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May Clinicians Disclose Health Information Protected under 38 U.S.C. §7332 to Surrogates?

To protect patient privacy and the confidentiality of sensitive health information, federal law¹ prohibits disclosure of personal health information that involves substance abuse, sickle cell, and/or HIV/AIDS without the patient's prior written authorization. In the event a patient who loses decision-making capacity has not authorized disclosure, VA clinicians are legally permitted to disclose such information only to the patient's *court-appointed guardian*. VHA's National Ethics Committee recently analyzed the conflict of duties that these restrictions may pose for some VA patients and clinicians.²

Conflict of Duties

Unless the patient authorized such disclosure before losing capacity (or disclosed protected information to the surrogate him or herself), VA clinicians may not disclose health information in one of the protected categories, even when that information is clinically relevant to treatment decisions the surrogate must make on the patient's behalf. In such circumstances, clinicians' *legal obligation* to protect the confidentiality of specific health information conflicts directly with their *ethical obligations* as health care professionals to engage in shared decision making and to ensure that authorized surrogates have the information they reasonably need to make appropriate decisions on the patient's behalf.

Guidance from VA Office of General Counsel

In response to the NEC's report, the Under Secretary for Health requested that VA General Counsel address this conflict of duties. General Counsel has advised that under the existing statute and implementing regulations, when a patient lacks decision-making capacity and has not previously authorized disclosure of 7332-protected health information to his or her surrogate, VHA clinicians who find it necessary to disclose such information to the surrogate must seek to have a court: (a) adjudicate the patient incompetent and appoint the surrogate as the patient's guardian, or (b) issue an order authorizing disclosure of the protected information to the surrogate.³

General Counsel noted that as an alternative, VA may wish to pursue a legislative proposal to amend 38 U.S.C. §7332 to allow disclosure to authorized surrogates in appropriately limited and well-defined circumstances.

The National Center for Ethics in Health Care is planning to propose such legislative change.

Notes

1. See [38 U.S.C. §7332](#).
2. See National Ethics Committee. [Disclosing Patients' Protected Health Information to Surrogates](#). February 2005.
3. See OGC Memorandum VAOPGCADV I-2006.

If you have questions or comments, please contact the Ethics Center at vaethics@va.gov