

Questions:

1. Does the HIPAA Privacy Rule require doctors to document all oral communications?

The HIPAA Privacy Rule does not require doctors to document all oral communications for treatment or payment purposes. However, a doctor may want to document oral communications for other reasons, such as creating a paper trail on a noncompliant patient. For example, if you have orally instructed a patient to take a particular medicine and avoid certain conduct, there is nothing about HIPAA that would require these oral directives to be in the chart. However, from a medical malpractice defense perspective, it would be nice to have a clean, concise paper trail supporting your advice.

Under the HIPAA Privacy Rule, however, doctors and other covered entities must keep records and account for certain disclosures of a patient's protected health information, even if the disclosure was oral. For example, if a doctor orally discloses the existence of a communicable disease to a public health authority, the doctor must maintain a written record of that disclosure, even if the disclosure was oral.

2. My state law authorizes health care providers to report suspected child abuse. Is it preempted by the HIPAA Privacy Rule?

No. The Privacy Rule allows doctors and other covered entities to disclose instances of child abuse to public health authorities. Thus, if your state law authorizes health care providers to report suspected child abuse, there is no preemption by HIPAA.

3. My state law is more protective of HIV information. Is it preempted by HIPAA?

No. You should think of the HIPAA Privacy Rule as establishing a floor for privacy protections of an individual's individually identifiable health information. Where it is possible to comply with HIPAA and an applicable state law (such as in this case, where HIPAA permits, but does not require, the disclosure of HIV information, and state law restricts the disclosure), and the state law is more protective, then the state law should be followed. By following the more restrictive state law, the covered entity complies with both state law and HIPAA, and there is no preemption.

Even in the unlikely event where a more restrictive provision in state law is contrary to the provisions of HIPAA (that is, it is impossible to comply with state law and HIPAA), HIPAA specifically provides that the more stringent state law will prevail.

4. May I disclose protected health information to authorities such as NIH without an authorization?

HIPAA permits certain disclosures to "public health authorities" without an authorization. A "public health authority" is defined by the Privacy Rule to mean "an agency or authority of the United States, a State, a territory, a political subdivision of a State or territory, or an Indian tribe, or a person or entity acting under a grant of authority from or contract with such public agency . . . that is responsible for public health matters as part of its official mandate." NIH would fall within this definition.

The Privacy Rule allows covered entities to disclose certain protected health information when required by federal, tribal, state or local laws, such as laws that would require the reporting of disease or injury, child abuse, birth or death.

For disclosures not required by other applicable law, a covered entity may disclose to a “public health authority” whose mandate includes collecting such information for the purpose of preventing or controlling disease, injury, or disability, including the conduct or public health surveillance, public health investigations and public health interventions, the minimum necessary information to accomplish the intended public health purpose.

5. May I make disclosures concerning workers' compensation if it is permitted under state law?

Yes. The Privacy Rule allows a doctor or other covered entity to disclose protected health information to comply with, and to the extent authorized by, applicable state law.

6. Is it marketing for a provider to describe his own products or services?

No. The Privacy Rule specifically excludes from the definition of “marketing” communications by a covered entity that describe the covered entity’s products or services. Thus, for example, an ophthalmologist can send to his or her patients an announcement regarding a new vision correction procedure.

7. Does the Privacy Rule make it easier for people or companies to market products or services to me?

No. The Privacy Rule actually makes it harder for companies to market products to patients. For example, under the Privacy Rule, doctors cannot provide patient lists to pharmaceutical companies for drug promotions without authorization. Likewise, hospitals are prohibited from providing companies the names of expectant mothers without authorization. These prohibitions were not in place in most states prior to the implementation of the Privacy Rule. Thus, the Privacy Rule has actually made it harder for companies to market products to patients.