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Legal Brief

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Medical Record Privacy – Disclosure With Patient Consent

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 February 1, 2013; readers should consult the most recent versions of referenced statutes, regulations, and cases to ensure there have been no material changes.

Summary

Subject to specific exceptions, protected health information may be released by patient consent expressed in a written authorization. The written authorization must contain certain provisions in order to be valid. Personal representatives and parents of minors may execute such an authorization.

Discussion

Unless disclosure without patient consent is otherwise permitted by law, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") mandated privacy rules require that a covered entity obtain written authorization for the use or disclosure of protected health information. Although the rules do not specify who must draft the authorization, it must be written in plain language and otherwise comply with the rules.

Required Elements

In order to be valid under the federal privacy rules, an authorization must be in writing and contain the following:

- A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion.
- The name or other specific identification of the person, or class of persons, authorized to make the requested use or disclosure.
- The name or other specific identification of the person, or class of persons, to whom the covered entity may make the requested disclosure.
- A description of each purpose of the requested use or disclosure. The statement "at the request of the individual" is a sufficient description of the purpose when an individual initiates the authorization and does not, or elects not to, provide a statement of the purpose.
- An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure. The statement "end of the research study," "none," or similar language is sufficient if the authorization is for the use or disclosure of protected health information for research, including for the creation and maintenance of a research database or research repository. "End of case" or "end of lawsuit" is also acceptable.
- Signature of the individual and date. If the authorization is signed by a personal representative of the individual, a description of such representative's authority to act for the individual must also be provided.

45 CFR §164.508

Required Statements

In addition to the required elements listed above, the following statements must be included in an authorization:

- The individual's right to revoke his/her authorization in writing and either (1) the exceptions to the right to revoke and a description of how the individual may revoke authorization, or (2) reference to the provisions of the covered entity's Notice of Privacy Practices relating to revocation.
- Notice of the covered entity's ability or inability to condition treatment, payment, enrollment, or eligibility for benefits on the authorization, including research-related treatment, and, if applicable, consequences of refusing to sign the authorization.
- The potential for the protected health information to be re-disclosed by the recipient and no longer protected by the privacy rules. This statement does not require an analysis of risk for re-disclosure but may be a general statement that the privacy rules may no longer protect health information.

Personal Representatives

Under both the federal rules and existing state law, a personal representative of the patient has the same access to protected health information and ability to release protected health information as a patient. Generally, parents of a minor or the guardian of a minor or adult are deemed to be "personal representatives" of the patient. 45 CFR §164.502

However, the HIPPA privacy rules provide for situations wherein parents or guardians do not have a right of access to the protected health information of un-emancipated minors. Specifically, when a minor has authority to act for himself without parental consent, the minor may direct the protected health information be withheld from a parent or guardian. For example, if a minor seeks an abortion without parental consent (which may be permitted with a court order), and if the patient asks that a parent or guardian not be informed, the practitioner may withhold the information from the parent or guardian.

Additionally, a practitioner may elect not to disclose information to a personal representative if the covered entity reasonably believes the patient has been or may be subject to domestic violence, abuse, or neglect by the personal representative or release of information to the representative could endanger the individual, and the covered entity decides it is not in the best interest of the individual to treat the person as the individual's personal representative. 45 CFR §164.502.

Psychotherapy Notes

Psychotherapy notes are also subject to the written authorization requirements for use other than treatment of the patient. However, authorization need not be obtained for psychotherapy notes for use by the originator of those notes for treatment purposes, for training purposes, to defend the practitioner in a legal proceeding brought by the patient, or for oversight activities relating to the originator of those notes. 45 CFR §164.508. "Psychotherapy notes" are notes recorded by a mental health professional in any form (handwritten, typed, dictated) which document or analyze contents of conversations during individual or group sessions. The term does not include medication prescription and monitoring documentation, treatment records, test results, and the like. 45 CFR §164.501

Conclusion

Absent specific exceptions, valid written authorization of the release of records, executed by the patient or the patient's personal representative, are necessary for the release of protected health information.

Cross-References

Medical Record Privacy – Covered Entities
Medical Record Privacy – Patient Right of Access to Medical Records
Medical Record Privacy – Protected Health Information

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