

# HIPAA PRIVACY BULLETIN

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## INTRODUCTION

The privacy rule promulgated by the Department of Health and Human Services (HHS) requires covered entities, except as provided in the rule, to obtain an individual's consent prior to using or disclosing Protected Health Information (PHI) to carry out Treatment, Payment or Health Care Operations (TPO). 45 C.F.R. §164.506(a)(1). In July, HHS also published its official guidance for the regulations which attempts to clarify the various requirements of the rule. The requirements of a consent were covered in the last two newsletters. However, the guidance provides additional information applicable to particular situations.

### **WHAT IS THE DIFFERENCE BETWEEN A CONSENT AND AN AUTHORIZATION?**

First, a consent is specific to the health care provider who directly provides treatment to the individual. The consent gives that provider permission to use and disclose PHI for TPO. A health care provider may condition treatment on the signing of a consent form. A health care provider is only required to obtain one consent for all uses and disclosures for TPO. The consent form is not required to specify the information to be disclosed or the recipient of the information. Generally, health plans and health care clearinghouses are not required to obtain the parties' consent to TPO, but can, in effect, rely on the consent given to the health care provider for these purposes.

An authorization, on the other hand, is more detailed, specifying the information to be disclosed and the precise purpose for the disclosure. The authorization then permits the covered entity to disclose information, other than for TPO, or to disclose information to a third party consistent with the authorization. Health plans and Health care clearinghouses must have the parties' authorization in order to disclose PHI for purposes other than TPO. Unlike a consent, an authorization has an expiration date and a covered entity may not condition treatment or enrollment on the signing of an authorization. Authorizations will be covered in more detail in future newsletters.

### **WHERE A COVERED ENTITY HAS OBTAINED BOTH A CONSENT AND AN AUTHORIZATION, WHICH ONE GOVERNS?**

When an individual has provided both an authorization and a consent, the covered entity must comply with the more restrictive document. The covered entity may also attempt to resolve any conflict directly with the individual. This can be done, for example, by requesting a new consent or discussing, and documenting, the individual's preferences.

### **CAN A PHYSICIAN ORDER A CONSULT WITHOUT VIOLATING THE RULE?**

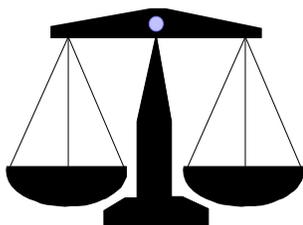
Yes. This falls under the definition of "treatment" and, therefore, so long as the provider with the direct treatment relationship with the patient has obtained consent to use that patient's health information for treatment purposes a second consent would not be required to consult with another physician.

**CAN A PROVIDER USE PHI TO SET UP AN APPOINTMENT OR SCHEDULE SURGERY FOR A NEW PATIENT WITHOUT FIRST OBTAINING CONSENT?**

Under the current rule, the answer is "No." However, HHS has recognized this as a problem and has pledged to modify the rule to allow this practice.

**WHERE AN INDIVIDUAL ENGAGES IN A COURSE OF TREATMENT INVOLVING MULTIPLE VISITS, MUST THE HEALTH CARE PROVIDER OBTAIN CONSENT FOR TREATMENT PRIOR TO EACH**

No. A health care provider only needs to obtain consent once for use of disclosure of PHI where there is a connected course of treatment or even where treatment is for an unrelated condition. A new consent is only required where a prior consent has been revoked.



**DOES A HEALTH CARE PROVIDER NEED A NEW CONSENT FORM TO USE OR DISCLOSE INFORMATION OBTAINED PRIOR TO THE COMPLIANCE DATE?**

No. The privacy rule permits a covered entity to continue to use or disclose health information which it has on the compliance date pursuant to a prior consent obtained by the individual prior to the compliance date. Similarly, health plans and health care clearinghouses may continue to use or disclose health information obtained prior to the compliance date for their own TPO purposes.

ATTENTION READERS, the editors of Thomson, Rhodes & Cowie *HIPAA Privacy Bulletin* invite you to submit questions you may have dealing with HIPAA issues. The editors will compile questions received and periodically provide answers to recurrent issues. Submission of a question is no guarantee that an answer will be provided, but we will make every effort to answer as many questions as possible. Of course, for specific legal advice the reader should seek counsel from a qualified health care law attorney.

Send questions to:

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Prior issues are available on request. Please direct inquiries to L. Jane Charlton or William James Rogers, Thomson, Rhodes & Cowie, P.C., Tenth Floor, Two Chatham Center, Pittsburgh, Pennsylvania 15219, (412) 232-3400, [TRC\\_Law@nauticom.net](mailto:TRC_Law@nauticom.net).