Outline to HIPAA presentation

I) Overview of the HIPAA Privacy Rule regulations that relate to obtaining a person's medical records for court proceedings and law enforcement purposes.

A) Entities covered by HIPAA
The medical records of a patient are protected and privileged under federal law through the Health Insurance and Accountability Act of 1996 ("HIPAA") (effective April 14, 2003). HIPAA is a law of broad application covering any health care provider that electronically transmits any insurance and coverage information or claims as well as several other forms of information. 45 *CFR* 164.500 (2000).

B) Protected health care information includes all individually identifiable information *maintained or transmitted in any form or media,* electronic or otherwise, including paper records that have never been transmitted electronically. 45 *CFR* 160.103 (definition of "protected health information").

C) A covered entity may disclose privileged information pursuant to judicial or administrative proceedings in response to the following (45 *CFR* 164.152(e)):

1) An order of a court or administrative tribunal, provided that the entity discloses only the protected health information expressly authorized by such order. 45 *CFR* 164.512(e)(1)(i).
2) A subpoena, discovery request or other lawful process not accompanied by a court order if the following requirements are met:
   (a) Satisfactory assurances are received in a written statement and supporting documentation from the party seeking the privileged records that demonstrate a good faith attempt to provide written notice to the individual;
   (b) that notice to the individual included sufficient information about the proceeding in which the records are requested *in order to permit the individual to raise an objection to the court*; and
   (c) the time for the individual to raise objections to the court have elapsed without objections being filed, or all objections filed have been resolved by the court. 45 *CFR* 164.512(e)(1)(ii), (iii) (Emphasis added).
3) A subpoena, discovery request or other lawful process not accompanied by a court order where a written assurance is received with accompanying documentation demonstrating that:
   (a) The parties to the dispute have agreed to a qualified protective order and have *presented such order to the court with jurisdiction over the dispute*; or
   (b) the party seeking the records *has a qualified protective order from a court* (defined at 45 *CFR* 164.512(e)(1)(v)). 45 *CFR* 164.512(e)(1)(ii), (iv) (emphasis added).
4) A subpoena, discovery request or other lawful process not accompanied by a court order and without the written assurances by the party seeking such records, if the health care provider itself makes reasonable efforts to provide notice to the individual

sufficient to meet the requirements otherwise required by the party requesting the information. 45 *CFR* 164.512(e)(1)(vi).

D) A covered entity may disclose privileged information for law enforcement purposes pursuant to process and otherwise required by law. 45 *CFR* 164.152(f).

1) As required by law including laws that require the reporting of certain types of wounds or other physical injuries, except for laws subject to paragraph (b)(1)(ii) (relating to the reporting of child abuse or neglect to a public health authority or other legally authorized government authority), or (c)(1)(i) (relating to disclosures about victims of abuse, neglect or domestic violence). 45 *CFR* 164.152(f)(i)
2) In compliance with and as limited by:
   (a) A court order or court ordered warrant, or a judicial officer issued subpoena or summons; or
   (b) A grand jury subpoena; or
   (c) An administrative request, subpoena, or summons, a civil or authorized investigative demand, or similar process authorized under law, only if:
      (i) The information sought is relevant and material to legitimate law enforcement inquiry;
      (ii) The request is specific and limited in scope; and
      (iii) De-identified information could not reasonably be used.
   (d) Limited information for identification and location of a suspect, fugitive, material witness or missing person upon an officer's request.
      (i) A covered entity may not release the individual's DNA, DNA analysis, dental records, typing, samples or analysis of bodily fluids or tissue.
3) Information about a patient who is suspected to be the victim of a crime if:
   (a) The individual agrees; or
   (b) Agreement cannot be obtained due to incapacity or emergency, so long as:
      (i) Officer represents information is not intended to be used against the patient, but to determine if another violated the law;
      (ii) Officer represents that law enforcement activity would be materially and adversely affected by waiting for patient to agree to disclosure; and
      (iii) The covered entity determines that disclosure is in the best interests of the patient.
4) When privileged records are deemed to constitute evidence of a crime that occurred on the covered entity's premises.
5) To report a crime in emergencies.

E) The relationship between HIPAA and other medical privacy laws.

1) HIPAA explicitly preempts state laws to the extent that the provisions contradict any state law provisions relating to privacy that are less stringent. 45 *CFR* 160.203.
2) HIPAA does not preempt or limit The Alcohol, Drug Abuse, and Mental Health Administration Act of 1972, 42 *U.S.C.* §§ 290aa-290ff. 65 *Fed. Reg.* 82,482-83 (December 28, 2000).

II) Overview of primary Wisconsin statutes providing for the privacy of medical records and treatment. (See attached "Outline of Major Wisconsin Medical Records Privacy Provisions" for a more detailed outline).

A) Privacy of Health Care Records - *Wis. Stat.* § 146.82

1) Records covered. § 146.81(4)
2) The Rule. § 146.82(1)
3) Exceptions. § 146.82(2)
4) Sanctions for violation of the statute, criminal and civil. § 146.84

B) Privacy of Health Care Communications or Information Obtained for Purposes of Diagnosis or Treatment, The Physician – Patient Privilege, *Wis. Stat.* § 905.04.

1) The Rule: A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, among the patient and the patient's medical/counseling professional. §905.04(2).
2) Exceptions:
   (a) communications and information relevant to proceedings for hospitalization, guardianship, protective services or placement;
   (b) condition an element of claim or defense;
   (c) homicide trials;
   (d) tests for intoxication;
   (e) reporting wounds and burn injuries; or
   (f) providing services to court in juvenile matters.

III) Overview of the Alcohol, Drug Abuse, and Mental Health Administration Act of 1972, 42 U.S.C.S. §§ 290aa-290ff.

A) The Rule: The patient records to which these regulations apply may be disclosed or used only as permitted by these regulations and may not otherwise be disclosed or used in any civil, criminal, administrative, or legislative proceedings conducted by any Federal, State, or local authority.

B) The restriction on use of information to initiate or substantiate any criminal charges against a patient or to conduct any criminal investigation of a patient applies to information obtained by a federally assisted drug abuse program after March 20, 1972, or is alcohol abuse information obtained by a federally assisted alcohol abuse program after May 13, 1974 for the purpose of treating alcohol or drug abuse, making a diagnosis for the treatment, or making a referral for the treatment. Such programs include:

1) An individual, entity (other than a general medical care facility), or identified unit within a general medical facility which holds itself out as providing, and provides, alcohol or drug abuse diagnosis, treatment or referral for treatment; or

2) Medical personnel or other staff in a general medical care facility whose primary function is the provision of alcohol or drug abuse diagnosis, treatment or referral for treatment and who are identified as such providers. (See Sec. 2.12(e)(1) for examples.)

C) Entities covered: An alcohol abuse or drug abuse program is considered to be federally assisted if:

1) It is at lease partially conducted directly or by contract by a department or agency of the United States;
2) It is being carried out under a license, certification, registration, or other authorization granted by any department or agency of the United States;
3) It is supported by funds provided by any department or agency of the United States by being:
   (a) A recipient of Federal financial assistance in any form;
   (b) Conducted by a State or local government unit which, through general or special revenue sharing or other forms of assistance, receives Federal funds which could be (but are not necessarily) spent for the alcohol or drug abuse program;
   (c) If it is assisted by the IRS by income tax deductions for contributions to the program or through the granting of tax exempt status to the program.

D) Information protected: The restrictions on disclosure in these regulations apply to any information, whether or not recorded, which identify a patient as an alcohol or drug abuser either directly, by reference to other publicly available information, or through verification of such an identification by another person.

E) Exceptions:
1) Veteran's Administration Medical care, governed by 38 *U.S.C.* 4132 and regulations issued under that authority by the Administrator of Veterans' Affairs.
2) Armed Forces
3) Qualified service organization communications with a program of information necessary to provide services to the program.
4) Crimes on program premises or against program personnel.
5) Reports of suspected child abuse and neglect.

F) Types of treatment and treatment providers covered.
1) The limited reading. 42 *C.F.R.* §2.11
2) The expansive interpretation. *United States v. Eide*, 87 F.2d 1429 (9th Cir. 1989); *State v. Dahl*, 2001 WI App 197, p. 10, 247 Wis. 2d 499, 633 N.w.2d 279 (Wis. Ct. App. 2001) (unpublished table decision)

G) Burden upon the prosecution. 42 *C.F.R.* § 2.65.

IV) The interplay of Wisconsin and federal medical records privacy laws.

A) The possible impact of HIPAA on Wisconsin medical record privacy laws.

1) Wis. Stat. §146.82(1) (Privacy of Health Care Records) refers to 45 *CFR* 146(e) and omits any reference to subpart (f) dealing with investigations for law enforcement purposes.
2) Federally funded or assisted drug treatment facilities must ascertain whether a court has made a finding of "good cause" before releasing treatment records pursuant to a subpoena or warrant. 72 *Op. Atty. Gen. Wis.* 12.

B) Blocking the release of records or suppression of records obtained by the state.

1) Keep the treatment provider from releasing records by immediately asserting your client's rights under HIPPA, state privacy laws and 42 CFR part 2.
2) Pursue suppression based upon constitutional violations, where no provision for exclusion of evidence is provided for in an act.
   (a) Consider the following language from the HIPAA Administrative Simplification: Privacy Rule Administrative comments in support of a 4th Amendment challenge to improperly obtained records:
   > *"Response:* Under the statutory framework adopted by Congress in HIPAA, **a presumption is established that the data contained in an individual's medical record belongs to the individual** and must be protected from disclosure to third parties. The only instance in which covered entities holding that information must disclose it is if the individual requests access to the information himself or herself."
   (b) Consider due process challenges where records have been released without a court order subsequent to a hearing on the matter, where notice of medical records requests were not received, or where a judge issued a summary order for the release of records without providing an opportunity to object.

C) Avoiding waiver of privilege and preserving issues for appeal and federal habeas relief.

1) Never disclose client's privileged medical records or consent to an in camera inspection.
2) Raise objections to the subpoena of protected records, the use of protected records for the prosecution or sentencing of the client.
3) File a motion for a protective order regarding medical records.
4) File a motion to suppress use of medical records.
5) Examine the possibility of prosecutorial misconduct and abuse of the subpoena power or abuse of the grand jury process.
6) Attempt to make a clear record of any evidentiary fruit obtained from the poison tree of unlawfully obtained medical records.
7) Consider motions to disqualify any judge or prosecutorial agency who has seen or handled privileged records under 42 CFR part 2 prior to a hearing allowing for the release of such records, as any violation of the act is a federal crime.

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Rose Jade of Newport, OR, and author of The Secret Life of 42 CFR Part 2, in the April 2006 issue of The Champion (30 Champion 34). Ms. Jade is willing to talk with people working on 42 CFR Part 2 issues and may be contacted at: sjade@dialoregon.net

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