Medical Malpractice *newsletter*

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Releasing medical records of a deceased adult

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RELEASING MEDICAL RECORDS OF A DECEASED ADULT—WHAT IS ALLOWED UNDER HIPAA?

Sal calls your clinic requesting copies of her 24-year-old son's medical records. She tells you her son was a patient of your clinic, and he died a few days ago. She is quite distraught during the call and says she wants answers about her son's death, which is why she is requesting his medical records. Sal's son died without a will, and no estate has been opened, so no administrator has been appointed. Should you release the records to Sal?

In Iowa: While the ultimate decision may involve many factors, in Iowa, there is no absolute legal authority to release the adult decedent's records to a parent who is not the executor.

In Minnesota: Although Minnesota statute does expressly allow for the release of medical records to a surviving spouse or parent of a deceased patient upon execution of a written authorization, it is very possible that a court of law may find that HIPAA preempts Minnesota law. If HIPAA does preempt Minnesota law, then Sal would have to show more than just her relationship to her son to have access to his health care records. No Minnesota court has decided this issue.

1. HIPAA and Related Privacy Rules

HIPAA is a federal law, passed in 1996, whose purpose is to protect and keep confidential patients' personal health information. Congress provided for the Secretary of Health and Human Services to promulgate privacy regulations ("Privacy Rules") to direct the implementation of HIPAA.

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HIPAA

RELEASING MEDICAL RECORDS OF A DECEASED ADULT—WHAT IS ALLOWED UNDER HIPAA?

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As of March 2013, specific "Privacy Rules" went into effect, which apply to the release of a deceased individual's medical records. According to these Rules, if state law gives the requesting person authority to act on behalf of the deceased person, then a "covered entity" (such as a hospital or medical clinic) may treat that person as a personal representative with regard to protected health information. Under these same Rules, the covered entity (such as a hospital or clinic) may disclose to that family member protected health information, but only certain specific pieces of information. This includes information related to the deceased that is relevant to the requesting person's involvement but only if that is not inconsistent with any prior expressed preference of the deceased that is known by the hospital or clinic.

2. Analysis under HIPAA and the Privacy Rules

a. Does state law grant someone who is not the executor or administrator the authority to act on behalf of the deceased individual?

(1) Iowa

Unlike some states, Iowa has no specific law addressing the release of medical records in this situation. However, Iowa has other laws that arguably apply.

One such example is Iowa's Life Sustaining Procedures Act, Iowa Code Chapter 144A. The applicable section is as follows: Under this law, if a person dies without a will and without designating someone as the "attorney in fact" through a living will, then Iowa law allows another person to step in and make end-of-life decisions. The law defines the following specific order as to who may make such decisions:
(a) Designated attorney-in-fact,
(b) Guardian
(c) Spouse
(d) Adult children
(e) Parent
(f) Sibling.

This law allows end-of-life decisions to be made by the defined individual but there are very specific criteria, i.e., the patient must be in a terminal condition, the individual must follow the patient's preferences, etc. The law does not give the individual carte blanche decision-making power.

One could argue that this law infers that Iowa will allow others to make important health care decisions for a patient who is no longer able to do so; therefore, the same basic tenant should be applied when a parent requests the medical records of the deceased adult child. There is no specific Iowa law on this point so how this argument would actually hold up in court is unknown.

(2) Minnesota

The Minnesota Health Records Act includes a deceased patient's surviving spouse and parents within the definition of "patient" when delineating who may have access to a patient's records. Minn. Stat. § 144.291. The Act further provides that "[u]pon request, a provider shall supply a patient [including a surviving spouse or a parent of a patient] complete and current information possessed by that provider concerning any diagnosis, treatment, and

prognosis of the patient in terms and language the patient can reasonably be expected to understand." Minn. Stat. § 144.292. Therefore, pursuant to these two statutes it is clear that Minnesota law specifically allows for the release of medical records to a surviving spouse or parent of a deceased patient. The request must come in the form of a signed and dated authorization. Minn. Stat. § 144.293.

Despite the fact that Minnesota law does allow parents to obtain their deceased child's medical records, it is important to consider that HIPAA may be found to preempt Minnesota law in this regard, making Minnesota's law on the subject null and void. Critically, HIPAA does contain an express preemption clause directing that HIPAA shall supersede any contrary provision of state law. 42 U.S.C. § 1320d-7(a). HIPAA does not, however, preempt state laws that provide more stringent privacy protections than those contained in HIPAA. 45 C.F.R. § 160.203(b).

Under HIPAA, family members who are not court-appointed personal representatives for their deceased relative's estate are generally limited in what they can obtain with respect to the deceased individual's protected health information. Generally, family members are only able to obtain protected health information of a deceased relative if (1) they were involved in their deceased relative's medical care or the payment of medical care for that deceased relative prior to the relative's death, (2) the protected health information is relevant to the requestor's involvement, and (3) providing the protected health information to the family member is not contrary to any prior expressed preference of the deceased individual. 45 C.F.R. § 164.510(b)(5). Therefore, because Minnesota law is more expansive than HIPAA (a federal law) in what it allows a family member to receive, it is possible that a court would find that HIPAA preempts Minnesota law and the family member should only be able to obtain protected health information that meets the criteria set forth in 45 C.F.R. § 164.510(b)(5).

Of course, a court may also find that HIPAA does not preempt Minnesota law, and instead, a parent of a deceased individual has "authority to act on behalf of a deceased individual" pursuant to HIPAA. Specifically, HIPAA states:

> If under applicable law an executor, administrator, or other person has authority to act on behalf of a deceased individual or of the individual's estate, a covered entity must treat such a person as a personal representative under this chapter, with respect to protected health information relevant to such personal representation.

45 C.F.R. § 164.502(g)(4). Minnesota law has not decided whether a parent of a deceased individual – who is not also the legally-appointed personal representative of the deceased child's estate – would be considered a person with "authority to act on behalf of a deceased individual." Accordingly, the best practice may be to require surviving spouses, parents, and other family members requesting medical records

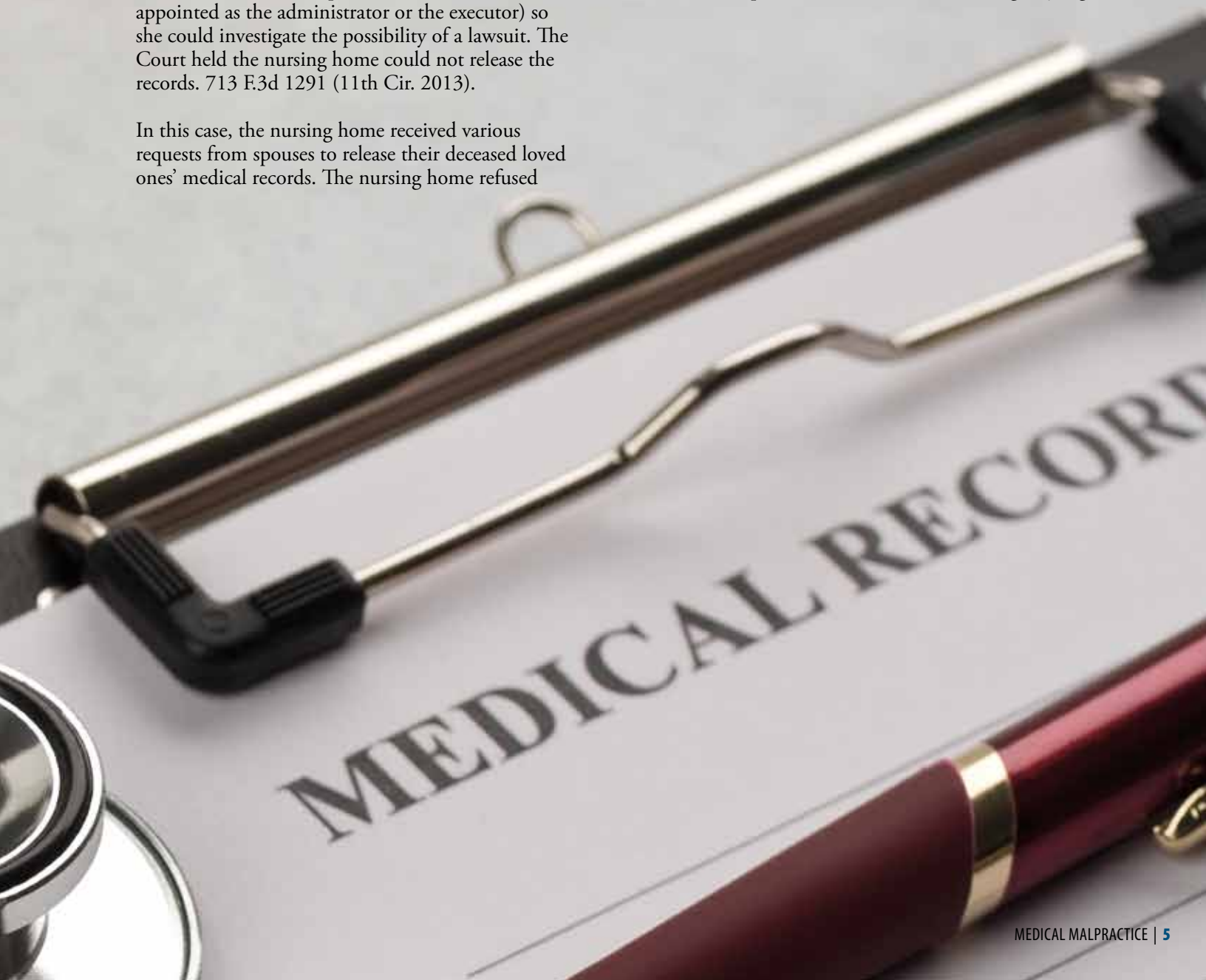
of a deceased individual to become a court-appointed representative of the deceased individual's estate in order to obtain access unless the information requested meets the criteria set forth in 45 C.F.R. § 164.510(b)(5).

(3) A Florida case that provides some insight

A Florida case provides insight, although obviously Florida law is different from Iowa or Minnesota law and the 11th Circuit is different from the 8th Circuit (which has jurisdiction over federal issues arising out of Iowa and Minnesota). *OPIS Management Resources, LLC v. Secretary, Florida Agency for Health Care Administration* specifically dealt with whether a nursing home could release a deceased patient's medical records to his spouse (who had not been appointed as the administrator or the executor) so she could investigate the possibility of a lawsuit. The Court held the nursing home could not release the records. 713 F.3d 1291 (11th Cir. 2013).

In this case, the nursing home received various requests from spouses to release their deceased loved ones' medical records. The nursing home refused on the basis that the spouses were not the "personal representatives" of the deceased under HIPAA. Florida's Agency for Health Care Administration issued citations to the nursing home for refusing to release the records. The Agency believed these spouses were to be treated as the "personal representatives" under Florida law; therefore, they were entitled to their deceased spouse's medical records.

The case went to the 11th Circuit Court of Appeals (a federal court), which issued a ruling agreeing with the nursing home. The *OPIS Management* case focused on a specific phrase from the HIPAA Privacy Rules that said, "any person who has authority to act on behalf of the deceased individual under state law." Florida had a specific law that set forth which people could access a deceased person's medical records. The Agency argued



this law allowed those specific individuals to act "on behalf of" the deceased, consistent with HIPAA requirements.

However, the Court held Florida's law was too broad-sweeping. Florida's law authorized the disclosure of protected health information without restriction—without requiring any specific authorization, for any conceivable reason and without regard to the authority of the individual making the request to act. Because the law was so broad-sweeping, the Court deemed it to be more expansive than HIPAA, which has narrow criteria for releasing medical records of deceased individuals.

In the United States, federal law is supreme over state law. If a state law conflicts with a federal law, the federal law trumps. If a state law is broader than the federal law, the federal law trumps. A state may make a law that is more restrictive than the federal law, but a state may not make a law that is less restrictive than the federal law.

The 11th Circuit held that the Florida law was less restrictive than HIPAA (the federal law); therefore, the Florida law bows to the restrictions of HIPAA. The bottom line is that the 11th Circuit Federal Court agreed with the nursing home: that the medical records should not be released to the spouse to pursue investigating a potential legal claim.

(4) Applying the lessons from the *OPIS Management* case to Iowa

Applying *OPIS*, we conclude the following: 1) Iowa has no specific law allowing medical records to be released (unlike Florida and other states), 2) arguing that the Life Sustaining Procedures Act, by inference, allows the parent to step in and obtain the deceased's medical records is using a law that is intended to address a very different situation (end-of-life decisions), and 3) the Life Sustaining Procedures Act could be read as broader than HIPAA such that the more narrow restraints of HIPAA would apply.

(5) Applying the lessons from the *OPIS Management* case to Minnesota

Like the Florida statute in *OPIS*, Minnesota also has a rather broad-sweeping statute that allows surviving spouses and parents of deceased patients to have virtually unlimited access to their deceased relative's medical records. Thus, one can infer from OPIS that it is very possible that a court of law would find HIPAA preempts Minnesota law.

b. Was the requesting individual involved in a) the deceased's care before the deceased's death or b) payment of the deceased's health care?

What exactly does "involved in the deceased's care before death" mean? The covered entity must have "reasonable assurance" that the requestor was involved in the deceased's care before death. Examples given in the Federal Register's comments to the Privacy Rules interpreting this section indicate the burden is not on the requestor (Sal, the mother) to prove to the covered entity (the Clinic) that she was "involved in the deceased's care before death." This may be inferred by any of the following actions: the requesting person might have visited the deceased before his death (if the deceased was in the hospital), the requesting person might have inquired about the deceased before death, or the deceased might have indicated that the requestor was involved in his care before death.

Questions to ask: Does the Clinic have any evidence that Sal was involved in the care of her deceased son before he died? Did he live with her? What were the circumstances surrounding the son's death? Is Sal responsible for paying her son's health care bills?

c. Is the information being requested relevant to the requestor's involvement in the deceased's care?

HIPAA does not allow carte blanche release of the deceased's medical records. HIPAA and the Privacy Rules specifically state the only information that may be given to the person requesting the medical records is that which is relevant to the requestor's involvement in the deceased's care.

Questions that should be asked: Why does the mother want the medical records? Are the records that might be released relevant to her involvement in her deceased son's care?

d. Is releasing the information inconsistent with any expressed preference of the deceased that is known to the healthcare entity?

Questions that should be asked: Did the deceased indicate he did not want his mother involved in his care? Did he indicate he did not want his mother to know about the care he received? Did he indicate he did not want his mother to know about any certain health conditions?

e. Are there "psychotherapy notes"? If so, those should not be released unless they would be used in treatment or if a legal proceeding required them—neither of which is applicable when the patient is deceased. 45 C.F.R. § 164.508(a)(2).

"Psychotherapy notes" have specific definitions under HIPAA and the Privacy Rules. They are not to be considered as part of the medical records, and they are not to be released.

3. Conclusions

In the situation at hand, there are many factors to consider. In addition to these legal issues, a hospital or clinic often wants to be sensitive to a mother who has lost a son under potentially difficult conditions. The clinic might be concerned about maintaining a relationship with the family of the deceased to assist in their time of need and to avoid causing further difficulties. These are real issues that are important for any healthcare entity to carefully consider and balance when making decisions such as this.

The goal of this article is to provide background information on the actual law so clinics and hospitals can be informed as they move forward in making difficult decisions such as these.


HEALTH
INFORMATION

DISCLOSING PROTECTED HEALTH INFORMATION TO LAW ENFORCEMENT

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Healthcare providers have long had considerable contact and involvement with law enforcement. Much of that contact comes in the form of sharing information about a provider's patients, based on a request from law enforcement for information or because of a duty to report certain information.

One of the many goals of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") Privacy Rule is to provide regulations that strike a balance between a patient's right to privacy and important law enforcement functions, such as criminal investigations and protection of the public. In furtherance of that goal, HIPAA's Privacy Rule provides a federal floor of privacy protections for a patient's protected health information ("PHI"), while still allowing for certain information to be shared with law enforcement under certain circumstances.

HIPAA's Privacy Rule – General Requirements

While the Privacy Rule allows healthcare providers to disclose PHI to law enforcement in some situations, certain requirements must first be met. First, prior to disclosing PHI to law enforcement a healthcare provider must verify the identity of the law enforcement, official making the request and also obtain any documentation, statements, or representations required to disclose the PHI. Because requests for information, and the justification for those requests, may be made orally, it is recommended that healthcare providers document in detail any such request and all disclosures made. If requests for information are made in writing, it is recommended that any documentation received regarding the request be maintained as part of the patient's medical record, if appropriate, or by the person, department, or entity making the disclosure.

Second, the Privacy Rule requires that healthcare providers make reasonable efforts to disclose the minimum information necessary to accomplish the permitted disclosure. That is, when disclosing PHI a healthcare provider must make reasonable efforts to disclose only the minimum PHI necessary to accomplish the intended purpose of the use, disclosure, or request. If reasonable under the circumstances, a healthcare provider may rely on a request for disclosure from law enforcement as being the minimum necessary for the stated purpose if the law enforcement official making the request:

1. Is permitted to make such a request; AND

2. Represents that the requested information is the minimum necessary for the intended purpose.

Third, it is important to note that, while the Privacy Rule *allows* healthcare providers to disclose PHI in some situations, it does not *require* that any disclosures be made except when a patient executes a valid authorization for disclosure. Despite this, state law may require disclosure in certain circumstances. For example, many states require healthcare providers to contact law enforcement to report child abuse or neglect, prenatal exposure to controlled substances, abuse of vulnerable adults, certain sudden or unexpected deaths, and violent injuries. Required disclosures vary greatly from state to state.

Finally, HIPAA's Privacy Rule provides only a federal floor for privacy protections, and states may enact laws providing stricter protections. Because states may enact law both requiring disclosure of information in certain circumstances and may also provide for stricter protections in other circumstances, it is imperative that, in addition to familiarizing themselves with HIPAA's Privacy Rule, providers should also familiarize themselves with the laws of the state where the provider practices.

Some Permitted Disclosures under HIPAA's Privacy Rule

IDENTIFICATION AND LOCATION OF A SUSPECT, FUGITIVE, MATERIAL WITNESS, OR MISSING PERSON: PHI may be disclosed ***in response to a request from law enforcement*** for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person; however, ***only*** the following information may be disclosed:

- Name and address;
- Date and place of birth;
- Social security number;
- ABO blood type and rh factor;
- Type of injury;
- Date and time of treatment;
- Date and time of death, if applicable;
- A description of distinguishing physical characteristics, including height, weight, gender, race, hair and eye color, presence or absence of facial hair, scars, and tattoos.

PHI related to a patient's DNA, DNA analysis, dental records, or typing, samples or analysis of body fluids or tissues (except for blood type and rh factor) ***cannot*** be released unless required by court order, warrant, or, if certain requirements are met, administrative subpoena or investigative demand.

VICTIMS OF A CRIME: PHI may be disclosed ***in response to a request from law enforcement*** for information about a patient who is a victim of a crime if the patient agrees to the disclosure. If the patient is unable to agree to the disclosure because of the patient's incapacity or because of some other emergency circumstance, a healthcare provider may still disclose PHI ***if*** each of the following is met:

- The law enforcement official represents that the requested information is needed to determine if a crime has been committed ***by a person other than the patient;***
- The law enforcement official represents that an immediate law enforcement activity would be materially and adversely affected by waiting until the patient is able to agree to the disclosure; *AND*
- The healthcare provider, in the exercise of professional judgment, determines that the disclosure is in the best interest of the patient.

If the patient is a victim of child abuse or an adult victim of abuse, neglect or domestic violence, other provisions of the Privacy Rule apply:

Victims of Child Abuse: PHI of a victim of child abuse may be disclosed to any law enforcement official authorized by law to receive reports of child abuse. The agreement of the patient or the patient's parents/guardian is not required.

Victims of Adult Abuse, Neglect or Domestic Violence: A healthcare provider who reasonably believes that a patient is an adult victim of abuse, neglect or domestic violence may disclose PHI about that patient to a law enforcement official authorized to receive such information if:

- The disclosure is required by law;
- The patient agrees to the disclosure;
- The disclosure is expressly authorized by law and the provider, in the exercise of professional judgment, believes the disclosure is necessary to prevent serious harm to the patient or others; OR
- The disclosure is expressly authorized by law and the patient is unable to agree to the disclosure because of incapacity, ***but only if*** an authorized law enforcement official represents that the requested PHI is not intended to be used against the victim and that an immediate law enforcement activity would be materially and adversely affected by waiting until the patient is able to agree to the disclosure.

Note: A healthcare provider who discloses PHI about an adult victim of abuse, neglect or domestic violence must promptly inform the patient that such a disclosure has been made, except if such disclosure would be made to a personal representative of the patient whom the provider reasonably believes is the perpetrator of the abuse, neglect or domestic violence OR if the provider, in the exercise of professional judgment, believes informing the patient of the disclosure would place the patient at risk of serious harm.

DEATHS CAUSED BY CRIMINAL CONDUCT: PHI about a deceased patient may be disclosed to law enforcement, for the purpose of alerting law enforcement of the patient's death, if the healthcare provider has a suspicion that the death was the result of criminal conduct.

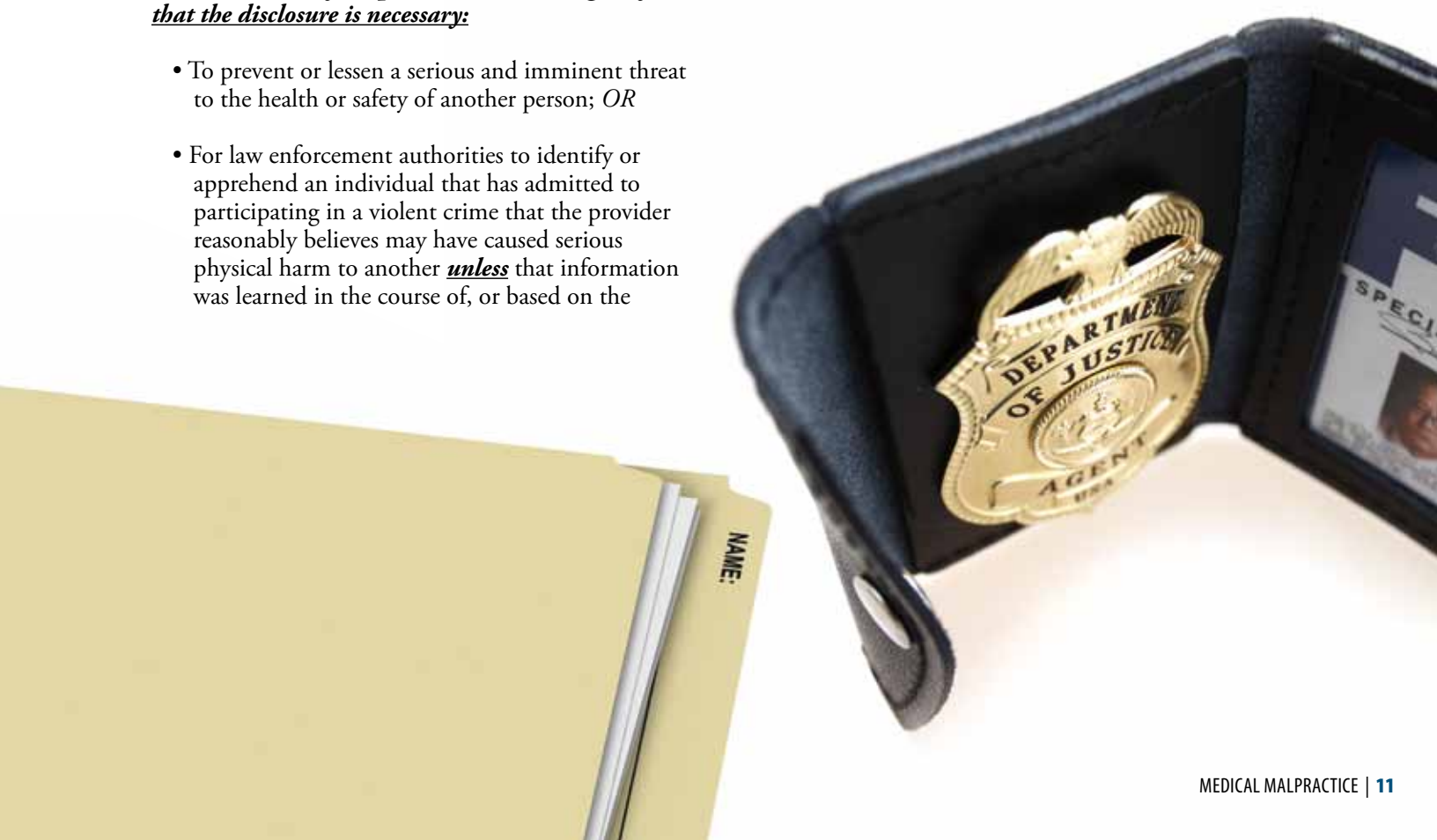
TO AVERT SERIOUS AND IMMINENT HARM OR FOR IDENTIFICATION AND APPREHENSION OF AN ADMITTED PARTICIPANT IN A VIOLENT CRIME: PHI limited to the specific information indicated above under *"Identification and Location of a Suspect, Fugitive, Material Witness, or Missing Person"* may be disclosed to law enforcement ***if the provider believes in good faith that the disclosure is necessary:***

- To prevent or lessen a serious and imminent threat to the health or safety of another person; *OR*
- For law enforcement authorities to identify or apprehend an individual that has admitted to participating in a violent crime that the provider reasonably believes may have caused serious physical harm to another ***unless*** that information was learned in the course of, or based on the individual's request for, therapy, counseling, or treatment related to the propensity to commit that type of violent act.

CRIMES COMMITTED ON HEALTHCARE PROVIDER'S PREMISES: PHI may be disclosed to law enforcement if the healthcare provider believes in good faith that such PHI constitutes evidence of criminal conduct that has occurred on the premises of the healthcare provider.

CORRECTIONAL INSTITUTIONS AND PATIENTS IN CUSTODY: PHI of an inmate or other individual in lawful custody may be disclosed if a correctional institution or law enforcement official represents that the PHI is necessary for:

- The provision of health care to such individual;
- The health and safety of such individual, other inmates, other persons at a correctional institution, or those responsible for transportation of such individuals; OR
- The administration and maintenance of the safety, security, and good order of the correctional institution.



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