

Medical Jurisprudence

Behavioral Sciences Term
St. Georges University
School of Medicine

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Segment
7 of 8

Confidentiality & Privacy

Objectives

At the conclusion of
this unit, the medical
student should be able
to answer the
following 5 questions

1. Explain the **difference** between privacy, confidentiality, and privilege
2. Identify **exceptions** to the duty of confidentiality

3. What is a **Tarasoff** duty
4. Identify the scope of **HIPAA** protection
5. Under HIPAA, what disclosures can be made **without** patient authorization

Duty of Confidentiality

Patient's right to confidentiality
typically arises in a physician/patient relationship

Typically applies to information one has disclosed to a person in a **position of trust** with the expectation that the information will not be released without consent.

When a physician obtains information from a patient, or prospective patient, she is immediately under a duty of confidentiality with respect to the information disclosed to him.

A physician has a clear legal **duty to protect** patient information and keep it confidential.

A breach of that duty is a **tort** for which a physician may be sued.

AMA Principles of Medical Ethics (III): A physician shall . . . safeguard patient confidences **within the limits of the law.**

Exceptions to duty of confidentiality

Not just permissive
Physicians are **mandatory** reporters

1

Gunshot wounds
Knife Wounds

2

Abuse or neglect

Child

Elder (vulnerable
adult)

Trigger is low
“reasonable
suspicion”

3

Communicable diseases

Neurological impairment
affect driving

4

Patient poses
imminent danger
to others → warn
them





Prosenjit Poddar
Indian exchange student
1967-1969



Poddar interested in Tatianna Tarasoff
She is not



"I am going to kill her."

Not only **may** you breach confidentiality, you **must**
Danger is serious
Danger is imminent

Privacy

The right to privacy exists on its own and does **not** require a physician/patient relationship to exist.

The Right to Privacy is a right that **every person** has and that right, accordingly, imposes a duty on others to respect an individual's privacy.

3 main types

Appropriate name or likeness



Intrusion upon seclusion



Public disclosure of private facts



Confidentiality vs. Privacy

IME

A physician conducting an insurance claims exam is **not** providing medical treatment to a patient and is not in a physician/patient relationship with the person being examined.

If that physician were to reveal purely private information about the individual he examined, that act probably would **not** be a breach of physician patient confidentiality because the obligation to “safeguard patient confidences” generally exists in a treatment relationship

Improper disclosure of that individual's private information could be treated as a violation of his **right to privacy** for which the physician could be held liable.

Claim for an invasion of privacy may have a different **statute of limitations** than a claim for a physician's wrongful disclosure of confidential information.

Insurer may pay for one claim but not the other.



TYPICAL OPINION FROM INSURANCE COMPANY DOCTOR

Privilege

Privilege applies only in the context of court proceedings

You might be served with **subpoena** for documents or deposition

Privilege is a limit on a party's right to **obtain** your medical records or testimony

Also a limit on party's ability to **introduce** into evidence (before jury)

HIPAA

The Health Insurance Portability and Accountability Act of 1996

Federal
law

State law can
be **more**
protective

HIPAA governs
use of PHI
by covered
entities

PHI

Health information

In any form or medium

Related to

Physical or mental health
(past, present, future)

Provision of healthcare

Payment for healthcare

Individually identifiable

Name

SSN

VIN

Account #

Email

Biometric (fingerprint)

**Covered
entity**

Health plans

Healthcare providers

Healthcare clearinghouses

Not

Employers

Worker comp carriers

Non-health plans (life,
disability)

Child protection agency

Normally, you need patient/surrogate **authorization** to release

Uses or disclosures of PHI require either individual opportunities to object or **written authorizations** pursuant to the “anti-disclosure rule.”

Some uses permitted without authorization

“Except as **otherwise permitted or required** . . . , a CE may not use or disclose PHI without an authorization”

TPO

Treatment
Payment
Operations

CEs may use or disclose PHI **without** individual written authorization to carry out treatment, payment, or health care operations

Disclosure required by law

Child abuse
Elder abuse
Public health
Imminent danger
Law enforcement

Even if authorized
(e.g. TPO, state
law reporting)

Minimum necessary

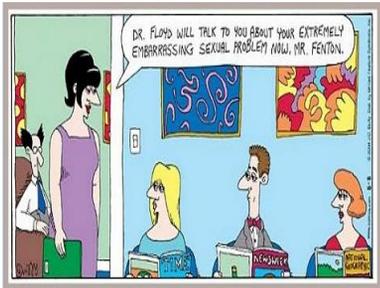
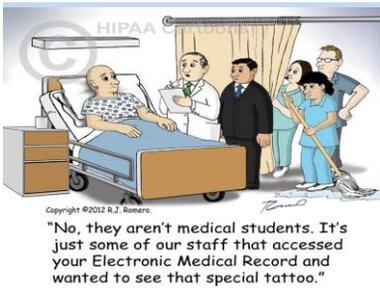
Limit information to that
necessary to accomplish
purpose

Otherwise

get patient
authorization

You can't talk about patients
outside of the office with anyone

Clinicians should only access the
medical information that is needed
for their job/clinical experience.



We need patients to give
permission before we can give
information to others on their
behalf.

Keep medical records in a secure
place-both paper & electronic.

If you are using electronic medical records....

You should have a unique **password-**
don't share with others

Do not access information on
yourself, your family, your friends,
staff or any other person.

Get your own records the way your
patients do

You have a **duty to report** any breach in confidentiality to your supervising doctor.

Most computer systems can track all access to records.

Inappropriate access is punishable by federal and state law.

Enforcement

No private cause of action

HIPAA Violation	Penalty Range	Annual Maximum
Individual did not know (and by exercising reasonable diligence would not have known) that he/she violated HIPAA	\$100 - \$50,000 per violation	\$1.5 million
Individual "knew, or by exercising reasonable diligence would have known" of the violation, but did not act with willful neglect	\$1,000 - \$50,000 per violation	\$1.5 million
HIPAA violation due to willful neglect but violation is corrected within the required time period	\$10,000 - \$50,000 per violation	\$1.5 million
HIPAA violation is due to willful neglect and is not corrected	\$50,000 per violation	\$1.5 million

Presumed reportable unless low probability compromise

1. Nature, extent PHI (sensitivity, likelihood identified)
2. Person who obtained access (e.g. independent obligation HIPAA)
3. PHI actually accessed
4. Extent mitigated (e.g confidentiality agreement)



"So you faxed a patient's records to a wrong number and you don't know who got it? Don't worry. It's not a HIPAA violation unless the patient finds out."

Other duties to report

When

Impaired colleagues (substance abuse, dementia)

Incompetent colleagues

When impairment
relates to patient
care

Where

Report to
supervisor

Otherwise to
medical board

This unit is a little
shorter, so we will
start death &
dying

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