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Searches of Patients & Disclosures to Law Enforcement

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Agenda

- Search and seizure law overview
- HIPAA – disclosures to law enforcement
- Hypotheticals
 - Can we? Would you?
- Takeaways

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Why Searches? Why Notify Law Enforcement?

- Assurance of reasonable safety within the facility (see Conditions of Participation; state licensure regulations; Joint Commission; etc.)
- Legitimate need to learn details (especially in emergencies)
 - Patient's identity
 - Medical history
 - Medications

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Violence in Health Care

- OSHA reported about 75% of nearly 25,000 workplace assaults each year occur in health care and social service settings
- 30% of nurses and 26% of Emergency Department physicians report having experienced violent incidents involving patients or families

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Search & Seizure

- Fourth Amendment applies only to searches and seizures conducted by government officials and persons who are acting as agents of government
- Courts evaluate:
 - Was the search or seizure conducted by or on behalf of government?
 - Did individual have an expectation of privacy?

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Exceptions to Warrant Requirement Under Fourth Amendment

- Inventory
- Exigent circumstances
- Plain view doctrine

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Search & Seizure

- In determining whether searches are reasonable when conducted by private individuals, courts consider:
 - Whether patient or visitor retained any expectation of privacy in belongings or area searched
 - If so, whether that interest was diminished or is subordinate to legitimate interest

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Emergency Departments

- Diminished expectation of privacy
 - "Public" area, with medical personnel constantly walking in and out
 - Patient typically remains there only a few hours

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Emergency Departments

- Courts have recognized need for hospitals to search individuals and belongings to:
 - Inventory belongings (pursuant to regular policy/process)
 - Determine patient's identity
 - Locate any medications or substances patient may be taking

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Hospital Room (Non-Emergency Care)

- Courts have reached differing conclusions:
 - Legitimate expectation of privacy due to length of stay and furnishings (i.e., living area space) in patient room

vs.

- While some expectation of privacy in closed closets, bags and drawers, hospital room itself is "public area" where hospital staff and physicians routinely go in and out

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Hospital Room (Non-Emergency Care)

Michigan court stated in *People v. Courts*, 205 Mich. App. 326, 517 N.W.2d 785 (1994):

"No one who had ever spent any time in a hospital room could continue to harbor any false expectations about his personal privacy or his ability to keep the world outside from coming through the door."

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Protection of Staff/Public Safety

- Examples of contraband (depending on unit):
 - lighters, matches, and tobacco products
 - weapons of any kind
 - illicit drugs or prescription drugs that are not prescribed to patient
 - any sharps, such as needles, straight pins, scissors, razors
 - plastic bags
 - steel-toed boots or high-heeled shoes
 - devices with recording capabilities

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Inventory Searches

- Generally considered to be reasonable if pursuant to policy and for purposes other than to discover contraband
 - To protect patient's property (and hospital from claims of property loss or theft)
 - To identify patient
 - To learn information relevant to patient's treatment and medical history
 - To protect staff and other patients from potential dangers

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Exigent Circumstances

- Situations presenting immediate danger to life or of serious injury or immediate threatened removal or destruction of evidence
- Generally decided after the events took place by court evaluating reasonableness of actions
 - Good documentation essential!

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Exigent Circumstances

- Must be based on more than "mere speculation"
- Are there other alternatives available?
 - Can room be locked down and/or patient put under observation while wait for police?
 - Is anyone's safety in immediate jeopardy?

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Plain View

- Concept which is applied more often to police searches
- For hospitals, if item in plain view, does patient have reasonable expectation of privacy?
 - If seize item because it constitutes contraband, what next?
 - Where to store
 - Return to patient
 - Destroy item
 - Call police

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Disclosures to Law Enforcement

- Disclosure of patient's name, condition, etc. is protected health information (PHI)
- Disclosure of "evidence" (for example, a bullet, bag of drugs, etc.) might not *itself* be PHI
 - But does it include identifying information?
 - Did you provide a history/details about how it was obtained from the patient, etc.?

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Disclosures to Law Enforcement

- HIPAA provides for disclosures to law enforcement, without patient authorization, in limited circumstances:
 - Pursuant to process and as otherwise **required** by law
 - Limited information for identification and location purposes
 - Victims of a crime
 - Decedents
 - **Crime on premises**
 - Reporting crime in emergencies
 - **To avert a serious threat to health or safety**

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Disclosures to Law Enforcement

- **Crime on Premises** 45 CFR 164.512(f)(5):
 - Covered entity may disclose to a law enforcement official PHI that the covered entity believes *in good faith* constitutes *evidence of criminal conduct* that occurred *on the premises of the covered entity*
 - Note: covered entities not required to guess correctly whether information will be admitted as evidence

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Disclosures to Law Enforcement

- **Avert a Serious Threat to Health or Safety** 45 CFR 164.512(j):
 - Covered entity may, consistent with applicable law and standards of ethical conduct, use or disclose PHI, 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: or

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Disclosures to Law Enforcement

- **Avert a Serious Threat to Health or Safety**
45 CFR 164.512(j):
 - Is necessary for law enforcement authorities to identify or apprehend an individual:
 - Because of a statement by an individual admitting participation in a violent crime that the covered entity reasonably believes may have caused serious physical harm to the victim; or
 - Where it appears that the individual has escaped from a correctional institution.

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Hypothetical #1

"Under the Influence" in the ED



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Hypothetical #1

- Patient is brought to ED
- Patient is "out of it" and appears to be under the influence of alcohol or drugs

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Can We Search?

- Does hospital have policy requiring inventory of patient property be done?
- Would search help staff know patient's identity and what substance(s) the patient is on?

Would You Search?



Hypothetical #1 – Bingo!

- Staff search patient's backpack and find what appears to be:
 - A little bit of marijuana
 - A lot of marijuana
 - Meth
 - Prescription bottles with different names on labels
 - White pills in baggie
 - Blank prescription pad
 - Pipe/bong/needles

Can We Call Law Enforcement?

- Crime on premises?
 - Unlawful possession of a controlled substance?
 - Intent to deliver a controlled substance?
 - Unlawful possession of drug paraphernalia?
 - Unlawful possession of a prescription drug?
 - Receiving stolen drugs?
 - False or forged prescription?

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Would You Call Law Enforcement?



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But Wait...What If...

- The individual in the ED is:
 - The son of the Hospital's Chief of Staff?
 - The daughter of the Hospital Board Chair?
 - A local "celebrity"?
 - The star quarterback for the local university?

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Hypothetical #2

Don't Mess With My Family ...



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Hypothetical #2

- An elderly diabetic man experiencing dizziness during a duck hunting trip was brought to the ED. The patient was accompanied by his son. While obtaining a blood sample, the phlebotomist noticed the patient's son was carrying a large hunting knife in a sheath attached to his belt. The patient also had a camouflage backpack that he brought with him to the ED.

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Can We Search?

- Plain view doctrine
 - Ask son to take knife off premises or to vehicle
- Inventory policy for backpack
- Are contents of backpack relevant to patient's ID or patient's medical condition?

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Would You Search?



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Hypothetical #2 – Chapter 2

- Assume the hospital did not search patient's backpack.
- Hours later, the patient is unhappy that he still has not received his test results. When a nurse comes in to take his blood pressure, nurse notices the patient's bag is open. She sees a pocket knife in the bag. The patient is clearly upset and is demanding to receive his results from the lab. The nurse is afraid.

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Can We Call Law Enforcement?

- Involve Hospital security
- Crime on premises?
 - Assault on a health care provider?
 - But what if he didn't mention or attempt to pick up the pocket knife?

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Would You Call Law Enforcement?



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But Wait...What If...

- The patient's test results come back as inconclusive. The patient is fuming over the these results and the length of time he spent in the ED. He threatens to return to the hospital with an Uzi to "take care" of everybody who treated him.

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But Wait...What If...

- Terroristic threats?
- Disclosure to avert a serious threat to health or safety?
 - What if he is 86-years old and suffers from dementia or is mentally unstable?

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Hypothetical #3

The Case of the Missing Sugar Packets



Hypothetical #3

- Staff notice that a waiting room next to the cardiac unit is always low on supplies stocked by the hospital for coffee
- Staff notice elderly woman with a large purse is frequently in the waiting room before supplies go missing

Can We Search?

- Do we have a reasonable belief that a crime is occurring on the premises?
- Has anyone seen theft occurring?
 - Inventory, plain view and exigent circumstances do not apply here

Would You Search?



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Hypothetical #3 – Facts Change

- Instead of coffee supplies, hospital staff report someone is stealing batteries from soap and hand sanitizer dispensers
- Instead of coffee supplies, ED staff report missing medical supplies from cabinet in exam room where woman was treated, including medications

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Can We Call Law Enforcement?

- Crime on premises?
 - Vandalism?
 - Theft?

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*Would You Call
Law Enforcement?*



Can We Call Law Enforcement?

- Crime on premises?
 - Unlawful possession of a controlled substance?
 - Unlawful possession of drug paraphernalia?
 - Unlawful possession of a prescription drug?

*Would You Call
Law Enforcement?*



Hypothetical #4

Party in the OB Unit



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Hypothetical #4

- Hillary and Donald just welcomed their first child. Elated to be a new father, Donald goes to a nearby convenience store to grab a few "adult beverages." He loads them into some wheeled coolers and goes back to the hospital. Hospital reception staff see Donald make multiple trips to and from his car to bring in three coolers.

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Can We Search?

- Reasonable suspicion of contraband or items prohibited by the hospital?
- Inventory, plain view, or exigent circumstances?
- Request permission to look in coolers?

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Would You Search?



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Hypothetical #4 – Chapter 2

- It's 2:00 a.m. the same night. Hillary's room is abuzz with a crowd of Donald's nieces – all wearing sweatshirts with private high school names and who appear to be under 21. Nurses see Donald bringing in buckets of ice chips for the coolers and taking shots using plastic baby bottles. Loud music and laughing can be heard up and down the halls.

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Can We Call Law Enforcement?

- Call Security? – violation of visiting hours/hospital policies against excessive noise
- Crime on premises?
 - Supplying alcohol to minors?
 - Possession of alcohol by a minor?

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Would You Call Law Enforcement?



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But Wait...What If...

- It's just a bottle of champagne to celebrate a birth, New Year's Eve, a patient's birthday, etc.?
 - Not disturbing other patients
- It's a cooler full of Jimmy John's cold cut sandwiches that Hillary has been craving for 9 months?



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Takeaways

- Have a written search policy that incorporates a range of scenarios
 - Goal is to minimize risks in the environment of care and ensure the safety of all persons who enter the facility and staff
 - Guidelines to determine whether and how a search of the patient/visitor, belongings, and/or room should be performed
 - Specify common areas can be searched without restriction

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Takeaways

- Search should not be more intrusive than necessary
- First always ask for patient's consent
- Then apply concepts of inventory, plain view, and exigent circumstances
- When conducting a search, use area which affords patient reasonable privacy
- Require two staff members to be present

Takeaways

- Implement the policy and be consistent
- Documentation
 - Summary of the reason(s) for the search
 - Who was present?
 - What was searched?
 - Results of the search
 - Was law enforcement notified? Anyone else?

Takeaways

- Educate and train staff, administration, security personnel, and volunteers
 - Everyone should be aware of the policy(ies)
 - Know the different types of permitted searches and when law enforcement can/should/will be notified
 - Consider limiting calls to law enforcement to administration or house supervisors/administrators on call

Questions?

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