

# HIPAA and Emergency Guardianships

How to Disclose Protected Health Information Without Violating the Law



**Ben A. Neiburger, JD, CPA and Shay Jacobson, RN, MA, NCG**  
**March 2010**

Changes in the way private insurance companies, Medicare, and Medicaid pay for hospitalization has dramatically decreased the average Length of Stay (LOS) over the last two decades. Hospitals are required to transfer clients to levels of care that are less expensive as expeditiously as possible – if not, they will not be paid. In this task, they are required to make safe and appropriate discharges for all of their patients. Complications arise for the hospital when the client lacks decisional capacity and subsequently needs post-hospital care. A client must be able to give informed consent for discharge, or do so through a proxy, such as an agent under a healthcare power of attorney.

But what happens when the client cannot give informed consent to a discharge? Who serves as an alternate decision maker, if the proxy is not available to give that consent? The hospital is a great risk in these situations on many fronts. No third party payor makes allowances for extended lengths of stay due to a lack of an appropriate decision-maker. The hospital is at great risk of not being compensated for days not considered “medically necessary” by insurance standards. If a hospital discharges a patient who lacks capacity to an unsafe plan, they can face liability as to the results of the plan. Re-hospitalizations after discharge reflect poorly on the hospital’s rating and can affect future business and insurance compensation. **Simply sending patients home is risky business.**

Emergency guardianships are a tool to help in just such situations. The risk is transferred to the decision-maker as the hospital makes recommendations and arrangements for a safe and therapeutic plan. What can a hospital do to start guardianship proceedings without violating HIPAA’s restriction on disclosure of protected health information? There is an exception in the HIPAA guidelines that allows for disclosure of information to a reasonable party if the client is at risk.

**In this article, the authors will evaluate the application of HIPAA in discharge situations for health care facilities seeking to ensure safe care plans for clients with issues of competency and guardianship.**

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## HIPAA and Emergency Guardianships

For many medical facilities, “HIPAA” seems like a four-letter word. With great fanfare, Congress passed the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Since that year, there has been what seems like a never-ending stream of regulations and tweaks to this law which governs many aspects of the privacy and disclosure of an individual’s protected healthcare data.

HIPAA rears its ugly head in many circumstances in administering care to clients, even at the time of discharge. When the hospital stabilizes the client and hospital services are no longer needed, but the client is not in a condition to go home, the hospital needs that client’s informed consent to discharge them to an appropriate facility. This can be especially difficult when the client has advanced dementia or other mental disabilities; even more so in cases where there is no family member or agent under a power of attorney to authorize discharge and placement. One of the hospital’s only options is to then discharge the client through a guardianship proceeding. **The problem with a guardianship proceeding is that the legal proceeding itself requires the health care provider to disclose protected health care information to show that the individual is disabled and, therefore, eligible to have a guardian appointed.** However, there is a little known exception to the HIPAA non-disclosure rules that can provide substantial relief in these cases. This exception allows medical providers to disclose protected health care information to a reliable attorney, professional guardian, or other trusted person for the purpose of preparing a guardianship petition.

## HIPAA Non-Disclosure Basics

HIPAA’s regulations govern the use and disclosure of so-called “protected health information” (“PHI”). There are two components to PHI, “health information” and “individually identifiable health information.”

“Health information” means, *“any information, whether oral or recorded in any form or medium that: (1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and (2) 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 the past, present, or future payment for the provision of health care to an individual.”* 45 CFR §160.103.

“Individually identifiable health information” is a subset of health information that includes demographic information collected from an individual that can identify an individual or which can be used to identify an individual and: *“(1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and (2) 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 the past, present, or future payment for the provision of health care to an individual”* *Id.*

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In other words, a considerable amount of the information that an entity has about someone's health could fall under the definition of PHI. Under this rule, many aspects of a client's data constitute PHI, including treatment, medical history and mental status, among others; and **specifically includes the information that the petitioner in a guardianship proceeding must present to a court to establish a guardianship.**

Understandably, the rules covering the disclosure of PHI are quite detailed and restrictive. HIPAA states that a covered entity (for example, a health care provider who transmits any health information in electronic form in connection with a transaction covered by the regulations) may only use or disclose PHI in the following circumstances:

1. to the individual;
2. for treatment, payment or healthcare operations as permitted under the regulations;
3. pursuant to a valid authorization signed by the individual;
4. pursuant to certain disclosures in which the individual has the opportunity to agree to or prohibit or restrict the use or disclosure; and
5. **certain uses and disclosures for which an authorization or opportunity to agree or object is not required. 45 CFR § 164.502(a).**

**Item (5) contains several exceptions that can provide relief in a guardianship situation.**

## Guardianship Basics

A guardianship is established when a court adjudicates a person to be a "disabled person." Illinois law defines a disabled person as a person 18 years or older who:

- (a) *"because of mental deterioration or physical incapacity is not fully able to manage his person or estate, or*
- (b) *is a person with mental illness or a person with a developmental disability and who because of his mental illness or developmental disability is not fully able to manage his person or estate . . ." 755 ILCS 5/11a-2.*

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A Court may decide, upon the petition of a “reputable person,” that a person is a legally disabled person. Health care facilities are frequently put in the position of being a petitioner, or assisting a petitioner, in order to facilitate a discharge. There are some simple rules that a petition must follow to meet the court’s need for information to adjudicate a person as disabled and appoint an alternate decision maker. It must include the following:

1. a description of the nature and type of the respondent's disability and an assessment of how the disability impacts on the ability of the respondent to make decisions or to function independently;
2. an analysis and results of evaluations of the respondent's mental and physical condition and, where appropriate, educational condition, adaptive behavior and social skills, which have been performed within three months of the date of the filing of the petition;
3. an opinion as to whether guardianship is needed, the type and scope of the guardianship needed, and the reasons therefore;
4. a recommendation as to the most suitable living arrangement and, where appropriate, treatment or habilitation plan for the respondent and the reasons therefore;
5. the **original signatures** of all persons who performed the evaluations upon which the report is based, one of whom shall be a licensed physician and a statement of the certification, license, or other credentials that qualify the evaluators who prepared the report. 755 ILCS 5/11a-9(a).

This information is summarized in a form referred to as the “physician’s report”; this report is not part of the court’s public record in the proceeding since the court keeps it under seal.

One frequent concern is the fact that it generally takes 30 to 45 days to establish a guardianship after the petition is filed. **However, if it is necessary for the immediate welfare and protection of an alleged disabled person or that person’s estate (that is, money and property), the court may appoint a temporary guardian to act until it is able to appoint a permanent guardian.** 755 ILCS 5/11a-4. The temporary guardianship process can be as short as a week or even less, depending on the thoroughness of the health information and the level of the “emergency.”

**It is encouraging to note that inability to discharge from the hospital is considered an emergency in the court’s eyes.** Once a guardian is appointed, the guardian can give the informed consent necessary to allow a hospital to discharge a client to another facility, home care, or alternative therapeutic options. So the key question remains, how does a hospital disclose the PHI necessary to support a guardianship petition without violating HIPAA?

## **The Problems Created – A Case in Review**

Unless they're using the exceptions to the non-disclosure rules, HIPAA's general provisions create certain problems for healthcare providers, especially hospitals and nursing homes. Here is a typical, hypothetical situation: John Deere, in his late 70's, was brought to the hospital's emergency room by the police after he was found wandering, dazed and confused, with a bleeding head wound. Luckily, John had identification on him so the hospital staff could try to contact next of kin. Using this information, the police said that John's house was in an upscale section of Oak Brook, but they could find no one home. Despite other attempts, neither the hospital staff nor the police could find any next of kin to call that night. After the laceration on John's head was sutured and his condition stabilized, his cognition never returned. Several days later, the police spoke with one of John's neighbors who said that John was a bit of a recluse, but he thought John had a daughter with his same last name in Irvine, California. Several days later the daughter was contacted and she had no interest in dealing with anything related to her father. She also stated that she had no siblings and that John had no parents or siblings living.

John's physical condition improved to the point where John only needed rehabilitation, which meant since it was not appropriate to remain in the hospital, Medicare would stop paying the bills. Unfortunately, the staff knew of no agent under a power of attorney for John, whose cognition was so bad that he barely knew his own name, much less able to give informed consent for a discharge to a rehabilitation facility. The hospital's risk management department informed the staff treating John that the only way he could be discharged with no liability to the hospital was to petition for a guardianship for John, and then have the guardian authorize the discharge and placement. However, no one had a clear answer to the HIPAA problem.

Could the hospital or doctors disclose John's PHI on the guardianship petition, and the physician's report that is presented with the petition, without violating HIPAA's rules and, if so, to whom could they disclose this information?

## **Exceptions to Disclosing Protected Health Information (PHI)**

When a person is conscious and can give informed consent for a medical procedure or a discharge, HIPAA restrictions on disclosure do not cause a health care provider too much inconvenience, since the health care provider can directly ask the person to agree to the procedure or discharge and expect a reasonable answer. In addition, when a person has a proper health care power of attorney in place (and the health care provider is aware of this document's existence), then the health care provider can disclose PHI to the individuals appointed and acting under those documents.

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The real problem for health care providers happens when a person cannot give informed consent and they do not have family available or proper estate planning documents in place.

**Luckily, a little known regulation buried in the HIPAA law contains a safety valve. This regulation provides a laundry list of situations under which an authorization to disclose or an opportunity to agree or object is not required.** These situations include:

1. disclosure of certain information to public health authorities who are authorized under law to collect such information for preventing or controlling disease, injury, or disability and the conduct of public health surveillance;
2. a public health or other appropriate governmental authority authorized under law to receive reports of abuse, or the Food and Drug Administration with respect to an FDA-regulated product or activity;
3. disclosures for judicial and administrative proceedings (that is, in response to an order of a court or administrative tribunal, or a response to a subpoena, discovery request, etc.);
4. disclosures for certain law enforcement purposes (such as certain laws that require reporting of certain types of wounds or other physical injuries or information about a decedent if death may have occurred from criminal conduct);
5. disclosures to organ procurement organizations regarding donations of and information about organs; and
6. **uses and disclosures to avert a serious threat to health or safety.** 45 CFR §164.512

This last situation, “uses and disclosures to avert a serious threat to health or safety,” is an important tool for health care providers to use when a client cannot give informed consent for treatment or discharge. Under this, a covered entity may use or disclose protected information “if the covered entity, in good faith, believes the use or disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public and is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat. . .” 45 CFR §164.512. The regulations include a presumption of good faith on the covered entity, assuming that the person to whom they disclose the information is reasonably able to prevent or lessen the harm.

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It is notable that health care providers are not limited in PHI disclosure only to public officials or entities, such as the public guardian or senior protective services. The HIPAA provision actually opens the client's resource pool to reputable private parties such as families, friends, private guardianship agencies, attorneys and the like. This allows the health care facility to move forward with an alternate decision maker as expeditiously as possible, thus facilitating the discharge. **The person to whom the hospital discloses PHI only needs to be trusted by the hospital and be able to lessen the threat or harm (such as by having a guardian appointed).**

Looking back at our situation with John Doe, if the hospital illegally discharges him because they're not equipped to handle the long-term rehabilitation John needs; and because he cannot give informed consent, he will have nowhere safe to go. Therefore, John is under a serious and maybe imminent threat to his health and safety. Under this standard, the hospital can certainly disclose the minimum amount of PHI to an attorney that the hospital hires for the purposes of an emergency guardianship petition, including the completion of the required physician's report until an emergency guardianship petition is heard and placement is made. After that, the hospital can ask the Court for a court order permitting it to disclose additional PHI, until a permanent guardian is appointed.

The hospital can certainly disclose limited PHI to such an official if that official can lessen the harm or threat, but the hospital can also make this disclosure to other trusted advisors including its own attorney, or other advisors who can lessen the harm, such as geriatric care managers or private guardianship agencies.

## CONCLUSION

HIPAA has many Byzantine rules regarding disclosure of PHI and stiff penalties for failure to comply. However, in those rare situations in which an individual cannot give informed consent, has no relatives willing and able to help, and does not have any powers of attorney, there are certain provisions in the HIPAA regulations that can provide relief if there is potential threat of serious or immediate harm to the individual. Under these circumstances, a hospital can disclose the minimum amount of information in a guardianship petition and physician's report necessary to its attorney, pertinent reputable parties, and to the court, so that the serious harm or threat can be reduced and the individual can be safely discharged and receive the care they need.



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was written in March 2010 by  
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Since 2003, Ben Neiburger has been a nationally-recognized and respected attorney in the areas of Elder Law, Estate Planning and Medicaid Planning, which includes expertise in Special Needs Trusts, Tax Planning for families, and Long-Term Care Planning.

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Ben is in continuous pursuit of knowledge & insight to the laws & finances that affect our families and elders, and brings this wealth of knowledge, his clear & common sense explanations, endless patience, gentle humor and genuine sensitivity to each of his national speaking engagements and family legal consultations.

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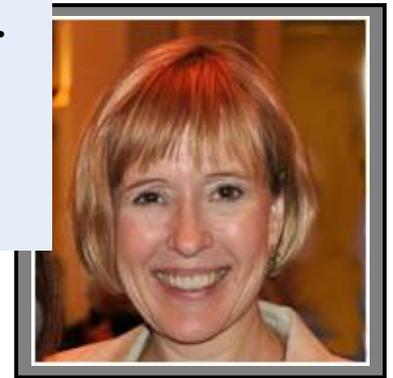
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