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Legal Brief

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Confidentiality of Patient Communications

This Legal Brief was drafted for general informational purposes only. It is not meant to be a comprehensive guide, nor should it be construed as legal advice. The information in this brief is current as of November 1, 2013; readers should consult the most recent versions of referenced statutes, regulations, and cases to ensure there have been no material changes.

Summary

Both South Dakota law and the HIPAA-mandated federal medical privacy rules generally prohibit the release of health-care related information to third parties. However, this legal privilege against disclosure is not without exception. The federal privacy rules and South Dakota law permit and in some instances even require the disclosure of health-care related information to law enforcement officials and others in specified circumstances.

Discussion

Under South Dakota law, a patient has a privilege to refuse to disclose and to prevent any other person from disclosing "confidential communications" made for the purpose of diagnosis or treatment of his or her physical, mental, or emotional condition, including alcohol or drug addiction, among the patient, his or her physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of a physician or psychotherapist, including members of the patient's family. The privilege may be claimed by the patient, his or her guardian or conservator, or the personal representative of a deceased patient. The physician or psychotherapist may claim the privilege, but only on behalf of the patient. If the patient waives the privilege, the physician or psychotherapist may not claim it. SDCL §19-13-7.

However, the privilege has several exceptions. First, a physician may disclose otherwise protected information if the physician "reasonably believes actions by the patient are likely to result in imminent death or substantial bodily harm to another." SDCL §19-2-12. Next, the privilege is handled differently in criminal proceedings. In such a proceeding, "if the physical or mental condition of any person is in issue," the general physician-patient privilege is deemed waived for "the purpose of proving the commission of a criminal offense." SDCL §19-2-3.2. This exception allows the physician to provide evidence concerning the commission of a criminal offense, but except as described below it doesn't authorize a report of a criminal offense by a physician. Finally, it should be noted that the court can order an examination of the physical, mental, or emotional condition of a patient. Such an examination is an exception from the general physician-patient privilege. SDCL §19-13-10.

In spite of the privilege, physicians and their professional staff are required by law to make a report if they have reasonable cause to believe that a person under the age of eighteen (18) years, a disabled adult, or an adult aged sixty-five (65) or older has been abused or neglected, or has died as the result of abuse or neglect. See "Reporting Child Abuse;" "Elder Abuse."

Physicians should also be aware of the general obligation to report felonies. If a physician has unprivileged knowledge of the commitment of a felony, including felony drug crimes, the physician is required to report it. Failure to report such unprivileged knowledge of a felony or concealing the felony is a class 1 misdemeanor. See SDCL §22-11-12.

The HIPAA-mandated privacy rules affect the physician/patient privilege in the sense that the definition of "protected health information" in the rules is broader than the state law definition of "confidential communications." "Confidential" communications are defined under state law as communications between physician and patient which are not intended to be disclosed to third parties except other health care providers, and in some cases, the patient's family. SDCL 19-13-6.

"Protected health information," on the other hand, includes virtually any healthcare-related information that is specific to an individual, including treatment records and billing or payment history. The difference is that the parties do not have to intend for the communication to be "confidential" in order for it to constitute "protected health information."

Accordingly, a casual question or comment from the patient in a social setting may not be deemed "confidential" under state law, but it and the physician's response would be deemed "protected health information" under federal law. Disclosures by the physician to the patient's family or others that may be permitted when applying the state law definition of "confidential" may in some circumstances not be permitted under the new federal rules. Similarly, billing and insurance records which clearly are not "confidential" under state law are in most instances "protected health information" under the privacy rules.

Federal law "trumps" state law to the extent federal law is more restrictive. Accordingly, the confidentiality definition and rule that should be followed is the "protected health information" rule established under federal law.

In addition to the law-enforcement related exceptions set out above, it is permitted, but generally not required, for the physician to disclose health-care related information to law enforcement for the identification or location of a suspect, fugitive, material witness, or missing person. If the physician chooses to provide information for this purpose, disclosure should be limited to the following information:

1. Name and address;
2. Date and place of birth;
3. Social security number;
4. ABO blood type and rh factor;
5. Type of injury;
6. Date and time of treatment;
7. Date and time of death, if applicable; and
8. A description of distinguishing physical characteristics, including height, weight, gender, race, hair and eye color, presence or absence of facial hair (beard or moustache), scars, and tattoos.

It is permitted but not required for the physician to disclose health-care related information to law enforcement in response to a law enforcement official's request for such information about an individual who is, or is suspected to be, a victim of a crime if:

1. The individual agrees to the disclosure; or
2. The health care provider is unable to obtain the individual's agreement because of incapacity or other emergency circumstance, provided:
    a. The law enforcement official represents that such information is needed to determine whether a violation of law by a person other than the victim has occurred, and such information is not intended to be used against the victim;
    b. The law enforcement official represents that immediate law enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure; and

c. The disclosure is in the best interest of the individual as determined by the health care provider, in the exercise of professional judgment.

It is also permitted, but generally not required, for the physician to disclose health-care related information:

1. To alert law enforcement of a persons' death, if the provider suspects that criminal activity caused the death; however, the physician is required to report a death which the physician has reasonable cause to believe a patient under the age of eighteen (18) years, a disabled adult patient, or a patient age sixty-five (65) or older died as the result of abuse or neglect;
2. If the provider believes that health-care related information is evidence of a crime that occurred on its premises and;
3. By a health care provider providing emergency health care in response to a medical emergency, other than an emergency on the premises of the provider, if such disclosure appears necessary to alert law enforcement to:
   a. The commission and nature of a crime;
   b. The location of such crime or of the victim(s) of such crime; and
   c. The identity, description, and location of the perpetrator of such crime if a physician believes that the medical emergency is the result of abuse, neglect, or domestic violence of the individual in need of emergency health care. 45 C.F.R. § 164.512(f).

State law also requires physicians dispensing controlled substances directly to patients to report that fact to the Prescription Drug Monitoring Program. SDCL Ch. 34-30E. These reports are permitted under the HIPAA- mandated privacy rules and are a recognized exception to the requirement that physicians keep such information confidential. For further information, see Controlled Substances legal brief.

The proceedings, records, reports, statements, minutes, or any other data of peer review committees, including medical staff committees of a licensed hospital, are not subject to discovery in litigation and are not admissible as evidence in any court or arbitration proceeding. Despite this prohibition on disclosure, a physician is entitled to access to, or use of, information upon which a decision regarding his or her staff privileges is based. A person who is the subject of peer review proceedings is also entitled to access to the records of those proceedings if needed for the defense of an action against that person.

Conclusion

Individual health-care related information is protected both under state and federal law, and may be disclosed to a third party only if permitted or required by law. Physicians should exercise care prior to disclosure of any health-care related information, including knowledge of illegal drug activity. However, reporting the illegal use of drugs or diversion is required when done in compliance with a court order or court-ordered warrant, subpoena, or an administrative request. Disclosure of health-care related information is permitted but not required in connection with other limited law enforcement related conditions, and is required in certain circumstances, including cases of abuse and neglect.

Cross Reference: Controlled Substances / Elder Abuse / Medical Record Privacy / Reporting Child Abuse

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