Information Sharing with the Personal Representative

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Disclaimer

This presentation is provided for educational purposes only. The presentation is not intended to provide legal advice or create an attorney-client relationship. Application of the rules discussed are fact specific. Additionally, organizational policies may restrict or modify the manner in which HIPAA provisions are applied.

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Agenda

- Review of Relevant HIPAA Provisions
  - Personal Representatives
  - Individuals Involved in Care
- Minors
  - Minor Consent
  - Impact on Parental Access
- Guardian v. Durable Power of Attorney
- Decedents
- Impact of 42 CFR Part 2
- Information Blocking
- Common Questions

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HIPAA – Personal Representatives

- 45 C.F.R. 164.502(g)
  - A covered entity must treat a personal representative as the individual for purposes of HIPAA Privacy
  - EXCEPTION: A covered entity may elect not to treat the person as the personal representative if the covered entity believes the patient has been or may be subject to domestic violence, abuse, or neglect by such person or treating the person as the personal representative could endanger the patient and the covered entity, in the exercise of professional judgment, decides it is not in the best interest of the patient to threat the person as the personal representative.
  - There is also an exception for minors, discussed later in the presentation.

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HIPAA – Personal Representatives

- Personal Representative stands in the shoes of the individual
- Has all rights of the individual:
  - Sign authorizations
  - Right to access, amendment, and accounting
  - Receives breach notifications
  - Right to request restrictions or confidential communications
- Disclosure is a SHALL (unless the exception applies)

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HIPAA – Individuals Involved in Care

- 45 C.F.R. 164.510(b)
  - A covered entity may disclose to a family member, other relative, or a close personal friend of the patient, or any other person identified by the patient, the PHI directly relevant to such person's involvement with the patient 's health care or payment related to the patient 's health care.
  - If the patient is present, then the covered entity must:
    - Obtain the patient's agreement;
    - Provide the patient with the opportunity to object to the disclosure, and the patient does not express an objection; or
    - Reasonably infer from the circumstances, based on the exercise of professional judgment, that the patient does not object to the disclosure.
  - If the patient is not present, or the opportunity to agree or object to the use or disclosure cannot practicably be provided because of the patient's incapacity or an emergency circumstance, the covered entity may, in the exercise of professional judgment, determine whether the disclosure is in the best interests of the patient and, if so, disclose only the PHI that is directly relevant to the person's involvement with the patient's care or payment related to the patient's health care or needed for notification purposes.

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HIPAA – Individuals Involved in Care

- Limited permissive disclosure with opportunity to object
- Subject to minimum necessary
- Know your organization's policies (frequently more restrictive than the regulations)
- How do you know –
  - Who is involved in the care
  - The extent of their involvement
- Disclosure is a MAY

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Minors – Personal Representative

- If under applicable law a parent, guardian, or other person acting in loco parentis has authority to act on behalf of an individual who is an unemancipated minor in making decisions related to health care, a covered entity must treat such person as a personal representative under this subchapter, with respect to protected health information relevant to such personal representation.

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Minor Consent to Treatment

- The person is not the personal representative and the minor has the authority to act as an individual, with respect to protected health information pertaining to a health care service, if:
  - The minor consents to such health care service; no other consent to such health care service is required by law, regardless of whether the consent of another person has also been obtained; and the minor has not requested that such person be treated as the personal representative;
  - The minor may lawfully obtain such health care service without the consent of a parent, guardian, or other person acting in loco parentis, and the minor, a court, or another person authorized by law consents to such health care service; or
  - A parent, guardian, or other person acting in loco parentis assents to an agreement of confidentiality between a covered health care provider and the minor with respect to such health care service.

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Minor Consent - Missouri

- A minor can give consent in Missouri in the following situations:
  - If the minor is married (RSMo 431.061)
  - A minor parent can give consent for him/herself or his/her child (RSMo 431.061)
  - Pregnancy, but not abortions (RSMo 431.061)
  - Venereal disease (RSMo 431.061)
  - Drug or substance abuse (RSMo 431.061)
  - Living apart from a parent or guardian – is 16 or 17 years old, is homeless or a victim of domestic violence or sexual assault, is self supporting (no financial support form parents), and has express or implied consent for living independently. (RSMo 431.056)

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Minor Consent - Kansas

- A minor can give consent in Kansas in the following situations:
  - For medical services for their minor child (KSA 38-122)
  - Unmarried pregnant minor, when no parent or guardian is available (KSA 38-123)
  - Age 16 years or over, where no parent or guardian is immediately available
  - "Mature" minors (case law)
  - Abortion **with additional restrictions** (KSA 65-6704 and case law)
  - Venereal disease (KSA 65-2892)
  - Substance use (KSA 65-2892a)
  - Sexual assault (KSA 65-448)

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Minor Consent – Impact on Parental Rights

- Not withstanding the minor's rights as an individual:
  - If, and to the extent, permitted or required by an applicable provision of State or other law, including applicable case law, a covered entity may disclose, or provide access to, protected health information about an unemancipated minor to a parent, guardian, or other person acting in loco parentis;
  - If, and to the extent, prohibited by an applicable provision of State or other law, including applicable case law, a covered entity may not disclose, or provide access to, protected health information about an unemancipated minor to a parent, guardian, or other person acting in loco parentis; and
  - Where the parent, guardian, or other person acting in loco parentis, is not the personal representative and where there is no applicable access provision under State or other law, including case law, a covered entity may provide or deny access to a parent, guardian, or other person acting in loco parentis, if such action is consistent with State or other applicable law, provided that such decision must be made by a licensed health care professional, in the exercise of professional judgment.

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Disclosure to Parents - Missouri

- Whenever a minor is examined, treated, hospitalized, or receives medical or surgical care for pregnancy, venereal disease, or drug/substance abuse:
  - His consent shall not be subject to disaffirmance or revocation because of minority;
  - The parent, parents, conservator, or relative caregiver shall not be liable for payment for such care unless the parent, parents, conservator, or relative caregiver has expressly agreed to pay for such care;
  - A physician or surgeon may, with or without the consent of the minor patient, advise the parent, parents, conservator, or relative caregiver of the examination, treatment, hospitalization, medical and surgical care given or needed if the physician or surgeon has reason to know the whereabouts of the parent, parents, conservator, or relative caregiver. Such notification or disclosure shall not constitute libel or slander, a violation of the right of privacy or a violation of the rule of privileged communication. In the event that the minor is found not to be pregnant or not afflicted with a venereal disease or not suffering from drug or substance abuse, then no information with respect to any appointment, examination, test or other medical procedure shall be given to the parent, parents, conservator, relative caregiver, or any other person.

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Disclosure to Parents - Kansas

- Sexual assault examination - written notice shall be given to the parent or guardian of a minor that such an examination has taken place, except when: (A) The medical care facility, child advocacy center or other facility has information that a parent, guardian or family or household member is the subject of a related criminal investigation; or (B) the physician, licensed physician assistant or registered professional nurse, after consultation with law enforcement, reasonably believes that the child will be harmed if such notice is given. (KSA 65-448)
- Venereal disease - Any physician examining or treating a minor for sexually transmitted disease may, but shall not be obligated to, in accord with the opinion of the physician of what will be most beneficial for the minor, inform the spouse, parent, custodian, guardian or fiancé of such person as to the treatment given or needed without the consent of the minor. (KSA 65-2892)
- Kansas law is otherwise silent on impact of information sharing with the parents.

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Guardian v. Durable Power of Attorney

- If under applicable law a person has authority to act on behalf of an individual who is an adult or an emancipated minor in making decisions related to health care, a covered entity must treat such person as a personal representative under this subchapter, with respect to protected health information relevant to such personal representation.

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Guardian v. Power of Attorney - Missouri

- A guardian is appointed when a person is determined to lack capacity. Process is in RSMO Chapter 475.
- Power of attorney for health care decisions – RSMo 404.800, et seq.
  - Unless the patient expressly authorizes otherwise in the power of attorney, the powers and duties of the attorney in fact to make health care decisions shall commence upon a certification by two licensed physicians based upon an examination of the patient that the patient is incapacitated and will continue to be incapacitated for the period of time during which treatment decisions will be required and the powers and duties shall cease upon certification that the patient is no longer incapacitated.
  - "Incapacitated", a person who is unable by reason of any physical or mental condition to receive and evaluate information or to communicate decisions to such an extent that he lacks capacity to meet essential requirements for food, clothing, shelter, safety or other care such that serious physical injury, illness or disease is likely to occur. There is a specific process in Missouri to make this determination.
  - Ability to make decisions regarding withholding or withdrawing care must be expressly stated in the document.
  - Except to the extent the right is limited by the power of attorney or any federal law, an attorney in fact designated to make health care decisions has the same right as the patient to receive information regarding the proposed health care, to receive and review medical records and to consent to the disclosure of medical records. However, the right to access to medical records is not a waiver of any evidentiary privilege.

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Guardian v. Power of Attorney - Kansas

- A guardian is appointed when a person is determined to lack capacity. Process is in KSA Chapter 59, Article 30.
- Power of attorney for health care decisions – KSA 58-625, et seq.
  - A durable power of attorney for health care decisions is a power of attorney by which a principal designates another as the principal's agent in writing and the writing contains the words "this power of attorney for health care decisions shall not be affected by subsequent disability or incapacity of the principal" or "this power of attorney for health care decisions shall become effective upon the disability or incapacity of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability or incapacity.
  - The grant of power or authority conferred by a power of attorney in which any principal shall vest any power or authority in an attorney in fact, if such writing expressly so provides, shall be effective only upon: (1) A specified future date; (2) the occurrence of a specified future event; or (3) the existence of a specified condition which may occur in the future. In the absence of actual knowledge to the contrary, any person to whom such writing is presented shall be entitled to rely on an affidavit, executed by the attorney in fact, setting forth that such event has occurred or condition exists.

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Decedents - HIPAA

- Power of Attorney - If under applicable law an executor, administrator, or other person has authority to act on behalf of a deceased patient or of the patient's estate, a covered entity must treat such person as a personal representative, with respect to PHI relevant to such personal representation. (45 C.F.R. 164.502(g)(4)).
- Individuals Involved in Care - If the patient is deceased, a covered entity may disclose to a family member, or other persons who were involved in the patient's care or payment for health care prior to the patient's death, PHI of the patient that is relevant to such person's involvement, unless doing so is inconsistent with any prior expressed preference of the patient that is known to the covered entity. (45 C.F.R. 164.510(b)(5))

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Decedents - Missouri

- Executor/Administrator – Letters testamentary
  - Letters testamentary shall be granted to the personal representative or personal representatives designated in the will. RSMO Chapter 473.
  - Letters of administration shall be granted to the following persons if otherwise qualified:
    - To the husband or wife;
    - To one or more of those who are entitled to distribution of the estate, who the court shall believe will best manage and preserve the estate. A conservator of a distributee is not entitled to preference;
    - If the court believes no one of the persons entitled to administer is a competent and suitable person, or if any such person fails to apply for letters when directed by the court, some other person may be appointed
- If a decedents estate is less than $40,000 and no application for administration has been filed within 30 days, then the personal representative designated in a will or any person entitled to receive property from the estate can file for resolution under RSMo 473.097.
- Wrongful death suit can be brought by: RSMO 537.080
  - By the spouse or children or the surviving lineal descendants of any deceased children, natural or adopted, legitimate or illegitimate, or by the father or mother of the deceased, natural or adoptive;
  - If there be no persons in class (1) entitled to **bring** the action, then by the brother or sister of the deceased, or their descendants, who can establish his or her right to those damages set out in section 537.090 because of the death;
  - If there be no persons in class (1) or (2) entitled to **bring** the action, then by a plaintiff ad litem. Such plaintiff ad litem shall be appointed by the court having jurisdiction over the action for damages provided in this section upon application of some person entitled to share in the proceeds of such action.

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Decedents - Kansas

- Executor/Administrator – Letters testamentary (KSA Chapter 59)
  - As designated in the will
  - Administration of the estate of a person dying intestate shall be granted to one or more of the persons hereinafter mentioned, suitable and competent to discharge the trust, and in the following order:
    - The surviving spouse or next of kin, or both, as the court may determine, or some person or persons selected by them or any of them.
    - If all such persons are incompetent or unsuitable, or do not accept, administration may be granted to one or more of the creditors, or to a nominee or nominees thereof.
    - Whenever the court determines that it is for the best interests of the estate and all persons interested therein, administration may be granted to any other person, whether interested in the estate or not.
- If decedent is intestate and leaves less than $75,000 in value, it can be directed by the successor without being granted letters of administration upon the successor producing an affidavit. (KSA 56-1507b).
- A wrongful death action may be commenced by any one of the heirs at law of the deceased who has sustained a loss by reason of the death. (KSA 60-1902).
- In Kansas - Death of the principal shall not prohibit or invalidate acts of the power of attorney in arranging for organ donation, autopsy or disposition of body. (KSA 58-629).

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42 CFR Part 2

- Minors – 42 C.F.R. 2.14
  - If a minor patient acting alone has the legal capacity under the applicable state law to apply for and obtain substance use disorder treatment, any written consent for use or disclosure may be given only by the minor patient. This restriction includes, but is not limited to, any disclosure of patient identifying information to the parent or guardian of a minor patient for the purpose of obtaining financial reimbursement. 42 C.F.R. 2.14
  - Where state law requires consent of a parent, guardian, or other person for a minor to obtain treatment for a substance use disorder, any written consent for use or disclosure authorized under subpart C of this part must be given by both the minor and their parent, guardian, or other person authorized under state law to act on the minor's behalf.
- Adult patients who lack capacity to make health care decisions—
  - Adjudication by a court. In the case of a patient who has been adjudicated as lacking the capacity, for any reason other than insufficient age, to make their own health care decisions, any consent which is required under the regulations in this part may be given by the personal representative.
  - No adjudication by a court. In the case of a patient, other than a minor or one who has been adjudicated as lacking the capacity to make health care decisions, that for any period suffers from a medical condition that prevents knowing or effective action on their own behalf, the part 2 program director may exercise the right of the patient to consent to a use or disclosure under subpart C of this part for the sole purpose of obtaining payment for services from a third-party payer or health plan.
- Deceased patients—
  - Vital statistics. These regulations do not restrict the disclosure of patient identifying information relating to the cause of death of a patient under laws requiring the collection of death or other vital statistics or permitting inquiry into the cause of death.
  - Consent by personal representative. Any other use or disclosure of information identifying a deceased patient as having a substance use disorder is subject to the regulations in this part. If a written consent to the use or disclosure is required, that consent may be given by the personal representative.

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Information Blocking

- Information blocking means a practice that except as required by law or covered by an exception, is likely to interfere with access, exchange, or use of electronic health information and if conducted by a health care provider, such provider knows that such practice is unreasonable and is likely to interfere with access, exchange, or use of electronic health information. 45 C.F.R. 171.103.
- Privacy exception at 45 C.F.R. 171.202
- FAQs and guidance have indicated that delay in availability of information through a patient portal could be considered information blocking.

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Common Questions – Patient Portal

- Should patient information be made available through the patient portal to:
  - Minors
  - The parents of teenage minors
  - Durable power of attorney
- Should certain types of information be restricted from the portal:
  - Substance use treatment/testing
  - Mental health records
- Variance in organizational implementation
  - Applicable state law
  - Types of treatment scenarios
  - EMR functionality

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Common Questions – No Estate

- Who is requesting the information?
- What information is being requested?
- What is the purpose of the request?
- What documentation is available?

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Common Questions - Treatment

Under the HIPAA Privacy Rule, may a health care provider disclose protected health information about an individual to another provider, when such information is requested for the treatment of a family member of the individual?

Yes. The HIPAA Privacy Rule permits a covered health care provider to use or disclose protected health information for treatment purposes. While in most cases, the treatment will be provided to the individual, the HIPAA Privacy Rule does allow the information to be used or disclosed for the treatment of others. Thus, the Rule does permit a doctor to disclose protected health information about a patient to another health care provider for the purpose of treating another patient (e.g., to assist the other health care provider with treating a family member of the doctor's patient). For example, an individual's doctor can provide information to the doctor of the individual's family member about the individual's adverse reactions to anesthetics prior to the family member undergoing surgery. These uses and disclosures are permitted without the individual's written authorization or other agreement with the exception of disclosures of psychotherapy notes, which requires the written authorization of the individual.

However, the HIPAA Privacy Rule permits but does not require a covered health care provider to disclose the requested protected health information. Thus, the doctor with the protected health information may decline to share the information even if the Rule would allow it. The HIPAA Privacy Rule may also impose other limitations on these disclosures. Under 45 CFR § 164.522, individuals have the right to request additional restrictions on the use or disclosure of protected health information for treatment, payment, or health care operations purposes. If the health care provider has agreed to the requested restriction, then the doctor is bound by that agreement and (except in emergency treatment situations) would not be permitted to share the information. However, the health care provider maintaining the records does not have to agree to the requested restriction. For example, an individual who has obtained a genetic test may request that the health care provider not use or disclose the test results. If the health care provider agrees to the restriction, the information could not be shared with providers treating other family members who are seeking to identify their own genetic health risks.

https://www.hhs.gov/hipaa/for-professionals/faq/512/under-hipaa-may-a-health-care-provider-disclose-information-requested-for-treatment/index.html

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Questions??

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