

POTENTIAL LIABILITY: PATIENT HEALTH INFORMATION PORTALS

NEXT CHALLENGE. NEXT LEVEL.

NEXSEN | **PRUET**

SCONL/ASHRM

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Medical Record Information: Ownership and Patient Rights

- ▶ The physician owns the physician patient records.
- ▶ The hospital owns the hospital records.
- ▶ The patient has a limited access right to their health information.
- ▶ The Physician Patient Records Act:
 - ▶ A patient or his legal representative has a right to receive a copy of his medical record, or have the record transferred to another physician, upon request, when accompanied by a written authorization from the patient or his representative to release the record.

Patient Access Rights

- ▶ 2003 HIPAA further refined the access right:
 - ▶ A covered entity (“CE”) must provide access when requested by the patient or the patient’s personal representative
 - ▶ Patient: if competent and able to consent
 - ▶ Personal representative if not:
 - ▶ Minor: Parent or Legal Guardian
 - ▶ Adult:
 - ▶ Court appointed guardian;
 - ▶ Healthcare power of attorney;
 - ▶ Spouse;
 - ▶ Parent or adult child;
 - ▶ Adult sibling, grandparent, or adult grandchild;
 - ▶ Any other relative by blood or marriage reasonably believed by the healthcare provider to have a close personal relationship;
 - ▶ Etc.
 - ▶ 30 days to provide access (allowed to extend additional 30 days)

Patient Access Rights

- ▶ 2009 HITECH

- ▶ If the CE uses or maintains an EHR with respect to PHI of an individual--

- ▶ (1) the individual shall have a right to obtain from such CE a copy of such information in an electronic format and, if the individual chooses, to direct the CE to transmit such copy directly to an entity or person designated by the individual, provided that any such choice is clear, conspicuous, and specific; and

- ▶ (2) any fee that the CE may impose for providing such individual with a copy of such information (or a summary or explanation of such information) if such copy (or summary or explanation) is in an electronic form shall not be greater than the entity's labor costs in responding to the request for the copy (or summary or explanation).

Patient Access Rights

- ▶ 2013 HITECH Final Rule
 - ▶ The individual has the right to request a copy of his/her PHI in electronic format if it is readily producible, or if not, in a hard copy form or in readable electronic form and format as agreed to by the CE and the individual.
 - ▶ If the PHI requested is kept electronically, then the CE must provide the individual with access in the form and format requested by the individual, if it is readily producible in such form and format, or if not, in a readable electronic form and format as agreed to by CE and the individual.
 - ▶ No extension beyond 30 days to provide access.

What happens if I don't provide my patient access?

- ▶ Potential Liabilities:
 - ▶ Professional disciplinary action by the Board of Medical Examiners: Misconduct includes -
 - ▶ failure to provide pertinent and necessary medical records to another physician or patient in a timely fashion when lawfully requested to do so by a patient or by a lawfully designated representative of a patient.
 - ▶ No “teeth” in the Physician Patient Records Act for violations.
 - ▶ No private right of action under HIPAA . . . But the Attorney General (“AG”) could sue if the AG had reason to believe that an interest of one or more residents of the State has been threatened or adversely affected by any person who violates a provision of HIPAA, the AG may bring a civil action on behalf of a resident to:
 - ▶ Enjoin further violations; or
 - ▶ Obtain damages (multiply each violation x \$100 the total not to exceed \$25K for each identical violation).
 - ▶ May award attorney fees.

Administrative Penalties

- ▶ Cignet Health: Large multi-healthcare provider group
- ▶ Failed to provide 41 patients access to their PHI (were 41 complaints – all individually filed with the OCR)
- ▶ Initial fine: \$1.3 Million for failure to provide access
- ▶ Subsequent fine: \$3.0 Million for failure to cooperate with the OCR's investigation (3/17/2009 – 4/7/2010)
- ▶ Total fine: \$4.3 Million
- ▶ Upshot – cooperate with the OCR investigation!
- ▶ But first, provide appropriate access!!

Providers obligations to provide patient access to certain PHI

- ▶ Meaningful use:
 - ▶ Stage 1: EP:
 - ▶ Beginning 2014, provide patients with the ability to view online, download, and transmit their PHI within four (4) business days of the information being available to the EP.
 - ▶ Provide clinical summary of each office visit within three (3) business days
 - ▶ Stage 1: EH: Beginning 2014, provide patients with the ability to view online, download, and transmit information about a hospital admission within 36 hours of discharge.

Providers obligations to provide patient access

- ▶ Meaningful Use:
 - ▶ Stage 2: EP:
 - ▶ Provide patients with the ability to view online, download, and transmit their PHI within four (4) business days of the information being available to the EP.
 - ▶ Provide patients with clinical summary for each office visit within one (1) business day
 - ▶ Stage 2: EH: Provide patients with the ability to view online, download, and transmit information about a hospital admission within 36 hours of discharge.

Change in the relationship dynamic between providers and patients

- ▶ Previously the provider controlled the timing of providing access to PHI.
 - ▶ Patient had to wait until received a call from the provider or until the next appointment/encounter.
 - ▶ Patient had to make a written request and wait.
- ▶ Now, providers must make PHI available electronically if requested (Privacy Standards).
- ▶ EPs must make PHI available within 4 days after availability to the EP (clinical summaries within 1 day of an office visit).
- ▶ EHs must make PHI available within 36 hours of discharge.
- ▶ Patients have always had access to their entire medical record, just not in real time.

Provide Access/Satisfy Meaningful Use Requirements – Patient Information Portal

- ▶ A patient portal is a secure online website that gives patients convenient 24-hour access to personal health information from anywhere with an Internet connection.
- ▶ <http://www.healthit.gov/providers-professionals/faqs/what-patient-portal>
- ▶ Once you increase accessibility, you increase your potential for risks involved with security, privacy and professional liability.

Addressing the New Reality: Minimize Your Risks

- ▶ Risks related to the security of the portal.
- ▶ Use only Certified Electronic Health Record Technology for your EHR:
 - ▶ Make sure that your EHR technology is on the Office of the National Coordinator for Health Care Technology (“ONC”) CEHRT list:
<http://oncchpl.force.com/ehrcert?q=chpl>
 - ▶ Use only CEHRT for your patient portal – required under the meaningful use standards.

Addressing the New Reality: Minimize Your Risks

- ▶ Risks associated with breaches in the privacy and security of PHI.
- ▶ Unauthorized Access/Breach of Unsecured PHI:
 - ▶ Implement appropriate administrative, physical and technical safeguards;
 - ▶ Educate your staff on the importance of security;
 - ▶ Audit/track access;
 - ▶ Encrypt the PHI.
- ▶ Have security incident processes in place.
- ▶ Have breach notification processes in place.

Addressing the New Reality: Minimize Your Risks

- ▶ Potential risk for allegations of Professional Negligence:
 - ▶ Potential for misunderstanding results
 - ▶ Laboratory tests
 - ▶ Radiology reports
 - ▶ Potential for misunderstanding how the test results are used in diagnosis and treatment decision-making
 - ▶ Piecemeal presentation of information – loss of opportunity to provide the overall picture
 - ▶ (Most) patients are not diagnosticians
 - ▶ Potential for the physician/office staff to not be aware of critical information the patient placed in the EHR through the portal
 - ▶ Potential for incomplete/incorrect information uploaded

Addressing the New Reality: Minimize Your Risks

- ▶ Patient education is key –
 - ▶ Get written consent to post the patient's information on the portal.
 - ▶ Consider providing a “user policy” and have patients accept the terms of use for portal.
 - ▶ Convey to the patient: Once you create access your information (username/password) you must take care to maintain the privacy and security of the access.
- ▶ Communication is key:
 - ▶ Brochure
 - ▶ On-line presentation
 - ▶ Notice of Privacy Practices (“NPP”)
 - ▶ Modify the “Access” section of your NPP
 - ▶ Face-to-face communication: “You may have access to this result on-line through the portal before we have an opportunity to discuss how the results of this testing impact your treatment.”

Addressing the New Reality: Minimize Your Risks

- ▶ Risks associated with the PHI of a minor.
- ▶ Special circumstance: Minor patients who can make health care decisions without parental consent:
 - ▶ Parents and legal guardians have access to PHI of minors at any age.
- ▶ Counsel minors:
 - ▶ Inform minors that parents/legal guardians have access rights to a minor's PHI even if:
 - ▶ The minor pays out of pocket for the health care service.

Addressing the New Reality: Minimize Your Risks

- ▶ Review office practices –
 - ▶ Additional sensitivity to timing/review of testing and imaging results and making patient contact.
 - ▶ Office staff education is key:
 - ▶ Educate your educators;
 - ▶ Make opportunities to educate patients.
- ▶ Establish mechanisms to be alerted to new information and when actions are taken on that information;
- ▶ Audit/track when physician/staff access to check.
- ▶ Documentation: Remember to document in the EHR your communication with your patient through the portal (if not automatically added to the EHR).

Addressing the New Reality: Minimize Your Risks

- ▶ Risks associated with relying on information patient communicates through the portal to:
 - ▶ Refill prescriptions (controlled substances – DON'T);
 - ▶ Triage or make a diagnosis in lieu of an office visit – DON'T;
 - ▶ Take great care when dispensing medical advice via the portal
- ▶ Limit use to non-emergency/educational communications.
- ▶ Clearly, constantly and continually communicate the appropriate use of the portal.

Addressing the New Reality: Minimize Your Risks

- ▶ Consult legal counsel
- ▶ Review your general and comprehensive liability policies:
 - ▶ Consider cyber-insurance coverage if you haven't already.
- ▶ Notify your insurance carriers of the change in your practices.

Addressing the New Reality: Minimize Your Risks

- ▶ Risk for miscommunication of test results:
 - ▶ Civil liability:
 - ▶ negligence/intentional infliction of emotional distress
- ▶ Risk for not achieving meaningful use =

▶ Lost \$\$\$\$

Questions?

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