

DISCLOSURES TO LAW ENFORCEMENT

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- ▶ Foster public education about HIPAA.
- ▶ Facilitate and streamline HIPAA implementation through identification of best practices.
- ▶ Reduce duplicate efforts among entities obligated to comply with HIPAA.
- ▶ Offer opportunities for partnering and collaborating between entities implementing HIPAA.
- ▶ Identify and evaluate new or difficult HIPAA interpretation issues.

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Today's Hosts



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Today's Discussion

- ▶ Disclosures to Law Enforcement under
 - HIPAA
 - Wisconsin state law
- ▶ Practical Examples and Considerations



Disclosures to Law Enforcement

- ▶ **General Rule**: Hospital staff may not disclose patient information without patient authorization
 - Unless the disclosure is specifically authorized by law
- ▶ **Wisconsin**
 - More Restrictive



Who is "Law Enforcement"?

▶ Examples:

- Police
- District Attorney
- Federal or state agency charged with detecting crime and enforcing anti-crime laws and who can make arrests



Who Are You? Prove It!

- ▶ Encounters with Law Enforcement require verification of identity to disclose information



A Balancing Act

Primary role as a Provider

BUT

Duty to cooperate with law enforcement

AND

Relatively restrictive state law



HIPAA v. Wisconsin Law: Competing Considerations

- ▶ HIPAA: Quite liberal in allowing disclosure to law enforcement
- ▶ Wisconsin law: More restrictive
 - Wis. Stat. §146.82 (general medical records)
 - Wis. Stat. §51.30 (mental health, substance abuse, developmental disabilities)
 - Wis. Stat. §252.15 (HIV test results)
 - Wisconsin AG Opinion—duty to cooperate with law enforcement



Mental Health / AODA and HIV Records

- ▶ **Chapter 51** has more stringent protections on certain “treatment” records
 - (Mental health, alcohol/substance abuse (AODA), Developmental disabilities)
 - **42 CFR Part 2** has additional federal regulations for AODA Records
 - Cannot even disclose presence in facility
 - Make a noncommittal statement
 - Leads to lots of myths about HIPAA generally
- ▶ Heightened protection for HIV test results in **Wis. Stat. § 252.15**



Disclosures vs. Reports

- ▶ **Mandatory reports**: Figure out to whom and how much
- ▶ **Permissive reports**: Figure out to whom and how much (and determine whether to report based on circumstances)
- ▶ If no report required or permitted, Follow **General Rule**:
 - No Disclosure unless:
 - Authorized by patient OR
 - Permitted under HIPAA and Wisconsin law



Disclosures v. Reports (cont.)

▶ Reporting

- Often just brief circumstantial or demographic details; not copies of patient records

▶ Later investigation phase by law enforcement

- Often cannot disclose



Remember

- ▶ Report information that is required or permitted **BUT**
- ▶ Disclosure of any Additional PHI, follow the General Rule
 - (e.g. beyond PHI necessary to make the report)

Examples of *Typically* Reportable Situations

- ▶ Deaths
- ▶ Crime (On The Premises)
- ▶ Wounds & Burns Reporting
- ▶ Perpetrators with Wounds
- ▶ Child Abuse
- ▶ Adult At Risk
- ▶ Elder Abuse
- ▶ Caregiver Misconduct
- ▶ Imminent Danger
- ▶ Dangerous Driver (under certain circumstances)
- ▶ Animal Bites (County Ordinances!)



Examples of Situations that are Usually Not Reportable

- ▶ Requires a Case-by-Case analysis to see if an Exception could apply
- ▶ PHI To Report Most Crimes
- ▶ PHI To Locate Missing Persons
- ▶ PHI To Report Motor Vehicle or Hunting Accidents
- ▶ PHI Related To Domestic Abuse of Adults
 - Maybe imminent harm? Perform case-by-case analysis



Common Dilemmas

▶ Prior to Discharge:

- Law enforcement asks to be notified of discharge date/time
- Can only report if imminent danger of harm, authorization, or court (or agency) order

▶ After Discharge:

- If law enforcement contacts the hospital and asks for the patient by name (and the patient has not opted out of the facility directory), may disclose fact that the patient has been discharged
- ▶ Information requests for PHI about a suspected perpetrator – drunk driver when no reportable category fits



Example: Patient in the ED

- ▶ Police accompany patient to the ED, but patient not in custody. Police ask to speak to the patient.
 - Ask patient. Only okay if patient allows it
- ▶ Police accompany patient to the ED, and patient is under arrest. Police ask to speak to the patient
 - Yes, police may speak to the patient.



Example: Patient in the ED (cont.)

- ▶ Patient is the victim of a crime and incapacitated?
 - Make the decision using professional judgment
- ▶ **HOWEVER**, a patient in custody does not mean that a patient gives up his privacy rights to disclose information about medical conditions
 - **Possible exception**: Minimum information necessary for police to safety transport the patient



More Common Dilemmas

- ▶ Law enforcement asks for patient by name
 - Use Facility Directory guidelines
 - Patient gives permission to let visitors know he/she is there.
 - If the patient is not able to respond, use professional judgment in the best interests of the patient (not necessarily to cooperate with law enforcement)

More Common Dilemmas

- ▶ Law enforcement asks for a patient who matches a description (e.g., head injury who fled accident)
 - No, Cannot directly identify patients
- ▶ Law enforcement asks if a particular minor is in the ED, and he is not. Minor later shows up.
 - No, Cannot call law enforcement unless an exception applies (e.g., child abuse)



More Common Dilemmas

- ▶ Suspect a patient is:
 - Carrying a weapon?
 - No law addresses this type of reporting by healthcare providers.
 - Crime on premises?
 - May consider requesting the patient to have weapon removed.
 - Carrying drugs?
 - No law addresses this type of reporting by healthcare providers.
 - Crime on premises?
 - May consider requesting the patient to have drugs removed.



Example: Inquiry by Law Enforcement

- ▶ Police stop by the emergency department asking if anyone has a dog bite “as if they have broken up a dog fighting ring”? Police ask the facility to notify the police if anybody comes in.
- ▶ Facility now aware of a crime
 - If see wounds come in that are reasonably connected to the dog fighting crime, most likely falls within the “wound” analysis
 - Does not matter that the police informed the facility of the crime, or that it may have been on the news
 - **General Rule:** Wounds the result of a crime are reportable



Deaths

- ▶ Properly authorized disclosures
- ▶ Court orders/ administrative written requests
- ▶ Certain investigations
- ▶ Coroners
- ▶ Watch out for deaths involving "sensitive records"

Coroners

- ▶ Completing a medical certificate
- ▶ Investigating a death where unexplained unusual or suspicious circumstances (homicides, suicides, accidental, following accidents, poisoning, etc.)



Crime on the Premises: Examples

- ▶ Physical attacks on people or property, at CE facility
- ▶ Drug seeking individuals– false pretenses
 - **A fake script is *not* PHI
- ▶ Identity theft/ fraudulent claims for payment
- ▶ Miscellaneous – you never know!



Crime on the Premises: Bottom Line

- ▶ Need WRITTEN request
- ▶ Legally Authorized Function
- ▶ Wisconsin Mental Health Act allows limited unauthorized disclosure for this purpose
 - Arguably applies to general health care records as well – open question



A Word About Drug Seeking Individuals

- ▶ Very difficult issue – no great solution
- ▶ Disclosures are arguably for treatment – although difficult, between providers
- ▶ Seeking drugs under false pretenses is a "crime" – to the extent you are willing to stretch "crime on the premises"
- ▶ HIPAA COW has issued a white paper on this subject



What Is a “Wound?”

- ▶ Reasonable minds will differ
- ▶ Natural inclination: define expansively when gut tells you to report
- ▶ Gunshot wounds
- ▶ Other wounds where “reasonable cause to believe that the wound occurred as a result of a crime”



Burns

- ▶ Second or third degree to at least 5% of body
- ▶ Inhalation of superheated air with respiratory results
- ▶ “Reasonable cause to believe that the burn occurred as a result of a crime.”



Wounds and Burns

- ▶ Providers can describe the wound/burn in detail
- ▶ However, if law enforcement arrives after the patient is discharged asking for details of wounds for accident reports, not reportable
 - Unless qualifies as a “crime”

Example: Motor Vehicle Accident

- ▶ Patient arrives on his own and states that he was in a MVA
- ▶ Law enforcement arrives later and indicate that they have found a car that has blood in it, but no driver
 - Police do not know the nature of the situation
 - MVA?
 - Some other type of violent crime?
 - Need to initiate a manhunt for a victim of a crime?
- ▶ Facility knows the individual was a patient



Example: Motor Vehicle Accident (cont.)

- ▶ Police ask the following question: Do you know the whereabouts of [Patient]?
- ▶ **Sample Response:**
 - “Yes, we know the whereabouts and believe a manhunt to be a waste of time to look for this person. We cannot tell you his whereabouts.”
 - Example of not talking around a question, but trying to cooperate and prevent law enforcement from any unnecessary action.
 - Assist, but stay HIPAA-compliant.

Perpetrators with Wounds: What Analysis Do We Use?

- ▶ Is it a “wound” that we think occurred as a result of a crime?
- ▶ Reasonably?
- ▶ Then report it!
- ▶ If not, use standard analysis



Suspected Child Abuse

- ▶ All medical professionals must report:
 - Suspected or known abuse or neglect of children or
 - Suspected abuse of unborn children



Suspected Child Abuse: Exception To Reporting

- ▶ Certain professionals involved in pregnancy/ OB screening care (physicians, nurses, PAs) are NOT required to report
- ▶ Unless...



Suspected Child Abuse: Even OB Treaters Must Report...

- ▶ The exceptions to the exception:
 - Sex with a caregiver
 - Child suffers from mental deficiency
 - Child is incapable of understanding consequences of sex (age or immaturity)
 - Child was unconscious or similar state during sex
 - Exploitation of child

Child Abuse – Bottom Line

- ▶ If in doubt, Report!
- ▶ But don't disclose more PHI than absolutely necessary to make the report, without authorization, court order, or agency written request



Elder Abuse – Bottom Line

- ▶ Report it
- ▶ But don't disclose more PHI than absolutely necessary to make the report, without authorization, court order or agency written request



Adult At Risk

- ▶ Providers must report suspected abuse, neglect, self-neglect, or financial exploitation of any adult patients who have a physical or mental condition that impact his/her ability to care for his/her needs **IF**:
 - Patient asks the provider to make the report, or
 - Risk of imminent harm to patient or another adult at risk



Domestic Abuse

- ▶ If Child – see child abuse rules
- ▶ If Elder – see elder abuse rules
- ▶ If Adult – see adult at risk rules
- ▶ All – consider wounds and burns
- ▶ Danger of imminent harm?
- ▶ If none of the above, need authorization or court order

Sexual Assault Victims – Bottom Line

- ▶ If Child – see child abuse rules
- ▶ If Elder – see elder abuse rules
- ▶ If Adult – see adult at risk rules
- ▶ All – see wounds and burns rules
- ▶ Danger of imminent harm?
- ▶ If none of the above, need authorization or court order

Suspicious Strangers

- ▶ If not a patient, Or
- ▶ Is a patient but no PHI...
 - REPORT!
- ▶ If PHI is involved, must consider whether the information falls into an exception to the general rule of confidentiality



Prisoners and Parole

▶ If Incarcerated

- May disclose to correctional health care providers without consent

▶ If Parole or Probation

- Requires authorization



“Legal” Blood Draws

▶ **IF**

- Blood (or other bodily samples) are taken at the direction of a law enforcement officer **AND**
- With regard to an individual in custody

▶ **THEN**

- ▶ There is **No physician– patient relationship** and may disclose without authorization

- **NOT PHI**

▶ **BUT**

- If patient presents not in police custody, and workup includes BAL, no exception to provide the test results to a later law enforcement request (without authorization or court order, etc.).
- No exception for **clinical** blood draws.



Caregiver Misconduct

- ▶ Follow HFS 13 and flow chart in DHS memo
- ▶ Investigation – document!
- ▶ If reportable, do so
- ▶ Within 7 calendar days



Imminent Threat/Imminent Harm/Threat to Public Safety

- ▶ Authorization is not required to make a disclosure to law enforcement to prevent or lessen a serious and imminent threat to the health or safety of the individual or public
 - So long as the danger is reasonably foreseeable by a health practitioner and the information disclosed is limited to that which is necessary to make the report



Imminent Threat/Imminent Harm/Threat to Public Safety

- ▶ Schuster v. Altenburg – providers have a duty to warn law enforcement (i.e., disclose PHI) if it is necessary to prevent imminent harm to the patient or other
 - Remember minimum necessary rule
- ▶ Requires a case-by-case analysis

Examples: Imminent Threat/Imminent Harm

- ▶ Intoxicated patient leaves the ED against the medical advice of the physician and gets into his vehicle
 - Reportable
- ▶ Facility gives patient medication that alters judgment
 - Facility has an obligation to make sure that the patient has a safe discharge following services
 - Under sedation: Wait until cleared to drive or that the patient has a ride. If no ride, arrange for transportation for patient.
 - Document informing patient of need to have transportation
 - Report only if have reasonable belief that patient is a threat to public safety by ignoring facility efforts to arrange for safe discharge
 - Report based on observations of driving, not knowledge of particular medications



Example: Suspect at Facility

- ▶ Drug overdose case in the ICU. Physician looked at online court records and saw a warrant for an arrest of patient for drug dealing.
 - Contact law enforcement?
 - ONLY if the patient's status as a drug dealer is a threat. Likely not.



Animal Bites

- ▶ Permissible to report to the public health department (rather than law enforcement) unless the health department has delegated this responsibility to law enforcement
- ▶ County Ordinances may require reporting



Motor/ Hunting Accidents

- ▶ Is there a separate reportable event? (e.g., wound or dangerous driver?) If not, don't report!
- ▶ Is there a way to report without PHI?
- ▶ If not otherwise reportable, an authorization from patient or court order is necessary



Bioterrorism and Communicable Diseases

- ▶ Providers may report and/or disclose PHI to a public authority acting as authorized by law in response to a bioterrorism threat.
- ▶ Providers are required to disclose PHI to public health authorities on reportable communicable diseases.



Prosecution Under Wis. Stat. ch. 980

- ▶ Upon request, Providers are required to disclose PHI to the Dept. of Corrections, Dept. of Health Services, DOJ, or a district attorney for use in the prosecution of any proceeding or evaluation (conduct under Ch. 980) if the PHI involves or relates to an individual who is the subject of the proceeding or evaluation



Inquiries From Law Enforcement With No Backup

- ▶ **If General Patient**: May disclose facility directory info to verified law enforcement asking for patient by name
 - Unless opted out of facility directory
- ▶ **If Mental health/ Substance abuse/ DD**:
 - Can neither confirm nor deny

Prescriptions

- ▶ **Example**: Police pull over a patient who had prescriptions in the car. Police then call the facility to confirm the prescriptions. Okay to disclose?
 - No
- ▶ **Fraudulent Prescriptions**
 - NOT PHI
- ▶ **Information communicated to a physician to obtain drugs by fraud (e.g., Rx script for diversion purposes)**
 - Not privileged, even if prepared by the physician



Surveillance Video

- ▶ Example: Pharmacy involved in a burglary. Review the video footage to provide evidence of the burglary and the suspect.
- ▶ Video is not a patient health care record, but it may be considered PHI if it involves a patient
- ▶ Okay to disclose this individual to the police?
 - Yes, if video or still image is of the crime itself
 - No, if the video just shows patients who may be suspicious in nature, but not committing the crime, but could let law enforcement know that the facility may have information if the required court order is provided
- ▶ If police ask for a video where no crime is involved (e.g., video of someone being dropped off at the facility)
 - No, this requires a court order or patient authorization

Inquiries Without Backup (cont.)

▶ Does not matter if:

- Patient is allegedly an illegal alien
- Patient gave a false name
- Patient is suspected of committing a crime
 - Unless imminent danger
- Patient is suspected of involvement in a car crash
- Information is somehow already out there



Inquiries Without Backup (cont.)

- ▶ If this does not fit into one of the exceptions we are discussing:
 - Tell law enforcement you do not wish to be obstructionist but...
 - You are obligated by confidentiality laws and...
- ▶ They will need a court order, state agency written request, or patient authorization



Search Warrants

- ▶ Providers are required to disclose PHI to law enforcement when presented with a valid court order including a search warrant, subpoena, summons or other similar process that has been signed by a judge or accompanied by a court order
- ▶ Limit the disclosure of PHI to the information identified in the order

Volunteers From Crime Victim/Crisis Support Teams

- ▶ Work closely with law enforcement officials to provide assistance to victims and their families
- ▶ But they are not law enforcement officials.
- ▶ Providers cannot share with these volunteers without patient authorization.



Anonymous Reporting

- ▶ Can facilities anonymously report to law enforcement via a “tip line,” e.g., drug-seeking patients?
 - NO!
 - There is no HIPAA exception for anonymity
- ▶ Anonymous reporting is still a disclosure



Health Care Oversight

- ▶ May disclose pursuant to written request of government
- ▶ Performing a legitimate government function
- ▶ Don't be too picky about "written" – email is fine, and okay to have them send it after the fact in urgent circumstances



Practical Problem

- ▶ Law enforcement officers are often more familiar with HIPAA than Wisconsin law
 - Wisconsin law is more restrictive about disclosures to law enforcement
- ▶ As a result, some law enforcement think they are entitled to more information than you can give them



Practical Solutions

- ▶ Have a good detailed policy that includes the following:
 - Policy statement – cooperating with police vs. protecting privacy
 - Incorporates state law requirements
 - Verification
 - Minimum Necessary
 - Disclosures that do not involve PHI



Practical Solutions (cont.)

- ▶ Policy (cont.)
 - Permissive disclosures (e.g. dangerous drivers)
 - Mandatory disclosures (e.g. imminent danger, reports required by law, court order)
 - Prisoners/ Probation/ Parole
 - Legal blood draws
 - Everything else requires authorization!



Practical Solutions (cont.)

▶ Train your front line:

- On the scope of acceptable disclosures; and
- That state law is often more restrictive than HIPAA



The End!

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