HIPAA Confidentiality Regulations and Collateral Source Information

Do confidentiality regulations require that clients sign releases of information before we talk to family and friends?

> Many of the behavioral health care providers we talk to tell us that they cannot talk to family and friends before they have a HIPAA release of information form signed.
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> Because some clients may not provide reliable information, obtaining information from collateral sources (other providers, their records, family, and friends) can be critical in providing good quality care, preventing suicide, and preventing violence to others. And in high-risk situations, the information is often needed as early as an intake assessment.
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> HIPAA regulates when healthcare providers can disclose information. It does not prohibit the receipt of information when the provider does not disclose information.
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> The federal Office for Civil Rights, which enforces HIPAA, explains,
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> > *"...HIPAA in no way prevents healthcare providers from listening to family members or other caregivers who may have concerns about the health and well-being of the patient, so the healthcare provider can factor that information into the patient's care." OCR February 20, 2014.*
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> Therefore, a provider could hypothetically approach a family member in the provider's waiting room and ask if the family member has anything to tell the provider. No information is disclosed by the provider in the encounter, and the provider could certainly listen to what the family member has to say.

HIPAA exceptions

Assume hypothetically, on the other hand, that a family member is at home rather than in the waiting room. If the provider calls a family member, the provider will have to disclose the provider's identity and ask questions about the client. This would necessarily disclose that the client is a patient receiving services. The disclosure is prohibited unless an exception to the rule of nondisclosure applies. But there are exceptions.

An exception we often see overlooked is the serious and imminent threat exception. Take, for example, the following hypothetical situation. Two months ago, a 26-year-old male, adult client living at home with his mother and diagnosed with paranoid schizophrenia and alcohol use disorder attacked his mother and beat her up. Prior to the attack, the client was agitated, slurring his words, and experiencing insomnia. Further, he often accused his mother of plotting to kill him. He had been taking his medication only intermittently. Now, the same client is in individual therapy exhibiting the same symptoms and has once again been taking his medication only intermittently.

In many states, a "duty to warn" is triggered only when the patient communicates a serious threat of violence. However, in our hypothetical, the client has not communicated an actual threat. Nonetheless, from the circumstances it appears that there is likely to be a serious and imminent threat to the mother's safety and that it would be advisable to contact the mother, to assess her potential vulnerabilities, and to suggest appropriate action for her safety. The mother, for instance, might have a serious mental illness herself which could interfere with her self-protection.

Providers often tell us that in these circumstances they think they could not talk to the mother without a HIPAA release, but the serious and imminent threat exception could apply. The federal Office for Civil Rights explains the threat exception as follows,

> When a patient poses a serious and imminent threat to his own or someone else's health or safety, HIPAA permits a healthcare professional to share the necessary information about the patient with anyone who is in a position to prevent or lessen the threatened harm—including family, friends, and caregivers — without the patient's permission. OCR, Additional FAQs on *Sharing Information Related to Treatment for Mental Health or Substance Use Disorder-Including Opioid Abuse, 12.19.17*.

It is important to remember that HIPAA defers to the provider's professional judgment in determining whether the threat is sufficiently serious and imminent,

> HIPAA expressly defers to the professional judgment of health care professionals when they make determinations about the nature and severity of the threat to health or safety. See 45 CFR 164.512 (j) (4). OCR, Additional FAQs on Sharing Information Related to Treatment for Mental Health or Substance Use Disorder-Including Opioid Abuse, 12.19.17

The deference to professional judgment is important because as a matter of public policy it is better to resolve doubts in favor of public safety.