 and 6.) Some of those elements are straightforward. The authorization must state who can release the records, who can receive the records and the date the authorization will expire. Some of the required elements are less straightforward, including the issue of whose signature must be on the authorization.

Look Again: Who Approved the Authorization?

Paul authorized Dr. Smith to release Mary's medical records to Paul's attorney. But does Paul have the authority to make that decision? Dr. Smith knows Paul was not Mary's healthcare agent. Dr. Smith only met Paul a few times, and he never discussed Mary's condition with Paul. In contrast, Dr. Smith knows that Tracy was Mary's healthcare agent.

The HIPAA privacy rule is federal law. State law determines the appropriate person to sign the HIPAA authorization for Mary's medical records.[3] In many states, only the executor or administrator of a deceased person's estate has the authority to allow the deceased person's records to be released to third parties. This means that before Paul could execute a valid authorization for his attorney to obtain Mary's records, Paul would have to incur the expense of opening a probate estate for Mary and he would have to be appointed executor or administrator of Mary's estate by the probate court.

Some states have relaxed this requirement. For example, in Illinois, Tracy could execute a valid authorization to obtain Mary's records because Tracy was Mary's healthcare agent when Mary was alive.[4] Illinois has a hierarchy of individuals who can obtain a deceased person's medical records. If there is no executor or administrator of the patient's estate, then a person who was the patient's healthcare agent while he or she was alive may obtain the records. If there was no healthcare agent, then the patient's spouse may obtain the records (if the patient never specifically objected in writing to the disclosure of his or her records). If there is no spouse, then either the patient's adult son/daughter, parent or sibling may obtain his or her records (again, as long as the patient never made a specific written objection to such disclosure).[5] Under the Illinois law, Paul could not execute a valid authorization because Mary did have a healthcare agent when she died, so Tracy would be the appropriate person to execute the authorization.

The Decision to Disclose (or Not)

Dr. Smith's office manager sent the records request to Dr. Smith's risk manager, who prepared a written response to Paul's attorney. In the written response, the risk manager noted that Paul had not been appointed executor or administrator of Mary's estate. There was no other state law that otherwise enabled Paul to execute a valid authorization for Dr. Smith's office to disclose Mary's medical records to Paul's attorney. Finally, the risk manager noted that if Paul was appointed executor or administrator of Mary's estate, Dr. Smith's office would reconsider the request.

A few days later, Tracy contacted Dr. Smith's office. She had heard that Paul was thinking about suing the nursing home for Mary's death. Tracy wanted to talk to Dr. Smith about his assessment of Mary's medical condition in the last few visits he had with Mary before she died. Dr. Smith spoke with his risk manager and learned that the HIPAA privacy rule allowed him to disclose certain PHI directly to Tracy.[6] When a patient dies, a physician or healthcare provider may disclose certain PHI to the patient's family member if that family member was involved in the patient's healthcare.[7] Dr. Smith could only disclose to Tracy information that was relevant to Tracy's involvement with Mary's medical care.[8] Tracy had been very involved in the decision to place Mary in the nursing home and was involved in Mary's medical care with Dr. Smith during the entire time she was in the nursing home, so it was not a violation of the HIPAA privacy rule for Dr. Smith to talk with Tracy about his last few assessments of Mary's medical condition. It likely would have been inappropriate for Dr. Smith to have the same conversation with Paul, as Paul was not involved in Mary's medical treatment with Dr. Smith.

Know Before You Disclose: Consider HIPAA and Your State's Laws

Dr. Smith's case study highlights the importance of knowing how your state's laws affect the HIPAA privacy rules. When there is a conflict between state law and HIPAA regulations, the general rule is that the state law should be followed if it imposes a more stringent standard than HIPAA, meaning a standard that puts more limitations on whether PHI can be disclosed.[9] For example, some states may impose laws that would prevent Dr. Smith from talking to Tracy about his final assessments of Mary's medical condition, even though the HIPAA privacy rule would otherwise allow him to do so. State laws affect not only who can authorize the release of protected health information, but also the different types of protected health information that can be released.

Mental Health Records

Many states have laws that specifically apply to the production of mental health records. If your office receives a request for a patient's medical records, and your file on that patient includes mental health records, look closely at the request. As with most requests, it should be accompanied by a HIPAA order or a written authorization signed by the patient (or the patient's representative). The HIPAA order or the authorization should specifically state that you can release the patient's mental health records to the requesting party.[10]

Some states allow healthcare providers the discretion to not disclose mental health records, even if the patient or his representative has specifically consented to the release of his mental health records. In South Dakota, a mental health professional may refuse to release mental health treatment records to the patient if the professional makes a determination in writing that releasing the records to the patient would be harmful to the patient's health.[11] In Michigan, the mental health professional may refuse to release records to a third party (even if the patient has consented) if the professional makes a written determination that disclosing the records would harm the patient or others.[12]

Law Enforcement

HIPAA provides that there are certain circumstances where healthcare providers can disclose PHI to law enforcement for purposes of investigating crimes. Consider the following scenario:

The suspect is having a rough night. He just lost his job and decides to drink away his troubles at the local tavern. By the end of the night, his wallet is empty and he is intoxicated, but he does not feel any better about his situation. He remembers that one of his neighbors works the night shift and that this neighbor frequently brags about having a large store of cash in his house, "just in case." The suspect drives to his neighbor's house and breaks into his home, surprised to find that his neighbor is sitting on the couch watching television. The neighbor is also surprised, as well as armed. The neighbor shoots the suspect in the leg. The suspect makes it to his car and tries to drive to the hospital in the next county. Five minutes down the road, he drives his car into a light pole and is ejected from the car, as he neglected to put on his seat belt. The officer finds him unconscious and notices that a large amount of blood is coming from the suspect's leg. The officer calls an ambulance to take him to the nearest emergency room where he is treated by Dr. Jackson. The officer asks Dr. Jackson for the results of the suspect's blood alcohol test. In the meantime, the officer receives a report that an alleged perpetrator was shot during an attempted home invasion. The officer asks Dr. Jackson whether the doctor has seen any gunshot wound victims in the last hour.

HIPAA provides that Dr. Jackson can tell the officer about the suspect's gunshot wound. Under the HIPAA privacy rule, when a police officer requests information from a healthcare provider for the purpose of identifying a suspect, the healthcare provider can disclose certain PHI without a HIPAA-compliant authorization or court order. The information that can be released to the police officer is the patient's:

1) Name and address
2) Date and place of birth
3) Social Security number
4) Blood type
5) Type of injury
6) Date and time of treatment
7) Date and time of death (when applicable)
8) Description of distinguishing physical characteristics[13]

In this case, Dr. Jackson will not violate HIPAA if he tells the officer that the suspect has a gunshot wound in his leg without a HIPAA-compliant authorization or court order.

Under the law of most states, Dr. Jackson should insist that the officer obtain a warrant or subpoena before Dr. Jackson discloses the results of the blood alcohol test. Some state laws may require Dr. Jackson to disclose the results even without a warrant. HIPAA does not allow Dr. Jackson to disclose

the BAC results to the officer without an authorization, court order or subpoena.

If a law enforcement officer asks your office for PHI pertaining to one of your patients, ask the following questions in this order:

- Does the law enforcement official have a HIPAA-compliant authorization or court order allowing you to release the requested information? If yes, your inquiry ends here and you can release all information allowed by the authorization or court order. If no, continue to the next question.
- Is the request for law enforcement purposes? If it is a law enforcement official who is requesting the information, presumably he/she wants the information for law enforcement purposes, but you should confirm. If the request is not for law enforcement purposes, then you cannot release the information without a HIPAA-compliant authorization or court order. If the official confirms that yes, the information requested is for law enforcement purposes, then continue to the next question.
- Is the law enforcement official asking for a patient's 1) name and address; 2) date and place of birth; 3) Social Security number; 4) blood type; 5) type of injury; 6) date and time of treatment; 7) date and time of death; and/or 8) description of distinguishing physical characteristics? If so, you may release information from 1–8. If the official is seeking other PHI, continue to the next question.
- Does the law enforcement official have a warrant, subpoena or summons from the court for the information? If he or she does, you may release it. If not, then ask him/her to cite the particular provision of state or federal law that authorizes you to release the information to law enforcement. Confirm with your risk manager that the state or federal law authorizes you to release the information to the official. For those who work exclusively in a hospital setting, it is best to consult with the medical records department and/or risk management before providing information to law enforcement.

Noncustodial Parents

Generally, noncustodial parents have the same right to access their children's medical records as custodial parents, though different restrictions apply in different states. Some examples:

- In Missouri, a judge may order that the child's address must be removed from the child's medical records before a healthcare provider can produce the records to a noncustodial parent who has limited visitation rights. This restriction applies in cases of prior domestic abuse.[14]
- In Ohio, the court has discretion to determine whether it is in the best interests of the child for the noncustodial parent to be denied access to certain parts of the child's medical records, and will issue a specific order if the court finds that the noncustodial parent may not access certain information in the child's medical records. The order will also specifically state that any provider's office that fails to comply with the order will be held in contempt of court.[15]
- In Michigan, only the parent with both physical and legal custody can obtain a minor child's mental health treatment records.[16] However, the noncustodial parent can obtain a copy of the child's mental health treatment records if the custodial parent consents.[17]

Child Protective Services

Most states have laws that require healthcare providers to report suspected child abuse. There is an exception to the HIPAA privacy rule that allows healthcare providers to disclose PHI when necessary to report suspected child abuse. If the law of your state mandates that you disclose your patient's PHI in order to report child abuse, then you should follow your state's law and make the report.[18] Exactly what PHI should be disclosed varies from state to state. Be careful to avoid offering PHI that is irrelevant to the child abuse report. Consider the following example:

Dr. Anderson is a family doctor in Kansas. He has been treating Patty, age 6, for the last four years. Patty sees Dr. Anderson regularly to monitor her severe asthma. When Patty appeared for her last visit, Dr. Anderson noticed that Patty was favoring her left arm and winced when Dr. Anderson brushed up against it. Dr. Anderson asked Patty if there was something wrong with her arm, and she looked down at the floor. Patty's mother insisted that Patty's arm pain was "nothing" and Patty was just "making it up." Dr. Anderson pulled up Patty's sleeve and noticed several fading bruises that were greenish yellow. Dr. Anderson ordered X-rays of Patty's arm, but Patty's mother made several remarks that suggested the X-rays were not necessary, and she would only take Patty to the radiology center if she "had time." This is not the first time that Patty's mother has behaved strangely when Dr. Anderson discovered bruises on Patty's body. Dr. Anderson believed

that he needed to make a report to the Kansas Department for Children and Families.

Pursuant to Kansas law, Dr. Anderson must provide the following information in his report:

- Patty's name, address, gender, race and age
- The reasons Dr. Anderson suspects Patty has been abused
- The nature and extent of the harm to Patty
- Any other information that Dr. Anderson believes would be helpful in establishing who is harming Patty[19]

If Dr. Anderson has no reason to think that information about Patty's asthma diagnosis and the treatment she receives for it would be helpful, then he need not offer this information to the Kansas Department for Children and Families. However, the Department may ask Dr. Anderson why he was seeing Patty on the day he discovered her bruises. Because Patty may need additional medical care (i.e., an X-ray and potential treatment for a broken arm), Kansas law specifically requires Dr. Anderson to cooperate fully throughout the investigation and to "freely" disclose protected health information.[20] The requirement to "freely" disclose protected health information applies when a report is made in Kansas that a child may be "in need of care."[21]

Follow these guidelines for sharing PHI with Child Protective Services:

- Are you required by state law to report suspected child abuse? Then you may share PHI with Child Protective Services when making the report as long as it is relevant to the child abuse report.[22] If you are asked to share additional PHI that you do not think is relevant to the child abuse report, check your state's law to see what you must disclose.
- Has Child Protective Services asked your office to disclose PHI for purposes of investigating a child abuse report? Check your state's law to see what information you are required to disclose.

Of course, if Child Protective Services provides you with either a HIPAA-compliant authorization or a court order, then you may disclose all PHI that is listed in the authorization or order. The above guidelines apply when there is no HIPAA-compliant authorization or court order for the requested PHI.

If you are a mandated child abuse reporter and you are making a report of suspected child abuse pursuant to state law, HIPAA requires you to inform the child's parent or legal representative that such a report has been or will be made, *unless* you have reason to believe that doing so will place the child at risk.[23]

State Laws are Important

All of the previous examples are intended to highlight the importance of knowing your own state's laws. HIPAA provides the general rules for medical records disclosure. State laws provide the specifics. It is imperative for practitioners to be aware of the requirements imposed upon them by state law when responding to requests for protected health information.

Resources

When determining whether an authorization signed by either the patient or his or her legal representative contains all of the elements required by HIPAA, see the Checklist for HIPAA Compliant Authorization.

Your risk manager and/or attorney can be your best resource for learning the nuances of your state laws and the interplay between state laws and the HIPAA privacy rule. For information on different states' laws, try www.healthinfolaw.org.

The U.S. Department of Health and Human Resources provides guidance on the HIPAA privacy rule at http://www.hhs.gov/hipaa/for-professionals/index.html.

Checklist for HIPAA-Compliant Authorization

The following elements satisfy the HIPAA Privacy Rule for authorizations signed by either the patient or the patient's legal representative to obtain the patient's records. 45 C.F.R. §164.508(c)(2). Your state may impose additional requirements.

The authorization should contain:

- A description of the information/records that may be disclosed. The description must be specific.
- The name of the person or persons who may disclose the information (e.g., your name or the name of your practice).
- The name of the person(s) who may receive the records (e.g., the patient's attorney).
- A description of the purpose of the disclosure, or the statement "at the request of the individual."
- An expiration date or expiration event for the authorization.
- Signature of the patient or the patient's authorized representative. If the patient's authorized representative is signing the authorization, then

Continued from page 5

there also must be a description of the representative's authority (e.g., healthcare agent, executor of estate).
- The date the authorization was signed.
- The following statements (or substantially similar statements):
  - ❍ "I, the undersigned, understand that I have the right to revoke this authorization. I understand the revocation must be in writing and bear my signature. My revocation must be submitted to the above healthcare provider. I understand that if I do revoke this authorization, my revocation will not affect any prior actions taken in reliance on this authorization."
  - ❍ "I understand that if the person or entity that receives the described records/information is not subject to federal privacy regulations or other laws, the records/information may be re-disclosed and no longer protected by those regulations."
  - ❍ "I understand that the healthcare provider may not condition treatment, payment, enrollment or eligibility for benefits on whether I sign this authorization. I may refuse to sign this authorization."[24]

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[1] 45 C.F.R. §164.500 et. seq.
[2] Id. at §164.502(f).
[3] See id. at §164.502(g)(4).
[4] 735 ILCS 5/8-2001.5(a).
[5] Id.
[6] 45 C.F.R. §164.510(b)(5).
[7] Id.
[8] Id.
[9] Id. at §160.203(b).
[10] 45 C.F.R §164.512(e)(1)(i); 45 C.F.R §164.508(c)(1)(i).
[11] S.D. Codified Laws §27A-12-26.1(2).
[12] Mich. Comp. Laws. Ann. §330.1748(6)(b).
[13] 45 C.F.R §164.512(f)(2).
[14] Mo. Rev. Stat. 452.375(12).
[15] Ohio Rev. Code Ann. §3109.051(H)(1).
[16] Mich. Comp. Laws. Ann. §330.1748(5)(c).
[17] Id. at (8)(a).
[18] 45 C.F.R. §160.203(c).
[19] Kan. Stat. Ann. 38-2223(b).
[20] Id.
[21] Id.
[22] 45 C.F.R. §164.512(c)(1).
[23] 45 C.F.R. § 164.512(c)(2).
[24] There are certain circumstances where treatment, enrollment, payment or eligibility MAY be affected by whether the patient signs the authorization, and so the language of the authorization should be adjusted. See 45 § 64.508(b)(4) for further information.

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