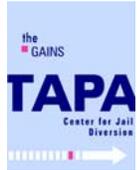


## Dispelling the Myths about Sharing Data between Mental Health and Criminal Justice Systems



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## "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"



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## 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"



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## 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)



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## The ACLU

- Question: Can the police get my medical information without a warrant?
- Answer: "Yes"



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## 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



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## 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



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## 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



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## 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



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## 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)



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## 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)



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## 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



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## 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 makes 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 3<sup>rd</sup> 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 3<sup>rd</sup> 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

## 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



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## Business Associate Agreements

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



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## 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.*



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## Standard Judicial Order

- Courts are not covered entities
- Courts may seek PHI
- Best solution is a standard order



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## 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



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## 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/> (news stories about HIPAA)
- [www.hipaa.samhsa.gov/download2/SAMHSAHIPAAComparisonClaredPDFVersion.pdf](http://www.hipaa.samhsa.gov/download2/SAMHSAHIPAAComparisonClaredPDFVersion.pdf) (comparison of HIPAA and 42 CFR)
- <http://csrc.nist.gov/publications/nistpubs/800-12/800-12-html/index.html> (introduction to security regulations)
- [www.courtinfo.ca.gov/jc/documents/reports/0405itema12.pdf](http://www.courtinfo.ca.gov/jc/documents/reports/0405itema12.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)