



# Compliance - TODAY

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by Daniel F. Shay, Esq.

# Navigating physician Notices of Privacy Practices

- » NPPs are for disclosures of protected health information (PHI) that don't require patient consent.
- » Authorizations are for disclosures requiring patient consent.
- » Not every use or disclosure needs to be listed in the NPP.
- » Review your NPP to see whether anything needs to be added or removed.
- » If your NPP is long, consider using a "layered" approach.

*Daniel F. Shay (dshay@gosfield.com) is an associate with the Alice G. Gosfield and Associates, PC law firm in Philadelphia.*

**T**he most recent HIPAA Privacy, Security and Breach Notification regulations made September 23, 2013 the date when compliance is expected. For physicians and physician practices, this means it is past time to revisit and revise office policies, compliance procedures, and HIPAA documentation, including the Notice of Privacy Practices (NPP). Many practices may not have revised their NPP in several years. Because failure to deliver an effective NPP to patients constitutes a violation of the HIPAA Privacy Rule—which could subject a practice to penalties of up to \$1.5 million in the case of repeated violations in a single calendar year—all practices should closely examine their NPP to determine what needs to be updated. This article presents some basic principles regarding NPP, discusses some of the changes required under the new regulations, and addresses how to effectively deliver the NPP to patients.



Shay

## Basic principles

The first thing that practices should keep in mind when revising their NPP is its underlying purpose. Under HIPAA, covered entities,

including physician practices, may use and disclose patient protected health information (PHI) for a variety of reasons. For example, PHI may be shared with another physician who is treating the patient, or with an insurance company responsible for paying for the patient's care. Similarly, practices may share PHI with auditors conducting compliance audits. Under these and other circumstances, the practice does not need to obtain the patient's permission to use or disclose the PHI. For all other uses or disclosures of PHI, the practice must obtain the patient's written authorization first.

An NPP is designed to inform patients of how a practice will use and disclose PHI in ways that do *not* require the practice to obtain the patient's authorization. In essence, the NPP tells the patient "These are the various ways that we will use your PHI, for which we do not need your permission."

By contrast, an authorization is a detailed document with a number of requirements. For example, the authorization must include a description of the PHI to be used or disclosed, the person who is authorized to make the use or disclosure, the person to whom the disclosure is made, an expiration date (where applicable) and, in some cases, the purpose for which the information may be disclosed.

An NPP does not need to individually list every possible use or disclosure of the patient's PHI that would require obtaining an authorization. In fact, the regulations only require that the NPP include statements that an authorization will be required for the release of psychotherapy notes, for uses and disclosures of PHI for marketing purposes, and for the sale of PHI. Aside from these requirements, the NPP can simply state that all other uses or disclosures not described in the notice will require an authorization.

Although "model" or "form" NPPs from professional organizations and government entities often offer an excellent baseline for drafting a notice, practices should understand that there is no one-size-fits-all NPP. Different practices will require different provisions, and some provisions contained in a "model" NPP may not apply. For example, physician practices that do not engage in disclosures for cadaveric organ, eye, or tissue donation purposes do not need to include a statement that they may make such disclosures. Likewise, if a physician practice does not ever use or disclose PHI for research purposes, there is no need to reference that the practice may do so under certain circumstances. There are, however, both benefits and costs associated with eliminating such uses or disclosures from the NPP.

Deleting references to uses or disclosures in which the practice will never engage may help keep the NPP shorter, and therefore make it more manageable for patients to read. However, doing so will mean that the practice must obtain an authorization from the patient if it later engages in such activities without updating its NPP to include the new activities.

Therefore, a practice should carefully consider which permitted uses and disclosures it will list in its NPP, if it wishes to shorten the notice. If the practice is less concerned with the length of its NPP, there is no harm in including the use or disclosure, even if the practice is unlikely to use or disclose the PHI in the described manner.

### What to update

To begin with, the NPP should include references to the changes implemented by the Breach Notification Rule. Specifically, the NPP should include a statement to the effect that the practice will use a patient's PHI to contact the patient in the event of a breach of their PHI. The NPP should also include a statement that the patient has a right to be notified in the event that their unsecured PHI has been breached. This statement does not need to elaborate on the definition of "breach" or "unsecured PHI," or other similar concepts, but covered entities are permitted to do so.

Practices should also review their NPP against the list of uses and disclosures that do not require an authorization, but which were not included previously in their NPP. For example, if a family

medicine practice recently began employing a nurse midwife to perform home births for patients, that practice may now be reporting births to state agencies, where it previously might not have made such reports. Because such disclosures do not require an authorization, the practice should add a description of such activities to its NPP.

On a related note, practices may want to eliminate language that they may have included in previous NPPs, which states that

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covered entities may contact patients to provide appointment reminders, information about treatment alternatives, or other health-related benefits and services that might be of interest to the patient.

The requirement to include this language was eliminated from the regulations. A practice may indicate that they will use patient PHI for such functions in the NPP, but there is no requirement to do so.

The revised NPP should also include a statement that a patient has the right to request that the practice not submit their PHI to an insurance company if the patient has chosen to pre-pay for the service or treatment.

Lastly, the effective date of the NPP will also need to be changed. As a practical matter however, this date cannot “reach back in time” to the compliance date under the regulations. Instead, the regulations require that the “effective date” for the NPP be the first day that the practice issues the revised NPP or otherwise publishes it. Thus, if a practice did not revise its NPP before September 23, 2013, it cannot “back date” the notice to that day, and must instead list the date it first published the NPP.

### Issuing the NPP

New patients must be issued a copy of the new NPP, and sign a statement that they have received and reviewed the NPP. However, existing patients do not need to sign the updated NPP. Instead, a practice may simply post a copy of the revised NPP in an obvious and prominent location, and keep copies on hand to distribute if a patient requests one.

For practices which believe their NPP may end up too long and cumbersome, the Department of Health and Human Services (HHS) permits the use of what it calls a

## Practices that maintain a website may also deliver the NPP to patients through the website.

“layered” approach, where the practice provides a patient with a shorter NPP that briefly summarizes the patient’s rights and other information, and a longer notice which satisfies the regulations

beneath the shorter one. In other words, the practice may provide a patient with, for example, a one-page summary listing the patient’s rights, and basic

information that is contained in the NPP, but must also provide an NPP that includes all of the required language under the regulations. HHS allowed this approach specifically to address covered entities’ concerns that NPPs were too long and cumbersome for patients to understand.

Practices that maintain a website may also deliver the NPP to patients through the website. They must still provide a patient with a paper copy of the NPP upon request, but electronic delivery is still permitted. Similarly, if the patient has elected to receive emails from the practice, the practice may deliver the NPP using email. However, if the email transmission fails (and the practice is aware of it), the practice must provide a paper copy of the NPP to the patient.

### Conclusion

Crafting the NPP is a task that requires attention to detail, as well as an understanding of HIPAA’s regulations and requirements. Although the NPP must be written in plain language, an effective and compliant NPP will require an understanding of several interconnected sections of the HIPAA regulations. Physician practices should therefore work closely with health care legal counsel to revise their NPPs, keeping in mind the day-to-day realities of how the practice operates. ☺