



LegalNotes

Volume1 Issue1

Welcome to LegalNotes!

LegalNotes is an online bimonthly *Aligning Forces for Quality* (AF4Q) publication that provides readers with short, readable summaries of developments in the law that collectively shape the broader legal environment for efforts to improve quality, reduce health care disparities, and improve the transparency of price and quality information. Exploring numerous topics, **LegalNotes** offers insight into changes in the law that may be of interest to AF4Q alliances, their partners and other interested readers.

Promoting Greater Access to Health Information: Fostering More Open Communications Between Health Care Providers and Patients

This inaugural issue of **LegalNotes** examines recent guidelines released by the U.S. Department of Health and Human Services (HHS), which add greater clarity regarding the extent to which the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule¹ permits health care providers to share information with patients and people involved in their care. Presented in an easy-to-use question-and-answer format, the guidelines address questions posed by both patients² and providers³ and clarify the Privacy Rule, which is commonly viewed as imposing an important legal check on the flow of health care information in treatment settings. The new guidelines can be found at www.hhs.gov/ocr/privacy/index.html; they build on previous regulations and guidelines covering a broad range of disclosures of protected health information.⁴

The HIPAA Privacy Rule in a Nutshell

The Privacy Rule implements HIPAA, a federal statute enacted in 1996. HIPAA's purpose was to improve many areas of the health care system, including increasing health insurance portability and improving quality and efficiency by facilitating the exchange of health information. Recognizing that easy exchange of information could increase the risk of privacy violations, Congress ordered HHS

to regulate the use and disclosure of protected health information (PHI), which is individually identifiable health information that is stored or transmitted in any medium.⁵ The resulting regulations, also referred to as the Privacy Rule, limit the use and disclosure of PHI by “covered entities” (health plans, health care clearinghouses and certain health care providers). Generally, covered entities may not disclose PHI without the individual’s authorization except for treatment, payment and health care operations (TPO). “Health care operations” includes quality assessment and improvement activities.⁶ Covered entities may also use and disclose “de-identified” information, which is information that “does not identify an individual and with respect to which there is no reasonable basis to believe that information can be used to identify an individual...”⁷ HIPAA does not overrule state laws that are more protective of a patient’s rights than the federal regulations.

Key Elements of the New Privacy Rule Guidelines

The new guidelines reinforce perhaps the most fundamental—and frequently overlooked—dimension of the Privacy Rule, namely, that outside of certain prohibited activities, HIPAA gives providers broad discretion in deciding whether and how to disclose personal health information.⁸ To this end, the new guidance clarifies that health care providers may share information when the following circumstances are met:

First, the information is relevant to the patient’s current condition;

Aligning Forces for Quality | Improving Health & Health Care in Communities Across America

Second, the information is being shared with family, friends, or other persons involved in the patient's care or payment;

Third, in their professional judgment, providers believe that the recipient needs to know the information; and

Fourth, assuming that the patient is physically present and is not incapacitated, the patient either agrees to have the information shared or else does not object to the disclosure when given the opportunity to do so. This "non-objection" requirement also is satisfied if, in the providers' professional judgment, the patient does not object. (If the patient is not present or is incapacitated, disclosure is permissible if the providers believe in their professional judgment that disclosure is in the patient's best interest).

The guidance also clarifies that providers may not share information if the patient objects or states generally that he or she does not want his or her health information disclosed, or if the information is not relevant to the person's current condition.

Specific Circumstances

The guidelines also clarify other aspects of disclosure:

Method of disclosure. If the above criteria are satisfied, providers may disclose information in person, over the phone or in writing. In the case of telephone inquiries from someone claiming to be a family member, friend, or otherwise involved in the patient's care or payment, providers are not required to verify the caller's identity. If the caller is someone other than a friend or family member, providers must only be "reasonably sure that the patient asked the person to be involved in his or her care or payment for care."

Third party access to information. Providers may allow others to pick up information such as prescriptions and medical supplies, if it is in the patient's best interest.

Interpreters. Providers are specifically authorized to share information with an interpreter without the patient's written

authorization if the interpreter is an employee of the provider or has a written contract with the provider, or the interpreter is the patient's family member, friend or other person (assuming the patient agrees or does not object).

Implications

The HIPAA Privacy Rule establishes federal standards to guard against the inappropriate disclosure of personal health information. The new guidance serves as a reminder, however, that HIPAA should not be interpreted as inhibiting the free flow of communication between providers on the one hand and patients and their family members and friends on the other, whom a patient may have brought into what might be considered a circle of care. Individuals facing serious health care choices frequently want their health care providers to share information—in writing, by telephone or face-to-face—within this circle of care. This is because a second listener might be able to help the patient understand what is being said, think of questions to ask and help the patient make important health care choices. Similarly, for example, in a society in which so many vulnerable elderly persons live alone and considerable distance from family members, the guidelines underscore that nothing in HIPAA prevents a health professional or hospital from exercising sound professional judgment in order to help a relative understand by phone what is happening to an incapacitated parent.

The new HIPAA guidelines serve as a reminder that the Privacy Rule rests largely on professional judgment regarding the circumstances under which information related to treatment can be shared. In an era of increased emphasis on information transparency, health literacy and patient involvement in care management, the guidelines underscore that rather than acting as a barrier, the Privacy Rule supports the broad goal of informing patients.

¹The Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule can be found at: "HHS Standards for Privacy of Individually Identifiable Health Information," *Code of Federal Regulations*, pts. 160 and 164. Summary of the Privacy Rule is available at: *Summary of the HIPAA Privacy Rule*. Washington: U.S. Department of Health and Human Services, Office of Civil Rights, 2003. (No author given.) www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf (accessed March 6, 2009).

²*A Patient's Guide to the HIPAA Privacy Rule: When Health Care Providers May Communicate about You with Your Family, Friends, or Others Involved in Your Care*. Washington: U. S. Department of Health and Human Services, Office of Civil Rights, 2008. (No author given.) www.hhs.gov/ocr/privacy/hipaa/understanding/consumers/consumer_ffg.pdf (accessed March 6, 2009).

³*A Patient's Guide to the HIPAA Privacy Rule: When Health Care Providers May Communicate about You with Your Family, Friends, or Others Involved in Your Care*. Washington: U. S. Department of Health and Human Services, Office of Civil Rights, 2008. (No author given.) www.hhs.gov/ocr/privacy/hipaa/understanding/consumers/consumer_ffg.pdf (accessed March 6, 2009).

⁴*Guidance: Significant Aspects of the Privacy Rule*. Washington: U. S. Department of Health and Human Services, Office of Civil Rights, 2002. www.hhs.gov/ocr/privacy/hipaa/understanding/summary/guidanceallsections.pdf (accessed March 6, 2009).

⁵"Definitions." *Code of Federal Regulations*, title 45, pt. 160.103, 2004 ed.

⁶"Definitions." *Code of Federal Regulations*, title 45, pt. 164.501, 2004 ed.

⁷Other requirements relating to uses and disclosures of protected health information." *Code of Federal Regulations*, title 45, pt. 164.514(a), 2002 ed.

⁸Rosenbaum S, Borzi PC, Burke T, et al. "Does HIPAA Preemption Pose a Legal Barrier To Health Information Transparency and Interoperability?" *BNA's Health Care Policy Report*, 15 (11): 1-13, 2007.