

CLINE, WILLIAMS, WRIGHT, JOHNSON & OLDFATHER, L.L.P.
MEMORANDUM

FROM: Cline, Williams, Wright, Johnson & Oldfather L.L.P.
Jill Jensen
Jeffrey E. Mark
Joerg Freye

DATE: March 12, 2003

RE: HIPAA FAQs

1. Telephone Calls for Appointment Reminders

- a. Must patients be given an option to not allow us to call them for an appointment reminder or for other matters?

An individual may request, and the covered entity must accommodate, reasonable requests by individuals to receive communications of protected health information from the health care provider by alternative means or at alternative locations. 45 C.F.R. §164.522(b)(1)(i). Even though the covered entity may not require an explanation of the basis for such a request, the covered entity may condition providing an alternative means of communication on the patient specifying an alternative method of contact. §164.522(b)(2)(ii)(B). In other words, if a patient does not want to be contacted by phone, the patient can be required to specify a reasonable alternative method of contact.

2. Messages on Answering Machines

- a. How much information may be left on a patient's answering machine?

Although messages may be left at the homes of patients, either on an answering machine or with family members, physician office staff will want to consider leaving only the office's name and telephone number and the minimum amount of other information necessary to confirm an appointment or ask the individual to call back. When leaving messages with family members or on an

©Cline, Williams, Wright, Johnson & Oldfather, L.L.P. This document is being provided as general information on the subject of the HIPAA Privacy Rule and its application and is not intended to be legal advice. Individual circumstances often involve unique or particular facts that will condition, limit, or modify the information provided in this document. If you have specific questions or require legal advice, please consult with competent legal counsel.

L0544552.4

answering machine, professional judgment should be used to determine how much information would be in the best interests of the patient. §164.510(b)(3). Since phone contact with patients is a routine occurrence in most physician offices, the offices' minimum necessary policy should define how much information is to be left with family members or on a patient's answering machine in those situations.

3. Charges for Medical Records

- a. What may a physician office charge an individual for copies of his or her patient records?

Under the HIPAA Privacy Rule, if an individual requests a copy of protected health information (PHI), a covered entity may charge a reasonable, cost-based fee for the copying, including the labor and supply costs of copying. §164.524(c)(4). If hard copies are made, the permitted costs would include the cost of paper and if electronic copies are made to a computer disk, this would include the cost of the computer disk. Further, if the individual requests the information to be mailed, the fee may include the cost of postage. Where the individual requests an explanation or summary of the information provided, and agrees in advance to any associated fees, the covered entity may also charge for preparing the explanation or summary. Physician offices will want to determine what costs they have in providing copies of medical records and should prepare their policies accordingly, making sure that any upper limits prescribed by state law are followed.

Nebraska law generally sets upper limits for permissible copying charges. In Nebraska, a physician office may charge no more than twenty dollars as a handling fee and no more than fifty cents per page as a copying fee. Neb. Rev. Stat. § 71-8404. Nebraska law also allows a provider to charge for the reasonable cost of duplicating medical records, which cannot routinely be copied or duplicated on a standard photocopy machine. A physician office may charge an amount necessary to cover the cost of labor and materials for furnishing a copy of an X-ray or similar special medical record. If the physician office does not have the ability to reproduce X-rays or other records requested, the person making the request may arrange, at his or her expense, for the reproduction of such records.

Nebraska law also prohibits a provider from charging a fee for medical records requested by a patient where the records are needed to support an

application for disability or other benefits or assistance or an appeal relating to the denial of such benefits or assistance. Because state law is more protective than the HIPAA Privacy Rule in this regard, it must be followed. Therefore, no charges can be made for copies of medical records needed under the following Nebraska statutes or federal laws:

- (1) Sections 43-501 to 43-536 regarding assistance for certain children;
- (2) Sections 68-1018 to 68-1025 relating to the medical assistance program;
- (3) Title II of the federal Social Security Act, as amended, 42 U.S.C. § 401, *et. seq.*;
- (4) Title XVI of the federal Social Security Act, as amended, 42 U.S.C. §1382, *et. seq.*; or
- (5) Title XVIII of the federal Social Security Act, as amended, 42 U.S.C. §1395, *et. seq.*

Neb. Rev. Stat. § 71-8405.

It should be remembered that where fees for medical records can be charged, the fees should be based on the actual cost for providing copies, but not more than the per page fee permitted by the Nebraska statute. Unless a physician office's actual costs justify it, the handling fee of twenty dollars should not be included in the charge to the individual.

Please note that HIPAA's limitations on charges for medical records do not apply to requests for medical records that are received from persons other than the individual whose PHI is being requested. Also note that the Nebraska statute providing for patient access and upper limits on charges for medical record copies does not apply to the release of records under the Nebraska Workers' Compensation Act.

©Cline, Williams, Wright, Johnson & Oldfather, L.L.P. This document is being provided as general information on the subject of the HIPAA Privacy Rule and its application and is not intended to be legal advice. Individual circumstances often involve unique or particular facts that will condition, limit, or modify the information provided in this document. If you have specific questions or require legal advice, please consult with competent legal counsel.

4. Filing of Patients' Complaints

- a. Does HIPAA require a covered entity to file a copy of the patient's complaint in the patient's chart?

No. The HIPAA Privacy Rule requires that all complaints and their resolution, if any, must be documented. §164.530(d)(2). The HIPAA Privacy Rule does not dictate how to document complaints. As long as the physician office's HIPAA policy clearly states where the complaints are maintained, they may be kept separate from the patient's file. Keeping complaints separate from the patient's chart, for example in a risk management file, does not violate the HIPAA Privacy Rule as long as the covered entity's HIPAA policy provides that the information is to be kept in the separate risk management file.

5. Notification of Physicians

- a. If a request to disclose PHI to an attorney or for legal purposes is received, do we have to notify all physicians who attended the patient or is it sufficient to notify only those physicians whose notes were given out? As part of this question the following excerpt from a HIPAA policy was provided to us:

- (1) If the request is from an attorney, it will be honored only upon receipt of a valid Authorization for Release of Information Form or court order directing the office to release information to the specific named attorney. If the request is from an attorney or marked for legal purposes, all physicians who attended the patient must be notified.

For purposes of this question, we assume that the physicians you are referring to are not in the same physician office. We also assume that the notification to be made to other physicians would involve PHI. The HIPAA Privacy Rule does not specifically address this issue. However, it does permit a covered entity to disclose protected health information to another covered entity without a patient's authorization for health care operations purposes if each entity has a relationship with the patient whose PHI is the subject of the request, the PHI

©Cline, Williams, Wright, Johnson & Oldfather, L.L.P. This document is being provided as general information on the subject of the HIPAA Privacy Rule and its application and is not intended to be legal advice. Individual circumstances often involve unique or particular facts that will condition, limit, or modify the information provided in this document. If you have specific questions or require legal advice, please consult with competent legal counsel.

pertains to the same relationship, and the disclosure is for a purpose involving quality assurance, quality improvement, or evaluations of health care providers.

The answer to this question is not clear. There is no question that the health care operations exception above would apply to situations where one covered entity asks another covered entity for PHI for the requesting covered entity's quality assurance/improvement or provider evaluation purposes. But would it also apply where a covered entity wants to notify another physician that records received from the physician's office have been disclosed to a patient's attorney?

First, if no PHI is disclosed in a notification, HIPAA would not apply and would not prohibit making a disclosure. If de-identified PHI is disclosed, HIPAA also would not prevent making a disclosure of de-identified information. See § 164.514. So, arguably, an initial notification under your policy could be made to another physician to the effect that your office has disclosed to an attorney (or other individual or entity) PHI found in your office records about one of the physician's patients. The notification would not identify any particular patient, however. The notification could then indicate that if the physician needs additional information about this matter for the physician's quality assurance/quality improvement purposes or to evaluate provider performance, the physician should send a written request to that effect to your office. If you receive a request for additional information from the other physician stating that the information is needed for quality assurance/quality improvement purposes or to evaluate provider performance, then it would probably be permissible under HIPAA to disclose the information. Stay tuned for more guidance from the federal Office of Civil Rights on this point. If you have any doubt about whether making the notification is permissible, obtain the patient's authorization first before doing so or consult with an attorney.

6. Disclosures Related to Research

- a. Is our own research staff permitted to review patient charts without patient authorization to identify candidates for research studies performed in conjunction with pharmaceutical companies?

Yes. The HIPAA Privacy Rule permits the disclosure of PHI for reviews preparatory to research, provided the covered entity obtains from the researcher,

©Cline, Williams, Wright, Johnson & Oldfather, L.L.P. This document is being provided as general information on the subject of the HIPAA Privacy Rule and its application and is not intended to be legal advice. Individual circumstances often involve unique or particular facts that will condition, limit, or modify the information provided in this document. If you have specific questions or require legal advice, please consult with competent legal counsel.

either in writing or orally, representations that: (1) the use or disclosure is sought solely to review PHI as necessary to prepare a research protocol or for similar purposes preparatory to research; (2) no PHI is to be removed from the covered entity by the researcher in the course of the review; and (3) the PHI for which use or access is sought is necessary for the research purposes. §164.512(i)(1)(ii). If the assurances listed above are provided, it is not necessary to obtain a patient's authorization prior to performing such reviews preparatory to research.

- b. Our research policies require written authorization prior to becoming a participant in a research study, however, our policy does not permit research participants to access their research-related PHI. Is this permissible under the HIPAA Privacy Rule?

A research participant can be denied access to their PHI where the individual agrees in advance to the denial of access when consenting to participate in research that includes treatment, and the covered entity informs the individual that his or her right to access PHI will be reinstated upon completion of the research. Provided these conditions are met, the individual's right of access to PHI created during the research may be suspended for as long as the research is in progress. However, the patient's access rights must resume after such time. § 164.524(a)(2); 65 Fed. Reg. 82734. Generally, the HIPAA Privacy Rule does not make a distinction between research information and other PHI. 65 Fed. Reg. 82734. Therefore, unless this special exception applies, a research participant must be permitted access to his or her PHI, research or otherwise, as provided for in the Privacy Rule.

7. Medical Records and Minors

- a. Can medical records for a minor be released to someone other than the biological parent? If not, how much information can be disclosed?

Please note that HIPAA applies to an individual's medical records and any other PHI about the individual.

The answer to this question depends upon who that other person is. The HIPAA Privacy Rule allows the disclosure of PHI, and thus, medical records of minors to the personal representative of the minor. §164.502(g). Disclosures

©Cline, Williams, Wright, Johnson & Oldfather, L.L.P. This document is being provided as general information on the subject of the HIPAA Privacy Rule and its application and is not intended to be legal advice. Individual circumstances often involve unique or particular facts that will condition, limit, or modify the information provided in this document. If you have specific questions or require legal advice, please consult with competent legal counsel.

to the personal representative are treated as disclosures to the individual. §164.502 (g)(1). Under §164.502(g), the personal representative is a person who has authority under state law to act on behalf of the minor in making decisions related to health care. If under applicable law a parent, guardian, or other person acting *in loco parentis* (in place of the parent) has authority to act on behalf of an individual who is an unemancipated minor in making decisions related to health care, a covered entity must treat the person as a personal representative. §164.502(g)(3)(i). Thus, a covered entity may disclose the medical records of a minor to a guardian or other person acting *in loco parentis*, such as a power of attorney, regardless of any biological relationship with the minor, if that person has authority to make decisions about the minor's health care. A person's authority to serve as a personal representative is determined by Nebraska law.

Even where a person is not the minor's personal representative, PHI about the minor may be disclosed under §164.510(3)(i)(B) in emergency circumstances if the health care provider determines in the exercise of professional judgment that the disclosure is in the best interests of the individual. Further, a covered entity may make disclosures to a family member, other relative or a close personal friend of the individual where the PHI is directly relevant to such person's involvement with the individual's care or the payment related to the individual's health care. §164.510 (b)(i)(A). A covered entity may also disclose PHI to notify a family member, a personal representative of the individual, or another person responsible for the care of the individual about the individual's location, general condition or death. Be sure to verify the identity of the person receiving PHI under §164.510, if the person is not known to you. See §164.514(h).

8. Notice of Privacy Practices

- a. Are covered health care providers required to mail their notice of privacy practices to each patient, or is it permissible to provide it to patients at the patients' next appointment in the office after the HIPAA Privacy Rule's compliance date?

Covered health care providers that have direct treatment relationships with individuals must, except in emergency situations, provide their notice of privacy practices to their patients as of the first service delivery after the compliance date. §164.520(c)(2); 67 Fed. Reg. 53238. This requirement applies whether the provider's first service is delivered electronically or in person.

©Cline, Williams, Wright, Johnson & Oldfather, L.L.P. This document is being provided as general information on the subject of the HIPAA Privacy Rule and its application and is not intended to be legal advice. Individual circumstances often involve unique or particular facts that will condition, limit, or modify the information provided in this document. If you have specific questions or require legal advice, please consult with competent legal counsel.

The notice can be provided in a variety of ways. Covered providers may satisfy the notice requirement by sending the notice to all of their patients at once by mail, by giving the notice to each patient as he or she comes into the provider's office after the compliance date, providing the notice electronically after the patient contacts the provider electronically, or by some combination of these approaches. See §164.520(c)(2). In emergency situations, covered providers may wait until after the emergency treatment situation to provide the notice when it is reasonably practicable to do so. §164.520(c)(2).

A covered entity may satisfy the applicable distribution requirements described above by providing the notice to the individual electronically, if the individual agrees to receiving materials from the covered entity electronically and the individual has not withdrawn his or her agreement. §164.520(c)(3). If an individual's first service delivery from a covered provider occurs electronically, the covered provider must provide electronic notice at the same time that the provider responds to the individual's first request for service. §164.520(c)(3). An individual that receives a covered entity's notice electronically also has the right to request a paper copy of the notice as described above. If the covered entity knows that the electronic transmission has failed, the covered entity must provide a paper copy of the notice to the individual. 67 Fed. Reg. 53238.

Covered providers that maintain a physical service delivery site must also prominently post the notice so patients will be able to read it. 67 Fed. Reg. 53238. The notice must also be available on-site for individuals to take on request. If the notice is revised, the covered provider must promptly post the revision and make it available on-site. Further, a covered entity that maintains a web site describing the services and benefits it offers must make its privacy notice prominently available through the site. §164.520(c)(3); 67 Fed. Reg. 53238.

Covered health care providers with direct treatment relationships with patients must, with one exception for emergency treatment situations, make a good faith effort to obtain a written acknowledgment that the patient has received the notice of privacy practices. This must happen no later than the date of first service delivery, including service delivered electronically. §164.520(c)(2). If the individual's acknowledgment of receipt cannot be obtained, the covered health care provider must document its good faith efforts to obtain it and the reason why the acknowledgment was not obtained. Failure by a covered entity to obtain an

individual's acknowledgment, assuming it otherwise documented its good faith efforts, is not considered a violation of the Privacy Rule. 67 Fed. Reg. 53239.

9. Withholding Information from a Minor's Parent

- a. What is Nebraska law as it relates to disclosure of a minor's protected health information to a parent?

The law in this area is not very clear, and providers will want to use great care in making decisions about disclosures of PHI of their minor patients, particularly where a minor is considered "mature." The general rule under Nebraska law is that an unemancipated minor's medical information is freely accessible by a parent. A parent of a minor child is entitled to access the child's medical records regardless of any determination relating to custody, unless a court orders to the contrary. Neb. Rev. Stat. § 42-381. However, exceptions do apply, and providers will want to be aware of those exceptions and use caution. In cases of doubt, please consult with an attorney.

- b. When can we withhold protected health information from a parent?

PHI can be withheld from a parent if the minor consents to health care service, and no other consent to such service is required by law. §164.502(g)(3)(ii). In Nebraska, PHI can be withheld from a parent where minors can personally consent to such treatments. Specifically, those treatments include the following: (1) Treatment of sexually transmitted diseases. Neb. Rev. Stat. §71-504; and (2) alcohol and drug abuse treatment. Neb. Rev. Stat. §71-5041. PHI can also be withheld from a parent where the consent of the parents or a personal representative is replaced by a court. §164.502(g)(3)(iii). In Nebraska, the requirement of parental consent for an abortion can be replaced by a court by means of a judicial bypass. Neb. Rev. Stat. § 71-6903. PHI must also be withheld if the parent or personal representative assents to an agreement that provides for confidentiality between the health care provider and the minor. Additionally, where a minor obtains a human immunodeficiency virus test, he or she has the right to remain anonymous. Neb. Rev. Stat. § 71-531.

Further, where a minor has become emancipated, a parent is not entitled to access the minor's PHI. In Nebraska, emancipation occurs when a person under the age of nineteen marries. Minors are also generally recognized as

©Cline, Williams, Wright, Johnson & Oldfather, L.L.P. This document is being provided as general information on the subject of the HIPAA Privacy Rule and its application and is not intended to be legal advice. Individual circumstances often involve unique or particular facts that will condition, limit, or modify the information provided in this document. If you have specific questions or require legal advice, please consult with competent legal counsel.

emancipated where they live independently of a parent or where they are in the military. The age of majority in Nebraska is nineteen years of age.

10. Disclosure of Protected Health Information of Adult Children

- a. Are covered health care providers permitted to disclose the medical records of a child nineteen years of age or older to the child's parents without authorization?

Generally, no. As noted above, under Nebraska law, an individual attains the age of majority at nineteen. Neb. Rev. Stat. § 43-2101. Once a minor becomes emancipated or attains the age of majority, as determined by applicable state law, the parent is no longer the personal representative of such individual under §164.502(g)(3), unless the parent has the authority to act on behalf of the individual for some reason other than their authority as a parent. Examples of such authority may include guardianship situations or powers of attorney for health care. Therefore, in the absence of another exception, once a child has reached the age of nineteen, a provider cannot disclose the adult child's PHI to his or her parents without the adult child's authorization.

- b. Does a parent have any right to an adult child's protected health information be if the child is still on the parent's insurance policy?

Where an individual, minor or otherwise, is covered under another person's health insurance policy, disclosure of PHI to the policyholder is permitted for payment purposes under § 164.502(a). The minimum necessary rule would apply, however. Consequently, where a child has reached the age of majority, a provider should disclose only the PHI necessary to obtain payment. Great care should be used to avoid disclosing more PHI than what is necessary for this purpose. In cases of doubt, obtain the patient's written authorization before making a disclosure and/or consult with an attorney. See also the discussion above regarding disclosures to family members under § 164.510 of the HIPAA Privacy Rule.

11. State Law Preemption

- a. Are there any Nebraska laws that would not be preempted by HIPAA?

As a general rule, the HIPAA Privacy Rule preempts all state law that is “contrary” to the HIPAA Privacy Rule. §160.203. This means that the HIPAA Privacy Rule generally prevails over Nebraska state law. Several exceptions to this general rule exist, however. First, any state laws that are more stringent than the HIPAA Privacy Rule are not preempted. §160.203(b). This means that the HIPAA Privacy Rule does not supersede any state law that is more protective of patient privacy rights than HIPAA. Second, state laws that provide for the reporting of disease or injury, child abuse, birth, or death, or for the conduct of public health surveillance, investigation or intervention are also not preempted. §160.203(c). Third, even if a law would be preempted under the HIPAA Privacy Rule, the state can seek a determination from HHS that the state law is not preempted because it is necessary for the state. Finally, the HIPAA Privacy Rule permits disclosures of PHI as required by state law, even in cases where the HIPAA Privacy Rule itself does not provide for the disclosure.

State law preemption analysis is very involved. Our office is in the process of preparing a comprehensive preemption analysis document for our clients. Should you have specific questions about how the HIPAA Privacy Rule relates to a particular state law, please consult an attorney.

12. Immunization Records

- a. Can immunization records be released to schools and other institutions without a signed records release form from the parent since state law requires the child to be immunized?

Yes. Neb. Rev. Stat. § 71-542(1) provides that immunization information may be accessed by schools, post secondary educational institutions, and licensed child care programs unless the information is otherwise restricted by the child’s parent. Nebraska law requires covered entities to disclose immunization information where the covered entity receives a request, and the immunization information is not restricted under Neb. Rev. Stat. § 71-540. Parents may deny access to immunization information by signing a non-disclosure form with the

©Cline, Williams, Wright, Johnson & Oldfather, L.L.P. This document is being provided as general information on the subject of the HIPAA Privacy Rule and its application and is not intended to be legal advice. Individual circumstances often involve unique or particular facts that will condition, limit, or modify the information provided in this document. If you have specific questions or require legal advice, please consult with competent legal counsel.

physician office which provided the immunization. Because the covered entity is otherwise required to grant such schools or programs access to the immunization information if the child's parent has not signed a non-disclosure form, then the immunization information can be released without the parent's written authorization. Immunization information to be provided is limited to the child's name, date of birth, the immunization provider, and all dates of immunization by vaccine type documented in the immunization information.

13. School Physicals

- a. Can we release school physical forms to schools without a signed parental authorization for records release?

The law is not clear on this point. Nebraska schools are required by Neb. Rev. Stat. §79-248 to monitor the health of the student population and to ensure that physical examinations of students are conducted. Unlike the law related to immunizations, Nebraska law on this point does not address the sharing of information between schools and health care providers. Until more guidance is issued from the federal Office of Civil Rights, it is advisable to require a parent's written authorization before releasing completed school physical forms to a child's school.

14. Authorization Requirements Relating to Minors

- a. Is a covered entity permitted to release the PHI of a minor child to that child's parents without a signed authorization from the minor?

See our answers to Question 9 above.