Dispelling the Myths about Sharing Data between Mental Health and Criminal Justice Systems

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November 13, 2006
TAPA Easy Access Net Teleconference

“Privacy” Foils Police
- Man assaulted wife, tried to burn down house
- Checked into hospital
- Police serve arrest warrant
- Hospital will not acknowledge suspect is a patient
- Hospital: “I don’t think we’re trying to be antagonistic toward law enforcement”

HIPAA Law Handcuffs Hospitals and Police
- “Area police agencies said the federal privacy laws have led to potentially dangerous people being released without their knowledge”
- Police “…agreed that hospital staff members are just following the new rules”

Fact or Myth?
- What does HIPAA really say?
- “…a covered entity may disclose protected health information in response to a law enforcement official’s request…for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person…”
  - Section 164.512(f)(2)(i)

The ACLU
- Question: Can the police get my medical information without a warrant?
- Answer: “Yes”

The Power of Myth
- HIPAA is the most misunderstood law in the country
- It presents no barrier to cross-systems collaboration
- It has become a major barrier to cross-systems collaboration
The Big Myths

- Myth 1: HIPAA applies to everyone
- Myth 2: All disclosures require consent
- Myth 3: No one has access without consent
- Myth 4: HIPAA eliminates state laws on confidentiality

More Big Myths

- Myth 5: Even staff from the same agency cannot share information
- Myth 6: I should not write anything down, because my client will see it
- Myth 7: If I violate HIPAA I will be severely punished, perhaps even executed
- Myth 8: Cross-systems collaboration is a great idea, too bad HIPAA makes it impossible

Today's Presentation

- What is covered?
- Who is covered?
- What exceptions exist?
- A note on the security regulations

Applicable Laws

- Health Insurance Portability and Accountability Act of 1996 (HIPAA)
- Federal regulations on substance abuse treatment (42 CFR)
- State statutes
- State court decisions

HIPAA

- Portability of insurance
- Privacy
- National standards for electronic security
- State law applies if more protective of privacy than HIPAA

What Is Covered?

Protected Health Information

- Any oral or recorded information relating to
  - the past, present, or future physical or mental health of an individual;
  - the provision of health care to the individual;
  - or payment for health care
PHI Must Be “Individually Identifiable”

- A subset of “health information,” including demographic information
  - (1) that is created or received by a covered entity
  - (2) that relates to the person’s condition; treatment; or payment for care;
  - (3) that identifies the individual, or might reasonably be used to identify the individual.

Exception for Psychotherapy Notes

- Notes in any medium documenting or analyzing the contents of a conversation during a private counseling session
  - Requires specific patient authorization to disclose
  - Payment cannot be denied for non-disclosure

42 CFR 2.11

- Records: Any information whether recorded or not relating to a patient received or acquired by the program
  - Any information identifying a patient as alcohol or drug abuser, obtained by program for diagnosis, referral, or treatment

Who Does HIPAA Cover?

- Health plans
- Health care clearinghouses
- Health care providers who transmit health information in electronic form

Who Is Not Covered?

- The police
- Accrediting agencies
- The courts
- Jails

Police

- May have access
  - To identify or locate a suspect, fugitive, witness, or missing person
  - When crime committed on premises of a covered entity
  - In medical emergencies in connection with a crime
  - Police may also identify injured parties
Courts and Judicial Officers
- Courts are not covered entities
- Prosecuting attorneys and defense attorneys are not covered entities
- “Standing orders” are recommended

Jails/Correctional Facilities
- Jails are usually not covered entities
- Health care provider to the jail may be a covered entity
- Special rules exist regarding PHI and correctional facilities

Does HIPAA Require Consent for Standard Releases?
- Consent is not necessary for:
  - Treatment (including for after-care)
  - Payment
  - Health care operations
- 42 CFR permits intra-program exchange and disclosures to qualified service organizations
- 42 CFR requires written consent for most disclosures
- State law may be more protective than HIPAA

May An Individual Ever Object?
- Facility directories (no specific medical information maintained)
- Notification of family, relative, friend
- In event of emergency, or incapacity of person, best professional judgment rule applies (164.510)

Are Other Disclosures Permitted? (164.512)
- In general, HIPAA permits broad disclosure
- Principle of “minimum necessity”
  - 42 CFR has a similar principle (information required to carry out the purpose of disclosure)

Permitted Disclosure: Public Health Activities
- Disclosure of PHI permitted to enable public health activities such as:
  - Disease prevention and control
  - Child abuse or neglect (state law and federal substance use law also permits)
  - To investigate work-related injury (with notice to employee)
  - 42 CFR permits disclosure of cause of death
## Permitted Disclosure: Victims of abuse or neglect
- If reasonable belief that person is victim of abuse, neglect, or domestic violence
- Individual either agrees, or
- State law permits, and covered entity believes necessary to prevent serious harm to individual or others, or
- Person lacks capacity and law enforcement represents PHI required for “immediate enforcement activity”

## Permitted Disclosure: Judicial/Administrative Proceedings
- PHI may be disclosed in response to
  - Judicial order
  - Subpoena without court order in some circumstances
  - 42 CFR requires court order
  - In general state law will require court order

## Permitted Disclosure: Law Enforcement
- Court order/grand jury subpoena/administrative summons
  - Information sought is relevant and material
  - Request is specific and limited in scope
  - De-identified information not reasonable
  - 42 CFR is more restrictive

## Permitted Disclosure: Law Enforcement (cont)
- For identification and location
  - Information about victims of a crime
    - Individual agrees to disclosure or
    - Individual lacks capacity and
      - Law enforcement requests info necessary to determine whether law has been violated (but not by victim)
      - Info won’t be used against the victim
      - Covered entity determines is in victim’s best interest
      - No comparable provision in 42 CFR

## Permitted Disclosure: Threat to Health or Safety
- If necessary to prevent or lessen a serious threat to the health or safety of individual or public
- To a person able to prevent the threat, including the victim
- Is necessary for law enforcement to apprehend the person
- Most state laws make disclosure discretionary
  - To protect an identified potential victim
  - No liability as long as good faith and no gross negligence

## Permitted Disclosure: Court-Ordered Exams
- Courts are not covered entities
- Payment from the court is not a HIPAA transaction
- An “assessment” is “treatment” within HIPAA
- If the examiner is covered by HIPAA, the exam is covered by HIPAA (see hybrid entity exception)
- Courts can use standard language in order to compel disclosure
- State laws typically permit
Permitted Disclosures: Correctional Facilities

- PHI can be disclosed without consent to provide health care to the inmate, or for the health and safety of other inmates or correctional officials (HIPAA).
- If the person is released, e.g. on parole, then HIPAA rules apply.
- No similar provision in 42 CFR.

Individual Right of Access

- Key provision, designed for accuracy.
- Must allow inspection or copy in form requested within 30 days of request (30 day extension permitted; 60 days if not on-site).
- HIPAA has appeals processes.

May Deny Access

- Psychotherapy notes.
- Information compiled in anticipation of legal proceeding.
- Inmate request, if harm may occur.
- Research-related information until end of research.
- If a 3rd party (not a health care provider) gave information on promise of confidentiality.

May Deny Access with Opportunity for Review

- If reasonably likely access would cause harm to the individual or others.
- Requested information refers to a 3rd party who may be endangered.
- Request is by a personal representative and disclosure would be reasonably likely to cause harm.

Will I Go To Jail?

- Primary enforcement by the Office of Civil Rights of HHS.
- No private cause of action.
- Penalties:
  - Civil: $100 per violation / $25,000 per year.
  - Criminal: $50,000 and up to one year (false pretenses double the fine/up to five years).
- There is no bite here, and barely a bark.
  - 17,000 complaints.
  - No enforcement to date.
  - DOJ has ruled that only covered entities are criminally liable.

Multi-System Tools

- Uniform consent form.
- Business Associate Agreements.
- Patient Safety Organizations.
- Standard Judicial Orders.
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**Uniform Consent Form**
- Essential tool
- Individual consents to use within a treatment system
- All providers are on the form
- Other requirements may be met as well

**Business Associate Agreements**
- Used for those providing ancillary services to a covered entity
- 42 CFR permits qualified service organization agreements

**Patient Safety Organization**
- Permits DHHS Secretary to certify these organizations
- Designed to permit privileged exchange of information within the PSO
- Relevant information includes
  - Efforts to improve patient safety and quality
  - Collection and analysis of patient safety work product
  - Development and dissemination of patient safety information, e.g., protocols, best practices, etc.
  - Use of such information to encourage “a culture of safety and of providing feedback and assistance to effectively minimize patient risk”
    - Public Law 109-41, Section 921-925.

**Standard Judicial Order**
- Courts are not covered entities
- Courts may seek PHI
- Best solution is a standard order

**The Security Regulation**
- An electronic system is “interconnected set[s] of information resources under the same direct management control that share common functionality. A system normally includes hardware, software, information, data, applications, communications and people.” (45 CFR 164.304)
- Exemptions include
  - Paper to paper faxes
  - Voice mails
  - Video conferencing

**Requirements (164.308)**
- Security management
- Assigned security responsibility
- Workforce security
- Information access management
- Security awareness and training
- Security incident procedures
- Contingency plan
- Evaluation
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Summary

- HIPAA, state law, and federal regulations on substance use confidentiality are more similar than not
- HIPAA does not block all exchanges of information
- The principle of “minimal necessity” is critical
- In a conflict, the most protective law applies
- Inter-system sharing of information is possible

Some Useful Sites

- [www.hhs.gov/ocr/hipaa/](http://www.hhs.gov/ocr/hipaa/) (Office of Civil Rights FAQs)
- [http://hipaablog.blogspot.com/](http://hipaablog.blogspot.com/) (news stories about HIPAA)
- [www.courtinfo.ca.gov/x/documents/reports/0409/item312.pdf](http://www.courtinfo.ca.gov/x/documents/reports/0409/item312.pdf) (information on standard court orders in California Probate Court)
- [www.ncsconline.org/WC/Publications/CS_PriPubHIPPA96Pub.pdf](http://www.ncsconline.org/WC/Publications/CS_PriPubHIPPA96Pub.pdf) (analysis of HIPAA and the courts, including a standing judicial order)