Our Bodies? Compliance Challenges and Solutions for Body and Specimen Donation for Research

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Rules of the Road

• The views expressed during this seminar are my own and do not represent those of my employer, my clients, or anyone else.

• The information provided here is for educational purposes only and not legal advice. Consult with your own attorneys for advice relevant to your particular situation.

• Ask questions any time.
The Compliance Issue

- Researchers need human specimens to do research

- Specimens (and associated annotations) come from:
  - Deceased individuals
    - Anatomical gifts
  - Living individuals
    - “Excess” / “discarded”
    - Donated for research

- Laws, regulations, accreditation standards, and institutional policies govern all of these activities, as well as the use of data (annotations) for research
Anatomical Gift Laws

• Uniform Anatomical Gift Act (2006 Revisions)***
  – Expands who can make anatomical gifts before death; gives healthcare advocates (POAs) new rights
  – Also facilitates easier revocation (e.g., by later inconsistent statements)
  – Authorizes, encourages use of donor registries
  – Strengthens respect for donor’s wishes as against inconsistent decisions that may later be made by surrogates … disempowers coroner/ME to donate
  – Expands who can make gifts after death (e.g., to include adults who exhibited special care and concern for the deceased)
  – Transplantation and therapy are clearly preferred over research and education where suitable
  – Addresses choice of law challenges
  – Enforcement: felony exposure for altering, concealing, etc. any document of gift, amendment, revocation, or refusal … but immunity for good-faith compliance
  – More information: www.anatomicalgiftact.org

*** Check your state’s laws – they may vary!!!
• Uniform Anatomical Gift Act
  – Expands who can make anatomical gifts before death to include emancipated minors and those who can apply for drivers’ licenses; healthcare advocates (POAs), parents (maintain right to revoke), guardians … permits oral gifts under limited circumstances
  – Also facilitates easier revocation (e.g., by later inconsistent statements)
  – Authorizes, encourages use of donor registries
  – Strengthens respect for donor’s wishes as against inconsistent decisions that may later be made by family members
  – Expands who can make gifts after death (e.g., to include adults who exhibited special care and concern for the deceased); patient advocates have first priority unless stated otherwise in POA
  – If multiple purposes are stated but not prioritized, transplantation and therapy are prioritized over research … if no specific purpose is specified, gift may be used ONLY for transplantation or therapy
  – Addresses choice of law challenges
  – More information: www.anatomicalgiftact.org

Medicare Conditions Of Participation (Hospitals)

• 42 CFR 482.27 (SOM Tags A-0585 to A-0586)
  – Laboratory must have written procedures for collection, preservation, transportation, receipt, and reporting of tissue specimens
  – Written policies approved by medical staff and pathologist must state which tissue specimens require macroscopic or microscopic examination (or both)

• 42 CFR 482.45 (SOM Tags A-0885 to A-893)
  – Hospital must have written policies and procedures to address its organ procurement responsibilities
  – Policies must incorporate appropriate OPO (and if necessary eye and tissue bank) agreement(s)
    • Specify criteria and timing for referral of individuals whose death is imminent or who have died in the hospital (must define “imminent death”)
    • OPO’s responsibility to determine medical suitability for organ donation (and, absent alternative arrangements made by hospital, tissue and eye donation)
    • Ensure the family is notified of options (intent is clearly to enhance donation)
    • Provide for education of staff
    • Etc.
Common Rule (45 CFR part 46)

- Prospective collection of identifiable biospecimens generally requires:
  - Prospective IRB approval of proposed research plan
  - Written informed consent from each prospective participant

- Exceptions
  - Research that does not involve “human subjects”
    - Deidentified biospecimens originally collected for another purpose
    - Biospecimens of decedents
  - Research involving collection of existing biospecimens or data that are not directly or indirectly linked to individuals

IRB Approval

- Risks to participants are minimized
- Risks are reasonable in relation to anticipated benefits, if any, to participants, and the importance of the knowledge that may reasonably be expected to result
- Equitable selection of participants
- Informed consent (or waiver), appropriately documented
- Data monitoring for participant safety (if appropriate)
- Participant privacy and confidentiality are adequately addressed
- Additional safeguards to protect the rights and welfare of vulnerable participants
Informed Consent

- Must be secured in advance of participation – absent waiver granted by IRB upon finding:
  - Minimal risk to participants
  - Waiver/alteration won’t adversely affect rights of participants
  - Research would otherwise be impracticable
  - Whenever appropriate, participants will be provided with additional pertinent information after participation

- Special rules for research involving children:
  - If minimal risk, at least one parent generally must sign
  - Investigators should seek and obtain re-consent when child reaches majority (unless waived)

(More on) Informed Consent
Who is Authorized to Make a Gift or Consent to Participate?

• Donor/Participant (Subject)
  – Competent adults
  – Others who are not “children”
    • Emancipated minor
    • For UAGA – anyone of age to apply for a driver’s license
    • Common Rule – anyone who can consent to the procedures being performed in the research

• Surrogate
  – For decedents
    • Order of authority is specified in UAGA; patient advocates have first preference
    • Special rules provided in case of disputes
    • Drafters intended donor’s wishes to control, not surrogates post-mortem
  – For living individuals
    • Legally authorized representative (determined by reference to state law)

Who is Authorized to Receive an Anatomical Gift?

• The following as specified by the donor:
  – Hospital; accredited medical school, dental school, college, or university; organ procurement organization; or other appropriate person, for research or education
  – An individual designated by the person making the anatomical gift if the individual is the recipient of the part
    • If not suitable, then gift generally passes to OPO unless otherwise designated by the donor
  – An eye bank or tissue bank

• The following if purpose but not recipient is specified by the donor:
  – Eyes for transplantation or therapy -> eye bank
  – Tissue for transplantation or therapy -> tissue bank
  – Organ for the transplantation or therapy -> OPO
  – Any part for research or education -> OPO
Purpose(s) of Gift/Donation or Research

- **Decedents**
  - Generally:
    - Transplantation and therapy or research and education or both
  - Special Rules:
    - If multiple purposes are specified without priority, the gift must be used for transplantation or therapy (but if not suitable then research or education)
    - If no purpose is specified, the gift may be used only for transplantation or therapy via the appropriate bank or OPO [unless surrogates expand]

- **Living individuals**
  - As specified in the informed consent document
    - A specific clinical trial, or a correlative study
    - Any research on a specified condition (e.g., cancer, diabetes, Alzheimer’s)
    - Deposit into a biorepository
  - If data annotations are included, HIPAA/HITECH rules apply

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Consent Process

- **Decedents**
  - Living individual may make a gift (or refuse)
  - Surrogates cannot generally reverse or amend … but if surrogates donate:
    - Any reasonably available member of a prior class can amend or revoke orally or in writing before incision is made/invasive procedures are started

- **Living Individuals (Research Participants/Subjects)**
  - Common Rule/FDA Regulations govern requirements for informed consent
  - HIPAA (as amended by HITECH and GINA) governs requirements for authorization – new regulations are in development for HITECH and GINA is budgeted for FY 2010
  - State laws vary
## Consent Documentation: UAGA

### DONOR CARD

I wish to donate my organs, eyes, and tissue. I give:

___ Any needed organs, eyes, and tissue.

___ ONLY the following organs, eyes, and tissue: _____________________________________

Date: ______________________ Donor’s Signature: ___________________________________

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### Common Rule/FDA

<table>
<thead>
<tr>
<th>Purpose</th>
<th>Statement that the study involves research, explanation of the purposes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Procedures</td>
<td>Description of procedures (identifying any that are experimental) and expected duration of subject’s participation</td>
</tr>
<tr>
<td>Risks</td>
<td>Description of any reasonably foreseeable risks or discomforts resulting from the research, statement (if applicable) the research may involve unknown risks</td>
</tr>
<tr>
<td>Alternatives</td>
<td>Disclosure of appropriate alternative procedures or courses of treatment, if any, that might be advantageous to subjects</td>
</tr>
<tr>
<td>Confidentiality</td>
<td>Statement describing the extent, if any, to which confidentiality of records identifying the subject will be maintained (FDA requires explicit reference to FDA)</td>
</tr>
<tr>
<td>Voluntary</td>
<td>Statement re: voluntary nature of participation</td>
</tr>
<tr>
<td>Termination</td>
<td>Anticipated circumstances where subject’s participation may be terminated without subject’s agreement, Consequences of subject’s decision to withdraw and description of procedures for orderly termination of participation</td>
</tr>
<tr>
<td>Additional Costs</td>
<td>Any additional costs to the subject that may result from participation</td>
</tr>
</tbody>
</table>

### HIPAA/HITECH

| Description of purposes of any use or disclosure of PHI |
| Description of information to be used or disclosed; who may request PHI for the research and who may receive it |
| Statement that once disclosed, information may no longer be protected by HIPAA |
| n/a |
| n/a |
| n/a [But patients also receive a “Notice of Privacy Practices” from their health care providers at first encounter.] |
| Description of requestor’s ability or not to condition treatment, etc. on granting of authorization (treatment generally may be conditioned in clinical trials) |
| n/a |
| [HITECH bars sale of ePHI for research unless the price charged reflects the costs of and preparation and transmittal of the date for that purpose.] |
| Description of any potential benefits reasonably expected from the research |
| n/a |
| n/a |
| n/a |

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https://cabig-kc.nci.nih.gov/DSI\%5C\%5Cuploaded_files/c/c1/HIPAA%2BCR%26FDA-Auth%26Consent.doc

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**DONOR CARD**

I wish to donate my organs, eyes, and tissue. I give:

___ Any needed organs, eyes, and tissue.

___ ONLY the following organs, eyes, and tissue: _____________________________________

Date: ______________________ Donor’s Signature: ___________________________________
### Consent Documentation: UAGA (Continued)

**DONOR CARD**

I wish to donate my organs, eyes, and tissue. I wish to give (complete either Section A, B, or C):

**Subject of Gift**

- Transplantation or Therapy
- Research or Education
- Both

**Purpose of Gift**

- Transplantation or Therapy
- Research or Education
- Both

**Section A:**

ALL of my organs, eyes, and tissue

- Yes
- No

**Section B:**

- My Organs
- Yes
- No

- My Eyes
- Yes
- No

- My Tissue
- Yes
- No

**Section C**

Special Instructions (If none of the above apply,) I wish to give only:

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Date: ____________  Donor’s Signature: __________________________

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### Consent Documentation: UAGA (Continued)

**DONOR CARD**

I give, upon my death, the following gifts for the purpose of (choose whichever applies): [ ] only transplantation and therapy, [ ] only research and education, [ ] transplantation, therapy, research, or education.

For the purposes specified above, I give:

[ ] ALL needed organs, tissues, and eyes; or

(If you checked the box immediately above, you should not check specific boxes below).

[ ] Organs  [ ] Tissues  [ ] Eyes

If none of the above applies, I wish to give ONLY:

The following organs and tissues:

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Date: ____________  Donor’s Signature: __________________________
Informed Consent Challenges

• Process
  – Avoidance of “human subjects research” designation
    • Legally: no consent required (but possibly still authorization)
    • Ethically: consent still may be required (e.g., dbGaP)
  – Appropriateness of waivers

• How much information is too much
  – Are lengthy descriptions and explanations appropriate
  – Description of biorepository governance policies
  – Does separation of “form” from “brochure” help

• Nature of risk discussion
  – No biospecimen research is risk-free
  – Likelihood of reidentification
  – Risk of stigmatization, discrimination, or similar harms associated with potential misuse of data

• Recontact considerations
  – Required for new research?
  – Can participants opt out?

In Essence

• Donors or participants must be given sufficient information to:
  – Understand the purpose of the research (‘contribution to a biobank’ may be sufficiently narrow)
  – Understand what will happen to them (and to contributed biospecimens and data) in connection with the research
  – Understand their options
  – Be able to knowledgeably evaluate the risks, potential benefits, and alternatives (and their risks?) to participation
    • Risks may be physical or not (e.g., privacy/confidentiality, legal, reputational, etc.)
    • Benefits to themselves or more generally
  – Make a voluntary and uncoerced choice to participate or to decline without penalty
    • Common Rule and HIPAA also provide a right to withdraw
    • Both subject to some restriction
Governance and Policies Generally

- Transparency
- Extent of external influence
  - Interested/independent scientific advisory/review board
  - Interested/independent consumer/participant advisory board
- Provenance
  - Acceptable/unacceptable specimens and data
  - Informed consent/authorization requirements
- Future use/storage
  - Approval mechanisms (IRB, SAB, etc.)
  - Opportunity to reconsent (at defined intervals, at majority, for individual projects, etc.)
  - Right to withdraw consent
Custodianship

- Who is the custodian
  - If not a disinterested third party, how are conflicts of interest resolved
- What is their authority/accountability
  - Who does it derive from
  - Who are they accountable to
- What are their obligations
  - Choose winners/losers?
    - What is relationship to SAB/community?
    - Any appeals process?
  - Stewardship of funds to support biospecimen resource (cost recovery)
  - Arrangements for appropriate disposition if biospecimen resource shuts down

Management

- How centralized
  - Single institutional resource with centralized decisionmaking
  - Centralized physical resource with decentralized decisionmaking
  - Multiple resources with common policies
  - Multiple resources with no common policies
- Physical integrity of specimens
  - Conditions of collection
  - Conditions of storage
  - Conditions of transmission
- Integrity of data
  - Physical, technical, administrative safeguards
- Policy development, review, approval, implementation, enforcement
  - Ethics review of provenance policies
  - Pathology review of storage policies
  - Privacy/security official review and approval of data policies
  - Role of legal review
Intellectual Property/Data Sharing

- Inventorship
  - Custodian (what is contribution)
  - Researchers
  - Others
- Licensing
  - Retain rights for future use for government/non-profit research, educational activities?
- Reach-through rights
  - Benefitting whom?
- Other data sharing considerations
  - Applicability of NIH, local institutional policies?
Practical Tips for Compliance

• Survey laws, regulations applicable to collection and subsequent use of biospecimens for research
  – Consider all potential sources
    • Specimens previously collected under standards that are not state-of-the-art
    • Excess clinical specimens
    • Donated specimens – anatomical gifts; research
  – “Standard” HRPP regulations and standards
    • Common Rule/FDA/AAHRPP
  – State Laws (including UAGA as adopted locally)
  – Special considerations
    • Stem cell research
• Develop and implement policies that address at least the items described above
• Educate, monitor, enforce

Useful Links

• UAGA: http://www.anatomicalgiftact.org
• OHRP/General Information: http://www.hhs.gov/ohrp
• HIPAA/HITECH: http://www.hhs.gov/ocr
• OBRR: http://biospecimens.cancer.gov
  – Revisions in Progress and Comments: https://cabig-kc.nci.nih.gov/DSIC/forums/viewtopic.php?f=20&t=57&sid=fa9154c768a8b5ad58ee4a007bd30
• caBIG Data Sharing & Intellectual Capital Knowledge Center: https://cabig-kc.nci.nih.gov/DSIC/KC
Questions?

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