Patient Blogs, PHI and HIPAA—Social Networking and Patient Self-Disclosures as Waiver of PHI

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I. Introduction

Most providers are aware that the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) Privacy Rule restricts a “covered entity” from disclosing Protected Health Information (“PHI”). However, an ever-increasing number of patients are browsing and posting personal health care data on search engines, blogs or other web-based forums, intending to create a more transparent climate and improve the quality of the health care delivery system. Yet alongside the subjective comments, some patients are also disclosing what is normally PHI for public review, comment and general consumption. Transparency and improved health care might be the goal, but what is often correctly assumed to be a patient’s free speech prerogative can contain objectively incorrect/disparaging information about a provider.

Those scenarios that include PHI beg the essential question of whether such patient blog postings should be afforded the applicable HIPAA protections, prohibiting a provider’s response. An example of such scenario is as follows:

Patient posts a disparaging comment on a blog, containing certain identifiable information about the patient, to the effect that physician “was insensitive to the fact that [patient] had suffered through a previous miscarriage, and was abrasive when [patient] became emotionally overwhelmed about not being able to get pregnant.” Physician finds this comment posted on the blog when performing a routine Google™ search on her own name. Physician gleans the identity of the patient, checks the patient’s medical record and wishes to contest the fact that patient ever informed her of the miscarriage. Moreover, providing physician reads multiple replies to the patient’s blog posting, expressing their concern, vowing to spread the word and boycott the physician in the future.

II. HIPAA Privacy Rule

The U.S. Department of Health and Human Services, which is the federal agency assigned to enforce the HIPAA Privacy Rule, has stated that:

1 42 U.S.C. §1301, et seq.
2 45 C.F.R. §160.103
“A major goal of the Privacy Rule is to assure that individuals’ health information is properly protected while allowing the flow of health information needed to provide and promote high quality health care and to protect the public’s health and well being. The Rule strikes a balance that permits important uses of information, while protecting the privacy of people who seek care and healing.”

“Covered entities” include: health plans, health care providers and health care clearinghouses; “covered entities” are also responsible for ensuring compliance with the Privacy Rule by their business associates. PHI is defined as, “all individually identifiable health information held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper or oral.” Finally, individually identifiable health information is defined as, “information, including demographic data, that relates to: the individual’s past, present or future physical or mental health or condition; the provision of health care to the individual; or the past, present or future payment for the provision of health care to the individual, and that identifies the individual or for which there is a reasonable basis to believe can be used to identify the individual.” None of the definitions address any responsibility of or by the patient.

The Privacy Rule explicitly prohibits a covered entity from disclosing PHI, unless as permitted or required in the Privacy Rule, or as the individual who is the subject of the information authorizes in writing. Therefore, based upon these definitions and limitations, the physician in our example is apparently unable to respond to the patient’s blog, since a communication or “transmission” would certainly include that patient’s PHI. Such a disclosure of PHI could potentially lead to penalties under the relevant enforcement regulations. So, can the provider respond without corrupting the integrity of blogging patient’s PHI? Does the patient in the scenario have free reign to make statements disparaging the provider with no recourse?

Even though the HIPAA parameters define when covered entities can release the PHI of patients, the Rule is silent on the blog scenario mentioned above, where a patient self-discloses PHI while making objectively disputed comments that could be damaging to the provider. Because it was the patient who posted their own PHI, they have essentially self-disclosed and should not be afforded any protections for such PHI. It would be disingenuous to claim a patient’s self-disclosure has rendered the health information no longer defined or protected to any extent as PHI, since the relative “balance” suggests that a patient has a right to prevent providers’ unnecessary, or unauthorized, disclosures. However, it is equally important for the provider’s interests to be “balanced,” supporting

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5 45 C.F.R. §§160.102, 160.103
6 45 C.F.R. §160.103
7 Id.
8 45 C.F.R. §164.502(a)
10 Author is unaware of any provision, rule or regulation in HIPAA that expressly permits provider/covered entity to impeach the credibility of a patient’s comments regarding the PHI to the extent already disclosed by the patient; likewise, is author unaware of any provision, rule or regulation in HIPAA that expressly prohibits such action.
the notion that patient’s PHI is no longer protected to the extent of the self-disclosure. This is a discrete balance, yet if HHS is sincerely interested in striking a balance, providers should be afforded the ability to respond to patients when they publish their individual PHI, and such publication contains objectively inaccurate, damaging comments.

III. Analogous Concept: Client’s Self-Disclosure as Waiver Under Attorney-Client Privilege to Extent of Such Disclosure

The concept of waiver through patient self-disclosure finds an apt analogue in waiver of the attorney-client privilege. It is well founded that: “The attorney-client privilege prevents disclosure of communications between an attorney and client that were made while seeking or rendering legal services.”\(^\text{11}\) This fundamental concept provides that the client is afforded protections under the rule, unless, as noted by Federal District Judge Schiller:

“The Court finds most persuasive the argument that when one party intentionally discloses privileged material with the aim, in whole or in part, of furthering that party’s case, the party waives its attorney-client privilege with respect to the subject-matter of the disclosed communication; \textit{Valenti v. Allstate Ins. Co.}, 243 F.Supp.2d 200, 220 (M.D.Pa.2003)(“Counsel is reminded that privilege is a shield not a sword.”).”\(^\text{12}\)

In addition, most states have strict rules preventing attorneys from disclosing their client’s privileged/confidential information, punishing the attorney unless those disclosures fall within one of a very few exceptions. Yet, there are exceptions, such as those found in the Texas Rules of Professional Responsibility: “(c) A lawyer may reveal confidential information: . . . (5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client; (6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.”\(^\text{13}\) Under the same theory of client’s waiver of the protections afforded them under the attorney-client privilege, a patient who self-discloses PHI should likewise be found to have waived the protections of their PHI, to the extent of such self-disclosure. Therefore, much as the attorney is able to use once privileged information after client’s disclosure, the provider should able to use patient’s PHI in responding to the extent of such patient’s self-disclosure.

IV. Possible Provider Responses


\(^{13}\) Rule 1.05 Confidentiality of Information, Texas Rule of Professional Conduct (Source: TEX. GOVT CODE ANN. §§ 82.001-400 (Vernon 1998)).
Considering the HIPAA Privacy Rule and the concept of a patient waiver to the extent of self-disclosure, providers might pursue the following methods of managing the blogging patient scenario:

A. Contact the Patient\textsuperscript{14}

One approach is to directly contact the patient in writing through the mail, telephonically, or by email to request that the patient to remove all postings of this nature and refrain from any future postings.

The downside to this direct contact approach is ostracizing the patient, who could possibly turn around and post another blog entry concerning your actions about their original posting, further exacerbating the incendiary nature of the obviously deteriorating relationship. Additionally, it could put the patient in a very defensive stance, potentially prompting, albeit a worst case scenario, administrative or legal action to counter the provider’s contact, thus creating an escalated situation in which there is not real winner, even if the provider eventually prevails.

B. Contact the Blog Host/Administrator\textsuperscript{15}

Another approach is to contact the web host or blog site administrator/director/manager, in an attempt to have the comments removed, explaining that such comments are disputed, based upon direct and objective evidence to the contrary.

Even though there is no obligation for the web host or administrator to remove the blog posting, generally speaking most web hosts and administrators value the veracity of their site and will work with the party requesting removal.\textsuperscript{16} However, web-hosts and administrators are merely providing the space on the Internet for publications by their members or participants and usually don’t claim ownership to the material or the substance of any blogged content. In fact, should the host be so inclined, they could highlight the comments to further agitate the party requesting removal. This would obviously frustrate the process of requesting removal from the web host or administrator and should be considered by the provider. This could also alienate the patient just as direct contact might.

C. Litigation

If contacting, or attempting to contact, either the patient or the blog host/administrator doesn’t resolve the dispute, an alternative for the physician is to file a civil suit. Most jurisdictions allow plaintiffs to seek redress for defendant’s false publications, whether written or spoken, under one of the various forms of the theory generally referred to as defamation. Without inundating this article in the particular elements and intricacies

\textsuperscript{14} http://nhsblogdoc.blogspot.com/, various blog entries discussing and promoting direct, sincere contact of the offending posting party to resolve false, misleading or disparaging comments appearing online (last accessed, September 26, 2008).
\textsuperscript{15} http://www.division42.org/MembersArea/IPfiles/Spring08/featured/google_factor.php, for the general premise of contacting the website owner or administrator when disputes of this nature arise (last accessed, September 26, 2008).
\textsuperscript{16} \textit{Id.}
of defamation, most jurisdictions require some type of damage/injury (i.e. pecuniary, reputation, etc.) to proceed with a claim for defamation. Physicians are likely going to have dissatisfied patients posting any number of subjective grievances on quality of care on blogs and websites. However, if the physician can show that the patient’s publication (legal term of art, generally referring to the written or spoken statement) was objectively false and caused injury, then a claim for defamation may be the appropriate route, especially if the patient refuses to cease/remove publication[s] and/or the blog host/administrator is unwilling to remove the patient’s publication on the blog. Yet it is also a long and costly route, as with almost all litigation.

Though a civil lawsuit against the individual patient for defamation might seem attractive to the physician under relevant state or federal laws, there is little chance for successful redress against the blog host/administrator. Under both U.S. Supreme Court jurisprudence before, and those Federal Court decisions interpreting, the Communications Decency Act (CDA) of 1996, blog hosts/administrators are generally protected from defamation liability based upon a wide array of fundamental theories that are beyond the scope of this article.17

D. Form Solution for General Problem?

One potential preemptive measure that providers might take to deter patient blogs/internet postings, would be to include the following disclaimer/notice of waiver on standard HIPAA, or other provider, forms that patients routinely sign:

“The integrity of your PHI is important to us. You are hereby notified that any self-publication (including the posting, broadcast or transfer) of your PHI, that reveals or otherwise contains individually indentified provider information posted on a blog, internet website, or other printed/electronic form or forum, constitutes a waiver of any protections afforded such PHI under HIPAA, as well as any other applicable regulations, rules or laws. Further, any self-publication of your PHI permits provider to respond to the original publications to the extent necessary to defend, limit and challenge the factual assertions contained within such publications. Any and all comments and publications will be considered self-disclosed/waived protections of your PHI to the extent such publication is made.”

Even if the disclaimer above were defeated/deemed ineffective upon the appropriate challenge, it might serve to put patients on notice that providers are aware of the publications on blogs, websites, and other venues by patients, thereby reducing malignant patient postings and the correspondent time and financial burden of administrative policing and responding in which providers would be otherwise forced to engage.

V. Conclusion

When considering the balance HHS seeks to promote in the HIPAA Privacy Rule, patients’ health care information has been afforded a great deal of protection. Yet when patients wantonly publish information on a blog or website which is objectively false and/or legally damaging to a provider, such self-disclosures/waivers should not be protected with blind indifference to the providers’ legitimate interests. Congress should strongly consider addressing the scenario of patient self-disclosures of PHI through legislation or regulations, as more patients are turning to web-based sites and blogs for health related decisions. After all, rules regarding PHI that better define the duties of both patients and providers will promote transparency, clarity and quality improvements across the board, promoting a true balance.