

Creating Conflict:
Nursing Informaticist as Privacy Officer

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Kary Mason

Imagine sitting in your office and you receive a letter from the HHS Office for Civil Rights (OCR) requesting copies of hospital policy and procedures regarding your employee's accessibility of medical records. This came as a complete surprise to a hospital ("covered entity") after a patient filed a complaint directly with the OCR stating access to her medical record was obtained and used by a family member to settle a family dispute. This got the compliance officer's attention and raised concern to find out the hospital was being investigated for a breach of the privacy rule. During investigation it was determined the breach did in fact occur by an employee that happened to be a family member. Upon contact with OCR, they were requesting results of the investigation. Since this came as a surprise to the hospital, the investigation was not initiated within the time frame (60 days) of the offensive, however, the investigation was started immediately upon OCR contact. The investigation involved interviews with key employees, communication with the OCR, review of audit trails of the medical record, review of policies and procedures related to medical record access and of course, involvement in finding a resolution from the OCR perspective as well as the employees perspective. (AIS Compliance, 2011) The information is based on a real case which the hospital requested anonymity. The purpose in presenting this case was to provide insight into the type of activity the Privacy Officer would become involved in when working at a hospital.

Background

Nancy P Malloy, RN, MS published an article entitled *The Informatics Nurse Specialist as Privacy Officer* in 2003 defending the Nursing Informatics nurse in the role of the Privacy Officer. After recognizing the development of the Health Insurance Portability and Accountability Act (HIPAA) and its purpose of protecting personal health information (PHI), she

develops her support of the concept of the informatics nurse specialist (INS) as the Privacy Officer by breaking down the areas of consideration. The areas of concentration include:

- Privacy and Confidentiality from the Nursing Perspective
- PHI and Privacy Legislation
- Nursing Informatics
- The Privacy Officer
- INS as Privacy Officer

The discussion on privacy and confidentiality begins with the definitions of both terms defining privacy as a person's right to control disclosure of their information while confidentiality applies to others disclosing information that is not their information. It is further stated that, based on the Nightingale Pledge taken as a nurse, there is an obligation by nurses to "safeguard the secrecy of information collected, stored, transmitted, and retrieved in a health care system." (Malloy, p55) This concept is stressed in Malloy's statement indicating privacy is a patient's fundamental right protected by ethical responsibilities of the nurse. (Malloy, p55) Safeguarding patient's information should be on the mind of nurses but the Nightingale Pledge is not the bases for this practice, as we will explore in this paper.

Malloy discusses PHI and Privacy Legislation by offering a definition of the medical record addressing paper as well as electronic information, however, the terms EHR, EMR, and PHR are not mentioned. In addition, PHI is defined as a "compilation of records and communications" used by health professionals to provide appropriate care as well as non-clinical purposes such as billing and research. (Malloy, p55) Malloy places emphasis on her role of INS and her knowledge regarding medical records, however, she does make the distinction between the content of the record, PHI, and the record itself, EMR, EHR or PHR. Further, if the

patient opts to omit information, whether intentionally or not, or has multiple providers, the record may a proportion of information.

The next section of the paper provides insight about nursing informatics (NI) as a specialty recognized with the role defined by the American Nurses Association (ANA). The ANA defines NI as follows:

“...a specialty that integrates nursing science, computer science, and information science to manage and communicate data, information, and knowledge to support patients, nurses, and other providers in their decision-making in all roles and settings. This support is accomplished through the use of information structures, information processes, and information technology.” (Malloy, p55)

Education expectations for the specialty were laid out to include specialized education at the graduate level to include structure of information as well as information management and communications; however, NI curriculum does not focus on information technology. Malloy further explains that it is through understanding the structure and process of information that allows the informatics nurse specialist (INS) to play a role in development, implementation, evaluation of systems, and collaboration with other members of the healthcare team including educators and researchers. Finally, correlation is made in addressing the use of the “nursing process” to aid in the policy and procedure development and implementation related to the policy rule. (Malloy, p 56) The focus of curriculum that Malloy shares seems in keeping with her role as an INS, but it does not demonstrate knowledge of legal implications related to use of computer systems in health care and more specifically HIPAA.

The final sections of Malloy’s article addresses the necessity for a Privacy Officer as mandated by HIPAA regulation, she goes a step further stating the attributes of the INS are those necessary for the privacy officer concluding the INS has the academic qualifications

combined with clinical knowledge on use of PHI that will lead to success in meeting the demands of HIPAA. In addition, she feels the role of patient advocate as a nurse demonstrates ethical responsibility, leadership and organizational skill necessary to meet the qualifications of a HIPAA expert and demonstrate knowledge of state and federal law (Malloy, p58). It is these facts along with Malloy's claim that the clinical background combined with the academic background incorporating information technology I use as the basis for argument against the practice of the INS becoming the Hospital Compliance Officer.

Florence Nightingale Pledge

Earlier Malloy stated the obligation by nurses is to "safeguard the secrecy of information collected, stored, transmitted, and retrieved in a health care system" (Malloy, p55) indicating the basis for the requirement is based on the Nightingale Pledge. History of the *Florence Nightingale Pledge* goes back to 1893 and written as a modified "Hippocratic Oath" similar to the physician's oath. It was started at the Farrand Training School for Nurses in Detroit, Michigan. The pledge reads as follows:

I solemnly pledge myself before God and in the presence of this assembly, to pass my life in purity and to practice my profession faithfully. I will abstain from whatever is deleterious and mischievous, and will not take or knowingly administer any harmful drug. I will do all in my power to maintain and elevate the standard of my profession, and will hold in confidence all personal matters committed to my keeping and all family affairs coming to my knowledge in the practice of my calling. With loyalty will I endeavor to aid the physician in his work, and devote myself to the welfare of those committed to my care. (ANA)

The pledge has brought about much controversy in recent years and in fact, some

schools have abandoned use of the pledge while others such as California State University have revised the pledge to address issues such respect for all religions and to demonstrate a collegial relationship with physicians as opposed to a subservient role. (Mirale, p 145)

Not all nurses take this pledge, but all nurses are held to the Code for Nurses published by the American Nurses Association Ethics committee. It is the code of ethics all nurses are held to that supports the responsibility to protect a patient's privacy and the role of patient advocate. While there are aspects of the Florence Nightingale Pledge that apply such as use of "confidence of personal matters," HIPAA standards ("Privacy Rule") that states "a covered entity may not use or disclose protected health information, except as permitted or required". (HIPAA, p47)

In summary, Malloy's argument would have much greater value had it focused on instead the Code for Nurses addressing the ethics of practice versus the Florence Nightingale pledge."

What is Hospital Compliance

The increased use of internet access and growing use of electronic medical records and other electronics introduces a growing concern for confidentiality. This is of great apprehension in healthcare resulting in the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") also known as the *The Standards for Privacy of Individually Identifiable Health Information* ("Privacy Rule"). The Privacy Rule set the standards for legal implications resulting in breach of PHI.

As hospitals aligned practice with HIPAA regulations, concern arose over expectations around compliance. In response to the hospitals concern, the (OIG) released recommendations to hospitals on effective models for "staying out of hot water" with HIPAA. It is important to

understand that these guidelines were merely that, guidelines and not mandatory and allow for adaptation based on the facilities needs, however, it was suggested that these programs be managed through employment of a Hospital Compliance Officer. In addition to recommendation for a HCO, they provided fundamental elements that should be incorporated into the program, which will be discussed later in this paper. (OIG, p1)

Malloy demonstrates her recognition of the need for a Hospital Compliance Officer but she fails to share the guidelines published from the OIG. The failure to recognize and acknowledge the contents of the guidelines may have been what led to Malloy's inability to recognize the two roles as separate and distinct. I would argue that not only are the roles separate and distinct, the reporting structure would also differ.

Nursing Informaticist's Role versus Compliance/Privacy Security Role

Regardless of the role one holds in the healthcare environment and regardless if the profession requires a professional oath, everyone is held to HIPAA privacy standards for PHI. In addition to standard privacy rules that must be followed by all covered entities, as mentioned earlier, the HHS Office of Inspector General (OIG) released recommendations for the development of Hospital Compliance programs to ensure compliance with the new HIPAA regulations. It recommends the designation of a "high-level" official with direct access to the governing body and chief executive officer be appointed to the role of compliance officer. Under the guidance of the compliance officer, it is recommended a committee be implemented outside that is managed independent of the hospital's general counsel. The separation of the two entities is for protecting the attorney-client privilege. (Gossett, p3)

In the article by Malloy, she attempts to point out the responsibilities of the Hospital Compliance Officer could easily carry out by the INS based on qualities required in her position. In an effort to determine if the same person can manage the INS and the Hospital Compliance Officer roles, we need to dissect the positions separately identifying qualifications for the job versus responsibilities versus education. Each of these attributes should be treated as separate and distinct. The personal qualities described include, leadership ability, credibility, and knowledge of the use of PHI within the organization. Next, Malloy lists educational requirements to include knowledge in healthcare, information management and technology, and leadership abilities. (Malloy, p 57)

Finally, the responsibilities are defined based on Malloy’s perspective correlating them to the personal qualities and education she listed previously. Below is a table that demonstrates the responsibilities of the Hospital Compliance Officer as defined by the INS versus those recommended by the OIG:

Informatics Nurse Specialist (Malloy)	Hospital Compliance Officer (OIG)
Develop and evaluate information management systems	Lead Compliance Committee
Implementation and management of information systems	Training and Education
Policy and Procedure development and implementation	Open Communication between compliance officer and hospital personnel (not limited to nursing)
Training and Education	Lead Investigation to breach of PHI
	Enforce Standards through Disciplinary Guidelines
	Auditing and Monitoring
	Respond to Detected Offenses and Developing Corrective Action Plans

In an effort to obtain a clear picture of the roles and responsibilities above and beyond those described by the OIG, a job description was obtained from the Health Care Compliance Association website (See Appendix A).

Assessment

Personal qualities was one aspect discussed in relation to qualifications for a position as a Hospital Compliance Officer as well as the INS, however, the qualities listed including leadership ability, credibility, and knowledge about the use of PHI information within the organization described are general in nature. They are qualities many managers would seek in candidates for various positions in healthcare, especially leadership roles. These qualities are also critical for any clinician with access to the medical record, either paper or electronic to ensure compliance with rules and regulations.

Education requirements is another area of focus to consider in making a determination if in fact the INS could or should also take on the role of Hospital Compliance Officer. Listed in the job description (Appendix A) compared to those stated as requirements for the INS, there are some distinct differences between the two roles. Malloy indicates the education requirements to include graduate level training with a focus on the structure of information as well information management and communications. Graduate level education is in addition to her nursing education supporting the qualification of experience in health care as stated a minimum qualification. (Malloy, p 57) In contrast, the compliance officer role seeks a bachelor's degree in accounting or a master's degree in business or health care administration with recommendation for certifications in Healthcare Compliance and as an auditor from the Institute of Internal Auditors.

Finally, the hospital will want to ensure the individual chosen for the compliance position has a diverse background in healthcare. When referencing a diverse background, it expands beyond the clinical areas because PHI information and HIPAA regulation reaches beyond the clinical arena. Under the Minimum Necessary Standard (160.502 (b)), PHI information can be provided to the level required to accomplish the task. (See Appendix B) (HHS, p 47) As the recommendations have been developing by the OIG, they have identified special area of concern that the hospital would want to ensure the Hospital Compliance Officer has some familiarity. Below is a list that will provide guidelines for the background that would be sought in compliance officer role:

- ❖ Billing for services not actually rendered
- ❖ Providing medically unnecessary services
- ❖ Upcoding
- ❖ DRG Creep
- ❖ Outpatient services rendered in connection with inpatients stays
- ❖ Teaching physician and resident requirements for teaching hospitals
- ❖ Duplicate billing
- ❖ False cost reports
- ❖ Unbundling
- ❖ Billing for discharge in lieu of transfer
- ❖ Patient's freedom of choice
- ❖ Credit balances - failure to refund
- ❖ Hospital incentives that violate the anti-kickback statute or other similar federal or statute or regulations
- ❖ Joint ventures that may violate the anti-kickback statute
- ❖ Financial arrangement between hospitals and hospital-based physicians
- ❖ Stark physician self-referral issues
- ❖ Knowing failure to provide covered services or necessary care to members of a health maintenance organization
- ❖ Patient dumping (OIG, p2)

Addressing many of these issues requires the focused attention of the compliance Officer with emphasis on training and education in a multitude of departments (not limited to clinical areas), policies and procedures that do not support retribution while still enforcing

disciplinary action for violations. In addition, responsibilities include monitoring for violations listed above through auditing and in the case of a violation investigating and reporting when appropriate in keeping with the rules of HIPAA. (OIG, p5)

Summary

In summary, after review of the education, qualifications and responsibilities as well as taking into consideration recommendations from the OIG, while there may be some shared responsibilities, best practice would support separate individuals in the roles of INS and Hospital Compliance Officer. The personal qualities of each position are those that employers would seek in a variety of positions and therefore are not enough to differentiate and support the INS in the role of privacy officer.

In regards to responsibilities, acknowledging both roles have overlap in some shared responsibilities, such as writing and implementing policies, there are enough differences as well that would support the privacy officer as a separate and distinct employee. I think it would be safe to say that most nurses, and certainly informatics education would not provide the background or training to address legal issues that arise from the use of HIPAA information in area such as billing, coding, falsification of cost reporting, Stark Laws, as well as contracting issues as they relate to business associate agreements. As I have demonstrated, this is just a sampling of the responsibilities that are far reaching beyond the expertise of the INS.

While I agree with the INS having a connection with the clinical staff, in particular nursing areas, HIPAA reaches departments beyond the clinical boundaries. A nursing education in conjunction with an understanding of the structure of information in information systems is a valuable asset in a role requiring interaction with clinical staff and understanding of workflow

when incorporating information systems in clinical areas. I believe a nurse in the informatics department provides an invaluable assets understanding of the needs of the clinicians and developing a collaborative relationship. Having been in the role of nursing informaticist, collaboration is critical to success because the clinical staff builds a trust and security in knowing it is your job to assist them. It is this same trust that could be broken if staff determines you to be a threat. It can be viewed as threatening if staff comes to the realization you are the compliance officer that will just as easily be reporting and investigating your wrong doings in the form of HIPAA violations that will paralyze your success as an INS.

Finally, OIG makes a clear distinction that the Hospital Compliance Officer is a “high-level” official with reporting responsibilities to the board of directors. This is far reaching beyond the responsibilities of the INS who should be visible to clinicians ensuring compliance with HIPAA policies and procedures and providing guidance through use of information systems.

As I have demonstrated throughout this paper, Malloy has failed to provide the evidence necessary to support the INS acting as the Hospital Compliance Officer. In fact, to the contrary, her arguments would support each as a unique and distinct role requiring some interaction on issues such as understanding and implementing policies and procedures focused on HIPAA compliance. In addition, I believe Malloy fails to recognize that HIPAA reaches beyond the clinical areas and therefore requires a much broader background than that offered by the INS. Finally, acknowledging the value of her background working with hospital systems, in the case of an audit or actual breach requiring extensive investigation, this would require the skill and support of the information systems security team. For all these reasons, it would be my recommendation, the role of INS and Hospital Compliance Officer should be separate and distinct roles.

Appendix A

Chief Compliance Officer and Privacy Officer Childrens Hospital Los Angeles September 30, 2010

Founded in 1901, Childrens Hospital Los Angeles has been treating the most seriously ill and injured children in Los Angeles for more than a century, and is acknowledged throughout the United States and around the world for its leadership in pediatric and adolescent health. Childrens Hospital is one of America's premier teaching hospitals, affiliated with the Keck School of Medicine of the University of Southern California since 1932.

The Saban Research Institute of Childrens Hospital Los Angeles is among the largest and most productive pediatric research facilities in the United States.

Since 1990, U.S. News & World Report and its panel of board-certified pediatricians have named Childrens Hospital Los Angeles one of the top pediatric facilities in the nation. Childrens Hospital Los Angeles is one of only 10 children's hospitals in the nation – and the only children's hospital on the West Coast – ranked in all 10 pediatric specialties in the U.S. News & World Report and named to the magazine's "Honor Roll" of children's hospitals.

To learn more about Childrens Hospital Los Angeles, please visit our website at www.CHLA.org

The specific responsibilities of the Chief Compliance Officer and Privacy Officer include:

Compliance Officer

- Serve as the officer responsible for the operation of a corporate compliance program that meets the expectations of Federal and state regulatory agencies
- Chair the hospital's corporate compliance committee, including, responsibility for directing the management of its charter, agenda, tasks, reports, and information
- Perform an annual assessment of compliance risks and develop, at the beginning of each fiscal year, a risk matrix proactively identifying areas of compliance risk
- Serve as the principal author, working in conjunction with the Audit Committee and senior management, of an annual compliance work plan delineating the programs, tasks and goals of the compliance program for the fiscal year
- Prepare -- in conjunction with the CFO, the General Counsel, other senior executives and advisers -- the annual agenda for contracted internal audits and other monitoring and auditing plans relating to the operation of the compliance program
- Conduct or supervise or support focused examinations of various work units
- Oversee the conduct of the compliance program's monitoring and auditing process
- Support, facilitate, and collaborate with the contracted internal auditors
- Conduct or supervise or support internal investigations
- Conduct or supervise or support development of correction action plans and/or examination of the effectiveness of corrective action plans stemming from investigations, examinations, and audits

- Present, as needed or requested, reports and evaluations to the corporate compliance committee and senior management regarding the status of compliance efforts in the hospital
- Report at each meeting of the Audit Committee of the Board of Trustees as to new compliance developments and the status of compliance efforts being conducted in the hospital
- Represent the hospital in meetings with federal and state agencies and accrediting organizations regarding compliance issues
- Host site visits by federal and state regulators and accrediting inspectors
- Coordinate and cooperate with University of Southern California and the Childrens Hospital Los Angeles Medical Group compliance officers
- Manage the conflict of interest disclosure program in conjunction with the Legal Department
- Direct the compliance hotline. Maintain a log system for all calls. Manage investigation and resolution of all calls by compliance or other appropriate departments (e.g., human resources)
- Develop and implement multifaceted educational and training programs focused, among other topics, on elements of the compliance program and developments in regulatory and accreditation requirements. Include unique programs targeted towards newcomers and ongoing training for all others including the Board of Trustees
- Develop and implement an internal communication program to promote (1) awareness of the compliance hotline, (2) increased awareness of compliance policies and procedures, and (3) an understanding of compliance issues.
- Maintain, review, and update compliance policies and procedures that reflect the hospital's needs and current regulatory and accreditation requirements, including a code of conduct, a code of ethics, a risk matrix, a compliance plan, an annual compliance work plan, and conflict of interest policies
- Coordinate with the Human Resources Department to check employees and vendors against the OIG Excluded Individuals/Entities and GSA debarred contractors lists
- Within resource limitations, consult with hospital work units regarding their regulatory filings
- Within resource limitations, consult with other work units in understanding and complying with regulatory requirements. This includes researching regulations, education, editing proposed policies and procedures, and responding to inquiries of regulatory agencies and accreditation organizations
- Support and participate in CHLA quality improvement initiatives
- Oversee the consistent enforcement of the compliance program, including, the issuance of sanctions regarding violation of compliance program requirements
- Conduct all other duties assigned by the General Counsel or the Audit Committee

Privacy Officer

- Develop, implement and maintain patient privacy policies and procedures
- Proactively identify security risks and develop and implement security policies and procedures to protect patient and employee privacy

- In collaboration with the Human Resources Department, develop and implement employee privacy policies and procedures
- Investigate and resolve alleged security breaches of patient and employee privacy
- Publicly report security breaches as required by state and federal laws
- Develop, implement and maintain other processes and systems to incorporate security and privacy as part of the hospital's compliance program, including, those relating to: monitoring and auditing, training and education; hotline reporting, corrective actions, communication and enforcement of the security and privacy policies and procedures, including, the issuance of sanctions regarding violation of privacy and security requirements
- Disseminate Business Associate agreements
- Serve as the first responder to all Business Associate agreement questions

Reporting Relationships:

- Direct reporting relationship for compliance issues to the Board of Trustees through the Audit Committee of the Board of Trustees.
- For guidance on all operational and administrative matters, reporting to the Senior Vice President and General Counsel

Qualifications:

- 4 to 7+ years experience of direct compliance responsibilities with an academic and research medical center
- An undergraduate degree in accounting or a masters degree in business or health care administration
- Certification in Healthcare Compliance by the Health Care Compliance Association is strongly preferred
- An auditor certificate from the Institute of Internal Auditors is preferred

Attributes:

- Views the essential role of compliance as facilitative, not punitive
- Possesses a strong understanding of health care industry and regulatory standards including the Medi-Cal program and research regulations
- Serves as a personal role model for compliant behavior consistent with the mission, vision, and values of CHLA
- Implements forward looking approach to predict trends and create solutions, not merely the ability to identify problems
- Able to develop partnerships, high functioning teams, and good working relationships across work units
- Fosters an open, transparent, and collaborative management style
- Experience with decision making in the face of imperfect and uncertain information
- Possesses good presentation skills with both large and small groups
- Able to operate effectively in an ambiguous and frequently changing environment

- Demonstrates a leadership presence that projects credibility, integrity, discretion, and confidentiality
- Is self-motivating, curious, and independent
- Understands and executes a focus on best practices
- Consistently demonstrates and promotes an optimistic and enthusiastic work environment
- Is Prompt
- Develops work product that is accurate, comprehensive and detail-oriented
- Possess knowledge of GAAP standards and principles
- Ability to read, analyze and interpret general business periodicals, professional journals, technical procedures, and governmental regulations
- Ability to write clear, concise reports, business correspondence, and procedures
- Self-reliant with Windows Office applications
- Algebraic skills

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