State Health Privacy Regulation--the Latest Controversy

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One of the most confusing, complex, and controversial aspects of the health information confidentiality debate is the issue of federal preemption of state laws, regulations, and statutes. Some organizations, like AHIMA, support complete preemption of state laws to provide for a uniform national standard for release and disclosure of health information. This includes treating all —from mental health to genetics to communicable diseases—health information at an equally high standard, with strict penalties for the wrongful disclosure of health information. Other organizations and groups support the establishment of a federal "floor" of protections that would not preempt stronger state laws and would also permit states to continue enacting laws that are stronger than the federal floor. Some have tried to balance the difference between complete preemption and a federal floor by letting stronger state laws remain in place and establishing a cut-off date for states to enact stronger legislation. Still, some organizations support no preemption whatsoever.

One reason for the confusion and controversy: until recently, there has been no comprehensive review of how each state has handled health information. However, 18 months ago, Janlori Goldman, director of the Health Privacy Project at the Georgetown University Institute for Health Care Research and Policy and long-time associate of AHIMA, began reporting the various states' health information policies. The result is a comprehensive report titled *The State of Health Privacy: An Uneven Terrain*.

The report is "specifically and exclusively a survey of statues, not laws"[1] and contains a summary of each state's health information confidentiality statutes. The report itself is not exhaustive and focuses primarily upon the uses and disclosures of information within the context of healthcare treatment and payment. Rather than addressing each state's laws on workers' compensation, public health reporting, adoption records, birth and death records, motor vehicle requirements, minor's rights, and other areas, the Health Privacy Project gives an in-depth look at the laws in selected states to show "the breadth and depth of the state laws that relate to the confidentiality of health records."[2]

In reviewing existing privacy and confidentiality protections, the Health Privacy Project reinforced the fact that every state acts differently and in accordance with its own time lines. This means that each state has its own unique methods in dealing with the issue and that health privacy laws may be found almost anywhere in a state's statutes. The report also notes a number of initial observations concerning the summaries of state statutes:

- states legislate and regulate health privacy by entity
- most state statutes were never intended to be comprehensive
- an ethical duty to maintain confidentiality is often assumed
- state laws have not kept pace with changes in healthcare delivery and technology

Some claim that the states' abilities to address the privacy and confidentiality issue in this manner have permitted them to create good laws that address specific consumer issues. Although some states have adequately—or even strongly—addressed specific consumer issues, the inability to address healthcare privacy and confidentiality in a comprehensive manner remains a problem. Through legislating and regulating by entity, the lack of comprehensive laws, the assumption that a healthcare professional will maintain confidentiality based upon ethical duties, and the inability of states to keep pace with changes in healthcare delivery and technology implementation and compliance of these laws and statutes become a confusing patchwork that puts information at risk.

In spite of the number of interacting components of the healthcare system affecting healthcare confidentiality, the important issue continues to be maintaining individuals' health information. Therefore, AHIMA supports establishing a single national standard that protects information throughout the healthcare system, regardless of these components. In addition, a single national standard will help healthcare providers and patients better understand the flow of health information and the methods to keep it confidential.

The Health Privacy Project had the difficult task of wading through the multitude of existing state statutes. In the end, it defined four broad categories of state statutes: patient right of access, restrictions on disclosure, privileges, and condition-specific requirements.[3] The key findings in each category are as follows:

Patient Right of Access

- states vary widely in the rights they grant to patients to receive and copy their own medical records
- 33 states provide a right of access to hospital records, 13 states provide a right of access to HMO records, and 16 states provide a right of access to insurance records
- all state statutes granting people a right to see and copy their own medical records limit that right with a set of exceptions
- many states have granted patients the right to amend or correct their medical information, particularly when insurance companies hold the records
- most states allow a person or entity to charge patients for copies of their medical record

Restrictions on Disclosure

- states vary widely in terms of the restrictions or prohibitions they impose on disclosures of medical records and medical information
- state statutes prohibit a person or entity from disclosing information unless certain conditions are met
- the most common restriction found in state statutes: patient authorization must be secured prior to health information being disclosed
- statutes specify numerous exceptions (e.g., treatment, payment, auditing, quality assurance, research) to the general authorization rule in which a person or entity may disclose information without patient authorization
- some states do prohibit the redisclosure of medical information. In such instances, an entity that receives medical information is prohibited from redisclosing unless a separate authorization is secured or the disclosure is in keeping with the statutory requirements.

Privileges

- privilege applies to a patient's or provider's right to keep certain communications confidential in a legal proceeding. It allows a patient in a legal or quasi-legal proceeding to refuse to disclose and to prevent others from disclosing certain confidential information (usually communications) obtained during the course of diagnosis and treatment.
- the report attempted to note where a state has worded its statutory privilege in such a way as to extend it beyond a legal or quasi-legal proceeding

Condition-specific Requirements

- nearly all states have laws imposing condition-specific privacy requirements, most often to shield people with mental illness, communicable diseases, cancer, and other sensitive stigmatized illnesses from broad disclosures
- in some cases, the condition-specific requirements allow for greater disclosure of the information
- most of the condition-specific requirements existing at the state level were enacted with mandatory reporting laws
- all states have laws designed to control the spread of contagious diseases, which include requirements that named individuals with particular illnesses or conditions be reported to health authorities

The report concludes "there is little probability that any federal legislation could match the breadth and scope of the existing state laws."[4] It also states, "any federal law that fully preempted state law would eliminate for consumers some of the rights and protections they currently enjoy, and disrupt current state legal and regulatory structures."[5] The project's rationale for this position is as follows:

- states have been the first to respond to concerns about health privacy and have enacted many strong protections to address these concerns
- state laws address a level of detail not considered in any of the federal proposals
- state law is extensive, and it is impossible to predict the full impact of full federal preemption

Although AHIMA disagrees with the report's final conclusions concerning federal preemption (as addressed earlier), the Association commends the Health Privacy Project for taking on this task and providing a comprehensive summary of state health privacy statutes. It will be a valuable resource for all involved parties in the health information confidentiality debate. To download a copy of the report, go to the Health Privacy Project Web site at http://www.healthprivacy.org.

As the August 21, 1999, deadline for Congress to pass health information confidentiality legislation has passed, the task is formally in the secretary of Health and Human Services' realm. Even so, we do not expect Congress to ignore the issue. AHIMA will continue to be engaged in the deliberations surrounding this issue and will keep members informed of all-important developments.

Notes

1. Available online at www.healthprivacy.org/resources/statereports/.
2. *Ibid*.
3. *Ibid*.
4. *Ibid*.
5. *Ibid*.

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