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The Dilemma of Health Care Privacy and Data Security

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Overview

- The Dilemma: reform depends on information-sharing beyond that permitted
- Authorization of disclosure
- Federal preemption
- "Special" cases
- Adaptation to health reform practically nil

The Dilemma

- Health care information is protected by patchwork of state and federal law
- Unauthorized disclosure of health care information prohibited, with exceptions varying by law
- Efforts to reform the health care delivery system depend on sharing health care information across the spectrum of care, and across state lines

Reform and Information-Sharing

- Sharing patient information is critical to:
  - Managing individual patient care
  - Managing the health of populations
  - Evidence-based medicine
  - Creating clinical protocols and pathways
  - Monitoring clinical performance
  - Shifting from fee-for-service to value-based reimbursement (THE NEXT BIG THING)

Authorization

- All privacy laws provide for patient authorization for disclosure to 3rd parties
  - Differences in authorization requirements
  - Differences in authorization content
  - Differences in the potential role of personal representatives (PR)
- Authorization slows or stops the data-sharing process

Exceptions to Authorization

- HIPAA
  - Payment
  - Treatment
  - Health Care Operations
  - A dozen categories of “exceptions”
- 42 CFR Part 2
  - Director acts as PR for disclosure to insurer
  - Medical emergency

Preemption

- HIPAA preemption
  - "contrary" state law preempted unless "more stringent," or public health reporting or oversight requirements require disclosure
  - "contrary" includes "obstacles" to Privacy Rules' "purposes" and "objectives"
  - HIPAA does not preempt any other federal law; e.g., 42 CFR Part 2

Preemption

- 42 CFR Part 2 (substance abuse)
- Only "more stringent" state law survives
- "[N]o State law may either authorize or compel any disclosure prohibited by these regulations."
- Basic Rule: no patient consent, no disclosure absent a court order

Special Cases

- Minors
- STDs, contraception, and substance abuse
- Personal representatives
- Identity theft statutes extended to PHI
- Psychotherapy notes
- State mental health statutes
- AIDS/HIV protections

Special Cases

- Disclosures permitted, prohibited, or required depending on:
  - Differing health information
  - Differing providers or patients
  - Differing provider arrangements
  - Differing purposes for disclosure
  - Differing recipients of the information
  - What law controls

Adaptation to Reform: ACOs

- MSSP ACOs
  - Subject to HIPAA
  - Subject to Part 2
  - Subject to more stringent state law
  - Subject to Data Use Agreement with CMS
- Affordable Care Act does not address informational needs of reform

Adaptation to Reform: CCOs

- CCOs are not to be confused with ACOs
- Oregon state statute ***requires*** health care providers to disclose PHI to CCO participants and the CCO for treatment, payment, and health care operations purposes, "[n]otwithstanding [conflicting state law re: mental health records]"
- HIPAA "Required by Law" exception?

Adaptation to Reform: HIPAA

- “Required by law” exception (§ 164.512(a))
  - Applies only to some laws
  - Legal requirement must also meet standards in subsections (c) (abuse reports), (e) (judicial/administrative proceedings), or (f) (disclosures to law enforcement)
- Exception for treatment, payment, and health care operations still the most reform-friendly privacy provision

Adaptation to Reform: Part 2

- Proposed rule February 9, 2016
- Changes consent requirements to permit a less specific description of the recipient of Part 2 info under certain circumstances
- Intended to facilitate information-sharing by health information exchanges ("HIE"), ACOs, and CCOs

Questions?

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