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OBRA vs HIPAA:

Who Has the Right to Demand Access to My Residents' Medical Records?

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"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 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 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.

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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.

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