

## How to Avoid the Good Cop/Bad Cop Routine: *Establishing HIPAA-Compliant Collaborative Relationships with Law Enforcement*

Nebraska Hospital Association  
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Michael W. Chase  
Abigail T. Mohs

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## Agenda

- Real-life scenarios involving hospitals, workforce and law enforcement
- Review of HIPAA law enforcement rules
- Steps to enhance understanding and communication between hospital and law enforcement

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## Remember This?

Utah nurse reaches \$500,000 settlement in dispute over her arrest for blocking cop from drawing blood from patient



<https://www.sltrib.com/news/2017/10/31/utah-nurse-arrested-for-blocking-cop-from-drawing-blood-from-patient-receives-500000-settlement/>

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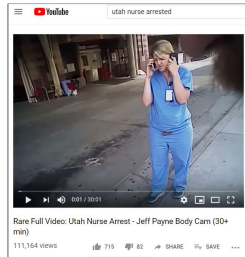
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## 30+ Minutes of Body Cam Footage



<https://www.youtube.com/watch?v=9Piuenvb-2g>

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## Background



- Hospitals frequently receive demands from police or other law enforcement officials
  - Not only written demands, but also verbal demands (in uniform; in the middle of the night; or immediately following an accident)
- Many times a conflict occurs when law enforcement seeks access to patients or requests patient information

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## What Are They After?

- Patient's name, condition, etc.
- Reports of anyone who presents with [fill in the injury]
- Lab results (e.g., blood alcohol)
- Other "evidence" (e.g., a bullet, bag of drugs, etc.), which might not *itself* be PHI
  - But does it include identifying information?
  - Did you provide a history/details about how it was obtained from the patient, etc.?

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## Background



- The "knee jerk" reaction might be to call law enforcement or give them the info
- But, wait ... what about HIPAA?
- Hospitals are not agents of law enforcement
- Must consider duties to the patient
- Carefully consider each situation before calling (or responding to) law enforcement

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## You Know the Rule

- **Individually identifiable health information is confidential by law and cannot be accessed, used or disclosed except according to an exception...**

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## Hypo #1

- A female in her mid twenties comes to the ED complaining of severe stomach pain. During the examination, the patient is reluctant to fully undress. A matronly nurse, Coco, convinces the patient that the providers need to understand the cause of the patient's pain, so the patient disrobes. After changing into the hospital gown, the patient breaks down into tears and tells Coco "he said he didn't mean to do it...but he knew what he did." After the exam, it's clear the patient was a victim of a sexual assault.

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## The Rule – "Required By Law"

- 45 CFR 164.512(f)(1): may disclose PHI
  - As required by law, including laws that require the reporting of certain types of wounds or other physical injuries



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## Nebraska's Wounds of Violence Reporting Statute

- Amended Neb. Rev. Stat. 28-902 (effective July 19, 2018)
- Expands definition of mandatory reporters to midlevel providers and nurses
- Sexual assault-specific reporting nuances
- AG guidance (July 2019)

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## But...What If...



- The sexual assault victim does not consent to a law enforcement report?
- The sexual assault victim is under 18?
- A pediatrician sees a minor for a sports physical and suspects malnourishment?
- The provider suspects an elderly patient's caregiver is neglecting the patient and writing checks without the patient's permission?

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## Hypo #2

- On July 4, two individuals involved in a fiery car crash were brought to the Roman County Hospital ED. Tests showed the driver was under the influence of sleeping pills. The passenger died due to multiple injuries. The next morning, Jimmy, a sheriff's deputy, shows up at the ED and demands the driver's medical records. The deputy does not have a subpoena or other written request for the information.

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## The Rule – "Pursuant to Process or Required By Law"

- In compliance with
  - Court order, court-ordered warrant, or a subpoena or summons issued by a judicial officer
  - Grand jury subpoena
  - Administrative request (subpoena, summons, civil investigative demand), provided that
    - The information sought is relevant and material to a legitimate law enforcement inquiry; and**
    - The request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which it is sought; and**
    - De-identified information could not reasonably be used.**

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## Administrative Requests

- Ask the deputy to complete the hospital's form
  - Statement that an investigation is ongoing
  - Include the three statements from previous slide
- Ask the deputy to get a subpoena (and include the three statements)
- If the deputy presents something in writing
  - Does it contain the three statements?
  - Can you infer the statements from the document?

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## The Rule – "Judicial and Administrative Proceedings"

- What about a subpoena *duces tecum*?
- (Not a disclosure to law enforcement – but you probably receive many of these!)
- Look to HIPAA subpoena rules
- Specific requirements:
  - Good faith attempt to notify the individual
  - Notice includes information about the proceeding
  - Time for objections has passed

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## But...What if...



- The name on the subpoena (or birth date, etc.) does not match your records?
- It only orders someone to show up at the courthouse on Tuesday – and doesn't say anything about records?
- The attorney who issued the subpoena won't answer the phone or won't re-issue a compliant subpoena?

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## Or...What If...



- Law enforcement knows an individual is at the hospital (not in custody) and insists on speaking with the patient
  - Did the patient opt out of your facility directory?
- The patient is still in the ED receiving treatment

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## Law Enforcement in Treatment Areas

- Patients have the right (unless overridden by some other authority) to privacy during examination/treatment
- Unless under arrest, ED patients should be asked for and give permission to be visited by (and to have PHI disclosed to) law enforcement

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## Law Enforcement in Treatment Areas

- Patient can ask law enforcement to leave the treatment room
- If not under arrest or in custody, the patient should be able to end an interview with law enforcement
- Document the identification of law enforcement personnel in treatment rooms (name, badge number, title)

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## Hypo #3

- Mike, an OR tech, uses his commute to catch up with his brother, who gets off his shift at the poultry plant about the time of Mike's commute. Yesterday morning, Mike's brother described a crazy scene at work where one of his coworkers threatened to "shoot up the place" later, but hurt his wrist in a slip, so went home. When Mike gets to work this morning, his first patient is a poultry plant employee who suffered a wrist injury the day before and needs surgery.
- Mike thinks the hospital needs to report this guy to the cops NOW.

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## The Rule - Identification & Location

- 45 CFR 164.512(f)(2): may disclose PHI
  - In response to a law enforcement official's request for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person.
  - May only disclose the following information
    - Name and address
    - Date and place of birth
    - Social Security Number
    - ABO blood type and rh factor
    - Type of injury
    - Date/time of treatment
    - Date/time of death
    - Description of physical characteristics
    - May not disclose DNA, dental records, or analysis of body fluids (e.g., blood alcohol)

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## But...What If...



- Mike's brother had filed a report with law enforcement and law enforcement contacts the hospital during the surgery?
- Notification upon discharge?
  - Remember, law enforcement entitled to "directory information" unless patient opts out
- Notification of delivery/birth?
- Request to notify of particular injuries?

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## Hypo #4

- At 10 p.m. on Saturday night, a patient comes to the ED with a group of friends. The patient was in a bar fight and has multiple deep cuts and a broken nose. The patient is clearly intoxicated and tests show his blood alcohol content is four times the legal limit. Thirty minutes later, the patient gets out his car keys, says he's "all good" and is leaving AMA. He tells staff his car is downtown and that he's going to walk down there, get the car, and go home (to a neighboring community 20 miles down the interstate).

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## The Rule - Avert a Serious Threat

- 45 CFR 164.512(j): may disclose PHI if the covered entity, in good faith, believes the use or disclosure
  - Is necessary to prevent or lessen the threat, including the target of the threat; or
  - Is necessary for law enforcement authorities to apprehend an individual; or
  - Is necessary for law enforcement to identify or apprehend an individual
    - Because of a statement made by an individual participating in a violent crime; or
    - Where it appears the individual has escaped from a correctional institution or lawful custody.

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## But...What If...



- A patient runs out of the ED with an IV catheter/port in his or her arm?
- Mike's coworker reiterates his threat to the hospital staff?
- A patient suffers from dementia and is threatening to "blow up the whole State of Nebraska?"
- The patient is involved in a nasty custody battle and says he's going to take matters into his own hands and go get what's rightfully his?

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## Surveillance Videos

- Common areas – hallways, activity rooms, waiting rooms, cafeteria, vending area, parking lot, entrance/exit
- Non-treatment areas – nursing stations, business office
- Treatment areas – exam/procedure rooms, consult rooms
- Where do patients, employees, visitors, contractors have an expectation of privacy?

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## Crime on Premises Exception

- May disclose PHI that the covered entity believes in good faith constitutes evidence of criminal conduct that occurred on the premises
- Do you need to disclose the whole video?
  - A screenshot?
- Nebraska Wounds of Violence Reporting
  - LB 677 (March 2012)
  - Assault on a health care professional

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### Teenager attacked while waiting in emergency room

Surveillance footage caught a teenager getting brutally attacked in an emergency room in Michigan.

Saturday, March 31st 2018, 7:21 PM EDT

**Updated:** Saturday, March 31st 2018, 7:33 PM EDT



<https://www.nbc-2.com/story/37853066/teenager-attacked-while-waiting-in-emergency-room>

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## Surveillance Takeaways

- Balance between patient privacy needs and organizational safety/security
- Most requests for surveillance footage will require a subpoena or court order

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## Body Cameras



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## Body Cameras

- Seemingly widespread adoption by law enforcement agencies
- Useful for criminal investigations and influencing officer behavior
- But how do facilities control when the cameras are turned "on" within the facility?

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## Body Camera Takeaways

- Cultivate a good working relationship with law enforcement
  - Could help law enforcement assist in avoiding other patients/information
  - Could help limit the further disclosures, if certain PHI is unintentionally captured
- Determine if (and under which circumstances) the organization will request law enforcement to limit the use of body cameras

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## Collaboration with Law Enforcement

- Discuss limitations and appropriate protocols for handling specific situations
- Provide education as necessary
- Improve processes for inter-agency communication
- Debrief problem situations as a group



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## More Recommendations

- Adopt HIPAA policies and procedures for each law enforcement exception
- Train workforce on the policies and procedures
- Periodic education/updates on specific scenarios
  - I.e., How to comply with/respond to subpoenas
  - I.e., Updated wounds of violence reporting (sexual assault)

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## Questions?

Michael W. Chase  
mchase@bairdholm.com  
(402) 636 – 8326

Abigail T. Mohs  
amohs@bairdholm.com  
(402) 636 – 8296

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