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Q. What is the effective date for new HIPAA privacy rules?

Although the HIPAA Privacy Rule became effective April 14, 2001, final revisions continue to be made and dentists covered by the new rule must comply by April 14, 2003. Continue to watch for final revisions.

Q. Do state or federal laws 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 not only wise to verify in writing that the contractor or entity agrees to maintain patient confidentiality but required that a written business associates contract be executed pursuant to HIPAA requirements. It is suggested that providers require that such entities include indemnification and hold harmless language in the contract and/or written agreement.

Q. What is a deposition?

A deposition is testimony given under oath before a court reporter. Depositions are important in the preparation of a case for trial and a part of the legal discovery process. Depositions freeze testimony and can be used to impeach your credibility if you later deviate from the testimo-

ny provided. Failing to appear for a deposition subjects you to the potential to be held in contempt of court. Always seek guidance from your personal attorney or FPIC's Risk Management Department before providing a deposition. Even if you are being deposed merely as a fact witness, the potential exists that the testimony you provide can later be used to facilitate a claim against you.

Q. Does the dentist-patient relationship end at the time insurance coverage expires or managed care plan terminates?

No. Once established, the dentist/patient relationship does not end merely because insurance is no longer available or a change in managed care coverage occurs. A dentist's responsibility to the patient continues unless and until the patient severs the relationship or the dentist provides proper notification to the patient of the intent to withdraw from providing further care and treatment. Seek legal or risk management guidance before terminating the dentist/patient relationship.

Preventive Action

The Quarterly Risk Management Newsletter for Policyholders of FPIC Fourth Quarter 2002

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Risk & Liability Issues Associated with Electronic Dentist/Patient Communication

By Cliff Rapp, LHRM, Vice President, Risk Management

Although written and verbal communications have traditionally been the primary method of communicating healthcare information, the Internet opens new avenues for providing such information and communicating with patients. In tandem with the potential benefits of electronic communications are sobering legal concerns and emerging increased liability exposure to the public through website capacity. To date, legal waters are largely untested. Consequently, it is important for those who communicate electronically to address the key risk management issues in developing office policies and procedures for Internet-based communication entailing patient privacy, confidentiality of patient information, security and encryption, informed consent, use of disclaimers, opportunities for patient education, and the implications of website linkage.

Recent data reveals that there is a growing demand by patients for specific healthcare

information and directives. Along with that demand is an increasing expectation for online interactivity.

ELECTRONIC COMMUNICATION SYSTEMS

Electronic communication systems encountered in the healthcare delivery system include:

- Practice-based Internet web pages
- Electronic prescribing systems
- Wireless personal data
- Drug formularies, allergies, and potential conflicts
- Electronic/hard copy e-mail transmission
- Internal, intranet web pages

ONLINE ADVANTAGES

There are numerous advantages in communicating electronically with patients. Electronic transmission of information is faster than traditional modalities, and in some cases, instantaneous. Along with meeting growing expectations for quick and precise information exchange, electronic communications have these advantages:

- Informs and educates patients
- Confirms delivery of communication/information exchange
- Provides automated follow-up
- Enhances informed consent and compliance
- Documents sequence of communication

INHERENT RISKS

There are, however, inherent risks in communicating electronically. Such risks include:

- Online malpractice exposure
- Extension of the dentist/patient relationship



- Inadvertent creation of the dentist/patient relationship
- Inappropriate disclosure of confidential patient information
- Violation of HIPAA regulations.

HIPAA

Federal requirements pertaining to electronic transactions and communication set forth by HIPAA (The Health Insurance Portability and Accountability Act) is an important consideration effecting virtually all practices. HIPAA mandated compliance with a standardized format for electronic transactions by October 2002 unless a one-year extension for compliance has been granted. HIPAA requirements also pertain to electronic dissemination of patient information, although most requirements are pre-empted by state confidentiality laws. It is important to remain vigilant to and compliant with the final revisions once made to a number of the requirements originally set forth by HIPAA.

RECORDS BECOME EVIDENCE

It is also important to remember that seemingly intangible electronic communication becomes part of the patient's medical records, and as such could become evidence in a malpractice claim. Consider all forms of communication as potential evidence. In this context, will the communication support a defense or facilitate a claim? Such evidence could include:

- Notes you author
- Records made by others

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FPIC publishes Preventive Action on a quarterly basis as a service to its policyholders. Information in this publication does not establish a standard of care, nor is it a substitute for legal advice. The information and suggestions contained in this newsletter are generalized and may not apply to all practice situations. FPIC recommends you obtain legal advice from a qualified attorney for a specific application to your practice. The information should be used as a reference guide only.

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

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- Correspondence
- Insurance and billing statements
- Staff notations and messages
- E-mail transmissions
- Answering service records

ADDITIONAL (WEBSITE) INFORMATION

Additional information pertaining to electronic communication is available at:

www.an-da.org/pubs/fpubl.html www.ahima.org/journal/pb/00.0i.html
www.medrecinst.com

RISK MANAGEMENT GUIDELINES ENTAILING ELECTRONIC COMMUNICATIONS

- Develop a policy and procedure entailing electronic communications
- Adhere to policy and procedure
- Do not overlook patients who do not have electronic access
- Develop a directory to ensure current and correct e-mail and website addresses
- Provide a disclosure statement specifically delineating the confines of the provider/patient relationship
- Publish disclaimers pertaining to emergencies, confidentiality, documentation, and alternative mechanisms for communication
- Ensure that e-mail is encrypted
- Do not use e-mail for emergencies or time-sensitive issues
- Consider initiating an e-mail triage system
- Avoid initiating unsolicited e-mail
- Prohibit "routing" of e-mail communications
- Include mechanism to block e-messages for non-patients
- Develop a component to ensure completion of the patient/provider/patient communication
- Include electronic communications in retention and documentation procedures
- Include the text of originating message in your response
- Develop secure patient identification/digital certification
- Ensure that patients can access their records
- Always obtain appropriate authorization and consent
- Adopt written privacy procedures
- Train employees and designate a privacy officer
- Limit disclosure of information to the request
- Adhere to stronger state laws pertaining to mental health, HIV, and AIDS
- Review informational websites and edit when necessary before posting or referral is made
- Insulate clinical website content from commercial content
- Obtain confirmation of message delivery
- Never allow electronic communication to usurp human interaction
- Employ a firewall to protect your website and data from unauthorized access
- Utilize encryption technology to protect the transmission of data to and from your website
- Comply with current and revised HIPAA mandates

Rx LOSS PREVENTION

Consider the case involving our insured, a general dentist, who treated a 42-year-old male for extensive dental work from November 1996 through completion in June 1999. The patient later transferred his care to a different dentist when his insurance plan was changed in 2000. In October 2000 a radiolucent lesion in the right mandibular ramus was noted in routine x-rays and the patient was referred to an oral surgeon who subsequently diagnosed the lesion as an ameloblastoma. *It was then determined that x-rays performed by our Insured in September 1997 showed the presence of a radiolucent lesion in the area in question, which went undiagnosed.* In November 2000, the patient underwent marginal resection of his jaw due to the ameloblastoma of the right mandible. Further evaluation revealed an area of microscopic ameloblastoma in the mandible that was expected to redevelop. The patient brought legal action against our insured for the failure to diagnose, alleging diminished prognosis as a result of the three year delay in diagnosis and treatment. Defense experts were unable to support our insured on either standard of care or causation given his failure to properly interpret the x-rays obtained in September 1997.

Consequently, settlement was necessitated in the amount of \$240,000.

HIPAA Update

As most practices are aware, in August 2002 the final Health Insurance Portability and Accountability Act (HIPAA) medical privacy rules were announced. The new rules address the many concerns of practitioners and provides a more practical approach to safeguard patient privacy. Regulations that were issued earlier created unintentional interference with patients' access to care. The final regulations balance privacy protections with patients' access to quality health care.

Key features of the final privacy rule:

- Eliminate written consent prior to release of information for certain purposes and instead allow patients to acknowledge they have received the required notice of privacy rights.
- Lessen "minimum necessary" restrictions.
- Acknowledge "incidental use and disclosure."

The privacy rule will become effective on April 14, 2003. However, the final security and transaction standard rules have not been released. October 16, 2002 marked the deadline for practices involved in electronic transactions to file an extension for compliance (*Preventive Action Vol. 15, No. 3*).

FPIC will provide compliance guidance to insureds, including sample privacy notices and business associates contracts, in upcoming *Preventive Action* Newsletters.

Risk Management Website

The FPIC website has recently been redesigned, including an extensive revision to the Risk Management section.

You can find a variety of useful information on the website including:

- Risk Management Staff Directory
- Risk Management Products and Services
- Presentations available for CME/CE credit
- The complete manual, *Dental Reference Tool*
- Numerous reference guides
- Frequently asked questions
- Publication order form
- Current and back issues of *Preventive Action*

Access the website at www.medmal.com