

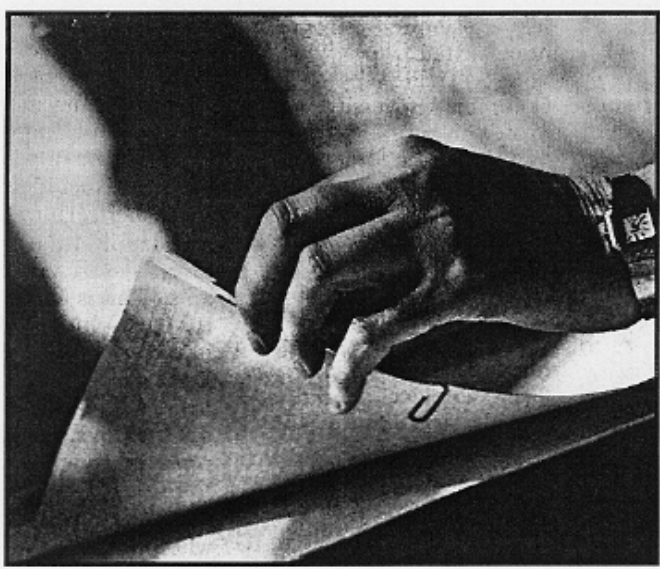
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Are Your Secrets Safe With Us?

New federal privacy regs give patients cause for paranoia.

In August of 1998, police in Fairfax County Virginia, convinced a magistrate to issue a search warrant for patient records at the Fairfax Methadone Treatment Center. A car had been stolen nearby and the magistrate accepted the



police's unsupported contention that individuals receiving drug treatment are prone to commit such crimes.

If this incident strikes you as an outrageous breach of medical privacy, be warned that matters may soon get even worse than that. Under recently adopted federal privacy rules, police would not longer need to persuade a judge to give them a warrant. They could simply show up at the therapists door and demand records. The conscientious therapist might protest and refuse to comply, but with fines ranging from \$10000 to \$25,000 for non-compliance, protecting client privacy could become expensive.

The ease with which law enforcement officials will be able to obtain medical records is just one of the many curious components of federal medical privacy rules recently approved by Secretary Tommy Thompson of the Department of Health and Human Services (HHS). The intent of these rules, which take effect in two years, was to streamline the exchange of medical information, while protecting patient privacy. But as lawyers, administrators, and analysts have waded through the 1,500 densely worded pages drafted by HHS, several alarming facts have come to light: When the rules become law, the federal government will have the right to examine individual's medical records. Without their knowledge or consent.

This is the upshot of a regulation that requires HHS to monitor compliance with the rules. The department will be hard-pressed to do that without examining patients' records. In effect, this means that the government will need to violate your privacy to determine whether your doctor or insurance carrier is committing the same transgression. If this sounds like nothing more than benevolent oversight, consider that if the rule had been in place when Richard Nixon was president, he would not have had to send thieves into the office of Daniel Ellsberg's psychiatrist. He simply could have ordered a compliance investigation.

According to the Washington Post, the rules give marketers and fund-raisers specific rights to use medical information to send solicitations and products promotion to potential clients.

Donald Palmisano, a trustee of the American Medical Association, has noted that patients can only opt out of such solicitations after receiving a promotion. But that is senseless, he says: "Once you've breached confidentiality, you've breached it."

In some situations, the rules state, patients who sign a single release form, possibly in registering for a health plan, grant permission, perhaps unknowingly, for their information to be shared with other providers, insurers, medical information clearing houses, and "business associates."

The rules stipulate only that this information be used for "treatment, payment, or healthcare operations." However, critics say that this limitation will be difficult to enforce, and that the information, once disseminated, cannot be reclaimed.

Under the new rules, as noted above, law enforcement officials investigating a crime will be allowed to examine medical records without a patient's knowledge or consent. Such searches will not require a warrant, a fact that civil libertarians say may violate Fourth Amendment objections against illegal searches and seizures. "The regulation are a federal license to intrude," says Twila Brase, president of the Citizens Council on Health Care. "Although they're called the 'privacy regs,' they actually allow the government to open up anyone's medical record at its discretion.

The new rules are of special interest to mental health professionals, whose livelihoods depend on their ability to maintain a confidential relationship with their clients. The therapeutic-client privilege already enjoys special status under federal law, due to the sensitivity of the information exchanged. The U.S. Supreme court reaffirmed the privilege in its 1886 decision in *Jaffee v. Redmond*, notes Scott Moss, of the National Association of Social Workers.

HHS was obviously mindful of that decision in formulating its new rules. Psychotherapy notes remain off limits to anyone except clients and therapists. However, the American Psychological Association has protested that the definition of 'psychotherapy' does not include such sensitive information as medication prescription and monitoring information, medication prescription, ad monitoring, counseling sessions schedules, treatment modalities, frequencies of treatment provided, results of clinical test and summary of diagnosis, functional status, treatment plans, symptoms, prognosis, and progress to date. Presumably, this material would enter the general electronic flow of identifiable medical data. (See http://www.psych.org/pub_pol_adv/privacyhhs4501.cfm)

The rules, it should be noted, are not without merit, and the need for new regulations was apparent. Until the mid-1990s, regulating

medical privacy was left almost entirely to the states. But the growth of national HMOs and hospital chains, plus the increase in interstate communication among insurers and providers, meant that health care workers had the burdensome task of determining whether every transmission of information conformed to the laws of the states involved. Additionally, computerized medical records and medical data bases allowed for instant access to patient information regardless of one's location. Hence, the old rules had become obsolete.

To remedy this situation, Congress granted itself the power in 1996 to develop national rules governing the exchange of medical information. However, it missed a self-imposed deadline for passing legislation, and eventually the task of formulating new administrative rules fell to HHS. The department published a working draft and accepted public comment until February 17, 2001. Thompson approved the final rules two months later.

In drafting the rules, HHS sought to strike a balance between the conflicting need of several parties. The Health Insurance Association of American a powerful lobby, argued that easy access to medical information would speed claims processing and improve communication with providers. They favored as loose a set of rules as possible. Employers, particularly those who are self-insured, insisted on enough flexibility to allow them to determine how employees were using their health plans and, therefore, how their insurance dollars were being spent. Health care providers lobbied for rules loose enough to free them from the administrative hassle of constantly confirming authorizations, yet tight enough so that clients did not become reluctant to share their medical secrets.

Therapist organizations and patients' rights groups lobbied for as restrictive a set of privacy standards as possible, but their efforts were stymied by a pair of financial realities: 1) Therapists and their patients could not afford to match the lobbying efforts of insurers, hospitals, and employers, and 2) It costs money to protect electronic medical data, and HHS was keen not to impose burdensome costs on the health care industry.

The new rules place therapist in an extremely difficult situation. The public is already concerned about what happens to confidential medical information. In fact, studies cited in the preamble to the new regulations note that a national survey conducted in January 1999 found that one in five Americans believes that their health information is being used inappropriately.

Further, and possibly more troubling, one in six Americans has reported taking some form of evasive action to avoid the inappropriate use of his or her medical information by providing inaccurate information to a health care provider, changing physicians, or avoiding health care altogether. And it's not just patient taking such actions. The Association of American Physicians and Surgeons has reported that 78 percent of its members said they had withheld information from a patient's record due to privacy concerns; and another 87 percent reported that a patient requested that the physician withhold information from their medical records.

Many patients obviously sense that their privacy is in jeopardy, and those who don't soon will. Under the new rules, clinicians must disclose to patients where their private medical information may be distributed. Therefore, therapist will soon have to update their confidentiality disclosure forms. A new form might well read something like this:

"Our conversations and communication are private and confidential except under the following circumstances.

1. If you are a danger to yourself or others.
2. If you report abusing a child or elder adult.
3. If the police suspect you of a crime.
4. If your insurer requests your records to support payment of a claim.
5. If your employer is self-insured and receives your treatment information.
6. If marketers and fund-raisers obtain your medical data by request.
7. If a life insurer, a public health agency, or researchers request your information.

In any of the above circumstances I will be required to disclose the general details of our therapeutic relationship, but I will not be required to provide detailed notes. Please sign below and let's begin the explore of your intimate personal life."

Clients may be hesitant to speak with therapist when so many potential ears could be pressed to the door. The stigma of mental health treatment has always been a tremendous hindrance for people who are seeking help. If we can't guarantee that our clients' intimate thoughts and feelings or identities won't be shared with many distant strangers, regulators, clerks, computers and databases, then they may well feel their secrets won't be safe with us.

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