

# Preventive Action

The Quarterly Risk Management Newsletter for Policyholders of FPIC

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## HIPAA PRIVACY RULE:

*Many dentists have fears regarding implementation of the HIPAA's Standards for Privacy of Individually Identifiable Health Information (the "Privacy Rule"). The Privacy Rule is intended to protect a patient's Protected Health Information (PHI) without interfering with the access to or quality of care. The following is a brief overview of the impact of the Privacy Rule on the dentist's practice.*

### WHAT IS HIPAA?

The Health Insurance Portability and Accountability Act of 1996 has several components, including insurance portability, fraud and abuse, health revenue issues, tax issues related to health, group health plans, and administrative simplification. Under the Administrative Simplification component of HIPAA, there are three subparts including electronic data interchange, the Privacy Rule, and Security. In 2000, Health and Human Services (HHS) issued final regulations concerning the Privacy Rule that were later amended in August of 2002. The deadline for compliance with the Privacy Rule is April 14, 2003.



made for the provision of health care to an individual. It includes any personal health information that may connect the patient to the information, such as the patient's name, address or social security number.

The Privacy Rule allows covered entities, such as dentist's practices, to use and disclose protected health information for three general purposes without first obtaining the patient's authorization: treatment, payment, and healthcare operations. There are a few other permitted uses of PHI that do not require the patient's authorization, including reporting for public health, law enforcement, tissue and organ procurement, to medical examiners and coroners, and for oversight activities, such as audits.

### PRIVACY NOTICE

The Privacy Rule requires practices to provide patients with a Privacy Notice detailing the rights and responsibilities of the patient and

*Continued on page 2*

### TABLE OF CONTENTS

Page 1	<i>HIPAA Privacy Rule: It's not as Bad as you've Heard</i>
Page 3	<i>Privacy Officer Job Responsibilities</i>
Page 4	<i>Acknowledgement of Receipt of Notice of Private Practices RX Loss Prevention</i>
Page 5	<i>Steps to Compliance</i>
Page 6	<i>Frequently Asked Legal Questions</i>

### PRIVACY RULE

The Privacy Rule controls the use and disclosure of protected health information (PHI) and applies to health care providers, health plans, and health care clearinghouses, referred to as "covered entities." Protected health information includes any information, oral, recorded, written, or electronic, which relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or billing and payments



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For comments, questions, or to obtain additional copies contact the FPIC Risk Management Department at 800-741-3742, ext. 3016. [rm@fpic.com](mailto:rm@fpic.com)

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Continued from page 1

the practice in protecting the privacy and confidentiality of PHI.

The Privacy Notice should be shared with patients upon delivery of service, or as soon as feasible in an emergency. It must be available to patients in print, written in clear, understandable language, and be posted at each service site. The notice should contain the patient's rights, the practice's duties, and a description of the types of uses and disclosures of PHI. The practice must attempt to obtain the patient's written acknowledgement that the privacy notice was provided. Each time the practice's privacy policies change, the privacy notice should be revised. Written acknowledgement must be obtained with each privacy notice revision. The patient acknowledgement(s) and a copy of the privacy notice and each revision must be maintained for at least six years. A written acknowledgement may serve for the entire length of treatment unless the privacy notice is revised.

### MINIMUM NECESSARY

Each practice must make reasonable effort to limit use and disclosure of PHI to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request. This means that disclosures of PHI by staff should be limited to the minimum necessary to accomplish their specific job function. Job descriptions for staff members should identify the types of information an employee may access and disclose.

### AUTHORIZATION

In most situations, the patient's authorization must be obtained when PHI is used or disclosed to any third party for purposes other than treatment, payment, and operations. For instance, if a product representative requests the names of patients for marketing, the patient's authorization must be obtained and must be specific for the use or

disclosure. It is only used for that purpose and is time limited.

The Privacy Rule distinguishes between uses and disclosures for payment, treatment, and healthcare operations for which no consent or authorization is required and authorizations where consent is needed, such as marketing, fundraising, and employment determinations. Unless disclosure is for payment, treatment, or healthcare operations or unless an exception applies, PHI cannot be disclosed absent an authorization. Where an authorization is needed, in order to be valid, several defined provisions must be included in the form and particular procedures must be followed in accordance with the Privacy Rule.

### MINORS

In general, the scope of the personal representative's authority to act for a minor patient under the Privacy Rule derives from his or her authority under applicable law to make healthcare decisions for such patient. Therefore, the Privacy Rule allows parents, as personal representatives, to access patient information for their minor children. However, there are a few exceptions when parents are not permitted access to minor's health information, such as health care treatment that a minor may consent to without parental consent, in cases of abuse or neglect, or if the court authorizes someone other than the parent to make treatment decisions.

### BUSINESS ASSOCIATES

The HIPAA Privacy Rule applies only to covered entities – health plans, health care clearinghouses, and certain health care providers. Most dentists do not carry out all of their healthcare activities and functions by themselves. Instead, they often use the services of a variety of other persons or businesses. The Privacy Rule allows physicians to disclose PHI to these "business associates" if the

Continued on page 3

providers obtain satisfactory assurances that the business associate will use the information only for the purposes for which it was engaged by the covered entity, will safeguard the information from misuse, and will help the covered entity comply with some of the covered entity's duties under the Privacy Rule. Typical business associate functions include: answering services, independent contractors for transcription, billing and collections, claims processing, and accounting.

## INTERACTION OF PRIVACY RULE WITH FLORIDA LAW

The Privacy Rule establishes, for the first time, a foundation of Federal protections for the privacy of protected information. The Privacy Rule does not replace Federal, State, or other law that grants individuals even greater privacy protections, and dentist practices are free to maintain or adopt more protective policies or practices.

## COMPLIANCE EFFORTS

The Privacy Rule generally requires physician compliance as follows:

- Notify patients about their privacy rights and how their information can be used.
- Adopt and implement privacy procedures for the practice.
- Train employees so that they understand the privacy procedures.
- Designate an individual to be responsible for seeing that privacy procedures are adopted and followed.
- Secure patient records containing PHI so that they are not readily available to those who do not need them.

Failure to comply with the provisions of the Privacy Rule may result in civil penalties of \$100 per violation up to a maximum \$25,000 per year for the same violation and criminal penalties of up to \$250,000, imprisonment, or both for intentional violations. The HIPAA Privacy Rules are the first

federal guidelines aimed at regulating the privacy of health information. Most practices are sensitive to their patient's rights for privacy and already take effective measures to protect patient privacy. However, in light of the requirements set forth by the Privacy Rule, the policies and procedures of your practice should be reviewed to ensure proper compliance.

FPIC offers a one-hour training program on Privacy Rule Compliance. If you are interested in scheduling this inservice or need further assistance, please e-mail [santamaria@fpic.com](mailto:santamaria@fpic.com) or call FPIC's Risk Management Department at 800 741 3742, ext. 3016.

Sample compliance tools, such as Privacy Notices, and additional reference material may be obtained by visiting the FPIC risk management website at [www.medmal.com](http://www.medmal.com). or by contacting the Risk Management Department. Other helpful websites include:

[www.ahima.org](http://www.ahima.org)  
[www.ama-assn.org](http://www.ama-assn.org)  
[www.hhs.gov/ocr/hipaa](http://www.hhs.gov/ocr/hipaa)  
[www.hipaadvisory.com](http://www.hipaadvisory.com)  
[www.himss.org](http://www.himss.org)  
[www.mgma.com](http://www.mgma.com)

## SAMPLE

### PRIVACY OFFICER JOB RESPONSIBILITIES

The Privacy Officer is responsible for oversight of all activities related to the privacy and confidentiality of protected health information. Basic Responsibilities of the Privacy Officer:

- Keep abreast of current federal and state privacy laws, as applicable to the practice. Keep others abreast of applicable privacy laws as indicated.
- Assess and analyze privacy safeguards.
- Develop, implement, and oversee privacy policies and procedures.
- Maintain appropriate privacy notice, authorization, and other administrative tools as required by practice policy and applicable laws.
- Establish and implement a grievance and complaint procedure for managing and documenting patients' complaints and grievances concerning privacy.
- Establish and implement procedures for managing patients' requests for PHI copies, disclosure accountings, and patient access and amendment.
- Ensure appropriate privacy training for employees, medical staff, and other personnel as indicated. Maintain documentation of training.
- Ensure periodic assessments are conducted to identify privacy gaps or high-risk areas.
- Monitor ongoing compliance with privacy practices.
- Monitor all new policies, procedures, services, and equipment for compliance with current privacy regulations.
- Monitor staff activities related to compliance with current privacy policies.
- Serve as liaison with legal counsel, legal entities (such as the Office of Civil Rights), patients, and internal and external auditors in privacy matters.
- Identify all business associates and ensure business contracts are maintained.
- Ensure that all PHI, as well as documents concerning compliance with privacy laws and policies, are maintained securely and appropriately.

EXAMPLE

## ACKNOWLEDGEMENT OF RECEIPT OF NOTICE OF PRIVACY PRACTICES

I acknowledge that I have received a copy of (Provider's Name) \_\_\_\_\_

Notice of Privacy Practices with the effective date of \_\_\_\_\_

\_\_\_\_\_  
Signature of Patient/Patient Representative

\_\_\_\_\_  
Date

\_\_\_\_\_  
Relationship to Patient

*(Note: Providers are required to make good faith efforts to obtain acknowledgement that each patient has received a Notice of Privacy Practices. The regulation does not specify how that acknowledgement is documented. This sample form is meant to serve as an example for one way that a provider could document the required acknowledgement.)*



## LOSS PREVENTION

Consider the case involving a 49-year-old male who presented to our insured dentist for dental care with a medical history of squamous cell carcinoma of the tongue and HIV positive. The patient last sought dental care five years earlier. Oral examination revealed decayed teeth 1 through 5, 13 through 19, 25, and 29 through 32; with restored teeth on 4, 5, 8, 9, and 30; and furcation involving teeth 3 and 19. The treatment plan was to extract teeth 1 through 3, 14 through 18, 30 and 31; eliminate caries and placement of partial upper and lower dentures. A month later, teeth 2 and 3 were extracted; however, the patient failed to return for further care until 16 months later when he presented insisting on extraction of remaining teeth for dentures. Oral examination at this time revealed missing teeth 2 and 3 and an abscess on 1 and 16, as well as a fungal infection of the mouth. Approximately 30 days later tooth 1 was extracted. When the patient was seen a month later, he complained of severe pain and insisted that teeth 30, 31, and 32 be extracted. Our insured removed the teeth without incident and scheduled further extractions the following month; however, the patient failed to return for further care. The patient subsequently filed a claim alleging that he developed radionecrosis of the right mandible because of our insured's treatment. The patient argued that had he been advised that he was at increased risk for radionecrosis, he would not have undergone the extractions.

Although experts could support our insured's care and treatment, a compromised settlement was necessitated because of a lack of documentation pertaining to informed consent.

*NOTE: FPIC provides HIPAA guidance as a benefit to its policyholders for educational and informational purposes only. Any representations or written reports rendered in conjunction with this benefit should not be considered a certification of HIPAA compliance nor should it be interpreted as offering legal, financial, or other professional services. Policyholders that are developing policies and procedures to comply with HIPAA's Privacy Rule should seek legal and/or professional assistance to be sure that an appropriate compliance plan is implemented for their particular practice.*

SAMPLE  
**STEPS TO COMPLIANCE**

Listed below is a series of steps to be completed on your way to compliance with the HIPAA Privacy Rule. It is not necessary that the steps be completed in the order listed.

TASKS	Problems/ Barriers	Date Completed
Review Privacy Rule		
Appoint Privacy Officer		
Conduct Office Assessment To ID Risk Areas		
Collect and Inventory Current Authorization Forms		
Review & Update Job Descriptions		
Prepare Personnel List With Each Person's Access to PHI for TPO		
List Business Associates		
Develop and Implement Privacy Policies:		
Records Retention, Storage and Destruction		
Transmission of Records		
Disciplinary Actions		
Complaints Process		
Duty To Mitigate		
Privacy Officer		
Disclosures/Releases		
Marketing		
Business Associates		
Training		
Communications (Fax, Electronic, ... etc.)		
Conduct Training – Staff /Business Associates		
Document Staff and Physician Training		
Implement a Complaint Process w/ Policies and Forms		
Develop and Implement Forms:		
Privacy Notice & Acknowledgement Form		
Patient Authorization & Revocation		
Restrictions on Use and Disclosure Request		
Request To Inspect and Copy PHI		
Request To Amend PHI		
Disclosure Accounting Log		
Patient Complaint Form		
Business Associates Contract		
Staff Confidentiality Agreements		
Conduct Ongoing Monitoring		



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**Q. Do Florida statutes or federal law set forth a specific manner in which obsolete patient records must be destroyed?**

No. However, the manner selected must protect patient confidentiality. Under new HIPAA confidentiality provisions, it is recommended that obsolete patient records be shredded for disposal. If a service is contracted for this purpose, it is recommended that an executed Business Associate Agreement, as well as indemnification, and hold harmless language be included in the signed contract and/or written agreement for services. Under Florida statutes, dental records must be retained for a minimum

four-year period. However, under HIPAA regulations, a Privacy Notice, each revision and the written patient acknowledgement must be retained for a six-year period.

**Q. Do mandatory reporting requirements set forth by Florida statutes pre-empt HIPAA privacy provisions?**

Generally, yes. A good example would be FS 381.003 which requires a dentist that diagnoses or suspects the existence of a disease of public health significance to immediately report the fact to the Department of Health. However, because the legal waters pertaining to most HIPAA privacy provisions have yet been tested, it is wise to seek legal or risk management guidance when uncertainty may arise.

**Q. What is meant by the legal phrase res ipsa loquitur?**

A Latin phrase meaning "the facts speak for themselves." Res ipsa loquitur is a rule of evidence under which an individual is deemed, under certain circumstances, to be negligent by mere occurrence of the incident and where the law presumes that the injury could not have occurred but for negligence. An example of a res ipsa loquitur case would be a retained foreign body claim.

**Q. What are the most prevalent conditions entailing diagnostic error in dentistry?**

In descending order: Gingival and periodontal disease; disorders of the hard tissues, including caries; disorders of pulp and periapical tissues; malignant neoplasms of the mouth; and temporomandibular joint disorders.

**Q. Are inadequate patient records grounds for disciplinary action?**

Yes, under Florida Administrative Code 64B5-13.005(3)(p) a dentist is subject to disciplinary action for "...Failure to keep written dental records and medical history records justifying the course of treatment of the patient including, but limited to, patient histories, examination results, test results, and x-rays, if taken..."

**Q. What is the final date for compliance under the HIPAA Privacy Rule?**

April 14, 2003