Confidentiality Stress Points and Challenges

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Confidentiality Stress Points

- Review of the basics: HIPAA, state and federal laws
- Disclosures among healthcare providers
- Disclosures to multi-disciplinary teams
- Disclosures to law enforcement/probation
- Subpoenas

Confidentiality: A Quick Review of the Basics – HIPAA, State and Federal Laws
Basic Privacy Rule (Applicable to All Disciplines and All Types of Health Information)

- Don’t talk unless you **MUST** or **MAY**!

- If you aren’t sure:
  - “May I put you on hold for just a minute?”
  - “Would you mind waiting here for just a minute?”
  - “Can I get your name and number and call you back?”

Why is it so Complicated? Various Disciplines Have Different “Thickness” of Protection!

- HIPAA: applies to all information – summer
- Civil Code 56.10 (Confidentiality of Medical Information Act or “CMIA”): physical health – spring
- Welfare & Institutions Code 5328: Mental health - fall
- Health & Safety Code: HIV Information – winter
- 42 CFR Part 2: substance use disorder (SUD) – blizzard

HIPAA: Basics

45 CFR Parts 160 and 164

**Subpart E** - Privacy Rule

- 164.502 – “A covered entity (CE) may not use or disclose protected health information (PHI) except as permitted or required by this subpart or by subpart C of part 160 of this subchapter.”

One “P”

Two “P’s”
HIPAA History and Purpose

- Insurance companies were NOT happy with the new regulations, and argued that because they all "spoke a different language" when it came to how they did business, it would be impossible to do what the law wanted them to do.

- Administrative simplification - regulators told insurance industry: then you better "standardize" how you do business!

HIPAA History and Purpose (cont.)

Administrative Simplification

- Regulations required use of "Standardized Transactions and Code Sets" to facilitate the electronic exchange of:
  - Health information
  - Insurance eligibility information, and
  - Claims information throughout the country
  - Required billing to be done electronically

HIPAA History and Purpose (cont.)

- Public got nervous about their privacy
  - Lots of examples of paper records being found in the trash
  - Lots of examples of private information being given or sold to third parties
  - Some states, like CA, already had medical privacy laws, but many didn’t
  - So, to assure the public that information would be private and secure, even in electronic standardized formats, the US Department of Health and Human Services (DHHS) promulgated regulations
HIPAA – Rules for “Covered Entities”
(Health Providers, Plans, & Clearinghouses)

- Privacy rule
- Security rule
- Minimum necessary rule
- Preemption rule

HIPAA Rule – Pre-emption

Analysis when several medical privacy laws (blankets) apply: follow “most stringent” law – another way to look at the protections:

- HIPAA
- MH – LPS Act
- SUD – “Part 2”

HIPAA “Must” and “May” Disclosures

“Must” disclosures (2):

1. Secretary of DHHS, if asked (e.g., HIPAA breach investigation)

2. Patient, if seeking “access” to own record (unless it will cause death or serious physical harm)
“Must” and “May” Disclosures (cont.)

“May” disclosures (4):
1. Treatment, payment or operations
   – 45 CFR 164.506
2. Written authorization
   – 45 CFR 164.508
3. Verbal authorization
   – 45 CFR 164.510
4. No authorization
   – 45 CFR 164.512

Disclosures Among Health Care Providers for “Treatment Purposes”

HIPAA (all disciplines)
Provider may share with other providers for “treatment purposes” – 45 CFR 164.506 (see 45 CFR 164.501 for definition of “treatment purposes” – it’s very broad); but also, throw on blankets:

Civil Code 56.10(c)(1) (physical health)
Disclosure permitted for “diagnosis and treatment” of the patient

Welfare & Institutions Code 5328(a)(1) (mental health)
Disclosure permitted to provider who has “medical or psychological responsibility for the care of the patient”

42 CFR §2.12(c)(3) (SUD)
Disclosures allowed among providers WITHIN the SUD program only for diagnosis, treatment, or referral for treatment – OTHERWISE YOU NEED WRITTEN CONSENT

45 CFR 164.508 - HIPAA Requirements for Form

1. What can be disclosed?
2. By whom?
3. To whom?
4. For what purpose?
5. Expiration date or event
6. Right of revocation
7. Right to copy of form
8. Other rights and warnings
9. Signature and date
Disclosures to “Whole Person Care Teams” and Other MDTs

Whole Person Care Teams and similar multi-disciplinary “coordinated” efforts to help folks with:

- Medical care
- Mental health care
- SUD services
- Housing
- Food resources
- Job training and education
- Disability services and support
- Transportation, etc. etc.

(if you talk about SUD with these folks and any are not in a TPR with patient then he/she must be named by name)

Disclosures to Law Enforcement

California medical privacy laws have always included certain exceptions that allow or require disclosures to Law Enforcement:

- Child abuse/neglect
- Elder and dependent adult abuse/neglect
- Gunshot wounds and other injuries
- The ‘Tarasoff duty to warn’ (serious threats communicated by patients to psychotherapists)
- Crimes committed on, or threatened against the premises or against staff
Note: On Probation Officers

Although they are also "law enforcement" we do not disclose health information to them in the same way that we might disclose information to a police officer who is responding to a 911 call, or when we report child abuse.

Generally, before disclosing PHI to someone’s Probation Officer, we need a written HIPAA-compliant authorization (45 CFR 164.508) that is ALSO:
- State law-compliant (Civil Code 56.11)
- Part 2-compliant if SUD Program info involved (recipient = named individual = named probation officer)

HIPAA at 45 CFR 164.512(f) – Disclosures to Law Enforcement

- HIPAA allows certain specific disclosures to law enforcement:
  1. In compliance with court orders or warrants,
  2. Limited disclosures for identification and location purposes,
  3. About victims of crimes,
  4. About decedents who may have died of criminal causes,
  5. Reporting crimes on the premises, and
  6. Reporting crimes in emergencies

- CMIA at CA Civil Code 56.10: if another law says you “must” disclose, then you “MUST” (§ 56.10(b)(9)); if another law “authorizes” a disclosure, then you “MAY” (§ 56.10(c)(14))

Disclosures to Law Enforcement (cont.)

BUT, NO similar “incorporation by reference” in state laws pertaining to MH or HIV, or federal law pertaining to SUD
- Mental health information – some things, but not for missing persons, witnesses, etc. (see W&I Code § 5328)
- HIV – not unless special rules apply (e.g., possible exposure to first responder), or you have authorization
- SUD – limited to reporting child abuse; or a crime committed on, or threatened, on premises or against staff
HIPAA: Permitted Disclosures to Law Enforcement – 45 CFR 164.512(f) (Paraphrased, Not Quoted!!)

1) Pursuant to process and as otherwise required by law
   • e.g., laws requiring reporting of certain types of wounds or physical injuries, or
   • Court order or court-ordered warrant, or subpoena or summons issued by a judicial officer, investigative demand, etc. so long as:
     • Information is relevant and material
     • Request is specific and limited in scope
     • De-identified information could not be used

HIPAA: Permitted Disclosures to Law Enforcement - 45 CFR 164.512(f) (cont.)

2) Limited information for identification and location purposes
   In response to LE official’s request for purpose of identifying or locating a suspect, fugitive, material witness or missing person, provided that the disclosure be limited to only:
   - Name and address - Date and place of birth
   - SSN, ABO blood type & Rh factor - Type of injury
   - Date and time of treatment - Date and time of death (if applicable)
   - Appearance (height, weight, hair and eye color, race, gender, facial hair, scars, and tattoos)
   But not: DNA or DNA analysis, dental records, typing, samples or analysis of body fluids or tissue

HIPAA: Permitted Disclosures to Law Enforcement - 45 CFR 164.512(f) (cont.)

3) Limited information - individual who is/or is suspected to be victim of a crime, if:
   • Person agrees to disclosure or
   • Agreement cannot be obtained because of incapacity of person or other emergency circumstance, so long as:
     • LE represents that info is needed to determine if someone else committed crime (not patient and won’t be used against patient)
     • LE represents that time is of the essence
     • Disclosure is in the patient’s best interests (prof. judgment)
4) Covered Entity may disclose information about individual who has died if:
   - Purpose is to alert law enforcement to the death when CE has suspicion that death may have resulted from criminal conduct
5) Crime on the premises
   - CE can disclose PHI it believes constitutes evidence of criminal conduct on the premises of the covered entity

6) Reporting crime in emergencies (CE is providing care in response to medical emergency, offsite)
   - Disclosure appears necessary to alert LE to
     - Commission and nature of a crime
     - Location of such crime or victim(s) of the crime
     - Identity, description, and location of perpetrator of the crime
     - If the medical emergency is the result of abuse, neglect, violence, etc. then disclosure would be pursuant to other exceptions in HIPAA (45 CFR 164.512(c))

Subpoenas – HIPAA Rules

45 CFR 164.512 (e) – Disclosures for judicial and administrative proceedings
   - Covered entity MAY:
     1. Disclose Protected Health Information (PHI) in response to a court order BUT limit to the info expressly authorized by the order
2. Disclose PHI in response to a subpoena, discovery request or other lawful process so long as:
   A) satisfactory assurances from party seeking info that patient has been given notice, or
   B) satisfactory assurances that party seeking info has made reasonable efforts to get a protective order from the Court

What are Satisfactory Assurances?
For purposes of giving notice (to patient) section – you receive written statement and accompanying documentation that:
1. The person has made a good faith attempt to provide written notice to the patient, or if location is unknown, then notice mailed to last known address
2. Notice had sufficient info about the litigation to permit the patient to raise an objection
3. The time to raise objections has elapsed and
   A. No objections have been filed
   B. If objections have been filed they have been resolved by the court and disclosure is consistent with the resolution

What are Satisfactory Assurances? (cont.)
- For purposes of getting qualified protective order – you receive written statement and accompanying documentation that:
  1. The parties to the dispute have agreed to a qualified protective order and have presented it to the court
  2. The party seeking the info has requested a qualified protective order from the court
What is a “Qualified Protective Order?”

A “qualified protective order” means:

- An order or stipulation by the parties that
  - A. Prohibits the parties from using or disclosing the PHI for any purpose other than the litigation or proceeding it is related to, and
  - B. Requires the return or destruction of the PHI at the end of the litigation or proceeding

One Last Option for the Covered Entity

Finally, if you haven’t received satisfactory assurances that the patient has received notice, or that a protective order has been obtained or sought from the Court, you may:

- A. Make your own reasonable efforts to provide notice to the patient (sufficient to meet the requirements of this section), or
- B. Yourself seek to obtain a qualified protective order (sufficient to meet the requirements of this section).

Subpoenas – California Law

California law lets you follow HIPAA rules when responding to a subpoena for Physical Health information (Civil Code § 56.10(b)(9) and § 56.10(c)(14)) BUT NOT FOR:

- HIV – get authorization or Court Order under limited specific laws, mostly related to criminal justice matters (H&S § 120075)
- Mental Health – get authorization or Court Order to bring info to Court (W&I Code § 5328(a)(6))
Subpoena’s – SUD info under federal regulations (42 CFR Part 2)

- Substance Use Disorder records – disclosure requires:
  - Authorization in writing from patient OR
  - Program must be given opportunity to go to Court if it is criminal matter, and
  - Both Program and Patient must be given opportunity to go to Court if it is civil matter (see 42 CFR Subpart E – Court Orders Authorizing Disclosures and Use, § 2.61- § 2.67 )

Questions?

Thank You

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