

Morgan Lewis

# ***FAST BREAK:*** **HANDLING SENSITIVE PATIENT** **RECORDS**

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# Agenda

- Sensitive health information in a patient record
- Federal/state law and subcategories of sensitive health information
- Tips to identify sensitive health information laws and ensure compliant disclosure

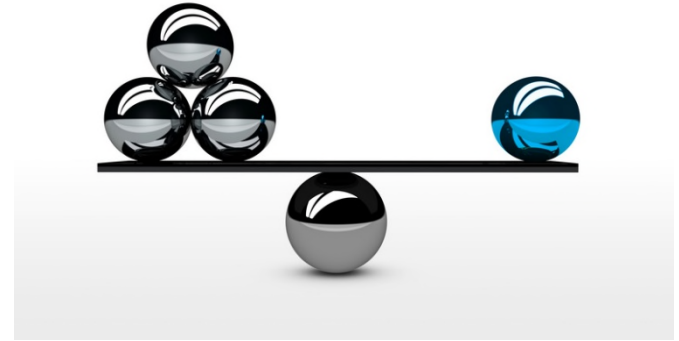
# **SENSITIVE HEALTH INFORMATION IN A PATIENT RECORD**

# Sensitive Health Information

- Generally speaking, sensitive health information is considered to be health information that carries with it increased individual sensitivity/risk in the event of disclosure
- Disclosure may include possibility of discrimination, social stigma, emotional distress, loss of insurance/employment
- Categories of health information often considered “sensitive” include:
  - Mental Health
  - Substance Use Disorder
  - Sexually Transmitted Infections
  - HIV/AIDS
  - Genetic Information

# A Balancing Act

- Laws applicable to sensitive health information have to balance:
  - Ensuring patient trust (patient-provider relationship)
  - Providing confidentiality protections
  - Increasing access to health information
  - Improving coordination of care and treatment
  - Preventing discrimination
  - Need to share information for the public good



**FEDERAL/STATE LAW  
AND  
SUBCATEGORIES OF  
SENSITIVE HEALTH  
INFORMATION**

# A Patchwork of Protections

- The existing body of laws are not comprehensive or consistent
- Generally, HIPAA applies uniformly to all protected health information, without regard to the type of information (exception: psychotherapy notes)
- 42 C.F.R. Part 2 (“Part 2”) applies to the confidentiality of substance use disorder (“SUD”) patient records
- Many states have enacted their own standards for the privacy and confidentiality of certain sensitive health information, which may overlap or be stricter than federal standards
  - State law may regulate when a provider may disclose sensitive health information, to whom the information may be disclosed, and for what purpose
  - States that have laws in these areas take different approaches and have differing requirements
- HIPAA/Part 2 takes precedence over a state privacy law unless that law is more stringent than the federal law (preemption analysis)

# Minor Records

- HIPAA generally allows a parent to have access to the minor's medical records, as his or her minor child's *personal representative* when such access is not inconsistent with state or other law
  - HIPAA exceptions / when parent not a personal representative: (i) minor consents to care and parent's consent of care not required under state law; (ii) minor obtains care at direction of court; (iii) parent agrees minor and provider have confidential relationship
- A minor's right to confidentiality generally is assumed when there is a right to consent to care



# Minor Records

- States have created minor consent laws giving minor adolescents the right to receive health care without parental consent or notification for certain services
- These services may include:
  - Substance use disorder treatment
  - Screening and treatment for sexually transmitted infections
  - Emergency treatment
  - Pregnancy prevention and care
  - Abortion
  - Mental health care
- “Emancipated” and “Mature Minor” considerations
- If there no applicable state law/state law is silent about the rights of parents to the health information of their children, then HIPAA regulations permit the doctor or health care facility to provide or deny access to the records, exercising professional judgment

# Mental Health Records

- State laws may address and protect the confidentiality of mental health records under various provider, licensure and/or facility requirements
  - Examples include:
    - Confidentiality requirements on mental health care providers or other provider types
    - Protection of mental health information maintained in mental health treatment facilities or other specific program
    - Information generated in the mental health commitment process
- States have enacted varying approaches/requirements regarding when an individual's consent is required to disclose mental health information and when it is not required
  - There are "treatment exceptions" similar to HIPAA, which allow different providers to share certain information with one another in order to deliver and coordinate care
  - Some state laws require patient consent before any mental health information collected by a psychologist or psychotherapist can be shared (more strict than HIPAA)

# Mental Health Records

- Federal perspective: Office for Civil Rights (“OCR”) recently posted “Information Related to Mental and Behavioral Health” webpage with Fact Sheets and FAQs
  - HIPAA Privacy Rule and Sharing Information Related to Mental Health Fact Sheet (updated 12/19/17)
    - The mental health guidance addresses three core areas:
      - How information related to mental health is treated under HIPAA
      - When information related to mental health may be shared with family and friends of an individual with mental illness, including parents of minors
      - The circumstances in which information related to mental health may be disclosed for health and safety purposes
    - OCR Mental Health FAQs (updated 12/19/17)
- Available at <https://www.hhs.gov/hipaa/for-professionals/special-topics/mental-health/index.html>

# Substance Use Disorder Treatment Records

- 42 C.F.R. Part 2 applies to the confidentiality of SUD patient records
  - Part 2 is applicable to an entity/provider that is both federally assisted and promotes itself as offering SUD services and provides or makes referrals for SUD services
- Nearly all state laws mirror or explicitly adopt the requirements found in 42 C.F.R. Part 2
  - No state law may authorize or compel a disclosure that is prohibited by 42 C.F.R. Part 2
- State law may cover additional treatment facilities not covered by federal rules (i.e., private treatment programs)
- Preemption considerations
  - State law limits disclosures of SUD treatment information without consent only for research purposes, provided patient identifying information is not disclosed
  - State law limits disclosures of SUD treatment information without consent only during a medical emergency; patient must be notified of the emergency as soon as possible

# Sexually Transmitted Infection Information

- Under HIPAA privacy rules, no patient authorization or consent form is required for mandated reporting or for public health activities
- State laws may add additional protection, requiring individual consent for specific disclosures
  - No person may disclose or be compelled to disclose the identity of a person investigated or treated for a STD, unless the patient consents
  - Notable exceptions include disclosures to the test subject, the state or public health officer, a health facility or provider, or law enforcement

# Genetic Information

- Many states have enacted genetic information privacy laws; these are typically more strict than HIPAA and, therefore, not preempted
- Generally, these states require an individual's specific written consent for the collection, retention, use, or disclosure of genetic information about an individual with certain exceptions (criminal investigation, court order)
- State laws may focus on:
  - Restricting disclosure and requiring an individual's consent
  - Limiting application of the law to specific group (i.e., health care insurers or providers)
  - Re-disclosure of the genetic information
  - Requirements in the individual consent form
  - Prohibiting discrimination by health care insurers

# **TIPS WHEN USING AND DISCLOSING SENSITIVE HEALTH INFORMATION**

# Sensitive Health Information Practical Tips

- Recognize the federal and state law landscape – guidance, compliance tools
- Inventory where sensitive health information is used and disclosed
  - Integrated and coordinated care considerations
- Analyze and understand technical capabilities
- Implement, enforce and audit policies and procedures; communicate policies and procedure requirements to workforce



# Thanks!



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Lauren focuses her practice on regulatory and transactional matters affecting clients in the healthcare sector. She counsels hospitals, health systems, hospices, pharmacies, and private equity clients, among others, across a range of regulatory issues, including matters related to compliance with HIPAA, the 340B Program, the Sunshine Act, fraud and abuse laws, Medicare and Medicaid enrollment, and licensure requirements. Lauren also advises clients on the corporate and healthcare regulatory aspects of merger and acquisition transactions.

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*"Fast Break: Healthcare Blockchain"*

Featuring Jonelle Saunders

➤ March 28, 3:00 PM (EST)