

A photograph of a city skyline with several tall buildings, including one with a 'MassMutual' sign, under a blue sky with light clouds. The foreground is a dark green curved shape.

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Counsellors at Law

HIPAA and Other Patient Rights

Compliance and Confidentiality

Disclaimer

- This information is a summary and does not represent the entire body of law on these topics.
- This presentation is not intended to provide legal advice.

HIPAA Basics

- The HIPAA Privacy Rule sets out the standard for how and what health information to protect
- “Protected Health Information” = *PHI*

Covered Entity

- HIPAA applies to a covered entity: a health care provider, regardless of size, that electronically transmits health information in connection with certain transactions such as billing and payment for services or insurance coverage
- Hospitals, academic medical centers, physicians, and other health care providers who electronically transmit claims transaction information directly or through an intermediary to a health plan are covered entities
- Covered entities can be institutions, organizations, or persons

What is PHI?

- Individually identifiable health information held or transmitted by a covered entity in any form or media, whether electronic, paper or oral. This includes a patient's:
 - (1) past, present or future physical or mental health or condition;
 - (2) provisions of health care to the individual; OR
 - (3) past, present or future payment for the provision of health care to the individual; AND
 - (A) identifies the individual or there is a reasonable basis to believe the information can be used to identify the individual (name, address, birth date, social security number)

Disclosure

- *Policy: prevent unlawful disclosure of PHI*
- i.e., the release, transfer, provision of access to, or divulging in any manner of information outside the entity holding the information

Permitted Disclosures

- The Privacy Rule requires that PHI be disclosed only in limited circumstances:
- (1) to the patient; (2) for treatment; (3) opportunity to agree or object; (4) incident to an otherwise permitted use and disclosure; (5) public interest and benefit activities; and (6) limited data set for purposes of research, public health or health care operations.

Third Party Requests for PHI

- Many times the covered entity is requested by a third party for PHI of a patient.
- When should it be released?

Considerations

- Is there a court order mandating release of the PHI?
- Did the patient have an opportunity to object?
- Is there a HIPAA compliant release?
- Has the release been revoked?

Questionable

- Laws are subject to interpretation
- If there is ANY question as to whether the disclosure is permitted by law, present the issue to Management and Management will either make the determination or ask its attorney

Consequences of Breach!

- No private party right to sue for breach of HIPAA
 - NOTE: patients may sue under state laws such as breach of confidentiality and unfair trade practices
- Enforcement by: Health and Human Services Office for Civil Rights
- Trend of **aggressive** enforcement in recent years.
- Sizeable settlements and Civil Money Penalties!

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WARNING!!!

- Massachusetts Eye and Ear Infirmary paid **\$1.5 million** following the theft of an unencrypted laptop containing PHI (2012)
- Mass General paid **\$1 million** following the loss of medical documents on a commuter train bearing 192 patients' records (2011)
- Rite Aid settled for **\$2.5 million** for violations of the HIPAA privacy rule when it was found dumping medical records in an unsecure dumpster
- Cigna Health was fined over **\$3 million** dollars for failing to provide 41 patients with medical records requested

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When is a disclosure a breach?

- (1) Unauthorized acquisition, access, use or disclosure of PHI;
- (2) Unsecure PHI, i.e., not rendered unusable, unreadable, or indecipherable to unauthorized individuals (i.e., PHI that is not encrypted or hard copies have not been shredded or destroyed such that the PHI cannot be read or reconstructed); AND
- (3) Significant risk of financial, reputational, or other harm to the individual whose PHI has been compromised.

WARNING: A disclosure will be presumed a breach of PHI unless the covered entity can demonstrate there is a low probability that the PHI has been compromised (i.e., poses a significant risk

Breach: What Now?

- (1) Must send a notice to those individuals whose unsecured PHI has been or is reasonably believed to have been breached no later than 60 calendar days after discovered.
- (2) If more than 500 individuals of Massachusetts are affected - notice in prominent media outlets without unreasonable delay and not later than 60 calendar days after the breach was discovered.
- (3) If more than 500 individuals are involved (regardless of where they live) - must also notify Health and Human Services (HHS) at the same time as notifying the affected individuals.
- (4) If fewer than 500 individuals are affected then the covered entity must maintain an internal log of breaches and submit the log annually to HHS.

Patient Privileges

- Patient is protected by state law privileges and HIPAA
- Privileges are a separate concern than HIPAA
- Psychotherapist-Patient Privilege
 - M.G.L. c. 233, § 20B

Psychotherapist Privilege

- Protects communications between a psychotherapist “relative to the diagnosis or treatment of the patient’s mental or emotional condition.”

Psychotherapist- Pt Communications

- Purpose: so patient may safely disclose personal information necessary for effective treatment or diagnosis
- PROTECTS: Conversations, correspondence, actions and records, memoranda or notes regarding the same
 - Exceptions apply
 - Incompetent person must have someone appointed to exercise or waive privilege
 - Minors- parent may exercise or waive privilege unless there is a conflict— e.g., abuse case
- Communication must relate to diagnosis or treatment
- Does not protect the fact, date, or purpose of diagnosis itself

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Assertion of Privilege

- Privilege belongs to the patient only
- Psychotherapist may have a duty to assert the privilege until it is clear that the patient has either waived or asserted privilege, or has been given opportunity to do
- Ultimately, the patient must be informed and take some action to exercise privilege to prevent disclosure

Exceptions

- **WARNING:** Psychotherapist should **NEVER** attempt to decide if an exception applies—**ALWAYS** err on the side of caution—the court or legal professional should decide if an exception to the privilege applies
- If the psychotherapist is wrong—potential liability for breach

Exceptions

- (1) Disclose for hospitalization or arrest
- (2) Communications to psychotherapist in a court ordered examination
- (3) In court proceeding patient places mental or emotional condition in issue (e.g. claim of irreparable mental damage)

Exceptions continued

- Deceased patient's mental or emotional condition placed in issue by beneficiary
- Child custody, adoption –if court determines that the evidence bears significantly on patient's ability to provide suitable care and it is more important to the welfare of the child that the communication be disclosed than the relationship between the patient and psychotherapist
- Psychotherapist may disclose in a defense against malpractice claim by the patient, or other wrongdoing

Social Workers

- M.G.L. c. 112 §135A –Broader protections
- All communications between a social worker and a client are confidential
- No social worker, colleague, agent or employee of any social worker, whether professional, clerical, academic or therapeutic, shall disclose any information acquired or revealed in the course of or in connection with the performance of the social worker's professional services, including the fact, circumstances, findings or records of such services

Social Worker Confidentiality Exceptions

- DON'T make an individual determination
- Example EXCEPTIONS
 - written consent by patient or representative
 - need to disclose for protection of safety of patient or others

Social Worker Confidentiality Exceptions Continued

- certain information in attempting to collect debt for services
- initiate proceedings relating to best interest of child re: foster care, adoption or born to inmate
- certain information learned in elder protection case
- abuse of disabled persons
- family/marital therapy with consent of adults

ASSERTION OF TESTIMONIAL PRIVILEGE RELATING TO SOCIAL WORKERS

- A client may assert privilege to prevent disclosure in situations similar to those set forth in psychotherapist privilege assertions discussed previously

Protection

- Every situation is unique
- Most situations are more complex than they seem, having a multitude of variables that will determine the best course of action to protect the patient, facility, and its employees

Hypothetical 1

- Mary (a patient) is involved in a child custody dispute with her husband
- Mary's lawyer directly calls Mary's therapist (Sue) hoping to learn information that will help Mary get custody of her child.
- Sue is very fond of Mary and wishes to help her.

Hypo 1: Considerations

- How does Sue really know that the individual on the phone is Mary's lawyer?
- Has Mary provided a valid HIPAA Release authorizing disclosure of PHI directly to her lawyer?
- Have confidential communications been waived?
- Is Sue really an expert on whether Mary would make a good parent?

Hypothetical 2

- Lawyer Larry gives a subpoena to Therapist Thelma commanding her to testify at a deposition regarding a civil lawsuit
- Lawyer Larry represents Complaining Carrie
- Complaining Carrie alleges that Bully Bill caused Complaining Carrie severe mental health impairment
- Bully Bill is Therapist Thelma's patient
- The subpoena is vague - Thelma is commanded to testify as to any information she knows about Bully Bill and to bring the entire patient file to the deposition

Hypo 2: Considerations

- Is the subpoena valid?
 - Served properly?
 - Payment of witness and travel fees?
 - Identified a “person most knowledgeable” or “record keeper”?
 - Will Lawyer Larry attempt use Therapist Thelma as an expert in mental health or just ask her to explain the documents?
 - Adequately identified the topics of testimony and documents?
How does Therapist Thelma know what to expect?
 - Reasonable amount of time for Therapist Thelma to comply?

Hypo 2: Considerations continued

- Has Bully Bill received notice of the subpoena?
 - Under the law, Bully Bill is entitled to reasonable notice and has the opportunity to object.
 - Has Bully Bill waived his HIPAA and privileges?

Hypo 2: Considerations continued

- Does Bully Bill have a lawyer?
 - Is the lawyer aware of the subpoena?
 - Has Bully Bill or his lawyer filed a motion for protective order in the court case?
 - Has Bully Bill's lawyer consented to the deposition?
 - If no lawyer, does Bully Bill even know his rights?
 - Whose job is it to tell Bully Bill his rights?
 - Should the medical facility file a motion for protective order?
 - Is Bully Bill a minor? (Guardian Ad Litem appointed?)

Hypothetical 3

- Cameron Criminal is charged with kidnapping Victim Vicki.
- Cameron Criminal wants to view Victim Vicki's mental health records to aid his defense. He hopes that her records will show that she went voluntarily with him for a road trip, and she was not kidnapped.
- Cameron Criminal's lawyer filed a motion for Victim Vicki's mental health records and served the facility.

Considerations to Hypo 3

- Victim Vicki is not a party to this case and doesn't have a lawyer (only a witness)
- If Victim Vicki receives a copy of the motion for her records, she probably does not know what the motion is asking for...it's in legalese
- Victim Vicki probably doesn't know her rights and may not be able to afford a lawyer that can tell her to file a motion for protective order

Follow Internal Protocol

- Check your mail and faxes regularly
- Provide any requests for patient information, documents or testimony to Ermelinda Cardona immediately (legal matters are time sensitive)
- If Ermelinda is not in the office provide them to Jennifer Collins

Goal

- Protect patients
- Protect your employer against fines, penalties and lawsuits
- Protect yourself against legal claims and licensing issues