

by
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No Hiding PIa

**WILL PATIENT
PRIVACY BECOME A THING
OF THE PAST?**

THE LAST SEVEN YEARS BEEN WITNESS to a behind-the-scenes legislative battle in Washington, D.C. over an enormously valuable yet previously inaccessible gold mine of data--the personal medical information of U.S. citizens. As medical records have migrated to electronic formats, enormous quantities of patient data that once sat in filing cabinets can now be instantaneously transmitted over the Internet. All kinds of interested parties are eager to make use of this data-- physicians want their patients' previous diagnoses and treatments; hospitals and insurers want to know about utilization; law enforcement wants evidence of any crimes, employers want accountability for their health insurance premiums; and pharmaceutical companies want access to potential customers. Along with all these other groups, psychotherapists have a vested interest in this data--whether they know it or not. Beginning on April 14, 2003, the clinical relevance of this battle over health care information will become painfully apparent to our profession.

On that date a new set of federal regulations, mandated under something known as HIPAA (the Health Insurance

Portability and Accountability Act), governing the privacy, security, and transmission of health information, will go into effect. Many believe HIPAA will change health care--particularly mental health care--in unimaginable ways. For the first time in the 227 year history of America, the federal government has granted itself the right to review *everyone's* medical record.

Where Did HIPAA Come From?

Passed by Congress in 1996, HIPAA is in some ways an admirable piece of legislation, principally for its most widely understood provision, COBRA, which allowed people to take their employer-paid health insurance with them upon job termination. However, included in the legislation was a section with the dubious moniker of Administrative Simplification Compliance Act, which required Congress to develop rules for the input, storage, use and transmission of electronic medical information. In response to the staggering increases in health care costs, national providers and insurers had argued that the differing laws and rules of 50 state added

exorbitant administrative costs to healthcare. The federal standardization of record keeping was supposed to be an answer to the problem.

The intent of the HIPAA rules was to create quick, easy, and painless processes for authorizing and paying for treatment. But indications that creating such national standards would not be easy came first when Congress missed its own 1999 deadline for deciding on the rules and the task fell to the Department of Health and Human Services (HHS), which expanded regulations beyond electronic data to include traditional paper medical charts.

HIPAA contains rules governing a number of issues of particular relevance to mental health professionals. HIPAA's security rules delineate the steps providers must take to secure patient information. Its transaction standards and provider identification standards are designed to ease authorization, billing and payment of claims by third parties. These three standards are largely seen as beneficial.

By far the most controversial of all the new HIPAA regulations have to do with medical privacy. Traditionally, a consent form signed by the patient has been the gold standard for medical privacy protection, with penalties for violating clinician-patient confidentiality. This would seem to be a fundamental right requiring an act of congress to undo, yet it was ultimately decided by HHS. As one of my medical colleagues pointed out to me, the Hippocratic Oath of "telling no secrets" has been superseded by a HIPAA-critic rule.

Instead of a signed consent governing access to protected health information, after April 14th, each health care provider, including private practitioners, will be required to issue a "Notice of Privacy Practices," that makes explicit where individuals' medical information "may" go and how it "may" be used. This means spelling out a subject usually left vague in most therapist-client contact—the limitations of medical privacy. The Notice must list all the "covered entities" that may receive private information without patient consent or authorization. Henceforth HHS, the administrator of the rules, will have total access to medical records to monitor compliance. Chillingly, this would

have negated President Nixon's need for burglars to steal Daniel Ellsberg's psychiatric records. He could have just ordered a HHS "compliance audit" of the psychiatrist.

Each health care provider has the responsibility to develop a Notice that reflects the contract and understanding between provider and client in that unique treatment context. In an effort to allow the provider more flexibility and self-determination, the privacy rule specifies that the Notice contain some

alarm and anger for the listed business and government entities authorized that have access to their health information. They worry that anyone in the circle of "covered entities" can do what they want with their personal information. The law enforcement disclosure creates concern that if charged with a DUI, the prosecutors could review clinical records in search of a drinking problem. Domestic violence and rape victims ask if the regulations mandate the report of suspected crimes against them, which

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HIPAA mandated language, some optional language, the privacy policies of the specific provider, and relevant state laws.

I've developed a few Notices of Privacy Practices and discovered the challenge of crafting one that is compatible with HIPAA, state law, yet does not violate personal values, and patient protection. For instance, how explicit should it be to inform but not frighten the client? Should the many limitations of privacy be printed with bullets and exclamation points or in tiny type so as to escape scrutiny and alarm? Should the notation about the access of varied law enforcement agencies be a short reference or drawn out to differentiate criminal, civil, or administrative access?

Under the privacy rule psychotherapy session notes are handled separately from other patient information and require a specific authorization for release. However, items specifically excluded from the protection include psychiatric diagnosis, symptoms, treatment plans, appointment times, and summaries of sessions, which are handled as routine medical information without restriction.

Client reaction to the Notice is quite varied. Many simply sign and return it. Those who do read it typically voice

to my knowledge is not yet required anywhere in the U.S. Clients wonder if sexual activity they've disclosed might become known by their employer.

The privacy rules are burdensome and intrusive, so naturally the first question is, "Do they apply to me? Am I a 'covered healthcare provider'," and in desperation, "Is there a regulatory loophole I can jump through to avoid compliance?" Mental health professionals employed by agencies, hospitals, clinics, case management companies, psychiatric practices, physician practices, home health services, and the like are covered by virtue of their employer's covered activities. For solo and small group practitioners the American Psychological Association advises in their HIPAA Q & A, "In the long run we believe that all psychologists providing health care services will be subject to the Rule. We also believe that it is both wise and prudent to prepare to become HIPAA compliant before the April 14, 2003." The APA cautions that, "psychologists who directly or indirectly accept third-party reimbursement for health services must comply with HIPAA." The scope of HIPAA is ever-expanding.

HHS has the power to assess civil and criminal penalties for HIPAA non-compliance ranging from \$100 to

\$250,000. However, HHS has indicated that, at least initially, it will adopt an advisory role to help providers become compliant.

To escape the regulatory burden of HIPAA, some mental health professionals are thinking of switching their practices to “coaching,” “personal consulting,” or “relationship advisement,” using the skills in psychotherapeutic techniques without issuing a diagnosis or billing insurance companies.

What Can We Do?

At a practical level, mental health professionals need to become fully equipped to both knowledgeably comply with the regulations and effectively challenge the more damaging parts of HIPAA. If we are to secure the sanctity of psychotherapy, we must own these issues. Begin your education by working on your own Notice of Privacy Practices. There are hundreds of examples on the Internet (HIPAA requires covered providers to post them on their web sites) and professional associations may feature some models on their sites. The regulations are written in language and concepts that may seem foreign to mental health professionals. Purchasing a guide or attending a workshop will provide a necessary overview of how the many pieces fit together. Writing the Notice takes some thought and reflection about your practices, client rights, and the limitations of privacy. It is the first hint of the meaning of HIPAA.

Become familiar with the patient rights under HIPAA, for they may have dramatic impact on the therapeutic relationship. The privacy rules asserts a client’s right to not only know of your privacy policies, but also to access, review, and correct their medical information. You must make clear how they can request an accounting of disclosures and how to limit disclosures. Yet ironically, HIPAA mandates that you also make clear that you are not required to honor their requests, a curious and contradictory starting point for a new therapeutic relationship.

Under the security regulations of HIPAA, you are required to conduct a privacy and security walkthrough of your office or clinic looking for “leaks.” For example, determine what can be heard in the waiting room or the reception area. Are telephone conversations private? Can clients view the appointment book? Who can see computer screens and are the machines password protected? Is there a fax protocol requiring verification of recipients and appropriate cover sheets? Who has access to patient information (e.g. cleaning crew)? If you use a computer to write client reports or letters on their behalf, how do you secure that electronic information and where is it backed up? What is your disaster recovery plan? As a rule it’s a good idea to conduct a walkthrough at least once a year.

Psychotherapy session notes are more rigorously protected than other patient information under the privacy rule. To ensure that protection, charts or electronic media should be assembled and stored as two distinct and identifiable types of information.

Review how clinical information flows into and out of the practice or agency. Clinicians often neglect to consider how well connected they are with others in healthcare. Consider how data gets from mailbox to clinician to chart to archive. How is client-related email handled? How does information leave the practice on its way to a payer, insurer, another provider, attorney, state program, or a billing agent? Where might those entities send it? You will need to ask these entities about their privacy practices, just as they will ask you about yours. “I’m not a covered entity,” may become a disqualifying statement.

Is HIPAA here to stay? There is a small hope for relief from some of the elements of HIPAA through legislative and judicial efforts. Representative Ed Markey (D-MA) introduced the Stop Taking Our Health Privacy (STOHP) Act to close loopholes in the medical privacy rule and to restore the patient consent requirement. That’s a

very good start, but such efforts will require tremendous support from provider and privacy advocates in the face of opposition from many large insurance and hospital systems eager for streamlined communication, as well as marketing and business interests hungry for previously inaccessible patient data. Some professional associations have raised questions about the impact of HIPAA, but with the immediate demand for mandated compliance, they have largely focused upon helping their membership acquire the advice, training and forms that will keep them from getting crushed by HIPAA.

It may well be that the future of HIPAA will ultimately be determined in the courts. “Litigation is the swiftest route to restore patient consent” says Deborah Peel, a psychoanalyst who testified with some success against the new HIPAA privacy regulations. “The courts always have affirmed the strongest protections for medical privacy, based on a long history in common law and the Constitution. Even Supreme Court rulings support medical and mental health privacy.” Unfortunately, the HIPAA rules are just now beginning, and court resolutions are years away.

Grappling with HIPAA will require a concerted effort by mental health professionals through time, training and resources. New rules and deadlines are coming upon the mental health field quickly, and we have fallen behind and are in danger of losing one of the cornerstones of the therapeutic relationship—patient privacy. But it is not too late to begin the task of reclaiming it. As an old Chinese proverb notes, the best time to plant a tree was 20 years ago. The second-best time is now. □

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This is an example of a HIPAA required “Notice of Privacy Practices”. It is used as an illustrative and instructional aid for the accompanying article authored by Michael Freeny, MSW published March, 2003. The article describes many requirements under HIPAA, including listings of new patient rights, informed consent, actions promised by the provider, provider policies, practices to secure protected health information, and new limitations regarding patient privacy and confidentiality.

No claim is made to the accuracy or appropriateness of the sample "Notice" for any specific health care provider in any specific state jurisdiction. It does not constitute legal advice, which should only be obtained from professional legal counsel in the state of clinical practice.

Further educational information and consultation may be obtained from info@clinicalCEU.com

