

CLINICAL CONNECTION

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Guidance

Mental Health & Substance Abuse

Managing patients who have mental health and substance abuse diagnoses, and sometimes combined diagnoses, can oftentimes cause one to pause and remember that there are special regulations and considerations for these patients. Unless your hospital has the capability of taking care of these patients, most of the time these patients are referred elsewhere for further care.

Sharing information about patients with a mental health condition or a substance abuse disorder between facilities and with family and friends has always needed clarification, and as a result the Department of Health and Human Services has provided some new guidance about the type of patient information that HIPAA allows providers to share.

The new guidance, which was required under the 21st Century Cures Act, provides clearer directions for providers about the information that can be shared. The intent of the Rule is to clarify that some patient health information (PHI) may need to be shared to ensure the patient receives the best treatment and occasionally to protect the health and safety of the patient or others.

Some questions that are frequently asked is when can providers:

- 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
- Communicate to law enforcement about the release of a patient brought in for an emergency psychiatric hold (Source: hhs.gov)

The guidance provides two new HIPAA webpages, one specifically for consumers and the other for providers, which addresses mental and behavioral health. There are efforts afoot to develop educational programs to help with other questions that arise regarding information sharing as it relates to these patient populations. The law does have some strict privacy requirements related to psychotherapy notes, yet there is specific guidance about the ability of providers to make judgements when there is a benefit to the patient. The Rule does discuss some specific scenarios that may be encountered such as a patient who is unconscious or incapacitated or when a patient is suffering from temporary psychosis or under the influence of drugs and/or alcohol. Once again, provider judgement is the deciding factor: "In all cases, the health care provider may share or discuss only the information that the person involved needs

to know about the patient's care or payment for care." (Source: hhs.gov)

EMERGENCIES

Unfortunately, emergency departments are faced with the challenge of the opioid crisis and are frequently seeing overdoses. The new guidance offers clarification regarding information sharing during such an emergency. Question: When does HIPAA allow a

doctor to notify an individual's family, friends, or caregivers that a patient has overdosed, e.g., because of opioid abuse?



When a patient has overdosed, a health care professional may notify the patient's family, friends, or caregivers involved in the patient's health care or payment for care if: (1) the patient has the capacity to make health care decisions at the time of the disclosure, is given the opportunity to object, and does not object; (2) the family, friends, or caregivers have been involved in the patient's health care or payment for care and there has been no objection from the patient; (3) the patient had the capacity to make health care decisions at the time the information is shared and the doctor can reasonably infer, based on the exercise of professional judgment, that the patient would not object; (4) the patient is incapacitated and the health care professional determines, based on the exercise of professional judgment, that notification



and disclosure of PHI is in the patient's best interests; (5) the patient is unavailable due to some emergency and the health care professional determines, based on the exercise of professional judgment, that notification and disclosure of PHI is in the patient's best interests; or (6) the notification is necessary to prevent a serious and imminent threat to the health or safety of the patient or others.

When a patient has overdosed, a health care professional may notify the patient's family, friends, or caregivers involved in the patient's health care or payment for care if:

- 1) the patient has the capacity to make health care decisions at the time of the disclosure, is given the opportunity to object, and does not object
- 2) the family, friends, or caregivers have been involved in the patient's health care or payment for care and there has been no objection from the patient
- 3) the patient had the capacity to make health care decisions at the time the information is shared and the doctor can reasonably infer, based on the exercise of professional judgment, that the patient would not object
- 4) the patient is incapacitated and the health care professional determines, based on the exercise of professional judgment, that notification and disclosure of PHI is in the patient's best interests
- 5) the patient is unavailable due to some emergency and the health care professional determines, based on the exercise of professional judgment, that notification and disclosure of PHI is in the patient's best interests
- 6) the notification is necessary to prevent a serious and imminent threat to the health or safety of the patient or others (Source: hhs.gov)

Once again, provider judgement is important when deciding to share information. Justification for sharing information with family and/or friends should be documented in order to mitigate

risk and any potential HIPAA violation. When encountering patients who have a substance abuse diagnosis, there are additional considerations since these patients are protected under 42 CFR. Oftentimes, a question arises on how do HIPAA and 42 CFR (the federal confidentiality rules for information about substance use disorder treatment), including treatment for opioid abuse, in an emergency situation are applied? Does one follow HIPAA or 42 CFR or do both apply? According to DHHS, "the health provider that provides treatment for substance use disorders, including opioid abuse, needs to determine whether it is subject to 42 CFR Part 2 (i.e., a "Part 2 program") and whether it is a covered entity under HIPAA. Generally, the Part 2 rules provide more stringent privacy protections than HIPAA, including in emergency situations. If an entity is subject to both Part 2 and HIPAA, it is responsible for complying with the more protective Part 2 rules, as well as with HIPAA. HIPAA is intended to be a set of minimum federal privacy standards, so it generally is possible to comply with HIPAA and other laws, such as 42 CFR Part 2, that are more protective of individuals' privacy."

In emergencies, HIPAA permits disclosure of protected health information for treatment purposes without patient authorization, and information can be shared when a threat of serious injury or harm to the patient or others may be minimized without patient authorization or permission. Further information about applying 42 CFR Part 2 in an emergency can be found using the link: samhsa.gov

POINTS TO REMEMBER:

1. The new rule provides greater clarity around care of mental health and substance abuse patients.
2. Providers have more latitude to make judgements regarding the sharing of PHI with family, friends and other referral sources.
3. In addition to HIPAA considerations, substance abuse has stricter rules under 42 CFR that apply to information sharing.

"The mentality and behavior of drug addicts and alcoholics is wholly irrational until you understand that they are completely powerless over their addiction and unless they have structured help, they have no hope."

Russell Brand, Musician





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