MEDICAL RECORDS FACT SHEET

STATE AND FEDERAL REQUIREMENTS CONCERNING DISCLOSURES OF MEDICAL RECORDS

Physicians are regularly requested to provide health information related to or about their patients. Both the Ohio Revised Code and the provisions of HIPAA (collectively, "HIPAA") contain provisions obligating the physician to provide information and, in other cases, impose restrictions on the circumstances under which the information can be provided. In a number of respects the provisions of Ohio law and HIPAA are not consistent. As a general rule, in any particular situation a physician would need to comply with the more restrictive of the two. What this means is that where Ohio law would permit the disclosure, but HIPAA would not, then HIPAA would control. Where HIPAA would permit the disclosure, but Ohio law would not, then Ohio law must be complied with.

Permitted Disclosures Without Patient Authorization

HIPAA permits a physician to disclose patient information in connection with treatment, payment, or what are known as "health care operations." An example of "health care operations" is the disclosure of patient information to the physician's malpractice defense counsel in a situation where the patient sued the physician for medical malpractice. Ohio law does not have a specific provision limiting the disclosure of health information in the context of treatment, payment, or health care operations.

Responding to an Authorization to Disclose Protected Health Information

A patient can give a physician an "authorization" with regard to the disclosure of protected health information of the patient to a third party. Ohio law does not contain a detailed listing of what such an authorization requires.

Regulations issues under HIPAA are detailed with regard to what the "authorization" must include. An authorization is either HIPAA compliant or it is not. Unless it fully complies with the requirements of the HIPAA regulations, it should not be complied with. It is recommended that if the practice declines to recognize a purported authorization because of a deficiency, that both the individual submitting it and the patient who signed it should be advised.

A HIPAA compliant authorization must contain the signature of the patient or of the patient's attorney-in-fact for health care, guardian, custodial parent (in the case of a minor), or in the case of a decedent, an executor. If the practice has any question as to the authenticity of the signature, efforts should be undertaken to confirm the validity of the signature.

It is recommended that every physician office ought to have a standardized authorization form that could be made available to patients. That standardized form could also serve as a guide in assessing the correctness of authorizations that were prepared by someone else.

When to Disclose Information in Response to a Subpoena, Criminal Investigation, or a Governmental Inquiry

A complete review of the provisions of Ohio law and HIPAA with regard to disclosure in these cases are beyond the intended scope of this article. What is important is that any disclosure made in these situations must comply with both Ohio law and with HIPAA. There are instances in which HIPAA would permit disclosure (e.g. in response to a Grand Jury subpoena) whereas Ohio law would not. Similarly, there are cases where Ohio law would permit the disclosure and HIPAA would not, or at least would not permit the disclosure without compliance with a number of HIPAA procedural requirements not found in Ohio law. There are other differences between Ohio law and HIPAA with respect to disclosures. For example, HIPAA contains a "minimum necessary" provision, whereas Ohio law does not.

A common misconception on the part of physicians is that a subpoena (often issued simply by an attorney or by a court reporting agency) is the equivalent of a court order and must automatically be complied with. Both the requirements of Ohio law and HIPAA must be met in order for the subpoena to be complied with. Physicians regularly report receiving subpoenas that comply neither with HIPAA nor Ohio law.

This is not to say that a subpoena should be ignored. Upon the receipt of a subpoena, efforts should be promptly undertaken to determine whether the subpoena can be complied with. If it is not to be complied with, prompt response should be provided to the issuing person explaining why there will be no compliance. If necessary, a motion to quash the subpoena should be filed.

Charging for Medical Records

As discussed in a separate Fact Sheet, both Ohio law and HIPAA address the charges that a physician may make for providing copies of the medical record. Ohio law is very specific with regard to the calculation of fees that may be charged. HIPAA simply requires that the fee be based on the actual cost of providing the records. HIPAA does not provide any detailed explanation of exactly how the "cost" is to be determined. It seems that to the extent that physicians and other health care providers are imposing a charge at all, they are simply using the Ohio limits.