

SHORTS



ON LONG TERM CARE

for the North Carolina LTC Community from Poyner Spruill LLP

OBRA versus HIPAA: Who Has the Right to Demand Access to My Residents' Medical Records?

"I represent your resident and I want a copy of her medical records." If you work in a nursing facility or assisted living community and you've never heard these words, something's seriously wrong with your ears. About once a week, I get a call from a provider asking for guidance on these types of requests, often from lawyers but not always.

Here's what creates the issue - most of you know that under the Omnibus Budget Reconciliation Act (OBRA) regulations for nursing facilities, and state licensure law for both SNFs and assisted living communities, residents have a right to see and obtain a copy of their medical records. But you also know that HIPAA precludes or restricts the disclosure of residents' protected health information (PHI), which includes virtually anything in a medical record, except in very limited situations. And where HIPAA does permit a disclosure, it requires an array of procedures designed to limit the information disclosed to the minimum necessary under that particular HIPAA exception.

So you get a letter from a lawyer or some family member demanding a copy of the resident's record and your HIPAA alarm goes off immediately. Ah, we've trained you well, but now what?

I'm not going to try to tackle the vast maze of confusing HIPAA scenarios SNF and AL providers could face in this article, but I am going to answer this one question and here it is. IF the individual demanding your resident's records is standing in the shoes of the resident, he or she is entitled to see and obtain a copy of the medical record. Why? Because the resident, if

by Ken Burgess



competent and/or acting on his or her own behalf, would have that right. That's clear under HIPAA. One of the primary exceptions to prohibited disclosures of PHI is disclosure to the individual resident or patient.

Okay, you say, I got that part, but don't I go through a bunch of procedures to ensure that my disclosure is the minimum necessary to comply with the request? Again, not if the requestor is the resident OR someone acting on their behalf.

The HIPAA regulations in 45 CFR section 164.502 allow you to disclose PHI to the individual (the resident in this case), without all the bells and whistles you'd employ if you were releasing the information about the resident to a third party. The requirements found in the HIPAA regulations that limit what and how you can release PHI really apply to requests for PHI by third parties about a patient, not to requests by the patient themselves or someone standing in the patient's shoes. For example, 45 CFR

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p.s.

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ATTORNEYS AT LAW

In This Issue New Health Care Decision Poster

We love getting comments and ideas from you, our readers. Rod Baird, administrator for Extended Care Physicians, PA, of North Carolina, wrote to us in April and said, "You might want to consider rewriting & formatting the section of the law governing the hierarchy of 'legal representatives' authorized to give consent for medical care so it is a stand-alone poster that facilities could place on their walls. It might help their staff sort out this incredibly complex and frustrating topic." Well, Rod, here you go! We hope this "fill in the blanks" poster is helpful to you and to all readers. If you would like extra copies of the poster, please email reply@poyners.com with your request and include your name, facility, address, and number of copies you need.



You Can “Just Say No” To Weapons At Your Facility

By *Ken Burgess*

There is NO constitutional right under the U.S. or North Carolina Constitutions for any person to possess a firearm or other weapon on the campus of your assisted living community or nursing facility. That means that you can develop, implement and enforce facility policies preventing residents from having guns or other weapons in the facility and in their rooms or living units.

The recent tragic shootings at long term care facilities around the U.S. and in North Carolina have brought this issue to the forefront, prompting some residents to insist they have a right to weapons because your facility is their home. Is this true? It is not. In the same way the owner of a private apartment complex can preclude weapons possession or use on site, so can the owner/operator of a long term care facility.

Several high profile court cases and political campaigns focusing on the Constitutional right to bear arms have created the notion among many that no individual has the right to restrict another person’s possession or use of a gun for legal purposes. This is incorrect. The U.S. Constitution’s guarantee of the people’s right to bear arms is found in the Second Amendment to the Constitution. Its reach is limited in that it only prevents the Government from infringing on a citizen’s right to possess guns for legal purposes. It does not reach private action by private persons, including those who operate residential or health care facilities.

So you can “just say no” to the possession or use of firearms or other weapons on your long term care facility campus. If this is your policy, it should be committed to writing and residents should be informed of this at or before admission.

A simply policy is all you need to enforce this restriction. One that we recently drafted reads as follows:

No person, including residents or family members, may possess or carry, whether openly or concealed, any guns, rifles, pistols, or firearms of any type on the premises of _____ (name of facility or property). Violation of this policy shall be deemed a violation of the applicable rental agreement or admission agreement and may constitute grounds for discharge or cancellation of the resident admission or rental agreement.

If you prefer a policy that is broader and addresses firearms and other types of weapons, below is sample language taken, in part, from existing North Carolina statutes prohibiting weapons on school grounds, liquor stores, and other public places:

No person, including residents or family members, may possess or carry, whether openly or concealed, any guns, rifles, pistols, or firearms of any type, stun guns, air rifles, air pistols, Bowie Knives, dirks, daggers, slingshots, loaded canes, switchblade knives, blackjacks, metallic knuckles, razors or razor blades (except solely for personal shaving), fireworks, or any sharp pointed or edged instrument (except instructional supplies, un-altered nail files and clippers, and tools used solely for the preparation of food, instruction, and maintenance on the property) on the premises of _____ (name of facility or property). Violation of this policy shall be deemed a violation of the applicable rental agreement or admission agreement and may constitute grounds for discharge or cancellation of the resident admission or rental agreement. ■



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Mind Your PHI – Even in the Trash

By Pam Scott

A Greensboro urgent care center recently agreed to pay \$50,000 to settle a case filed by the N.C. attorney general after the center's discarded patient records for more than 750 individuals were discovered in a Dumpster, complete with individuals' names, Social Security numbers, birth dates, insurance account numbers and PHI. The center had hired a contractor to destroy the records. The attorney general brought the action under the State's Identity Theft Protection Act. The act requires businesses to adopt formal policies and procedures for secure disposal of records containing personal information and to take steps to ensure that any contractor hired to destroy such records is reputable and competent. This case highlights the value of investing time and resources in secure record destruction and due diligence of record disposal contractors, which would likely cost much less than the monetary penalties a health care provider faces for illegal dumping of patient records.

For more information on PHI or other health law-related issues, please contact Pam Scott at 919.783.2954 or pscott@poynerspruill.com.

OBRA vs HIPAA (continued from page 1)

section 164.502(b)(2) dealing with the "minimum necessary" requirement does not apply to requests made by an individual for his or her own records.

The same is true for a third party with legal authority to act for the resident. In the case of a deceased resident the HIPAA regulations are very clear on that issue. According to 45 CFR section 164.502(g)(1) you are required to treat a personal representative of an individual as the individual, meaning the representative can do whatever a resident could do in terms of obtaining records; you must be sure that the person is, in fact, a personal representative of the resident. The regulations in section 45 CFR section 164.502(g)(4) dealing with deceased individuals say if, under applicable law, an executor, administrator, or other person has authority to act on behalf of a deceased individual or the individual's estate, then you must treat that person as the actual patient with respect to access to records. When you combine that with the OBRA resident's rights requirement that a resident or his or her representative has the right to a copy of the resident's medical records, it's pretty clear that you must provide the full records as requested IF AND WHEN you establish that the person requesting them actually has that authority.

We usually recommend that the requestor provide our clients with testamentary letters from the clerk of court, which he or she can get if they are named as the executor in the resident's will or, if there is no will, the clerk of court qualifies the requestor as the administrator of the estate. Either way, there will be evidence from the clerk of court of that person's authority to act for the estate.

In the case of residents who are alive and competent, they can execute an authorization for individuals that they want to have their records. If the resident is incompetent, an individual with a durable power of attorney, health care power of attorney, or a guardian of the resident's person or general guardian is a "legal representative" for this purpose.

Ken Burgess advises clients on a wide range of legal planning issues arising in the SNF setting, assisted living setting, and other aspects of long term care. He may be reached at 919.783.2917 or kburgess@poynerspruill.com.



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HHS Set to Identify by Name All Private Practices Experiencing a Breach Affecting 500 or More Individuals



by **Elizabeth Johnson**

As you know, HIPAA-covered entities experiencing a security breach are obligated to notify affected individuals, the U.S. Department of Health and Human Services (HHS), and, in some cases, the media. When a breach affects 500 or more individuals, the covered entity must report the incident to HHS within 60 days of discovery. HHS, in turn, provides a brief summary of the event on its website, www.hhs.gov/ocr/privacy/hipaa/administrative/breachnotificationrule/postedbreaches.html.

To date, HHS has listed private practices anonymously, identifying them only as "Private Practice." HHS took the position that private practices could not be specifically named on the website because they are identifiable as "individuals" within the meaning of the Privacy Act, which would potentially require the practice's consent prior to listing it by name. Pursuant to the Privacy Act, HHS may designate its publication of breaches, including naming private practices, as a "routine use" of the information such that prior consent is not required for the publication. Accordingly, on April 13, HHS published a Federal Register notice stating its intention to start identifying private practices by name on its breach website, designating such publication as a "routine use" of the information under the Privacy Act. Although it has yet to do so, HHS has been entitled to

name private practices (both prospectively and retroactively) since May 23, 40 days from publishing its Federal Register notice.

Private practices (and other HIPAA-covered entities) should take steps to mitigate the risk of a security breach. Although a breach can occur in a variety of ways, almost half of the breaches reported on the HHS website were caused by lost or stolen electronic portable devices, such as laptops. In addition, BNA's *Privacy Law Watch* reports that 80% of medical identity theft cases are caused by health organizations' staff. As a result, portable media and dishonest employees are among the most likely causes of a security breach.

HIPAA covered entities also should implement a written procedure to respond to suspected breaches, as mandated by recent revisions to the HIPAA Privacy Rule. A sound procedure will help covered entities, including private practices, respond promptly to suspected breaches, enabling them to meet the 60-day reporting deadline if their investigation of the breach determines it must be reported to individuals and HHS.

Elizabeth Johnson's practice focuses on privacy, information security, and records management. She may be reached at 919.783.2971 or ejohnson@poynerspruill.com.



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Postscript on 'The Irresponsible Responsible Person'

By Ken Burgess

Our article on "The Irresponsible Responsible Person" in the April 2010 issue of *Shorts* prompted a number of great responses and questions, along with a few new clients wanting revised admission agreements (Thanks!). The article, in short, pointed out that the term "responsible person" or "responsible party" is used frequently in SNF and assisted living admission agreements but is not defined anywhere in applicable state or federal law. We recommended replacing the term with two different terms – "financial legal representative" (someone with legal control over a resident's funds and assets) and "personal legal representative" (someone who agrees to accept required notices and give certain consents for a resident). The point we made was that using a term that has no legal meaning, like "responsible person," tends to confuse both providers and third parties such as family members because it's not clear what a "responsible person" is agreeing to do or can legally be required to do.

One reader raised a really interesting point for providers licensed as adult care homes. The Division of Health Service Regulation has a Resident Register form that adult care homes are required to use. Item 10 on that form has a line for "Responsible Person." So the reader asked if this needed to be changed. The answer, thankfully, is "no." That form is not a contract under which a third party is undertaking legal responsibilities for a resident, so it's different than a resident admission agreement signed by a third party. Instead, the form is simply a data collection form. More important, Item 10 on the form expressly defines what it means by "responsible person" by asking the provider to indicate if this individual is a guardian, power of attorney, or payee of funds assigned to a resident. This is entirely consistent with our April article in which we recommended that if you plan to keep using the term "responsible person" in your admission agreements, define precisely what you mean by it AND ensure that the obligations you are imposing on a third-party responsible person are actually permitted by applicable state or federal law. We've discussed this issue with officials at the Division of Health Service Regulation and they concur with our reading of the Resident Register form. Thanks to our reader for that great question. ■

Ken Prefers 'Monkey Crunch'

From the Marketing Department

Ken Burgess authored "Rum Raisin, Monkey Crunch, and Mocha Frappuccino Cherry with Gummy Bears on Top: Striving for Personal Autonomy and Choice in a Regulated Long-Term Care Environment," published in the March/April edition of the *North Carolina Medical Journal*. In Ken's trademark lighthearted style, the article takes a serious look at the tension between state and federal regulations focused on ensuring resident safety and the expectations of baby-boomer residents for personal choice and autonomy. Read it online at <http://www.ncmedicaljournal.com/Mar-Apr-10/Burgess.pdf>.

Ken's Quote of the Month

"Twenty years from now you will be more disappointed by the things you didn't do than by the ones you did. So throw off the bowlines. Sail away from the safe harbor. Catch the trade winds in your sails. Explore. Dream."

Mark Twain



CPR Training with the Health Law Group

Would you trust this lawyer to save your life? On June 11, the entire PS Health Law Section received CPR training and certification from the Triangle Area Chapter of the American Red Cross. We're pretty sure we're the only law firm Health Law Section in the country that can honestly say "We can save your license AND your life."



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