Patient Representatives in Telehealth

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Richelle Marting is an attorney, registered health information administrator, and certified coder who focuses on healthcare coding, billing, and reimbursement issues. She has practical, in-the-trenches experience with coding and billing issues. She has served as an outpatient multi-specialty surgery coder, hospital-based outpatient coder and a compliance coordinator for a large multi-specialty medical group. As an attorney she advises clients proactively on complex reimbursement questions and has guided multiple clients through extensive Medicare and OIG audits and investigations.

Richelle has served as an expert witness in privacy litigation in defense of healthcare providers, served as a privacy site coordinator and interim health system privacy officer, and published a number of articles on privacy-related topics.
Renewal of Federal PHE

• Current 90-day renewal set to renew or expire 7/14/2022
• Refer to HTRC pop up webinar on Consolidated Appropriations Act of 2022
“Every human being of adult years and sound mind has a right to determine what shall be done with his own body”

- Judge Cardoza
Why Obtain Consent

• Provider licensing laws
  • See for example KAR 100-28a-8: “assisting in the care or treatment of a patient without the consent of the patient, the attending physician, or the patient's legal representative”

• Professional associations
  • American Medical Association Code of Medical Ethics

• Facility licensing requirements
  • CMS RHC: “For each patient receiving health care services, the clinic...maintains a record that includes...evidence of consent forms”

• Payor contracts/service-specific requirements
  • Blue KC: “members have certain rights to...give informed consent to treatment”
Forms of Consent

- Implied
- Express, Verbal
- Express, Written
- General consent to treatment at outset of provider-patient relationship
- Some services have specific consent language or forms (e.g. Hospice)
- Involuntary commitment and consent
- Consider limited English proficiency, readability, understandability
Who May Give Consent?

- Patient or legal representative
- Legal representatives
  - Minors
  - Incompetent Adults
    - Legal guardians
    - Durable Power of Attorney for Health Care Decisions
Generally parents consent to minors’ treatment, but minors may be able to consent to their treatment in certain instances.
Who May Give Consent: More on Minors

- Guardians or parents with legal custody of a minor
- Divorced parents – legal versus physical custody
  - One may have sole physical custody while both retain joint legal custody
  - Decision-making authority may be different from financial responsibility
- Adults standing *in loco parentis* for a child may consent to the child’s treatment during emergencies
- Married minors
- Foster care
Who May Give Consent: More on Minors

- Kansas: Any minor sixteen (16) years of age or over, where no parent or guardian is immediately available, may also give consent to the performance and furnishing of hospital, medical or surgical treatment or procedures.

- Missouri: Allows “relative caregivers” to consent to treatment of a minor if caregiver is competent, child lives with caregiver, and caregiver completes an affidavit. Married minors, treatment of minor child, pregnancy, birth control, venereal disease, drug and alcohol abuse.

- Oklahoma: emancipated minors, pregnancy, communicable disease, drug and substance abuse.
Who May Give Consent: More on Minors

Missouri relative caregiver affidavit:

- the name of the child;
- child’s date of birth;
- the relative caregiver’s name and date of birth and the address at which the relative caregiver lives with the child;
- the relationship of the relative caregiver to the child;
- the driver’s license or identification card number of the relative caregiver;
- contact information of the parent;
- a description of any attempts that the relative caregiver has made to advise the parent of the relative caregiver’s intent to consent to medical treatment or educational services for the child, and of any response to the relative caregiver provided by the parent;
- if applicable, a signed and dated delegation of authority to the relative caregiver by the parent to consent to educational services or medical treatment;
- if applicable, the reason why the relative caregiver is unable to contact the parent to advise the parent of the relative caregiver’s intent to consent to medical treatment or educational services for the child;
- the date the relative caregiver signed the affidavit; and
- a declaration under penalty of perjury that the named child lives with the relative caregiver, that the relative caregiver is a competent adult and eighteen years of age or older and that the information provided in the affidavit is true and correct.
**Missouri:** If a provider acts in good faith in determining whether a person has authority to consent, and relies upon the representations of someone purporting to have authority without any notice to the contrary, Missouri laws permits the provider to rely on such representations. 

*Source: RSMo § 431.061.4*

Incapacitation is a judgment of a patient’s ability to provide informed consent
Who May Give Consent: Incompetent Adults

- Judgment on ability to understand nature of treatment, risks, benefits, alternatives
- Power of Attorney, Durable Power of Attorney, Durable Power of Attorney for Healthcare Decisions
- Living Will/Advance Directives
Other Telehealth Consent Rules

• **Kansas:** When the patient consents and the patient has a primary care or other treating physician, telemedicine provider sends report to primary care provider within three days. *Source: KSA 40-2,212*

• **Missouri:** Telehealth providers shall obtain patient’s or the patient’s guardian’s consent before telehealth services are initiated and shall document the patient’s or the patient’s guardian’s consent in the patient’s file or chart. *Source: CSR 20, 2150-2.240, RSMo 335.175*
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HIPAA and state law privacy rules apply equally to telehealth services as they do to in-person services.
**HIPAA Use and Disclosure Rules**

- *Were not waived* during the PHE
- Certain administrative rules were waived
  - Penalties related to obtaining a patient’s agreement to speak with family members or friends or honoring a patient’s request to opt out of the facility directory
  - Distributing notice of privacy practices
  - Patient right to request privacy restrictions or confidential communications
  - Penalties for use of telehealth platforms that fall below Security Rule requirements
• Patient’s right to access PHI in a designated record set

• **Must** disclose to personal representatives
  • “legal representative” under state law

• Disclosure of information to friends or family when patient is present, opportunity to object
  • Obtain individual’s agreement; or
  • Provide opportunity to object and individual does not; or
  • Reasonably infer individual does not object
HIPAA Use and Disclosure Rules

• Privacy in provider’s environment
• Privacy in patient’s environment
• Minors: Are members of the household visible or audible?
After the Session: Sharing Information

Patient portals, bills, and releases of information are handled carefully when representatives are involved in care.
Patient Portals

• Consider age of parent access
• Minors consent to own services
• But, information blocking rules
Patient Statements and Bills

• Minors on parents’ insurance
• HIPAA right to request restriction
• HIPAA right to request confidential communications
• Patient registration paperwork and consent to leave detailed messages
Releases of Information

- Verify identity and authority
- Identity: reasonable efforts, can’t mandate a particular form (e.g. driver’s license)
- Authority: Divorce order, consent from parents of minor in foster care, guardianship, DPOA-HC
Questions?

Available Through Heartland Telehealth Resource Center for Technical Assistance
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