

# An Important Telehealth Message for NCPS Ethics Chair, Marvin Firestone, JD, MD

## 3/23/2020

### I. The 1135 Waiver Related to HIPAA Does NOT Mean Indiscriminate Texting is Permissible

The 13135 waiver related to HIPAA does not mean you can freely text protected health information. As the federal government has cautioned, even “[i]n an emergency situation, covered entities must continue to implement reasonable safeguards to protect patient information against intentional or unintentional impermissible uses and disclosures. Further, covered entities (and their business associates) must apply the administrative, physical, and technical safeguards of the HIPAA Security Rule to electronic protected health information.” (<https://www.hhs.gov/sites/default/files/hipaa-and-covid-19-limited-hipaa-waiver-bulletin-508.pdf>)

The relaxation of HIPAA is limited, as of last week when I did the research, to the fact that Secretary Azar exercised the authority to waive sanctions and penalties against a covered hospital that does not comply with the following provisions of the HIPAA Privacy Rule:

- the requirements to obtain a patient's agreement to speak with family members or friends involved in the patient's care. See 45 CFR 164.510(b).
- the requirement to honor a request to opt out of the facility directory. See 45 CFR 164.510(a).
- the requirement to distribute a notice of privacy practices. See 45 CFR 164.520.
- the patient's right to request privacy restrictions. See 45 CFR 164.522(a).
- the patient's right to request confidential communications. See 45 CFR 164.522(b).

(<https://www.hhs.gov/sites/default/files/hipaa-and-covid-19-limited-hipaa-waiver-bulletin-508.pdf>)

The waiver became effective on March 15, 2020, which is important, because there are further restrictions. When the Secretary issues such a waiver, it only applies:

- (1) in the emergency area identified in the public health emergency declaration;
- (2) to hospitals that have instituted a disaster protocol; and
- (3) for up to 72 hours from the time the hospital implements its disaster protocol. When the Presidential or Secretarial declaration terminates, a hospital must then comply with all the requirements of the Privacy Rule for any patient still under its care, even if 72 hours have not elapsed since implementation of its disaster protocol.

As we are all aware, even without 1135 waivers issued, HIPAA allows patient information to be shared, without the patient's authorization, under a “minimum necessary” standard for:

- treatment
- hospital operations
- to persons at risk of contracting or spreading a disease
- to prevent or lessen a serious or imminent threat; and
- other specified circumstances including certain disclosures to individuals involved in a patient's care and for notifications.

(45 CFR 164.512). Again this is federal law. I have reminded clients that they need to keep in mind that California has its own confidentiality laws that are often more restrictive and I have found no information waiving those laws. Bottom line is to use common sense (assuming someone has it) re patient confidentiality: keep such communications to the “minimum necessary” and related to one of those factors listed above and it is likely OK, particularly in this period of crisis response.

## II. Use of Out-of-State Practitioners During COVID Response

While CMS relaxed its restrictions on telemedicine and state licensure requirements, as we know each state has to act, as well. California issued guidance on how that would work including the following:

- No out-of-state practitioner may provide medical care until s/he receives approval of the Director of the Emergency Medical Services Authority for medical personnel and the Director of the Office of Emergency Services for nonmedical personnel;
- The request must come directly from the facility where the practitioner will work (or a staffing agency that identifies where the individual will work);
- The facility must represent that it is unable to secure sufficient staffing from California certified and licensed healthcare professionals;
- The Request for Temporary Recognition of Out-Of-State Medical Personnel During a State of Emergency form must be completed;
- A specific individual must be identified;
- EMS Authority “shall” make a written determination within two (2) – four (4) business days;
- The authority shall be in effect for a period of time not to exceed the duration of this emergency, or the time set by EMS, whichever is first;
- Practitioner may not provide medical care until approval is received; and
- Facility must monitor the practitioner and notify EMS of “any unusual occurrence within 24 hours of the event occurring.”

Until such elements are satisfied, the provisions of state law prohibiting practice without a CA license/certificate (Cal Bus. & Prof Code § 2052) still apply:

Visit the California Medical Association website to stay up to date on California guidelines

<https://www.cmadoocs.org/>