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COMMENTS REGARDING

Standards for Privacy of Individually Identifiable Health Information; Proposed Rule (45 CFR Parts 160 Through 164)

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The Proposed Rule is wise to point to *Jaffee* v. *Redmond* in recognition of the privileged nature of the patient-psychotherapist relationship in society. The Proposed Rule also correctly recognizes HIPAA's obligation to specifically ensure protection of the patient-psychotherapist relationship in its role of protecting individual patient privacy. In Jaffee, the Supreme Court clearly stated the reason for protecting psychotherapy notes:

> Effective psychotherapy...depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure...The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem.

The difficult task for HIPAA is to set forth rules which upholds this protection.
To begin with, the content of the information is privileged, independent of the form in which it is recorded, be it on paper, audio tape, video tape, or computer software. The Proposed Rule appropriately recognizes this by including both paper and electronic information in the definition of "psychotherapy notes." Yet by specifying the form of protected information as "detailed notes. ..used only by the therapist who wrote them," it leaves exposed all patient information which does not fit this narrow criterion. For example, once notes are shared, even with another member of the treatment team, they are exposed to indiscriminate disclosure. Moreover, by not specifically defining the content of "minimally necessary" disclosure to different parties, the Rule leaves this important judgement to the sometimes arbitrary decisions of individuals.
Therefore, we feel that the revised Rule needs to define the content, not the form, of

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protected information. The challenge, then, is to define the content of the information to which Jaffee refers, the specific content of minimally necessary disclosures, and to whom and under what circumstances disclosure of psychotherapy notes is permitted. These comments address the following topics:

- Definition of Psychotherapy Notes
- Patient Authorization to disclose Psychotherapy Notes
- Disclosure for Treatment
- Disclosure for Payment
- Disclosure for Healthcare Operations
- Disclosure for Purposes other than Treatment, Payment and Healthcare Operations
- Audit Trails
- Patient Review
- Death
- Disclosure to the Criminal Justice System
- Responsibilities of Third Party Recipients of Patient Information
- Compliance and Enforcement
- Creation of De-identifyed Information
- Proposal: De-identifying all disclosed patient data, not used for Treatment
- Proposal: Creation of a Patient Privacy System

Definition of Psychotherapy Notes

Problem in Proposed Rule: Under the Proposed Rule, when a healthcare professional shares a psychotherapy note with another provider, then that information is no longer privileged, and the definition of "psychotherapy notes" no longer applies to that information. In practice, a treatment team in a mental health facility shares information about a patient in order to care to the patient. It is unethical for information necessary to the welfare of the patient to be withheld from other professionals administering care. Therefore, the definition of psychotherapy notes in the Proposed Rule is faulty, because it would expose almost all privileged information, as defined by Jaffee to disclosure. In addition, the Proposed Rule further defines a psychotherapy note as "not [being] involved in the documentation necessary for healthcare treatment..." This overlooks the very purpose of a psychotherapy note: it contains information that is actually, in practice, very often essential to treatment. The fact that a healthcare professional documents the information contained in a psychotherapy note is almost always due to the belief that the information is relevant and possibly vital to treatment.

Comment: The Proposed Rule seeks to uphold the letter as well as the spirit of Jaffee, while attempting a practical approach to facilitate care, commerce and operations. Satisfying the needs of care, commerce and operations, requires *precise* definitions of privileged information and the precise mechanisms and circumstances for disclosure. Ambiguities in the regulations concerning psychotherapy notes will either compromise privacy, or impede commerce and operations. Precision, rather than ambiguity, will achieve the laudable intent of the Proposed Rules.

Solution: Define Psychotherapy Notes to mean information recorded (in any medium) by a licensed mental healthcare provider which is created or modified with the consent of either 1) the patient, or 2) a person who is legally authorized to act on behalf of the patient, for the purpose of documenting the evaluation of a person's psychiatric or psychological state, and/or to document the treatment of a mental disorder. The information must be maintained separately from the general medical record, and labeled: *Confidential Information: This Article Contains Psychotherapy Notes Protected by Patient-Healthcare Provider Privilege.*

Patient Authorization to Disclose Psychotherapy Notes

Problem in Proposed Rule: Disclosure of information for Treatment, Payment and Healthcare Operations is automatic and does not require patient authorization of any kind. In the case of Psychotherapy Notes, authorization is required for each disclosure. The Proposed Rules do not create clear distinctions between disclosures for purposes of Treatment, Payment, and Healthcare Operations. Therefore, the Proposed Rules offer no assurance that the "minimum necessary" information will be disclosed.

Solution: The Proposed Rule defines four categories of disclosure, distinguished by the purpose for which disclosed information will be used: Treatment, Payment, Healthcare Operations, and all other uses. In practice, for each category of disclosure, "a minimum necessary determination would need to be consistent with and directly related to the purpose of the use or disclosure", and furthermore not violate *Jaffee.*

The solution calls for the Revised Rule to define the content of the information to which *Jaffee* refers, the specific content of minimally necessary disclosures, and to whom and under what circumstances disclosure of psychotherapy notes is permitted, for each of the four categories, and allow disclosure of information upon authorization of the patient, and informing the patient of the specific type of information that will be released whereby the patient will have the option to agree to release that type of information for the purpose proposed.

Disclosure for Treatment

Problem in Proposed Rule: Disclosure of information to treatment team causes psychotherapy notes to lose privileged status. Patient Authorization is never required.

Comment: Members of treatment team must have access to psychotherapy notes in order to treat a patient, Willful neglect of information made available by the patient is unethical, can be dangerous to the patient, and is potentially unlawful.

Solution: Allow psychotherapy notes to be shared by treatment team, just as privileged information can be shared amongst attorneys on behalf of a client. This category includes disclosures of the patient record to accredited mental healthcare workers who are involved in the treatment team designated by the primary mental healthcare worker. We define the "primary mental mental healthcare worker" as the principle, accredited, mental healthcare worker who is responsible for patient

evaluations and interventions. The treatment team would be automatically authorized to access the entire patient record as follows:

Information Type	Permitted to Disclose
Entire Patient Record	Entire Patient Record

In addition, for the purpose of treating a patient's general medical conditions, it is permissible to automatically disclose the following information into a general medical chart.

Information Type	Permitted to Disclose
Medication treatment	NDC Code with dose and course
Allergies	Allergies from a list of allergies, as yet to be determined.

Disclosure for Payment

Problem in Proposed Rule: The Proposed Rule is unnecessarily broad. It defines the type of information that can be disclosed so broadly that the entire patient record could fall under the broad categories. In addition, it is unclear whether

Solution: For billing purposes, "minimum necessary" should be limited to the contents of the HCFA 1500 form, whose clinical component is limited to:

Information Type	Permitted to Disclose
Diagnoses	ICD9-CM Code
Treatment	CPT Code and NDC Code with dose and course

For Utilization Review purposes, as performed by an entity responsible for payment, and not by a designated member of the treatment team, then the "minimum necessary" information should be limited to:

Information Type	Permittedl to Disclose
Diagnoses	DSM-IV code
Symptoms	Presence or Absence of DSM symptomatologic criteria
Functioning	GAF score
Status	Voluntary or Involuntary; Inpatient or Outpatient
Treatment Plan	CPT Code and NDC Code with dose and course
Prognosis	Scale of "None, Modest, Moderate, Substantial, Complete"

The above table is a refinement of New Jersey and District of Columbia statutes, which have been in effect since 1985 and 1978 respectively. The New Jersey and District of Columbia statues are referenced as models in the Surgeon General's landmark report, released in 1999 entitled Mental Health: A Report of the Surgeon General.

Disclosure for Healthcare Operations

Problem in Proposed Rule: The Proposed Rule is unnecessarily broad. It defines the type of information that can be disclosed so broadly that the entire patient record could fall under the broad categories. There is little protection that those who receive information will protect privileged information.

Comment: Individual statements of the patient are not permitted, and in fact are not needed. For example, statements of sexual orientation, religious beliefs, though useful in forming an initial understanding of the patient, and possibly helpful in determining diagnosis, symptoms and so forth, are not in themselves used for defining diagnosis or treatments and are not necessary for utilization review or case management by third parties. Furthermore, members of an institution, who are not part of a treatment team, need not have more detailed information.

Solution: Information in this category may be disclosed only to authorized parties who have a legal and ethical obligation by their own certification, such as M.D. or RN, to maintain confidentiality. It is possible to describe specific information about diagnosis, symptoms, functioning, treatment plan and prognosis without revealing privileged information. It is possible to do this by narrowly defining the specific information for disclosure of each information type:

Information Type	Permitted to Disclose
Diagnoses	DSM-IV code
Symptoms	Presence or Absence of DSM symptomatologic criteria
Functioning	GAF score
Status	Voluntary or Involuntary; Inpatient or Outpatient
Treatment Plan	CPT Code and NDC Code with dose and course
Prognosis	Scale of “None, Modest, Moderate, Substantial, Complete”

If more information is required for disclosure for Healthcare Operations, such as for the purpose of accreditation audits, then all psychotherapy notes must be de-identified before review.

Disclosure for Purposes other than Treatment, Payment and Healthcare Operations

Solution: Disclosure of psychotherapy notes, without patient authorization, is permitted when there is imminent risk to public health and safety or required by law in cases of abuse or neglect. Otherwise, no disclosure is permitted without a patient specifically authorizing the type of information that would be disclosed and to whom the disclosure would be made. Each disclosure of information requires a separate, signed statement from the patient authorizing disclosure. This includes information for the purposes of public health, research, oversight, government health data systems, coroners/medical examiners, law enforcement, next of kin, and hospital directories for use by others than the treatment team.

Audit Trails

The revised rule should require that a record must be kept of disclosed information, including the content, method of transmittal, destination and intended use of the information, and whether it was for the purpose of treatment, payment, healthcare operations, criminal justice, or other.

Patient Review
The revised rule should allow a patient access to psychotherapy notes and be able to view and receive printed reports of such a type that a clinician uses in the evaluation and treatment of a patient. The patient should not be allowed to change or delete information contained in a psychotherapy note. The patient should be allowed to append information to a psychotherapy note.

Death
Problem in Proposed Rule: In the Proposed Rule patient information can be disclosed with few restrictions two years after the death of a patient. No special provision is given to psychotherapy notes.
Comment & Solution: Confidentiality of mental health information must be guaranteed to the patient in perpetuity. If privileged information can be disclosed after death, then a patient could be inhibited from fully disclosing personal and possibly embarrassing information. The protection of privileged information after death has been recognized in other relationships. Specifically, the Supreme Court recognized (Swidler et. al. v. US) that “the attorney-client privilege survives the death of the client”, that “without assurance of the privilege’s posthumous application, the client may very well not have made disclosures to his attorney at all. .." The confidential relationship between patient and mental healthcare worker, recognized by the court in *Jaffee*, should similarly be maintained after death.

Disclosures to the Criminal Justice System
Solution: All patient information concerning violations of law must be protected, just as they are in the client-attorney relationship. For example, information about procurement and use of illegal weapons is necessary for mental health treatment. If law enforcement could subpoena information of this nature in order to learn of an individual’s activity there would be a chilling effect on patients’ discussion of such behavior, inhibiting treatment that could avert future criminal behavior. Since treatment of the patient does not require disclosure of the precise nature of a crime, by limiting the disclosure specifically to the criteria for the DSM, then it can be noted in the record that criminal behavior occurred, but the specific act or nature of the behavior need not be disclosed. In addition, with respect to law enforcement authorities, only disclosure permitted by judicial review, not by administrative or civil request, may occur. In the case of a patient or family suing the provider, then the patient would decide whether to disclose the requested information. This is a public safety issue as well, since in the absence of such restrictions, a patient interested in dangerous behavior (spousal abuse, for example) would be less likely to seek treatment or would be reluctant to engage in the full and frank discussion necessary for recovery, as *Jaffee* notes.

Under no circumstances should psychotherapy notes be disclosed for the purpose of discovering information regarding a party other than the person who is identified as the patient of the chart which contains the psychotherapy note.

De-identified information should also be barred from disclosure, as law enforcement might use de-identified information from a psychotherapy note in order to discover information of a specific nature regarding third parties mentioned by the patient. Knowledge that law enforcement could mine de-identified information for such data would bring about a chilling effect on patient candor with a mental healthcare worker

For the purpose for investigating healthcare fraud, specifically by the Inspector General's office, then de-identified records should be used. Only upon the discovery of fraud, and upon court order, then a record containing individually identifiable health information may be obtained. The individually identifiable health information must be maintained in a manner to protect the identity of the individual, and under no circumstances may the identity of the patient be revealed to the public.

Responsibilities of Third Party Recipients of Patient Information

Problem in Proposed Rule: Third parties, such as "business partners" and payers are not bound by the rule to protect private information in any particular fashion.

Solution: Third party recipients be required to acknowledge receipt of information, and to protect it in a manner to ensure that the information not be used for any purpose other than that for which it was requested, and that no other party can access the information for any purpose at all.

Compliance and Enforcement

Problem in Proposed Rule: An individual who believes that a covered entity is not complying with a requirement may file a complaint with the Secretary within 180 days from the date of alleged non-compliance. A patient may be under care and in some cases due to his or her condition be unable to access the record within 180 days. Another problem is that by filing a complaint, an individual then has to expose sensitive information to the public.

Solution: Extend the time to review record and procedures to 3 years after the last date of treatment. Complaints regarding non-compliance in regard to psychotherapy notes should be made to a panel of mental health professionals designated by the Secretary. All patient information would be maintained as privileged, would not be revealed to the public, and would be kept under seal after the case is reviewed and closed.

Creation of De-identifyed Information

Problem in Proposed Rule: The proposed rule suggests a mechanism for de-identifying patient information, but the mechanism is faulty. For example: a patients occupation can be used to ascertain the identify of an individual (e.g. President of the United States).

Solution: The Secretary endorse one method, or more than one method for de-identifying information in the same manner that the Secretary has endorsed three methods for transmitting encrypted payment information (e.g. DES) to HCFA.

Proposal: De-identifying all disclosed patient data, not used for Treatment

Problem in Proposed Rule: By linking patient identifying information with patient psychotherapy notes, it is possible to either accidentally or purposefully breach privileged information about an individual to unauthorized parties.

Comment: It is technologically possible for no party, except the Treatment Team to have the unique ability to possess psychotherapy notes and also know the identity of an individual. This is a goal. As a practical matter, the healthcare information infrastructure can not immediately implement this proposed mechanism, though the technology currently exists to do so.

Solution: It is entirely possible to keep the content of psychotherapy notes entirely separate from the actual identity of a patient. In fact, the identity of the patient need not be disclosed at all, as it is irrelevant for diagnostic and treatment purposes. Therefore, the actual identity of the patient could be coded, just as suggested in a section of the Rule. This way, no single third party actually has identifiable information about specific patients; that is, the billing parties know only the actual identity of the patient, and the utilization review parties have the minimum set of protected information, but actually are unaware of the individual identity of the patient.

Proposal: Creation of a Patient Privacy System

Problem in Proposed Rule: The Proposed Rule does not guarantee patient privacy. The Proposed Rule acts as a set of guidelines for patient information that in the breach are punishable. Unfortunately, unauthorized disclosure does harm to the patient, and to the integrity of the healthcare system as a whole.

Comment & Solution: Even if a covered healthcare entity has the best of intentions, it is possible through inexperience, human error or some other factor to be deficient in the implementation of secure methods, In our society, safety devices for use by the public are often manufactured to comply with specified requirements and then inspected to ensure that those requirements continue to be fulfilled. It is recommended that a proactive program be put in place similar to the Department of Defense's Trusted Product Evaluation Program, which ensures that computer products designated for use under specific security classifications perform according to DOD specified standards. It is recommended that the Secretary of DHHS create a similar program to ensure that products and procedures for use in maintaining patient privacy are tested, certified, and will in fact perform to standards.

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