Text Messages in Health Care:
There's More to it Than HIPAA

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How the Heck Does that Happen?

- Telephone Consumer Protection Act
- Limits text messages and robocalls delivered by autodialer (regardless of content)
  - Consent standards
- Requirements pertaining to marketing messages
  - Do-Not-Call Registry
  - Time-of-Day Limits
  - Suppression
  - In-Call Opt Out for Robocalls
  - Policies
  - Training

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Why the Settlement?

$1500 / violation penalty

+

No fault standard

×

1,000,000s messages

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= Big Settlements

Capital One	$75M
Jiffy Lube	$35-47M
AT&T	$45M
HSBC	$40M
Bank of America	$32M
Papa John's	$16M
Lifetime Fitness	$10-15M
Gallup	$12M
Walgreen	$11M
Steve Madden	$10M
Discover	$8.7M
Kaiser Permanente	$5.4M

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Presentation Format and Assumptions

- Format
  - Present five health-care-based hypotheticals
  - Demonstrate compliance concerns that arise for each
  - Suggest strategies to address
- Assumptions
  - All messages sent through an automatic telephone dialing system ("auto-dialer")
  - Text message and pre-recorded, auto-dialed calls are considered interchangeably
- Focus will be primarily on compliance with Telephone Consumer Protection Act ("TCPA")

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Hypotheticals

Each hypothetical has a major "lesson" to impart:

1. No "marketing," no problem
2. Not-so-broad: TCPA's exemption for "HIPAA" messages
3. Vetting new programs: it's not all about HIPAA or consent
4. Beyond health care messages: payment due
5. Beyond patient messages: employee communications

Hypo #1 – No "marketing," no problem (right??)

A pharmacy wants to start a refill reminder program. Since it has telephone numbers for most of its patients, the pharmacy decides to implement a text reminder that will be delivered a few days before the current fill is due to run out.

"Marketing" – What is it?

- Refill reminders are not "marketing" for HIPAA purposes
  - If currently prescribed, and
  - If any financial remuneration received in exchange is reasonably related cost of the communication
- Same analysis for:
  - Treatment (e.g., recommend alternate treatments or care settings)
  - Case management/care coordination
  - Health care product or service covered by benefits plan
  - Generic equivalents
  - Recently lapsed prescription (90 calendar days)
  - Adherence communications

"Marketing" under TCPA

- The "initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services…"
- FCC 2003 Report and Order (discussing "dual purpose" calls):
  - "[S]uch messages may inquire about a customer's satisfaction with a product already purchased, but are motivated in part by the desire to sell ultimately additional goods or services."
  - "[R]egardless of the customer service element to the call…[i]f the call is intended to offer property, goods, or services for sale either during the call, or in the future…that call is an advertisement."
- Ninth Circuit: Recorded messages regarding a customer loyalty program are telemarketing messages
- Courts and FCC conduct a fact-based analysis of caller's intent
- **Calls/texts need not include advertisements to be deemed "telemarketing"**

But marketing is not the only risk

- TCPA requires consent for any text or robocall to a mobile phone
  - VERY limited exceptions…coming in next hypothetical
- Consent can be withdrawn by any reasonable means
- Consent standard lower for:
  - Informational messages (non-marketing)
  - "Health care messages"

Getting Consent – Context Matters

- Kolinek provided cell number to Walgreens pharmacist "who told him that his number was needed for potential identity verification purposes"
- Court dismissed, relying on 1992 FCC order stating "persons who knowingly release their phone numbers have in effect given their invitation . . . to be called."

> In retrospect, the Court should have taken from the 2012 Order an indication that the FCC considers the scope of a consumer's consent to receive calls to be dependent on the context in which it is given—contrary to what the Court had seen in the 1992 Order as a general rule that consent for one purpose means consent for all purposes.

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Hypo #2 – TCPA's not-so-broad "HIPAA exemption"

A patient checks into Hospital ABC for a routine, outpatient procedure. In the days leading up to the surgery, the patient completes certain paperwork which includes a blank for "phone number." The patient fills in her cell phone number. On the day before the surgery, for the convenience of the patient, Hospital ABC sends the patient a text message reminding her of the scheduled time to arrive at the hospital and certain other important pre-surgery reminders.

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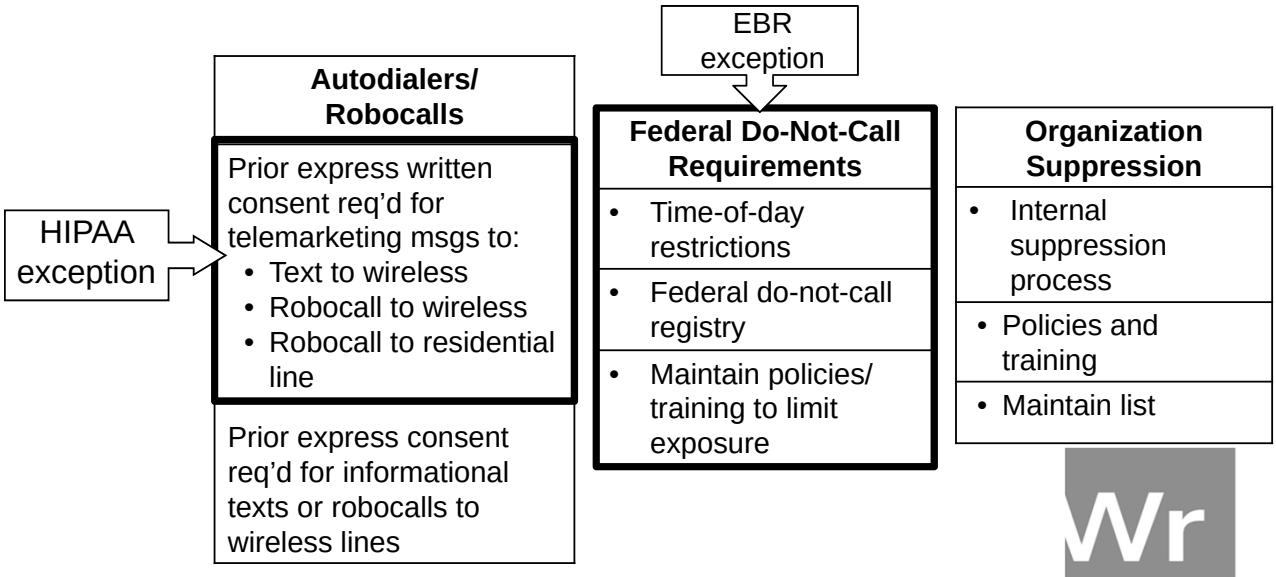
Generalized TCPA Requirements**



** Fax requirements excluded

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Did the Hospital obtain proper consent to send the text message?

- The TCPA does not include a broad "HIPAA" exemption
- Instead, TCPA allows a lower consent standard if delivering a "healthcare message" as defined under HIPAA
  - Messages to a cell phone require "prior express consent"
  - Messages to a residential phone number does not require consent
- Was the content of the text message a "health care" message under "HIPAA?"
  - "Health care" message not well defined
  - "Treatment" communications under HIPAA within scope of "health care" message
  - "Marketing" defined differently under HIPAA and TCPA

Is there an exception for delivering messages to a cell phone without prior express consent?

- Yes, for certain "urgent" healthcare messages, if specific requirements are met:
  1. Only sent to wireless telephone number provided by the patient
  2. State the name and contact information of the healthcare provider
  3. Content of message limited to specific topics
  4. Must be one minute or less in length or 160 characters or less
  5. Initiate only one message per day (whether by voice call or text message), up to a maximum of three messages combined per week from a specific healthcare provider
  6. Must offer recipients within each message an easy means to opt out of future such messages,
  7. Healthcare provider must honor the opt-out requests immediately.
  8. Message must be free to the end user

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Hypo #3 – Vetting new programs

As the Compliance Officer for your health care institution, you meet periodically with the IT department to discuss compliance-related technology needs. During a recent meeting, a developer mentioned a new text message program scheduled to launch next week. The program will send text messages to patients who delivered a baby in the last 60 days with reminders about well-baby care. The messages are sponsored by a local baby store and include coupons. The developer was very excited about this great new way to engage "Millennial moms" (a term he borrowed from the marketing department). Building a relationship now could help ensure they keep visiting your institution for life.

How will the program manage the patient's communication preferences?

- How will the program obtain proper consent from the "called party?"
  - "Prior express written consent" is required before sending the message because message includes an advertisement
  - HIPAA Authorization likely required because of use of PHI for marketing purposes
- Is the patient offered a way to opt-out of future messages?
  - The patient must be provided a way to revoke consent and halt future messages
  - Opt-out must be processed as quickly as possible
- How is the record of consent or opt-out maintained?
  - The EMR or other system must maintain a record of each action by the patient to opt-in and opt-out of the program.
  - Record should include a time and date stamp of each action

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What does your Text Message Compliance Program look like?

- Does the organization have procedures on how to implement a text message program?
  - At a minimum, procedures should include standards on: obtaining consent, offering opt-outs, permissible and required content in messages, times of day messages can be delivered, and how to retain records
- How has training been provided to key areas on text message compliance requirements?
  - Provide detailed training to departments most likely to develop text and auto-dialed call programs
  - General awareness communication to entire organization
- Does the organization have a method to audit & monitor programs?
  - Inventory of all programs
  - Periodically review programs against policies and procedures, with a focus on highest risk requirements

Will a vendor be used to send the text message?

- Vendors are commonly used to implement text message programs
- Vendors operate auto-dialing equipment used to send the message
- Key considerations when vetting a vendor:
  - Vendor's level of understanding federal and state legal requirements
  - Contract should state which entity is executing different TCPA compliance requirements
  - Indemnification expectations
  - State licensure requirements
  - Set expectation within organization as to which vendors may be used

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Hypo #4 – Beyond HIPAA: Payment Due

Upon visiting a physician's practice for treatment, a patient fills out new patient forms and provides her cell phone number in a box provided for "contact information." She also completes a separate form acknowledging her responsibility to pay for her care and signs it. She does not pay for her care, and the account becomes delinquent. The physician's office refers the matter to a collections specialist, which delivers payment reminder robocalls to the cell phone number in the new patient paperwork.

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LAW360 News, cases, companies, firms Advanced Search

Hospital Debt-Collection Robocalls Flout TCPA, Class Says

Legal & Regulatory Issues

Lawsuit claims Prospect Medical violated FCC medical debt collection law with robo-dialing

Medical Bill Debt Collector Healthcare Revenue Recovery Faces Liability for Alleged Federal TCPA and FDCPA Violations

Emergency room patient challenges legality of robocall debt-collection calls

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Consent for Debt Collection

- "Prior express consent"
  - Phone number given as a contact point will be okay for debt collection *if the phone number was given in context of transaction that gave rise to debt* – FCC 2008
- Favorable Example: Chavez v. Advantage Group
  - Chavez seeks care at Parkview Medical Center; provides cell phone number during admission process
  - Fails to pay bill; Parkview assigns debt to Advantage
  - Advantage uses autodialer to repeatedly call Caves re: bill
  - Chavez sues, but court finds consent based on disclosure of phone number

Consent for Debt Collection

- Risks
  - Distinction between "express" consent or "implied" consent?
    - Mais decision
  - Number reassignment
  - Opt out
- Recommendations
  - Context matters (number must be disclosed in context of transaction from which debt arose)
  - Be explicit (arguably not required)
  - Writing not required, but highly recommended

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Hypo #5 – Beyond HIPAA: Employee Communication

Hospital XYZ operates in a cold climate that has frequent snow storms during the winter making roads difficult to travel. During these months it can be difficult to ensure proper nursing coverage. In an effort to communicate more effectively with the nursing staff about the scheduled shifts and available open shifts, the hospital plans to start using text messages to communicate with the nursing staff.

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How will the program manage the employee's communication preferences?

- Does the program obtain proper consent from the nurse before delivering the text?
  - The TCPA requires "prior express consent" when delivering an informational message to a "called party"
  - No exception for messaging employees
- Will the program offer an ability to "opt-out" of future messages?
  - The nurse (e.g., "called party") must be able to revoke his/her prior consent
- Will the messages be received on a hospital-owned phone or the nurse's personal phone?
  - Prior consent can be obtained from the 'current subscriber'

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Is alternative communication channel available?

- Could the same content be delivered through a “push to app” notification or an email?
- TCPA only applies to text message or auto-dialed calls. App notifications and emails are outside scope of the TCPA.

Wrapping It All Up … Key Takeaways

- Balance practical considerations and legal risk in execution
  - Know the level of consent required, but consider burden of proof
  - Ensure proper opt out channels are available; vet for reasonableness
  - Implement rule requirement, but be aware of FCC commentary and court interpretations
  - Contract posture as a tool for compliance and risk mitigation
- Communication, procedures and training are critical elements of your text message compliance program

Wrapping It All Up … Risks to Consider

- Math problem (no fault, lots of messages = big money)
- Mistakes (fat fingering, opt out fail)
- Misunderstandings (customer does not understand they agreed)
- Number reassignment
- Vendors

Questions?

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