

# Information Sharing and Cross-System Collaboration

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# The Importance of Client-Specific Information

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- Identify target population for intervention
- Provide better clinical care
- Provide information for assessing outcomes
- Provide information for program evaluation



# Applicable Laws

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- Health Insurance Portability and Accountability Act of 1996 (HIPAA)
  - Privacy regulation
  - Security regulation
- Federal regulations on substance abuse treatment (42 CFR Part 2)
- Federal Educational Rights and Privacy Act (FERPA)
- State statutes
- State court decisions



# The (Mis)Application of HIPAA

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- Birthday parties in nursing homes in New York and Arizona have been canceled for fear that revealing a resident's date of birth could be a violation.
- Patients were assigned code names in doctor's waiting rooms — say, "Zebra" for a child in Newton, Mass., or "Elvis" for an adult in Kansas City, Mo. — so they could be summoned without identification.
- Nurses in an emergency room refused to telephone parents of ailing students themselves, insisting a friend do it, for fear of passing out confidential information, the hospital's patient advocate said.
- State health departments throughout the country have been slowed in their efforts to create immunization registries for children because information from doctors no longer flows freely.

■ *Jane Gross, Keeping patient details private, even from kin. New York Times, July 3, 2007*



# The Ideal Confidentiality Policy

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1. You have to give me all of the information I want, when I want it, in the form I want it
2. I can't give you anything, because everything you want is confidential (plus someone told me HIPAA says so, whatever HIPAA is)



# Why Confidentiality?

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- Reduction of stigma
- Fostering trust
- Preserving privacy
- Encouraging help-seeking behavior
- It is an important, but not absolute, legal and ethical principle



# Today's Discussion

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- Key issues from HIPAA and 42 CFR as applied to cross-system collaboration
- Tools to ease cross-system collaboration
- The electronic security regulation
- Impact of the stimulus bill



# Some Basic Assumptions

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- Most state laws are stricter than HIPAA
- Few state laws are stricter than 42 CFR Part 2
- The privacy regulations get too much focus
- The security regulations do not get enough focus
- Myths not facts are the biggest barriers to collaboration



# HIPAA Myth 1

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- *Myth:* HIPAA applies to everybody
- *Fact:* HIPAA applies only to
  - Health plans (group health plan, Medicare, Indian Health Service plan...)
  - Health care clearinghouses
  - Health care providers who transmit health information in electronic form
- *Courts are not covered entities*
- *Special rules for corrections*
- *Accrediting agencies are not covered*



# “Program” 42 CFR 2.11

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- An individual or entity that “holds itself out as providing, and provides, alcohol or drug abuse diagnosis, treatment or treatment referral”
- Unit within a general medical facility that holds itself out as providing diagnosis, treatment or treatment referral



# HIPAA Myth 2

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- *Myth:* All disclosures require consent
- *Fact:* HIPAA does not require consent for disclosures or uses that are
  - necessary to carry out treatment,
  - payment, or
  - health care operations
- *On the other hand:* 42 CFR has stringent consent requirements
- What does your state law say?



# HIPAA Myth 3

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- *Myth:* No one has access to protected health information
- *Fact:* HIPAA permits disclosures for the following purposes:
  - Public health activities
  - Victim of abuse or neglect
  - Judicial/Administrative proceedings
  - Law enforcement
  - Threats to health or safety
  - Court-ordered examinations
  - Correctional facilities



# HIPAA Myth 4

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- *Myth:* HIPAA eliminates state laws on confidentiality
- *Fact:* State laws that are *more* protective of confidentiality apply instead of HIPAA
- *Fact:* HIPAA merely sets a national minimum



# HIPAA Myth 5

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- *Myth:* Federal law prohibits staff from the same agency from talking to each other
- *Fact:* Both HIPAA and 42 CFR (on substance use) permit intra-agency exchanges of information



# Permitted Disclosure: Courts

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- Courts are not covered entities
- Payment from the court is not a HIPAA transaction
- An “assessment” is “treatment” within HIPAA
- An eligibility screen for a therapeutic court is not
- Courts can use standard language in order to direct disclosure
- State laws typically permit or require disclosure based on court’s weighing of public interest/need for disclosure against potential harm of disclosure
- 42 CFR has specific requirements for subpoena



# Permitted Disclosure: Judicial/Administrative Proceedings

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- PHI may be disclosed in response to
  - Order from court or administrative tribunal
  - Subpoena or discovery request without court order if
    - Reasonable efforts to provide notice, *or*
    - Reasonable efforts to obtain qualified protective order
    - Qualified protective order: Court order or stipulation by parties that information will not be used other than for litigation purposes *and* PHI will be returned or destroyed at end of litigation
  - 42 CFR requires court order
  - In general state law will require court order



# Permitted Disclosure: Law Enforcement (HIPAA)

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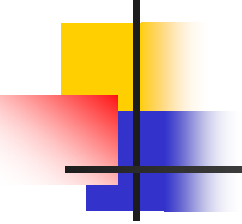
- For identification and location
  - Name and address
  - Date/place of birth
  - Social security number
  - ABO blood type
  - Type of injury
  - Date and time of treatment
  - Date and time of death (if applicable)
  - Distinguishing physical characteristics
  - DNA, dental bodily fluids *not* covered



# Permitted Disclosure: Law Enforcement (cont)

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- Information about victims of a crime
  - Individual agrees to disclosure *or*
  - Individual lacks capacity and
    - Law enforcement represents info necessary to determine whether law has been violated (but not by victim)
    - Info won't be used against the victim
    - Covered entity determines is in victim's best interest
    - No comparable provision in 42 CFR



# Permitted Disclosure: Victims of abuse or neglect

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- PHI may be disclosed if covered entity reasonably believes person is victim of abuse, neglect, or domestic violence
- Individual either agrees, *or*
- State law permits, and covered entity believes necessary to prevent serious harm to individual or others, *or*
- Person lacks capacity and law enforcement represents PHI required for “immediate enforcement activity”



# Permitted Disclosure: Law Enforcement (cont)

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- Decedents, to alert law enforcement that covered entity believes death may have been suspicious (42 CFR is similar)
- To coroner or medical examiner or funeral director (42 CFR requires consent from legal representative or family member)
- Crime on premises (42 CFR is similar)
- Crime in emergencies
  - Commission and nature of crime; location of crime or victim; identity, location, description of perpetrator



# Permitted Disclosure: Law Enforcement

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- In compliance with court order/grand jury subpoena/administrative summons
  - Information sought is relevant and material
  - Request is specific and limited in scope
  - De-identified information not reasonable
  - 42 CFR is more restrictive



# Law Enforcement (cont)

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- If use or disclosure is necessary to prevent or lessen a serious threat to the health or safety of individual or public
- To a person able to prevent the threat, including the victim
- Is necessary for law enforcement to apprehend the person
- Most state laws makes disclosure discretionary
  - To protect an identified potential victim
  - No liability as long as good faith and no gross negligence



# Permitted Disclosures: Correctional Facilities

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- PHI can be disclosed without consent to provide health care to the inmate, or for the health and safety of other inmates or correctional officials (HIPAA)
- If the person is released, e.g. on parole, then HIPAA rules apply
- No similar provision in 42 CFR



# 42 CFR: “Disclosure” Defined

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- “A communication of patient identifying information, the affirmative verification of another person’s communication of patient identifying information, or the communication of any information *from the record* of a patient...” (42 CFR 2.11)



## 42 CFR, Part 2

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- Generally cannot disclose information without subpoena and court order - arrest/search warrant not sufficient
- Can disclose for crime committed by patients on program premises or against program personnel or a threat to commit such a crime



## However, 42 CFR Permits

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- Disclosures by a non-federally supported treatment entity providing services to a court-ordered patient (42 CFR 2.12)
- Diagnosis made “solely for the purpose of providing evidence for use by law enforcement authorities”
- If facility is not identified publicly as only an alcohol or drug abuse facility, patient’s presence may be acknowledged if do not reveal alcohol or drug abuse (42 CFR 2.13)



# 42 CFR and Probation

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- A program may disclose information about a patient to those persons within the criminal justice system which have made participation in the program a condition of the disposition of any criminal proceedings against the patient or of parole or other release from custody if
  - Disclosure only to those who need the information for monitoring/supervision
  - Written consent of the patient (but revocation rule does not apply)



# HIPAA Myth 6: Enforcement

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- *Myth:* If I violate HIPAA I will be severely punished, possibly even executed
- *Fact:* There have been 37,000 complaints filed with the federal government; only a handful of enforcement actions
- *Note:* This may change with stimulus bill amendments



## Enforcement (cont)

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- There is no private right of action under HIPAA
- There are no reported cases of liability under 42 CFR, Part 2
- Primary enforcement by the Office of Civil Rights of HHS
- Penalties
  - Civil: \$1000 per violation/ \$100,000 maximum
  - Willful: \$10,000 (if corrected)/\$250,000 maximum
  - Willful: \$50,000 (if uncorrected) and \$1,500,000 maximum in calendar year



## Florida Law (394.4615.8)

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- “Any facility or private...practitioner who acts in good faith in releasing information from this section is not subject to civil or criminal liability for such release.”



# HIPAA Myth 7

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- *Myth:* There is simply no way to share information across systems because of HIPAA
- *Fact:* HIPAA provides or permits several tools:
  - Uniform authorization forms
  - Business associate agreements (and qualified service organization agreements under 42 CFR)
  - Standard judicial orders
  - Patient safety organizations



# Business Associate Agreements

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- Can be used for disclosure in which a party provides a “function or activity involving the use or disclosure of individually identifiable health information, including claims processing or administration, utilization review, quality assurance, billing, benefit management, and repricing... (164.501)
- Other functions as well, for example, provision of legal advice
- 42 CFR permits qualified service organization agreements



# The Security Regulation

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- An electronic system is "interconnected set[s] of information resources under the same direct management control that share common functionality. A system normally includes hardware, software, information, data, applications, communications and people." ([45 CFR 164.304](#))



# Requirements (164.308)

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- Security management
- Assigned security responsibility
- Workforce security
- Information access management
- Security awareness and training
- Security incident procedures
- Contingency plan
- Evaluation



# The Stimulus Bill and HIPAA

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- More requirements for business associates (e.g. security rules now apply)
- Modest change to “restriction request” rule
- Penalties increased in some circumstances
- Private citizens can recover percentage of recovery obtained by government enforcement
- State attorneys general can enforce
- Framework for electronic record



# Some Useful Sites

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- [http://www.hipaa.samhsa.gov/download2/SA\\_MHSAHIPAAComparisonClearedPDFVersion.pdf](http://www.hipaa.samhsa.gov/download2/SA_MHSAHIPAAComparisonClearedPDFVersion.pdf)
- <http://hipaablog.blogspot.com/>
- [http://www.access.gpo.gov/nara/cfr/waisidx\\_02/42cfr2\\_02.html](http://www.access.gpo.gov/nara/cfr/waisidx_02/42cfr2_02.html)
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