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Inside this Issue

Review Your Patient Privacy Protocols

A significant change to the Washington Uniform Health Care Information Act (UHCIA) may have slipped under the radar. A new exception to the general rule of non-disclosure of medical records now exists. Under Substitute House Bill 1477 (SHB 1477),[1] now codified as RCW 70.02.205, a health care provider "may" provide medical records without a written authorization from the patient **or** the patient's personal representative, under the following circumstances:

1. The (a) disclosure is to a "family member," including a patient's state-registered domestic partner, "other relative," "close personal friend," or "other person identified by the patient"; **and** (b) the health care information (HCI) requested is "directly relevant" to that person's involvement in the patient's *health*

[1] See the link below for the full text of the bill: http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/House/1477-S.SL.pdf

care,[2] or *payment* for that health care; **or**

2. The "use or disclosure" of the health care information is for the notification or location of a family member, a personal representative, or other person responsible for the patient's health care, in order to inform those persons of the patient's "location, general condition, or death."[3]

The agency can make the above disclosures in two different circumstances. The first circumstance is when the patient is **not** present for the request. If the patient is **not** present when the HCI is requested, or locating the patient would be impracticable, then the HCP may "in the exercise of professional judgment, determine whether the use or disclosure is in the best interests of the patient"; and if the HCP does so, again, the HCP can only disclose the HCI that is "directly relevant" to the requestor's involvement in the patient's health care.

The second circumstance in which the above disclosures—to family members, "other relatives," "close personal friends" and "persons identified by the patient"—may be made is when the patient **is** present for the disclosure. If the patient **is** present, or is "otherwise available" prior to the disclosure, the HCI may be disclosed if the HCP (1) gets the patient's consent; (2) provides the patient with the opportunity to object to the disclosure and the patient does not object; **or** (3) the HCP determines, "based on the exercise of professional judgment," that the patient does not object to the use or disclosure.[4]

So what are the implications of SHB 1477, and how will this new exception work in practice? First, understand that under the "old law," a HCP could disclose HCI without patient authorization to an "immediate family member"; additionally, the HCP could disclose the HCI to someone that had a "close personal relationship with" the patient, but **not if** the patient told the HCP in writing not to disclose the information. SHB 1477 seems to indirectly amend this old law, and now adds new categories of persons: "family members"—not "immediate family

[2] Under RCW 70.02.010, "health care" means "any care, service, or procedure provided by a health care provider."

[3] For purposes of this article, we are mostly going to focus on the first type of disclosure, not the type involving the notification or location of a person representing the patient.

[4] This exception—when the patient is present—is relevant in the case of a patient that may or may not have the capacity to consent to disclosure, even when the patient is present—think an elderly patient accompanied by a grand-child, or an individual with autism. For purposes of this article, we are more concerned with the exception for when the patient is **not** present, because that sort of scenario seems ripe for informed-consent issues.

members"—"other relatives" and "persons identified by the patient."

Under SHB 1477, the HCP may disclose to these types of persons without patient authorization, (1) if the patient is not present or could not be located, or is present and does not object; **and** (2) this information is directly relevant to these persons' involvement in the patient's health care.

SHB 1477 seems to make it possible for a second cousin—an "other relative"—that is not the personal representative of the patient, to consent to the release of the HCI of that patient, so long as that second cousin is somehow involved in the health care of the patient. SHB 1477 seems to make it possible for a HCP to disclose HCI to a close personal friend of the patient, even if the patient would have, if available, said no in writing, as would have been the case under the "old law."

That is because SHB 1477 has provisions for when the patient is not available or locating the patient would be impossible. If the patient is not available to object, or lacks the capacity to object, and if the requestor is a "family member," "other relative" or "close personal friend" who is caring for the patient, then it is irrelevant whether the patient would object to the disclosure, under SHB 1477.

Remember that this new exception is a *permissive* disclosure, meaning that the HCP is not *required by law* to disclose the HCI. However, if the HCP chooses to make the disclosure to a "family member…other relative…close personal friend [or] other person identified by the patient," the HCP must use its professional judgment to discern whether disclosure would be in the best interest of the patient. This would mean asking questions of the requestor to ensure that they are caring for the patient in a compassionate manner, or are closely related enough to the patient to show that they have honest intentions.

Of course, the HCP should always require that identification be shown prior to disclosing the requested HCI. The HCP should ensure that the requestor is who they say they are, to show good faith.

Furthermore, the HCP must determine what portions of the HCI are "directly relevant" to the requestor's provision of health care to the patient. Let us pretend that a second cousin, who is a registered nurse, makes a request for the entire incident report involving the patient. The patient has diabetes and schizophrenia. But the second cousin only cares for the patient's diabetes, by administering insulin shots to the diabetic patient, and ensuring that the patient follows certain dietary restrictions. Pretend further that the medical incident report contains information about the patient's schizophrenic episode. This sort

of information would not be "directly relevant" to the second cousin's provision of health care to the patient. In other words, be careful with this new exception in SHB 1477, which is now codified at RCW 70.02.205.

Of course, any disclosure under this permissive exception must be the minimum necessary to accomplish the purpose of the request. *See* RCW 70.02.205 (3). Understand that this same permissive exception now exists under HIPAA as well, at 45 C.F.R. § 164.510 (b)(1)(i)-(ii).

But there is a second change to the UHCIA involving the permissive exception for avoiding "imminent danger." The old rule seemed to state that HCI may be disclosed to persons, on a need-to-know basis, when disclosure would "avoid or minimize and imminent danger" to the patient or "any other individual." Because of SHB 1477, the new law reads that disclosure is permissible if necessary to "prevent or lessen a serious and imminent threat" to the health or safety "of a person or the public." We take the first variation of this exception—changing "imminent danger" to "imminent threat"—with a grain of salt. However, the second variation—changing danger to patient or any other individual to "a person or the public"—broadens the exception somewhat.

Most importantly, if your agency is ever faced with a scenario in which disclosure would avoid an immediate threat to the public or any person, use your common sense, in good faith. Understand that your agency enjoys qualified immunity for the good-faith release of medical records, when there exists a clear exception permitting their release. And remember that this "imminent threat" exception is a permissive exception.

Appeals of LID Assessments Are Not as Easy as You Might Think

The Firehouse Lawyer has written extensively on the propriety of local governments using local improvement districts (LID) as an alternative funding mechanism.[5] Recently, the Washington Court of Appeals, Division Two, clarified what standards of review a court will apply when determining whether certain LID assessments are valid. In *Hamilton Corner v. City of Napavine*,[6] an owner of three properties within a LID alleged that the LID assessment was applied on a "fundamentally wrong basis," or was "arbitrary and capricious." The *Napavine*

[5] http://www.firehouselawyer.com/Newsletters/February2016FINAL.pdf
http://www.firehouselawyer.com/Newsletters/March2016.pdf

[6] http://www.courts.wa.gov/opinions/pdf/D2%204950 7-4-II%20Published%20Opinion.pdf

court clarified that these two different alleged standards mean the following:

First, an LID assessment is issued on a "fundamentally wrong basis" when a mistake in formulating the assessment was so fundamental that the *entire* LID, as applied to *all* property owners (not just the challenger), should be invalidated. *See Abbenhaus v. City of Yakima*, 89 Wn.2d 855, 859, 576 P.2d 888 (1978). In other words, an LID assessment is not wrong simply because one person disagrees with the assessment. The assessment must be wrongly calculated as applied to all property owners, according to the *Napavine* court.

Second, an LID assessment is "arbitrary and capricious" when there is not room for two opinions about whether the assessment is wrong. *See Abbenhaus*, 89 Wn.2d at 858-59. In other words, an LID assessment is not wrong just because a court may deem it wrong. Not to paint with too broad a brush, but essentially, if others could argue that the assessment is reasonable, then the assessment is not "arbitrary and capricious," according to the *Napavine* court.

Napavine does not break new ground. We need not discuss the facts from *Napavine* in detail here. But understand that the court essentially held that the "fundamental purpose" of the LID assessment at issue was to expand the public water system, and although the challenger was not receiving one of the benefits of that expansion (potable drinking water), the challenger was receiving water for fire suppression that the challenger did not receive before. Consequently, the court held that the LID assessment was not "fundamentally wrong" or "arbitrary and capricious."

SAFETY BILL

Safety Bill is on vacation this month visiting his new grand-daughter, and the column will appear next month for sure.

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