

Responding to Law Enforcement

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(11-14)



Overview

- Privacy issues
 - HIPAA rules
 - Mandatory disclosures
 - Permissive disclosures
- Treatment requested by police
- Police requests to access patients
- Focus on Idaho, but...
 - HIPAA applies to all states.
 - Most states have similar laws.



Written Materials

- OCR, *HIPAA Privacy Rule: Guide for Law Enforcement*
- H&H Client Alert, *Disclosures to Law Enforcement*
- H&H Client Alert, *Responding to Subpoenas, Orders, and Administrative Demands*

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Preliminaries

- This is an overview of relevant laws.
 - May be additional or local laws or ordinances.
- HIPAA preempts less restrictive state laws.
- This focuses on disclosures to law enforcement; additional rules may apply in other situations.
 - Subpoenas
 - Civil litigation
 - Agency inspections
- Submit questions via chat feature or directly to kcstanger@hollandhart.com.
- The session will be recorded and available for download.

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Preliminaries

This presentation is similar to any other legal education materials designed to provide general information on pertinent legal topics. The statements made as part of the presentation are provided for educational purposes only. They do not constitute legal advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the speaker. This presentation is not intended to create an attorney-client relationship between you and Holland & Hart LLP. If you have specific questions as to the application of law to your activities, you should seek the advice of your legal counsel.

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Privacy Issues

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Problem



- Law enforcement (police, prosecutors, others) may not understand HIPAA.
 - They are not subject to HIPAA.
 - Their job is to catch bad guys and protect citizens, not help you comply with HIPAA.
 - They may tell you things that are not accurate.
- But you are still subject to HIPAA...

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HIPAA Civil Penalties

Conduct	Penalty
Did not know and should not have known of violation	<ul style="list-style-type: none"> • \$100 to \$50,000 per violation • Up to \$1.5 million per type per year • No penalty if correct w/in 30 days • OCR may waive or reduce penalty
Violation due to reasonable cause	<ul style="list-style-type: none"> • \$1000 to \$50,000 per violation • Up to \$1.5 million per type per year • No penalty if correct w/in 30 days • OCR may waive or reduce penalty
Willful neglect, but correct w/in 30 days	<ul style="list-style-type: none"> • \$10,000 to \$50,000 per violation • Up to \$1.5 million per type per year • Penalty is mandatory
Willful neglect, but do not correct w/in 30 days	<ul style="list-style-type: none"> • At least \$50,000 per violation • Up to \$1.5 million per type per year • Penalty is mandatory

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HIPAA Criminal Penalties

- Applies if employees or other individuals obtain or disclose protected health info from covered entity without authorization.

Conduct	Penalty
Knowingly obtain info in violation of the law	<ul style="list-style-type: none"> • \$50,000 fine • 1 year in prison
Committed under false pretenses	<ul style="list-style-type: none"> • 100,000 fine • 5 years in prison
Intent to sell, transfer, or use for commercial gain, personal gain, or malicious harm	<ul style="list-style-type: none"> • \$250,000 fine • 10 years in prison

Additional Consequences

- State attorney general may sue for HIPAA violations.
 - \$25,000 per violation + costs
- Individuals may assert common law tort claim.
- Must self-report breaches of unsecured protected health info.
 - To the individual.
 - To HHS.
- Must impose sanctions against members of workforce who violate HIPAA.
- Adverse licensure action.

HIPAA Analysis



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HIPAA Analysis

- **Does HIPAA apply to the request?**
 - Are you a covered entity or business associate?
 - Does the request seek protected health info?
- **Does HIPAA allow disclosure?**
 - Does the officer have authority to request the info?
 - Is there a HIPAA authorization allowing disclosure?
 - Does a HIPAA exception allow the disclosure?
- **Even if HIPAA allows disclosure, should you make the disclosure?**
 - Does another law require or prohibit disclosure?
 - Have you limited the disclosure to the minimum necessary?

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Does HIPAA Apply?

- HIPAA applies to:
 - Covered entities
 - Healthcare providers who engage in certain electronic transactions.
 - Health plans, including group health plans if:
 - 50 or more participants, or
 - Administered by a third party.
 - Healthcare clearinghouses.
 - Business associates of covered entities
 - Create, receive, maintain or transmit protected health info on behalf of the covered entity.
- HIPAA does not apply if provider is not acting in its capacity as a healthcare provider, e.g., as employer.

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Does HIPAA Apply?

- HIPAA applies to protected health info (“PHI”)
 - Info that may reasonably be used to identify an individual.
 - Relating to health, health care or payment.
 - Medical records, bills, info obtained during treatment.
 - NOT info unrelated to health care or payment.
 - Created or maintained by covered entity.
 - Applies to records created by other providers.
 - In any form or medium.
 - Paper, electronic, oral, etc.
- HIPAA does not apply to other info even though it may be confidential, e.g., employment records.

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HIPAA: General Rules

- Covered entity may not use or disclose PHI unless:
 - For purposes of treatment, payment or healthcare operations.
 - Have written, HIPAA-compliant authorization.
 - An exception applies that allows disclosures.

(45 CFR 164.502)

- There are some specific exceptions that apply to disclosures to law enforcement if certain conditions are satisfied.

(45 CFR 164.510 and 164.512)

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Disclosures Required by Law

- HIPAA permits you to disclose PHI to the extent another law requires disclosure.
 - Limit disclosure to scope of the law.
- This does not apply if the other law simply permits disclosure.
 - E.g., statute allows disclosure of info to Dept. of Transportation re condition that affects driving.

(78 FR 5618)

- HIPAA preempts less restrictive state laws.

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Disclosures Required by Law

Injury from Firearm or Crime

- Applies to person operating a hospital or other medical treatment facility, physician, resident, intern, PA, nurse or EMT.
- Applies if there is reason to believe the patient treated or requesting treatment has received:
 - (a) Any injury inflicted by means of a firearm; or
 - (b) Any injury indicating that the person may be a victim of a crime.
- Must report to local law enforcement as soon as treatment permits. Report shall include the name and address of the injured person, the character and extent of the person's injuries, and the medical basis for making the report.
- Immunity for reasonable compliance.

(IC 39-1390)

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Disclosures Required by Law

Child Abuse or Neglect

- Applies to any physician, resident, intern, nurse, social worker, or other person.
- Applies if there is reason to believe a child under age 18 has been abused, abandoned or neglected, or observe the child being subjected to conditions which would reasonably result in abuse, abandonment or neglect.
- Medical staff members notify the person in charge of the hospital or his designee who shall make the report.
- Must report the conditions to law enforcement or CPS within 24 hours.
- Failure to report is a misdemeanor.
- Immunity for good faith report.

(IC 16-1605; *see also* 45 CFR 164.512(b))

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Disclosures Required by Law

Abuse, Neglect or Domestic Violence

- Under HIPAA, may disclose info about victim to govt agency:
 - If individual agrees to disclosure;
 - If and to extent disclosure is required by law; or
 - If and to extent disclosure is authorized by law, and (i) provider believes disclosure is necessary to avoid serious harm to victim; or (ii) if individual is incapacitated, law enforcement represents that info is not to be used against victim and immediate enforcement activity would be materially impaired by waiting.
- Must promptly inform patient or personal rep of disclosure unless:
 - Provider believes that informing patient would place the individual at risk of serious harm; or
 - If disclosure would be to the personal rep, provider believes the personal rep is responsible for the abuse, neglect or other injury, and that it is not in best interest of patient to disclose the info.

(45 CFR 164.512(c))

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Disclosures Required by Law

Vulnerable Adult Abuse or Neglect

- Applies to any physician, nurse, employee of health facility, residential facility, osteopath, optometrist, chiropractor, podiatrist, social worker, pharmacist, physical therapist, home care worker, and others.
- Applies if there is reasonable cause to believe that a vulnerable adult is being or has been abused, neglected, or exploited.
- Must immediately report info to Idaho Commission on Aging; nursing facilities must report to DHW.
- Must also report to law enforcement within 4 hours if reasonable cause to believe that abuse or sexual assault has resulted in death or serious physical injury jeopardizing the life, health or safety.
- Immunity for good faith reports.
- Failure to report is a misdemeanor. In addition, action may be taken against nursing facility licenses.

(IC 39-5403; see also 45 CFR 164.512(c))

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Disclosures Required by Law

Vulnerable Adult Abuse

- “Vulnerable adult” means a person 18 years of age or older who is unable to protect himself from abuse, neglect or exploitation due to physical or mental impairment which affects the person's judgment or behavior to the extent that he lacks sufficient understanding or capacity to make or communicate or implement decisions regarding his person.

(IC 39-5302)

- Not every abused adult.
- Still have obligation to report treatment of victim of a crime.

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Disclosures Required by Law

Mental Health Provider's Duty to Warn Victim of Threat

- Applies to “mental health professionals”, i.e., physicians, professional counselors, psychologists, social workers, and professional nurses.
- Applies if patient has communicated an explicit threat of imminent serious physical harm or death to clearly identified or identifiable victim, and patient has apparent intent and ability to carry out such a threat.
- Must make reasonable effort in timely manner to warn the victim and notify law enforcement agency closest to the patient's or victim's residence of the threat, and supply law enforcement with any information concerning the threat of violence.
- If the victim is a minor, the mental health professional must also warn victim's custodial parent, noncustodial parent, or legal guardian.
- Immunity if act reasonably and consistent with standard of care.

(IC 6-1901 et seq.)

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Disclosures Required by Law

Custody of Body

- Applies to persons who find or have custody of a body.
- Applies if death:
 - (a) Occurred from violence, whether by homicide, suicide or accident;
 - (b) Occurred under suspicious or unknown circumstances; or
 - (c) Is of a child if there is reasonable suspicion to believe death occurred without a known medical disease to account for the death.
- Must promptly notify either the coroner or law enforcement.
- Must take reasonable precautions to preserve the body and body fluids, and not disturb the scene pending investigation.
- Failure to notify coroner or law enforcement is a misdemeanor.
- Failure to notify coroner or law enforcement with intent to prevent discovery is a felony.

(IC 19-4301A)

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Disclosures Required by Law

Theft of Controlled Substance

- Registrants must notify the DEA Field Division Office in their area, in writing, of the theft or significant loss of any controlled substance within one business day of discovery of such loss or theft.
- Complete and submit to the Field Division Office in their area, DEA Form 106, "Report of Theft or Loss of Controlled Substances" regarding the theft or loss.
- Failure to report may result in adverse action against DEA registration.

(DEA Diversion Control Program; 21 CFR 1301.76(b))

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www.deadiversion.usdoj.gov/21cfr_reports/theft/

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REPORTING > Reports Required by 21 CFR > Theft or Loss of Controlled Substances - DEA Form 106

Theft or Loss of Controlled Substances - DEA Form 106

IMPORTANT NOTICE: Only those persons registered with DEA to handle controlled substances may utilize this form.

Federal regulations require that registrants notify the DEA Field Division Office in their area, in writing, of the theft or significant loss of any controlled substance within one business day of discovery of such loss or theft. The registrant shall also complete and submit to the Field Division Office in their area, DEA Form 106, "Report of Theft or Loss of Controlled Substances" regarding the theft or loss. (21 C.F.R. § 1301.76(b))

DEA controlled substance registrants are strongly encouraged to complete and submit the DEA Form 106 online. In addition to being more convenient, completing the form online results in fewer errors. A link to the online DEA Form 106 is provided below.

In order to better track controlled substances reported as lost or stolen, DEA has incorporated use of the National Drug Code (NDC) number in the DEA Form-106. The NDC number identifies the manufacturer, product, dosage form, and package size. Entry of the NDC number will prompt the system to auto-populate additional fields such as the name of the product, dosage form, dosage strength, and quantity per container.

If a registrant does not have internet access, a paper copy of the DEA-106 form can be requested by writing to:

ARCOS

BCM Online

Chemical Import/Export Declarations

CSOS (Controlled Substances Ordering System)

Drug Theft/Loss

Import/Export

Inventory of Drugs Surrendered

Quotas

Reports Required by 21 CFR

Submit a Tip to DEA

Year-End Reports

Other Disclosures Required by Law

- Blood tests which confirm the presence of blood-transmitted or bodily fluid-transmitted virus or disease (IC 39-4505).
 - Certain reportable infectious, contagious, or communicable diseases. (IC 39-602; IDAPA 16.02.10.20)
 - Births, deaths, stillborns, and induced abortions (IC 39-255, -260, -261, and -272).
 - Inflammation of eyes of newborn (IC 39-902)
 - Results of PKU tests (IC 39-909)
 - Don't forget about local laws or ordinances...
- (See also 45 CFR 164.512(b))

Disclosures to Avert Serious Harm

- May disclose info if provider believes in good faith that the disclosure is:
 - Necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public;
 - Made to a person reasonably able to prevent or lessen the threat, including the target of the threat; and
 - Consistent with applicable law and ethical conduct.
- Provider presumed to act in good faith if based on:
 - provider's actual knowledge, or
 - credible representation by someone with apparent knowledge or authority.

(45 CFR 164.512(j)(1)(i), (3))

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Disclosures to Apprehend Person

- May disclose if provider believes in good faith that the disclosure is necessary for law enforcement to identify or apprehend an individual:
 - Because of a statement by an individual admitting participation in a violent crime that the covered entity reasonably believes may have caused serious physical harm to the victim, or
 - It appears that individual has escaped from a correctional institution or from lawful custody.
- Does not apply if info learned through treatment of propensity to commit the act.

(45 CFR 164.512(j)(1)(ii))

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Written Authorization

- May disclose per the patient's written authorization.
- Authorization must contain core elements.
 - Identify info to be disclosed.
 - Identify entity authorized to make disclosure.
 - Identify entities to whom disclosure may be made.
 - State the purpose of disclosure.
 - “At the request of the individual” sufficient if patient initiates the authorization.
 - State an expiration date or event.
 - Signed by patient or their representative.
 - Explain patient's rights.
 - Patient has right to revoke authorization at anytime.
 - Provider cannot condition treatment on authorization.
 - Info may not be protected if redisclosed.

(45 CFR 164.508)

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Facility Directory

- May disclose limited info as part of a facility directory if:
 - Informed the patient that provider would include info in facility directory and gave the patient the chance to restrict disclosures (e.g., in notice of privacy practices) and patient did not object.
 - Requestor asks for the person by name.
- Disclosure limited to:
 - Patient's name.
 - Patient's location in facility.
 - Patient's general condition.

(45 CFR 164.510)

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Health Oversight

- May disclose to health oversight agency for oversight activities authorized by law.
 - Includes audits; investigations; inspections; or civil, criminal, or administrative proceedings.
 - Relates to
 - Oversight of health care system.
 - Eligibility for benefits under government programs.
 - Compliance with government programs.
 - Compliance with civil rights laws.
 - Does not apply to investigations of individual unrelated to provision of health care or claim for health care benefits.

(45 CFR 164.512(d))

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Law Enforcement Orders

- May disclose per
 - Court order, warrant, subpoena or summons issued by a judicial officer.
 - I.e., signed by judge or magistrate.
 - Grand jury subpoena.
 - Administrative request, subpoena, summons or demand authorized by law if:
 - Info relevant and material to legitimate law enforcement inquiry;
 - Request is reasonably specific and limited to purpose; and
 - De-identified info could not be used.

(45 CFR 164.512(f)(1)(ii))

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Judicial or Administrative Action

- May disclose per:
 - Order from court or administrative tribunal.
 - Limit disclosure to scope of order.
 - Subpoena, discovery request, or legal process not accompanied by court order if:
 - Receive satisfactory written assurances that party issuing subpoena notified patient and patient had chance to object;
 - Provider notifies patient and patient fails to object; or
 - Reasonable steps have been taken to obtain a protective order.

(45 CFR 164.512(e))

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Request to Identify or Locate Person

- Upon request from law enforcement, may disclose limited info to help identify or locate a suspect, fugitive, witness, or missing person.
 - Name and address
 - Date and place of birth
 - SSN
 - Blood type and rh factor
 - Type of injury
 - Date and time of treatment and death
 - Description of distinguishing characteristics (height, weight, race, hair color, facial hair, scars, tattoo, etc.)
- Not info re DNA, dental records, or sample or analysis of body fluids or tissues.

(45 CFR 164.512(f)(2))

- Applies to media alerts or “wanted” posters. (65 FR 85232)
- Probably does not apply to general requests to notify them if they treat (e.g., MVAs) or when patient is released.

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Victims of Crime

- Upon request from law enforcement, may disclose limited info about patient suspected to be victim of crime (other than abuse) if:
 - Patient agrees to disclosure, or
 - Unable to obtain patient's agreement because of incapacity or emergency and:
 - Law officer represents that info needed to determine violation of law by someone other than the patient and will not be used against the patient;
 - Law officer represents info needed immediately for law enforcement activity; and
 - Provider determines disclosure in best interests of individual.

(45 CFR 164.512(f)(3))

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Decedents

- If provider thinks that death resulted from a crime, provider may disclose info about decedent to law enforcement for the purpose of alerting law enforcement of the death.

(45 CFR 164.512(f)(4))

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Crime on Premises

- If provider thinks that crime has occurred on the premises, provider may disclose info that provider believes in good faith constitutes evidence of crime.

(45 CFR 164.512(f)(5))

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Crime Off Premises

- If providing emergency care away from hospital, may disclose info if necessary to alert law enforcement to:
 - Commission and nature of crime (other than abuse);
 - Location of crime or of victims; and/or
 - Identity, description, and location of perpetrator.

(45 CFR 164.512(f)(6))

- Only applies to the extent you are rendering care, i.e., acting as healthcare provider.

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Crime Against Workforce Member

- Provider not deemed to have violated HIPAA if a member of its workforce who is a victim of a crime discloses info to law enforcement if:
 - Info disclosed is about suspected perpetrator of crime, and
 - Info disclosed is limited to:
 - Name and address
 - Birthdate
 - SSN
 - Blood type
 - Type of injury
 - Date and time of treatment
 - Distinguishing physical characteristics

(45 CFR 164.502(j)(2))

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Persons in Custody

- May disclose info about inmate or other person in custody to law enforcement or correctional facility if official represents that info necessary for:
 - Provision of health care to person;
 - Health and safety of individual or other inmates;
 - Health and safety of officers or employees at correctional facility;
 - Health and safety of officers transporting prisoner; or
 - Safety, security, and good order of correctional institution.
- Does not apply after the person is no longer a prisoner.

(45 CFR 164.512(k)(5))

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Whistleblower

- Provider is not deemed to have violated HIPAA if its workforce member discloses info if:
 - Workforce member believes in good faith that provider has violated the law or has endangered others, and
 - Disclosure is to a health oversight agency or authority authorized by law to investigate and respond.

(45 CFR 164.502(j)(1))

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Public Health Activities

- May disclose for certain public health activities.
 - To public health authority authorized to receive info to prevent disease or injury.
 - To a person at risk of contracting or spreading disease if covered entity is authorized by law to contact person.
 - For certain FDA-related actions.

(45 CFR 164.512(b))

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Police Requests for Treatment



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Police Requests for Treatment

- General Rule:
 - Patient has the right to consent to or refuse treatment.
 - If patient is incompetent, must get consent from authorized surrogate decision maker, e.g.,
 - Legal guardian
 - Spouse
 - Parent
 - Other appropriate relative
 - Other person with responsibility for patient.
 - In emergency, may render care to incompetent patient as if had effective consent.
- (IC 39-4503 and -4504)
- *Obtain consent from patient or authorized decision maker.*

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EMTALA

- If patient is brought to a participating hospital and a request is made for examination or treatment, hospital must:
 - Provide an appropriate medical screening exam, and
 - If exam reveals an emergency medical condition, provide either:
 - Stabilizing treatment, or
 - An appropriate transfer.
- Competent patient still has right to refuse care.
 - Document that care was offered and refusal.

(42 USC 1395dd; 42 CFR 489.24)

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Laws Authorizing Care w/out Consent

- State laws may authorize a provider to undertake a test, exam or treatment even if patient does not consent.
- But provider is not required to render the care.
 - Provider may want to decline to render care if patient objects to care.

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Laws Authorizing Care w/out Consent

24-Hour Mental Hold

- Applies if patient comes to hospital and peace officer or physician or midlevel on medical staff has reason to believe that the person is:
 - Gravely disabled due to mental illness, or
 - The person's continued liberty poses an imminent danger to that person or others.

(IC 66-326)

- No such thing as a “medical hold”.
 - Need consent from patient or authorized surrogate.
 - If patient is incompetent and it is an emergency, may provide necessary care while attempt to obtain consent.

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Laws Authorizing Care w/out Consent

DUI Testing

- Persons with drivers license are deemed to have consented to DUI testing requested by police.
- Providers are immune from liability for providing such tests if comply with standard of care.

(IC 18-8002(1), (6))

- But the patient may still refuse.
 - Patient subject to penalties. (IC 18-8002(3)-(4))
 - Provider may provide care despite patient's refusal, but doing so is risky.

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Laws Authorizing Care w/out Consent

Testing of Persons Charged with Certain Offenses

- Providers may test persons charged with certain offenses to determine if they have HIV, venereal diseases, and hepatitis, e.g.,
 - Sex offenses
 - Drug violations
 - Prostitution
 - Other crime in which bodily fluid has likely been transmitted to another

(IC 39-604)

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Laws Authorizing Care w/out Consent

Testing Inmates

- Providers may examine or test jail or prison inmates for:
 - Venereal diseases
 - HIV
 - Hepatitis

(IC 39-604(1)-(3))

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Police Ordered Treatment

- Police may order blood draw for DUI testing if officer has probable cause to suspect
 - Aggravated DUI, or
 - Vehicular manslaughter.
- Blood drawn by physician, qualified medical tech, RN, or phlebotomist designated by hospital.
- Police obligated to pay for the draw.
- Provider may refuse if provider determines:
 - Draw would result in serious injury to hospital personnel or other patients, or
 - Draw is contraindicated by medical condition of suspect or other patients.

(IC 18-8002(6))

- But *Missouri v. McNeely* (S.Ct. 2013) casts doubt on constitutionality...

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Court Ordered Treatment

- Court may order or issue warrant compelling examination or testing. (See, e.g., IC 19-625)
 - Limit exam or test to scope of the order or warrant.
 - May seek to quash or modify the order if necessary.

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Police Access to Patients



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GOVERNMENT

HIPAA allows police access to patients, federal judge rules

■ The case highlights the interplay between state and federal laws on sharing medical information about alleged crime victims, experts say.

By AMY LYNN SORREL — Posted May 21, 2007

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HIPAA privacy rules do not bar law enforcement from having access to patients who are victims of alleged crimes, a Louisiana federal judge recently ruled. The decision affirmed that police had the right to arrest a hospital case worker for obstruction of justice when she tried to stop police from questioning a patient.

The ruling likely will not embolden state authorities to barge into the treatment room, experts say.

"But the facts are perhaps a wake-up call," said Philip H. Lebowitz, a HIPAA lawyer and partner with Philadelphia-based Duane Morris LLP. "It does point out that what you might think is the right thing to do might not be under HIPAA."

Elizabeth Maier, the hospital employee at the center of the case, sued the police for falsely arresting her when she kept local police from seeing a patient who was being treated for alleged domestic abuse at Lafayette General Medical Center. The patient did not want to report the incident, but a nurse already had called 911, according to court records. Maier was never prosecuted.

During the encounter, Maier told police that HIPAA requires a patient's consent before disclosing private medical information. She argued in her lawsuit that the nurse who called the police to report the abuse had violated the patient's confidentiality under HIPAA. Maier also said police should have known she was just doing her job to protect the patient's privacy.

The police, on the other hand, argued that Louisiana law requires them to investigate reports of domestic violence once they are made and that Maier's actions prevented them from doing their duty.

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Police Access to Patients

- Private entities may generally require a warrant.
 - Cooperate with terms of warrant.
- Police may be able to access public areas without a warrant.
 - Consult with your attorney if this is problematic.
- Explain to police that, like other members of public, police are not given unrestricted access to patient care areas.
- Police are usually willing to cooperate.

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Police Access to Patients

- If police want access to patient or facility:
 - Determine if access is appropriate considering:
 - Patient care concerns.
 - Provider operations.
 - Patient wishes.
 - Ask the patient if they consent to police access.
 - If patient agrees, provide access as appropriate.
 - If patient declines, explain to police.
 - Explain objections to police and work on solution.

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Police Access to Patients

- If police insist on access despite objections.
 - Do not obstruct police action.
 - Do not lie or misrepresent facts to police.
 - Document objection, including parties involved and circumstances.
 - Complain to police officer's supervisor.

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Applying the Rules



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Applying the Rules:

General Rule

- If have concerns or questions about disclosure to law enforcement:
 - Explain same to law enforcement;
 - Voice and document objections; and/or
 - Ask for authority from law enforcement.
- **NEVER physically obstruct, misrepresent facts, or affirmatively hinder law enforcement efforts.**
 - May be liable for obstruction of justice.
- When in doubt, contact your attorney.

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Prepare in Advance

- Include disclosures to law enforcement in Notice of Privacy Practices.
- Establish policy or process for responding.
 - Identify person responsible for contacting or responding to law enforcement, e.g., charge nurse, administrator on call, or privacy officer.
 - Ensure privacy officer understands applicable rules.
 - Instruct personnel to notify responsible person ASAP.
- Work out process with law enforcement in advance.
- Train personnel concerning the process.
 - Limits on disclosures.
 - Process for disclosures.

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Verify Authority of Requestor

- Before disclosing protected info, covered entity must:
 - Verify identity and authority of person requesting info if he/she is not known.
 - E.g., check the badge or papers of officers.
 - Obtain any documents, representations, or statements required to make disclosure.
 - E.g., representations from police that they need info for immediate identification purposes, or written satisfactory assurances accompanying a subpoena.
- Does not apply to disclosures for purposes of facility directory where patient has not objected to disclosures.
- May rely on representations of officer if reliance is reasonable.

(45 CFR 164.514(h))

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Verify Authority of Requestor

- To be valid, court or administrative tribunal must have jurisdiction over entity to whom order, warrant, or subpoena is issued.
 - Federal court with jurisdiction in in the state.
 - State court.
 - Generally not court from another state.
- May rely on representation of officer if reliance is reasonable.
- When in doubt, check with your attorney.

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May Require Warrant

- In most cases, you are not required to respond to a law enforcement request absent a warrant, subpoena or court order.
 - The United States Constitution generally prohibits warrantless searches or seizures.
 - HIPAA exceptions generally allow, but do not require, disclosure.
- But be careful.
 - Usually want to cooperate with law enforcement.
 - State laws may require certain disclosures.
 - Do not physically interfere, lie to, or affirmatively hinder law enforcement if they proceed over your objection.

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Informal Requests for Info

- Generally need not respond to informal law enforcement request for info.
- Ask for basis or authority for request.
- Must have HIPAA exception to disclose info, e.g.,
 - Is disclosure to avert harm?
 - Is there a law that requires report to law enforcement?
 - Do we fit within one of the exceptions for disclosure to law enforcement?

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Object to Improper Disclosures

- Explain HIPAA requirements.
- Ask to speak with officer's supervisor.
- Contact your own attorney.
- Document your objections and police actions.
 - Names and badge numbers.
- Never physically interfere with law enforcement if they insist on acting despite your objection.

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Minimum Necessary Standard

- Even if HIPAA exception allows disclosure, you generally may not disclose more than is minimally necessary to accomplish intent.

(45 CFR 164.504)

- Limit disclosures to:
 - Extent disclosure required by law.
 - Scope of warrant, order or subpoena.
 - As necessary to accomplish purpose of disclosure.

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Log the Disclosure

- Providers must log most disclosures to law enforcement so that they may respond to patient's request for accounting of disclosures.
- Log must record:
 - Date of disclosure.
 - Name and address of entity receiving info.
 - Description of info disclosed.
 - Either a statement of purpose of disclosure or copy of the written request for disclosure (e.g., the order, subpoena, etc.).

(45 CFR 164.528)

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Accounting of Disclosure

- Law enforcement or health oversight agency may suspend person's right to obtain accounting.
 - If written directive, the statement should:
 - Confirm accounting would be reasonably likely to impede agency's activities, and
 - State time for suspension.
 - If oral direction:
 - Provider must document direction, identity of agency or official.
 - Suspension limited to 30 days unless written statement obtained.

(45 CFR 164.528)

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Report Breach of Unsecured PHI

- **Must report “breach” of unsecured PHI in violation of the HIPAA privacy rule to:**
 - Patient or personal representative.
 - Report within 60 days.
 - HHS.
 - If breach < 500 persons, may report within 60 days after calendar year.
 - If breach > 500 persons, must report at same time you notify individuals.
 - Local media, if breach > 500 persons in the state.

(45 CFR 164.400)

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Report Breach of Unsecured PHI

- **Unauthorized access, use or disclosure of unsecured PHI is presumed to be a reportable breach unless provider can demonstrate that there is a low probability that the data has been compromised based on risk assessment of:**
 - Type of info disclosed;
 - Entity to whom info disclosed;
 - Whether entity actually looked at the info; and
 - Actions taken to mitigate disclosure.

(45 CFR 164.402)

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Report Breach of Unsecured PHI

- May delay breach report to individual and HHS if law enforcement states that breach notification would impede criminal investigation or damage national security.
 - If statement in writing, may delay report for time period stated in writing.
 - If statement is oral, may delay for up to 30 days.
 - Document the statement, including identity of officer.
 - May request that written statement obtained in meantime.

(45 CFR 164.412)

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Ensure Business Associates Comply

- Business associate contract requires associates to comply with basic HIPAA requirements.
- Require business associates to immediately give provider notice of legal process.
- Not liable for business associate's violation unless:
 - Knew of violation and failed to act, or
 - Business associate is your agent.

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Consider Other Privacy Laws

- Attorney client privilege.
- Work-product doctrine.
- Peer review privilege.
- Drug and alcohol treatment records.
- Others?

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Additional Resources



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Resources

- OCR, *HIPAA Privacy Rule: Guide for Law Enforcement*
- H&H Client Alert, *Disclosures to Law Enforcement*
- H&H Client Alert, *Responding to Subpoenas, Orders, and Administrative Demands*
- *AMA Guidelines for Releasing Patient Info to Law Enforcement*, available on the internet

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www.hhs.gov/ocr/privacy/

Outlook.com - kcsta | x Blaine J. Benard | Pe... x Health Information P... x

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Health Information Privacy

The Office for Civil Rights enforces the HIPAA Privacy Rule, which protects the privacy of individually identifiable health information; the HIPAA Security Rule, which sets national standards for the security of electronic protected health information; the HIPAA Breach Notification Rule, which requires covered entities and business associates to provide notification following a breach of unsecured protected health information; and the confidentiality provisions of the Patient Safety Rule, which protect identifiable information being used to analyze patient safety events and improve patient safety.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy, Security and Breach Notification Rules

Learn about the Rules' protection of individually identifiable health information, the rights granted to individuals, breach notification requirements, OCR's enforcement activities, and how to file a complaint with OCR.



What's New

- OCR issues 2011-2012 HITECH Act Reports to Congress - 6/10/14
- Security Risk Assessment Tool Released - 3/28/14
- New Guidance on HIPAA Privacy Rule and Sharing Information Related to Mental Health - 2/20/14
- Spanish Language Model Notices of Privacy Practices - 2/13/14
- Digital Privacy Notice Challenge open through April 7 - 2/10/14
- HHS Strengthens Patients' Right to Access Lab Test Reports - 2/3/14
- HIPAA Privacy Rule and the National Instant Criminal Background Check System (NICS) - 1/7/14
- New HIPAA Law

Questions



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