

Requests for Medical Information in the Age of HIPAA *Recognizing and Avoiding Common Problems*

Courtesy of the Mintz Levin Health Law Section

Every day, health care providers and other organizations subject to the HIPAA Privacy Rule (called “Covered Entities”) are bombarded with requests for medical records. These requests come from other Covered Entities, patients, family members, government representatives, private lawyers, and others who believe that they are entitled to patients’ medical information.

The burden of responding generally falls on medical records personnel, who must understand the complexities of the HIPAA privacy rule, as well as its interplay with state law, to ensure that a Covered Entity does not wrongfully release – or wrongfully *refuse* to release – patients’ medical records.

In addition to making proper release decisions, Covered Entity personnel must keep track of certain releases for a specified number of years in case a patient later exercises his or her right under HIPAA to an accounting of disclosures of his or her medical information.

Covered Entities that make the wrong release decision risk patient embarrassment, anger, negative publicity, and quite possibly complaints to the federal government (almost 20,000 patient complaints have been filed with the Department of Health and Human Services since April 14, 2003, the effective date of the HIPAA Privacy Rule). Worse yet, bad decisions expose Covered Entities to the risk of civil fines and possibly criminal prosecution.

In the years since the effective date of the HIPAA Privacy Rule, we have found that certain requests for the release of medical information cause more problems for Covered Entities than others. We present these problematic scenarios below in order to highlight some of the challenges of managing patient information in the age of HIPAA.

Pressures From Lawyers

Covered Entities often struggle with demands from lawyers – some of whom are unfamiliar with HIPAA – who insist that records are needed for court, or who even threaten to arrest or otherwise cause problems for keepers of medical records should they fail to provide requested information within the time frames established by the lawyers. Some Covered Entities have mistakenly assumed that all lawyers are automatically entitled to patients’ records and have wrongfully released information.

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

Knowledge of both HIPAA and state-imposed limitations on the release of medical information is the best approach to responding properly to requests from lawyers that may not comply with HIPAA's requirements. Covered Entities should provide initial and ongoing training to their personnel and should use readily available resources – such as technology-based systems that provide review and tracking tools – to help their records staff assess each request in a timely and informed way.

Lawyer Confusion Regarding Family Roles

This firm has encountered lawyers who represent a patient's family – but not the actual patient – and who demand medical information regarding the patient. This problem often arises when a family is unhappy about a patient's progress.

Although these circumstances can be difficult, it is important to take the time to understand the HIPAA rules and the applicable state rules, to ask the right questions, and to get a clear picture of who is speaking for whom in order to confirm that the patient's rights – not the family's wishes – are protected. Remember that even a patient's own lawyer cannot have access to medical information without the appropriate permission.

Subpoena Problems

Many times Covered Entities release information in response to a subpoena when the subpoena is not accompanied by the HIPAA-required assurances (such as notice to the patient and an opportunity to object or a signed authorization for the release from the patient). Alternatively, some clients are so nervous about their obligations under HIPAA that they *refuse* to release medical records even when a subpoena is accompanied by the appropriate assurances.

Confusion can also arise with out-of-state subpoenas or court orders that generally follow HIPAA's requirements but that may be unenforceable in the Covered Entity's jurisdiction without further documentation such as an order from an in-state court. How should a Covered Entity's medical records staff address procedural problems that can confound even practicing attorneys? They probably should not do so on their own. At a minimum, Covered Entities should have procedures and systems in place that flag such issues when they arise and prompt employees to call for supervisory review.

Patient Authorizations

It would seem that a request for the release of medical information accompanied by a patient's authorization would present the fewest problems from a HIPAA compliance perspective. However, this firm sees Covered Entities release medical records in response to invalid authorizations (for example, authorizations that are unsigned, that have expired, or that lack the HIPAA-required core elements).

To avoid problematic releases in this category, Covered Entity personnel must be familiar with the key features of valid authorizations and should use available resources such as check lists and electronic tools that help them assure the completeness and validity of authorizations.

Disclosures on Behalf of Minors

Requests for the release of minors' medical records can be extremely complicated given the many shapes, sizes, and varieties of families today. Such releases are even more complicated when a minor is "emancipated" under state law or able to make independent medical decisions for some or all purposes. Covered Entities should review such requests carefully and exercise caution before releasing minors' records.

Sensitive Information

Clients who are able to sort through all other concerns and who make a release decision still need to ensure that they have redacted or that they have special permission to release certain sensitive patient information protected by state law.

Finally, a Covered Entity's HIPAA obligations do not always end upon release of the requested medical records. Covered Entities must ensure that certain releases are tracked so that they can be accounted for in accordance with HIPAA if and when a patient exercises his or her right to an accounting.

Regardless of the size of the Covered Entity, HIPAA presents significant challenges as well as significant demands on the time and attention of medical records personnel. It is almost impossible to keep track of the HIPAA Privacy Rule's many requirements, never mind the complex interplay between HIPAA and state law. It is important for Covered Entities to provide training, effective management information systems, and professional back-up as necessary to ensure that those on the front lines have ready access to the tools they need to handle every request for patient information, no matter how complex.

This white paper is intended to supply the public and other interested parties with general information about HIPAA and its impact on covered entities. It is not and should not be considered legal advice or a substitute for professional advice of any kind.

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