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Confidentiality, Privilege, and HIPAA

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Disclosures

Neither I nor my spouse/partner has a relevant financial relationship with a commercial interest to disclose.

Confidentiality

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- Professional's duty to keep matters re
  in confidence from third parties



Circle of Knowing Model

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Lawyer
Police
Outside MD or
Therapist



Family
Former MD or
Therapist

Exceptions to Confidentiality

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- Emergency
- Waiver
- Incompetence
- Civil commitment
- Statutory reporting requirements
- Statutory exceptions, e.g., imminent risk of harm to the patient (suicide)
- Other legal requirements, e.g., duty to protect third parties

Tarasoff and the Duty to Protect Third Parties

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- No common law duty to take action to protect others from harm except where a special relationship exists between the parties.
- Special relationships imposing duty to control the actor
  - Parent and child, doctor and patient, parole officer and parolee
  - Actor must be able, or have right, to control
  - Harm must be foreseeable
- Origins: the duty to disclose infectious diseases:
  - To family members, close contacts
  - To public authorities
- Jurisdictions differ: Duty to protect third parties rejected in FL, IL, NC,TX, VA

Evolving Duties to Third Parties

- The driving cases: liability for failure to warn a patient of side effects that are causally related to an injury to a third party
- Expanded duty: Volk v. DeMeerleer (Washington, 2016)
  - Treating psychiatrist (Ashby) could be liable for murders/attempted murder committed by patient
  - Special relationship existed that imposed a duty of reasonable care to protect foreseeable victims
  - Forseeability is a question to be answered by the trier of fact

Evolving Duties to Third Parties

- Volk v. DeMeerleer (cont'd)
  - Patient of 9 years with bipolar disorder/psychosis
    - Long history of suicidal & homicidal/destructive ideation; revenge thoughts and grudges
    - No specific threats to decedent Schiering (his girlfriend) or other victims (her children)
    - Poor compliance
  - Last visit in April 2010; Schiering had moved out
    - Pt reported begin stable but with SI
    - Ashby noted unstable mood
  - Schiering ends relationship on July 16; Ashby not aware
  - Murders/attempted murder of Schiering and sons on July 17

Evolving Duties to Third Parties

- Volk v. DeMeerleer (cont'd)
  - Summary judgment for defendants based on lack of proof of specific threat and absence of a duty to the third parties
  - Summary judgment reversed, in part, on intermediate appeal
  - Washington Supreme Court
    - Distinction between *medical malpractice* (duty owed to patient) and *medical negligence* (Restatement of Torts §315-duty to third parties arising out of special relationship)
    - Special relationship existed between Ashby and DeMeerleer
    - No duty to control necessary

Privilege

- Patient's right to have matters revealed to a professional held in confidence
- Testimonial privilege
- Now available in Federal jurisdictions
- Exceptions:
  - Same as for confidentiality
  - Dangerous patient exception

HIPAA: Health Insurance Portability and Accountability Act

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- Primary purposes
  - Insure portability of health insurance when changing employers
  - Prevent unauthorized disclosures of medical information
  - Facilitate the exchange of medical information to improve the efficiency of care
- Civil and criminal penalties
- Pre-empted by more protective state law
- The end of civilization as we know it?

The HIPAA Bogeyman

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- Uncharted, and unlitigated, territory
- Sets minimum protections; higher protections control
- Only applies to
  - Health Plans
  - Health Care Clearinghouses
  - Health Care Providers Performing Certain Electronic Transactions
    - Claims, enrollment, eligibility
    - Payment, premiums
    - Referrals, certifications, authorizations
- Where state law provides a higher level of privacy protection, it preempts HIPAA

Protected Health Information (PHI) Under the Privacy Rule

- Identifying information
  - Name
  - Address
  - SSN
- Past, present, or future condition
  - Mental
  - Physical
- Services/ treatment provided
- Payment

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HIPAA: The End of Civilization as We Know It?



"It's a baby. Federal regulations prohibit our mentioning its race, age, or gender."

Privacy Rule Allows Disclosure Without Consent for the Public Good (§164.512)

1. Where required by law, e.g. judicial and administrative proceedings, mandated reporting (No Minimum Necessary Req.)
2. To public health authority, e.g. reporting STDs
3. Child abuse and neglect

Disclosure for the Public Good

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4. Other victims of abuse, neglect, or domestic violence, where agency is authorized to receive information and
   - Disclosure is required by law, and in accordance with law, or
   - Individual agrees to disclosure, or
   - Disclosure expressly authorized by statute/regulation and
     - The practitioner "in the exercise of clinical judgment" believes the disclosure is necessary to prevent serious harm to the individual or other potential victims, or
     - If individual is unable to agree because of incapacity, LE or other official represents that the info is not intended for use against the individual and failure to release would materially and adversely affect and immediate enforcement action

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4. (cont'd) Prompt notice (can be oral) to individual of disclosure, unless, in provider's professional judgment
   - Would put individual at risk of serious harm, or
   - Notice would be to a personal representative who provider reasonably believes is source of the abuse
5. FDA reporting of adverse events, etc.
6. Report communicable disease to a person who may have been exposed, so long as authorized by other law

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7. Employee Workplace Surveillance: may report PHI to employer if:
   - Physician is member of workforce or provides care (evaluation?) at the request of employer for medical surveillance or to evaluate for a work-related illness or injury; and
   - PHI consists of findings of work-related injury or illness; and
   - Employer needs the findings to comply with obligations under federal or state law (OSHA, Mine Safety); and
   - MD provides written notice to individual that it is disclosed to employer

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8. Health Oversight Activities
   - E.g., audits, civil and criminal investigations
   - Not if the individual is subject of investigation, except if investigation relates to receipt of health care, claim for public benefit, qualification or receipt of public benefits, such as disability

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9. Judicial and Administrative Proceedings
    - Court order
    - Subpoena or discovery request if
        - Requestor offers written statement with documentation that
            - There has been a good faith attempt to provide written notice to individual, and
            - Time to raise objections has lapsed and no objections filed
        - Qualified protective order
        - Provider notifies individual or seeks protective order

Disclosure for the Public Good

10. Law Enforcement
    - Required by law, e.g. gunshot, other injury
    - Warrant or process
    - Administrative request for law enforcement
    - Limited information for identification and location purposes, e.g. locating suspect, ID body
    - Victims of crime, e.g. rape kit, if individual cannot consent
    - Suspicious death
    - Crime on premises of the practice
    - Reporting crime in emergencies if necessary to alert LE to
        - Commission and nature of the crime,
        - Location of crime or victims, and
        - Identity, description, and location of perpetrator

Disclosure for the Public Good

11. Coroners and Funeral Directors
12. Cadaveric Organ, Eye, Tissue Donation
13. Research

Disclosure for the Public Good

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14. Avert a Serious and Imminent Threat to Health and Safety
    - May disclose or use PHI, consistent with applicable law and ethical standards, if good faith belief that it is necessary
        - To prevent or lessen serious and imminent threat to health or safety of a person or the public and disclosure is to a person/entity reasonably able to prevent or lessen the threat, including the target; or
        - For LE to identify or apprehend an individual (i) who escaped from lawful custody or (ii) statement by individual admitting participation in a violent crime reasonably believed to have caused serious harm to the victim
    - Good faith of such disclosure is presumed

Disclosure for the Public Good

15. Specialized Government Functions
    - Military and veterans affairs
    - Separation and discharge from the military
    - National security and intelligence activities
    - Protective service for USSS protectees
    - State Department medical suitability determination
    - Medical care of inmates
    - Government programs providing public benefits, if expressly required or authorized by statute or regulation
16. Compliance with Workers' Compensation Programs

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U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE FOR CIVIL RIGHTS

HIPAA Privacy Rule and Sharing Information Related to Mental Health

Background

The Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule provides consumers with important privacy rights and protections with respect to their health information, including important controls over how their health information is used and disclosed by health plans and health care providers. Ensuring strong privacy protections is critical to maintaining individuals' trust in their health care providers and willingness to obtain needed health care services, and these protections are especially important where very sensitive information is concerned, such as mental health information. At the same time, the Privacy Rule recognizes circumstances arise where health information may need to be shared to ensure the patient receives the best treatment and for other important purposes, such as for the health and safety of the patient or others. The Rule is carefully balanced to allow uses and disclosures of information—including mental health information—for treatment and these other purposes with appropriate protections.

In this guidance, we address some of the more frequently asked questions about when it is appropriate under the Privacy Rule for a health care provider to share the protected health information of a patient who is being treated for a mental health condition. We clarify when HIPAA permits health care providers to:

- Communicate with a patient's family members, friends, or others involved in the patient's care;
- Communicate with family members when the patient is an adult;
- Communicate with the parent of a patient who is a minor;
- Consider the patient's capacity to agree or object to the sharing of their information;
- Involve a patient's family members, friends, or others in dealing with patient failures to adhere to medication or other therapy;
- Listen to family members about their loved ones receiving mental health treatment;
- Communicate with family members, law enforcement, or others when the patient presents a serious and imminent threat of harm to self or others; and
- Communicate to law enforcement about the release of a patient brought in for an emergency psychiatric hold.

In addition, the guidance provides relevant reminders about related issues, such as the heightened protections afforded to psychotherapy notes by the Privacy Rule, a parent's right to access the protected health information of a minor child as the child's personal representative, the potential applicability of Federal alcohol and drug abuse confidentiality regulations or state laws that may provide more stringent protections for the information than HIPAA, and the intersection of HIPAA and FERPA in a school setting.

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HIPAA Violation Penalties

- No private cause of action (but has been cited as the standard in private breach of confidentiality cases)
- Enforcement by DHHS Office of Civil Rights
- Penalties
  - Civil (42 U.S.C. §1320d-5)
    - $100/violation; maximum $25,000 annually
    - No penalty if: punished criminally, lack of knowledge or reasonable diligence, result of reasonable cause rather than willful neglect and action taken within 30 days

HIPAA Violation Penalties

- Criminal penalties (42 U.S.C. §1320d-6)
  - Criminal Knowing violation by disclosure of PHI
    - Fine not more than $50,000, imprisonment not more than 1 year, or both.
    - If committed under false pretenses, fine of not more than $100,000, imprisonment for not more than 5 years, or both.
    - If with intent to sell, transfer, or use for commercial advantage, personal gain, or malicious harm: fine of not more than $250,000, imprisonment for not more than 10 years, or both.
- Implications for clinicians: beware what you do with your video and audio tapes.

State Statutes and Common Law

- Pettus v. Cole (57 Cal. Rptr.2d 46 (Cal.App. 1, 1996))
  - Employee sued employer and two psychiatrists who had examined employee re disability leave
  - Alleged:
    - Unauthorized release of medical information in violation of Confidentiality of Medical Information Act (CMIA)
    - Invasion of constitutional right of privacy
    - Breach of contract,
    - Wrongful termination in violation of public policy
    - Unauthorized use of medical information.

Pettus v. Cole (cont'd)

- Psychiatrists violated Confidentiality of Medical Information Act by giving employer (including supervisor) a detailed report of the psychiatric evaluation of an employee without the employee's specific written authorization

Pettus v. Cole (cont'd)

- Employee raised a triable issue re: violation of his right to privacy under the California Constitution by MDs
- Employer violated both the CMIA and the employee's state constitutional rights to autonomy & privacy when it terminated his employment because of his refusal to comply with its demand that he enter an inpatient alcohol treatment program

So What Do We Do?

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- HIPAA as setting minimal requirements
- Extension and acknowledgment of HIPAA standards likely
- Pay attention to jurisdictional requirements
- Prior to evaluating individuals
  - Know who will receive the report and adjust content accordingly
  - Oral warning and consent
  - Written permission to release report
  - Limit release of information on a “need to know” basis