

Prevention and Recovery Conference

The Legal Aspects of Sharing Behavioral Health Information

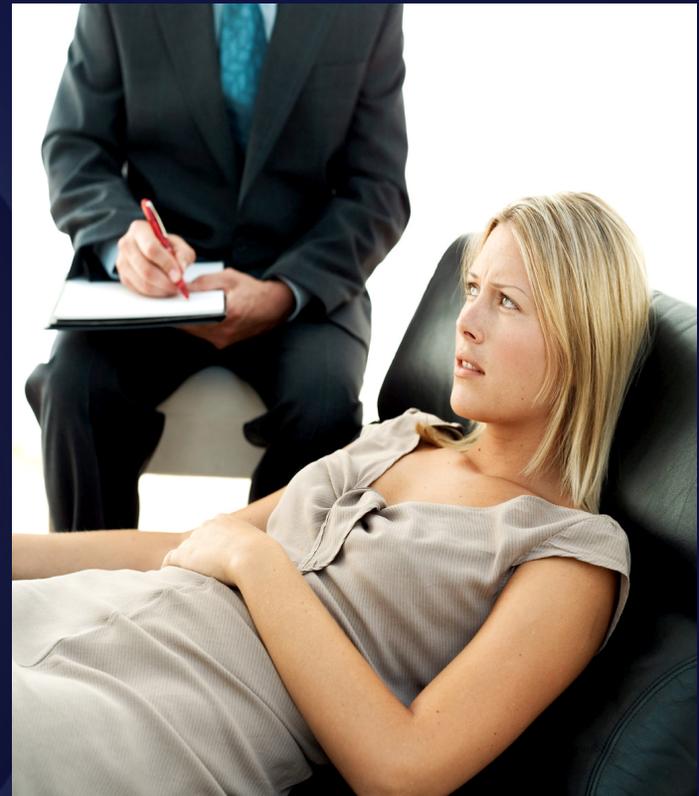


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The Issue

- National effort for more integrated care.
- Encourage development of HIEs.
- Questions about extent to which behavioral health information can be included without violating applicable laws.



Short Answer – Part 1

- & HIPAA permits mental health information to be used and disclosed for TPO among affiliated members of an HIE without express patient consent or authorization.

Short Answer – Part 2

& Federal law pertaining to the confidentiality of substance abuse treatment information requires express consent.



Short Answer – Part 3

- & The primary Oklahoma statute pertaining to the confidentiality of mental health information is consistent with HIPAA.
- & But, certain professional privilege statutes have not been amended to be consistent with HIPAA.

Short Answer – Part 4

- & Trade groups remain concerned about patient privacy.
- & Codes of ethics and other directives may require patient consent.



HIPAA Purpose

- & Establish a set of national standards for the protection of PHI.
- & Provides a federal floor for privacy while preserving more stringent state laws.



Policies and Procedures

& **As Covered Entities, Providers Should Have:**

- ! NPP
- ! Policies on required and permitted uses and disclosures
- ! HIPAA compliant authorization
- ! Policies implementing administrative requirements and patient rights
- ! Business Associate Contract

Privacy - Basic Principle

- & Covered Entity May Not Use or Disclose PHI, except either**
- ! As the Privacy Rule permits or requires; or
 - ! As the individual who is the subject of the information (or the personal representative) authorizes in writing.

What Information Is Protected?

& Protected Health Information

- ! All “individually identifiable health information” held or transmitted by a covered entity.



Covered Information

Relates to the past, present, or future physical or **mental health condition** of an individual; the provision of health care to an individual; or the past, present or future payment for the provision of health care to an individual.

Psychotherapy Notes

- & HIPAA does not distinguish between mental health information and physical health information, with one narrow exception for psychotherapy notes.

Psychotherapy Notes - Definition

- & Notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are **separated** from the rest of the individual's medical record.

Psychotherapy Notes – Definition

& Excludes –

- ! Medication prescription and monitoring;
- ! Counseling sessions start and stop times;
- ! Modalities and frequencies of treatment;
- ! Results of tests

Psychotherapy Notes – Definition

& Excludes (part 2)

! Summary of

- Diagnosis;
- Functional status;
- Treatment plan;
- Symptoms;
- Prognosis; and
- Progress to date.

Permitted Uses and Disclosures

& Individuals

& Treatment, Payment and Health Care Operations

& Business Associates (includes HIEs)

ONC Fact Sheet

- & Can a HIO, as a business associate, exchange PHI with another HIO acting as a business associate?
- & Yes, so long as the disclosure of PHI is authorized by the HIO's BA agreement and the information exchange would be permitted by HIPAA.

ONC Fact Sheet

- & How do HIPAA authorizations apply to an electronic health information exchange environment?
- & HIPAA requires the individual's written authorization for any use or disclosure of PHI not otherwise expressly permitted by the Privacy Rule. For example, authorizations are not generally required to disclose PHI for TPO.

ONC Fact Sheet

- & Can a covered entity use existing aspects of the Privacy Rule to give individuals the right to decide whether sensitive information about them may be disclosed to or through a HIO?

ONC Fact Sheet

- & Yes. To the extent a covered entity is using a process either to obtain consent or act on an individual's right to request restrictions under the Privacy Rule as a method for effectuating individual choice, policies can be developed for obtaining consent or honoring restrictions on a granular level, based on the type of information involved.

ONC Fact Sheet

- & For example, specific consent and restriction policies could be developed, either on an organization level or HIO level, for HIV/AIDS, mental health, genetic, and/or substance abuse information.

ONC Fact Sheet

- & Does the Privacy Rule permit a covered entity to disclose psychotherapy notes to or through a HIO?
- & Yes, provided the covered entity has obtained the individual's written authorization.

Oklahoma Law

43A O.S. § 1-109

- ! Applies to mental health and drug or alcohol abuse treatment information.
- ! Amended to be consistent with HIPAA as to treatment of mental health information.

Oklahoma Physician and Psychotherapist-Patient Privilege

12 O.S. § 2503

- ! Gives patient right to prevent disclosure of patient's PHI
 - Health care providers must protect patient's privilege

Physician-Patient Privilege

& Amended to clarify that it is a testimonial privilege only and that it does not make communications confidential when state and federal privacy laws would otherwise permit disclosures.



Psychologist Privilege

& Appears consistent with the Physician-Patient Privilege because of cross-reference 59 O.S. 2503.



Other Privilege Statutes

- & The following have not be amended:
 - ! Patient-Licensed Professional Counselor
 - ! Licensed Marital and Family Therapist

Professional Ethics

& *Ethical Principles of Psychologists and Code of Conduct*, Standard 4.01

& American Psychiatric Association, *The Principles of Medical Ethics*, Section 4, paragraphs 1 and 2.

Public Awareness

& June 21, 2012 article in Boston Globe – *“As records go online, clash over mental care privacy,”* by Liz Kowalczyk

Public Awareness

- & “It’s one thing to give your psychiatrist the right to share your information [with certain doctors], it’s another to enter your data into a system that makes it available with relative ease to an unknown number of physicians who may be involved in your care. Most Americans see the benefits as much greater than the risks. But there are groups who are very uncomfortable with their records being shared with people they have not specifically designated.”
- & David Blumenthal, M.D., Partners’ chief health information officer

Public Awareness

& Dr. Thomas Lee, head of Partner's physician network, said segregating psychiatrists' notes fosters stigma, "Schizophrenia and Parkinson's disease are both biochemical disorders of the brain. Why is one considered mental health and the other medical?"

Substance Abuse

- & 42 CFR Part 2
- & Protects “identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse. . . .”



Definition of “Program”

- & Federally assisted
 - ! Funded by federal agency (Medicare/Medicaid)
 - ! Licensed or certified as a Medicare provider
 - ! Registered to dispense controlled substances

Definition of “Program”

- & Individual/entity who holds itself out as providing, and provides, alcohol or drug abuse treatment;
- & An identified unit within a general medical facility;
- & Medical personnel who’s primary function is substance abuse treatment.

Patient Consent Required

- & Limited exceptions.
- & Consent must contain certain items, including a specific statement.
- & All medical information in a patient's record is protected, including those unrelated to substance abuse.

SAMHSA FAQs

& Does Part 2 permit the disclosure of information without a patient's consent for the purposes of TPO?

SAMHSA FAQ

- & Unlike HIPAA, which generally permits disclosure of PHI without patient consent or authorization for purposes of TPO, Part 2, with limited exceptions, requires patient consent for such disclosures. Some types of exchanges may take place without patient consent when a qualified service organization agreement exists.

SAMHSA FAQ

& May information protected by Part 2 be made available to an HIO for electronic exchange?

SAMHSA FAQ

- & Yes, only if:
 - ! A patient signs a Part-2 compliant consent; OR
 - ! A QSOA is in place between the Part 2 program and the HIO.

SAMHSA FAQ

- & If Part 2 information has been disclosed to the HIO, either pursuant to patient consent or under a QSOA, may the HIO then make that Part 2 information available to HIO-affiliated members?

SAMHSA FAQ

& Only if the patient signs a Part 2-compliant consent form.



Summary – Part 1

- & Patients should be informed of the potential uses and disclosures of their PHI, including the fact that it may be disclosed to an HIE and exchanged among HIE members.

Summary – Part 2

- & Mental health information is treated like physical health information under HIPAA and Oklahoma.
- & However, Oklahoma professional privilege statutes may place limitations on disclosure of PHI.

Summary – Part 3

- & Professional codes of ethics generally indicate that mental health treatment providers have an obligation to maintain the confidentiality of patient information.

Summary – Part 4

- & Substance abuse information is subject to heightened requirements under Part 2.
- & Written Part-2 compliant consent is required to exchange information.

PRESENTED BY

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