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PULSE

The Importance of Communication Consent Language

Email and text messaging have become efficient, productive and—in many cases—preferred methods for businesses and consumers to communicate. In the health care world, these channels of communication play an increasingly important role in patients' experience with respect to treatment, insurance and payment resolution.

Providing a variety of communication channels for patients lays the foundation for good customer service because it allows patients to choose the mode of communication that's most comfortable and convenient for them as individuals.

For example, one survey found that millennials report phone calls to be time-consuming, disruptive and stressful—in fact, 81% of millennials indicated that they have to summon the "courage" to make a call or answer a call from a number outside their contacts. Email and text messaging can be more effective at reaching this segment of the population.

Conversely, a separate study concluded that as of 2018, 66% of Americans over 65 still preferred phone calls to text messaging, while another study found that 86% of Americans over age 50 felt comfortable communicating via text messaging and, for those aged 50-69, texting had in fact surpassed email as their preferred mode of written electronic communication.

These data indicate that even within a given demographic, communication preferences can vary widely and change quickly.

Offering a range of communication methods and obtaining consent to communicate through those methods can also help improve collection liquidation rates and reduce risk for both providers and their collection partners.

What is "Consent" and Why Does it Matter for Email and Text Messaging?
At its simplest, consent can be thought of as permission. When health care providers include clear, specific consent language in their intake forms, patient agreements, guarantor or payor agreements, and similar documents, they set the stage for positive customer

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service and clear communication about receivables. For those and a number of other reasons, it's critical that patients can understand the consent that they're providing and what it means as a practical matter when they "sign on the dotted line."

Obtaining a patient's consent to send emails or text messages can:

- Ensure the health care provider's legal compliance with federal laws like the Telephone Consumer Protection Act and corresponding state laws.
- Improve provider and affiliate communications with patients, enhancing goodwill and streamlining the patient experience.
- Create opportunities for tracking, delivery, and re-delivery mechanisms that do not exist with traditional paper communications.
- Help ensure patient privacy under the Health Insurance Portability and Accountability Act (HIPAA) and more general state and federal privacy laws.
- Enable providers' debt collection partners to implement policies and procedures designed to avoid unintentional violations of the Fair Debt Collection Practices Act (FDCPA), e.g., for inadvertent unauthorized third-party disclosures.
- Diminish the risk of emails or text messages being delivered to the patient's employer-provided email address or telephone number without the patient's authorization.
- Help provider vendors and affiliates, including debt collectors, communicate with the consumer via an expected medium, thus reducing the risk of missed communications, creating built-in rapport, and increasing the likelihood of engaging patients in productive communications that result in positive health care and receivables outcomes.

Even if you're not currently using email or text messaging to communicate with patients, if done properly, there's almost no downside to adding clear consent language to your underlying patient and guarantor agreements, as it may prove useful in the event that your organization chooses to change its approach to patient communications in the future.

Basics on Consent and the Law: What You Need to Know

A number of federal and state statutes require consumer or patient consent before a health care provider or debt collector can communicate with the consumer via email or text message.

For example, while the HIPAA Privacy Rule does not prohibit health care providers or their business associates—under an appropriate business associate agreement—from communicating with patients via email or text message, it does impose certain restrictions, e.g., access controls, audit controls, user authentication, and transmission security.

Notably, the federal Department of Health and Human Services has published guidance stating that the HIPAA Privacy Rule affords patients the right to receive unencrypted emails, but if they choose to exercise that right, they must be informed of the risks and sign a consent agreement. For more information on HIPAA consent, visit HealthIT.gov, the official website of The Office of the National Coordinator for Health Information Technology.

Similarly, the federal Telephone Consumer Protection Act (TCPA) permits a caller to use an automatic telephone dialing system (ATDS) to send text messages to patients' wireless phones, but only if the "called party" has granted prior consent.

In the context of the TCPA, the Federal Communication Commission and the vast majority of courts that have considered the issue have determined that text messages fall within the ambit of the TCPA. Thus, it's important for patient consent to include not only an accurate telephone number as well as an indication of whether it's a wireless or landline number, but also a clear disclosure to the effect that, by providing the telephone number(s), the patient authorizes the provider and its affiliates to call the patient at those telephone numbers for all purposes related to the patient's health care, including billing and collections, and to send text messages to the consumer at those telephone numbers

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Checklist for Cellphone and SMS Consent

- ☐ Do you have a TCPA consent disclosure that includes ATDS calling and APRV calling?
- ☐ Does your TCPA consent disclosure cover affiliates and vendors?
- ☐ Does your TCPA consent disclosure specify that the consent covers text messaging?
- ☐ Do you have an email consent disclosure?
- ☐ Do your disclosures explain how to opt-in or opt-out of all electronic health information exchanges?
- ☐ Do your disclosures explain the risks of using unencrypted emails for the communication of any PHI and include an appropriate consent disclosure?
- ☐ Does your Notice of Privacy Practices spell out disclosures of PHI (including phone numbers, email addresses and cellphones provided) allowed under HIPAA for treatment, payment and operations subject to the "minimum necessary rule?"

TCPA Disclosure Guidelines

Your TCPA disclosures should:

1. Clearly state how the consumer will be acknowledging the disclosure (e.g., merely by providing a phone number? By signing the document? By checking a box on an electronic form?).
2. State the entity or entities to which the TCPA disclosure applies, i.e., your organization, any affiliate organizations, all vendors, and all agents specifically including third-party debt collectors (i.e., if you regularly use a third-party vendor to call patients, you want to specify that third-party here).
3. Specify the mechanisms that you will use to communicate with the patient via this telephone number, particularly where you or a vendor will be using ATDS calls, APRV calls and text messaging.
4. Expressly state, as broadly as possible, the scope of the purposes for which you will use the telephone numbers, e.g., for all "communications related to the healthcare services we provide including but not limited to treatment, administration, and billing or debt collection."
5. Note that the patient's consent to call or text is not a prerequisite for service.
6. Finally, consider putting your TCPA disclosure in prominent typeface and in close proximity (e.g., either directly above or below) of your request for patient telephone contact information rather than burying the disclosure in a long list of terms and conditions.

for those same purposes.

For decades, the FCC has held that when an individual provides consent in this manner, the consent can be "passed down" from the party that obtained the consent (e.g., the health care provider) to its agents, including debt collectors. This significantly simplifies telephonic and text-messaging communications for past-due receivables that have been placed in collection as well as for ancillary or follow-up health care services delivered by provider affiliates.

Although not the focus of this article, it is worth noting that the FCC recently modified a long-standing rule on certain TCPA exemptions for non-marketing calls—including health care calls and debt collection calls—to residential landlines. This will make obtaining patient consent all the more important, as the exemption will be reduced from an unlimited number of unconsented-to automated or prerecorded voice (APRV) calls to a residential landline to just three such calls in 30 days. Again, this highlights the importance of obtaining consent not only for calls to a patient's wireless number but also to a patient's residential landline.

While the FDCPA generally does not directly apply to providers, obtaining consent may still benefit providers by equipping their collection agents with a variety of communication channels through which they can collect past due accounts compliantly. That is because for debt collectors, the FDCPA imposes additional restrictions on emailing and text messaging consumers. But the Consumer Financial Protection Bureau (CFPB) has expressly approved these means of communication. In fact, the federal rule that the CFPB adopted in 2020 provides limited "safe harbor" procedures by which a debt collector can ensure that a patient has consented to receive emails or text messages at a given email address or telephone number. And, again, this information can be passed from the provider to the debt collector in ways that will provide less formal—but not necessarily less meaningful—protection against inadvertent FDCPA violations.

In general, subject to certain restrictions, the FDCPA permits debt collectors to communicate with a patient via text message or email as long as:

1. The consumer has not asked the debt collector to stop sending communications via that channel of communication—e.g., "stop texting me."
2. The consumer has not revoked any prior consent –e.g., "I know I gave the hospital this telephone number, but please stop calling me on this line."
3. The consumer has not issued a general cease-communication request.
4. The debt collector does not send an email to a consumer's employer-provided email address unless the consumer has provided express consent to the debt collector (or an immediately prior debt collector) to communicate with the consumer via that email address or has used that email address to communicate with the debt collector or an immediate prior debt collector.

What to Include When Obtaining Consent

The laws and regulations surrounding prior express consent, including when it is required and the manner in which you can obtain consent in full compliance with all applicable laws, are highly nuanced and vary based on the equipment used. They are also business-specific. As a result, there is no one-size-fits all, plug-and-play disclosure, and attempting to provide one can prove more harmful than helpful to a business. For that reason, you should consult your own counsel before attempting to craft any intake forms, contracts, or other company policies or procedures around consent. That said, there are some common themes.

Here are a few elements to consider for your intake forms and other agreements with patients and guarantors:

1. In general, each expression of patient consent should not be buried in a set of terms and conditions—and particularly not a set of terms and conditions set forth in a separate document. Rather, the consent should be worded in plain language, presented in the same typeface as (or more prominent

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Sample TCPA Disclosures

These publicly available samples from large health care organizations may help you craft your own TCPA disclosures that match your communications policies:

Johns Hopkins

Consent to be Contacted: I agree that by providing my landline, cellphone number(s) or email address, I am giving express consent for Johns Hopkins, its staff, employees, independent contractors, assignees, successors, and agents, to contact me through email or at these numbers, or any number or email address that is later acquired for me and to leave live or pre-recorded messages, text messages or emails regarding my health care-related matters, my account, or my bill related to any services I receive. I confirm that any phone number I provide is associated with me and not a third party. For greater efficiency, calls may be delivered by an autodialer. Additionally, for my convenience, emails and text messages may be sent unencrypted, which may present certain risks, including the risk of being intercepted during transmission or viewed by someone other than me. I agree to accept these risks. If I do not wish to receive text messages, I can call 1-800-318-4246 to opt-out. Providing an email address or telephone or cell phone number is not a condition of receiving services.

Mayo Clinic

Use of Cellphone: I agree Mayo Clinic may use an automated telephone dialing system to contact the cellular telephone number(s) that I provide to Mayo Clinic for appointment and payment purposes.

NB: This disclosure would not necessarily cover ATDS or APRV calling to a residential landline or text messaging to a wireless number.

Methodist Health System

Consent for Wireless Telephone Calls: If at any time I provide a wireless telephone number at which I may be contacted, I consent to receive calls (including autodialed calls and prerecorded messages) at that wireless number from the hospital, agents, and independent contractors, including servicers and collection agencies regarding the hospitalization, the services rendered, or my related financial obligations.

NB: This disclosure would not necessarily cover artificial voice calling to a wireless number, ATDS or APRV calling to a residential landline, or text messaging to a wireless number.

typeface than) surrounding text, and be placed in proximity to the information to which it relates. For instance, if the consumer is providing their telephone numbers in the middle of page 2, put the disclosure about calling and texting right above or below those blanks on page 2.

2. Consent disclosures should clearly express the scope of the consent. First, that the patient's consent to call, email and text all apply not only to the health care provider but also to its agents, assignees, and contractors. Second, that each facet of consent (i.e., consent to call, consent to text, consent to email) apply to all communications related to the consumer's care, expressly including administration, billing and debt collection.
3. Specify all the potential channels that can be used for communication, including email, text message and telephone calls (expressly including via automated equipment and artificial or prerecorded voice calls).
4. Include opt-out language if/when required by applicable law.
5. Where applicable, make clear that certain communications may cause the patient to incur third-party charges (e.g., from their wireless carrier), and, where applicable, that certain communications will not be encrypted and that the lack of encryption carries an inherent risk of inadvertent disclosure.

Additionally, take a look at your Notice of Privacy Practices that you provide to patients as required by HIPAA's Privacy Rule. Ensure that it spells out that disclosures of protected health information (PHI)—including via telephone, to any telephone numbers that the patient provides, and via email, to any email addresses that the patient provides—as allowed under HIPAA for treatment, payment and operations all fall within the "minimum necessary rule." In addition, ensure that your Notice of Privacy Practices includes language stating that contact will be made for billing and collection purposes where necessary.

In addition to amending any established agreements or creating new ones, keep in mind you will also likely have to include the new language on intake forms and make sure documents are updated at every point of entry for patients, both in person and online.

Finally: The Contract is Just the First Step

Your mission to obtain patient consent doesn't end once you update agreements and form language. You should, in addition, take steps to ensure that you have current and correct contact information for your patients. This may require you to create new procedures to verify patient email addresses and telephone numbers at every reasonable opportunity. You may need to create incentives for your staff or even incorporate this facet of patient communication into a representative's scorecard, just as you would other compliance essentials: Did you verify the patient's telephone number? Did you ask about text-messaging preferences? Did you state the call recording disclosure? Did you ask for the consumer's preferred email address and confirm that you have authorization to send emails to that address?

In addition, for the purposes of TCPA compliance, you might consider availing yourself of the FCC's Reassigned Numbers Database (RND), particularly for patients with whom you have not communicated via telephone or text for more than 60 days. In short, the RND provides a mechanism by which you can confirm that the wireless telephone number a patient has provided has not been reassigned to a different subscriber. The FCC has provided a limited safe harbor for callers that avail themselves of the RND in an effort to avoid inadvertent TCPA violations caused by re-assigned wireless numbers. For more information, visit the FCC's RND information page: https://www.fcc.gov/reassigned-numbers-database.

Building Advocacy Partnerships in Health Care

Advocacy is a careful process and, with growing attention to issues that touch debt collection and the health care revenue cycle at the legislative and regulatory level, there needs to be a partnership between collection agencies and their health care clients.

ACA International has focused on developing resources for members to accomplish this goal and has extended the olive branch to trade associations in the health care industry to combine efforts where there are common goals.

ACA's continued efforts to work with trade associations in the health care industry have grown for members serving health care clients, with the goal to advance advocacy on health care medical debt credit reporting and ensure regulations consider the impact on providers and patients—both at the state and federal level.

Here are a few examples of advocacy ACA has fostered to bring together collection agencies and health care providers and how you can help.

The Collaborative: Associations United for California Providers and Agency Success

After health care laws in California took effect in January 2022 imposing new restrictions on hospitals and debt collectors alike, ACA brought together debt collection and health care representatives and ACA CEO Scott Purcell to help organizations learn from each other and move forward with the new laws in place.

The Collaborative involved numerous health care organizations including the California Hospital Association, multiple California chapters of the American Association of Healthcare Management, the Healthcare Financial Management Association, the California Association of Collectors and ACA members to discuss compliance and future advocacy efforts.

This coalition-building approach was replicated in other states, including in Nevada to encourage members of the health care community to weigh in on ACA's ongoing judicial challenge to S.B. 248 and engage in advocacy efforts to pass common-sense legislation. Similar efforts were also used to lobby against legislation in Colorado, Virginia, New York and North Carolina.

Nevada Medical Debt Law

ACA, the Nevada Collectors Association, and other stakeholders advocated heavily as S.B. 248, a bill with several requirements for debt collectors working on health care accounts, was developed in Nevada's legislature.

Throughout the legislative process, ACA members weighed in on the impact the bill could have for their businesses and consumer communications and went before the Nevada Financial Institutions Division (NFID) as it advanced the regulations to implement the law.

In June 2021, ACA, the NCA and 14 other plaintiffs filed a lawsuit against the NFID to prevent S.B. 248 from taking effect until the state provided clarity on the bill's requirements and resolved conflicts with federal law, including the Fair Credit Reporting Act, Fair Debt Collection Practices Act and the U.S. Constitution.

As the case progressed, showing collaboration with the health care community, the Nevada Hospital Association filed an amicus brief in support of a 9th Circuit appeal taken by the NCA and other stakeholders arguing that the U.S. District Court for the District of Nevada erred in denying the plaintiff-appellants' motion to enjoin the effect of S.B. 248.

The amicus brief signifies progress in ACA's efforts to encourage the medical provider community in Nevada to get involved in a variety of advocacy efforts related to S.B. 248—starting with supporting the plaintiff-appellants' interlocutory appeal.

Judicial advocacy continues to protect businesses harmed by the new law.

Medical Debt Credit Reporting

Since the announcement a little over a year ago that the three national credit reporting agencies (CRAs) would make significant changes to medical collection debt reporting, ACA has engaged with the CRAs, legislators and regulators to

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NEWS & NOTES

CMS Cracks Down on Hospital Price Transparency Compliance

The Centers for Medicare & Medicaid Services (CMS) announced updated enforcement methods to crack down on hospital price transparency compliance last week, including earlier and automatic civil monetary penalties, or CMPs.

The hospital price transparency law, which mandates hospitals to display standard rates on their websites in a single, machine-readable format, has only resulted in CMPs being issued to four hospitals. Gross charges, discounted cash rates, and fees negotiated between hospitals and third-party payers are examples of standard fees.

Read the report here.

Physician Compensation Rises 17% Since 2018 as Shortages Persist

A new 2023 Medscape report found that physician compensation rose yet again, with the average physician salary growing from $299,000 in 2018 to $352,000 in this year's report. That is over a 17% increase during that period and a 4% increase compared to last year's average physician salary. However, clinician shortages and record levels of burnout continue to rise in the health care sector.

Meanwhile, the gender pay gap in health care has somewhat decreased for doctors. Primary care female doctors make 19% less than their male counterparts, down from 25% in 2018.

The racial pay gap, however, did not account for inflation. Black and African American doctors still make around 13% less than their White counterparts. In general, Latinx and Hispanic doctors make less money than White doctors.

Read the report here.

Learn More

For more health care collections news, visit ACA's Health Care Collections page at www.acainternational.org/pulse-newsletters-archive.

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understand the changes and advocate for a fair approach that would balance the needs of businesses and consumers.

ACA submitted letters to the CRAs, Congress and the Consumer Financial Protection Bureau building out those resources so members and their health care provider clients could personalize them and send them to lawmakers and regulators.

ACA also built on that advocacy with media outreach, having responses to the CFPB's characterization of medical debt and the process to change medical debt credit reporting published in *The Wall Street Journal*, the *New York Times* and *Kaiser Health News*.

Since the announcement of the CRAs' credit reporting changes and actions from the CFPB that appear to be driving these changes, ACA has been steadfast in its advocacy on the unintended consequences here and how to find workable solutions.

The more voices we can add to these efforts, the better, and that is our mission here—to give you a voice.

Get Involved

How can you help with that goal?

It starts with communication. If there is an issue, law or regulation such as those mentioned in this article that stands to impact your business, chances are it could impact your other providers.

Take California's medical debt law, for example. Agencies licensed in the state have limits on collection actions, and their health care clients are required to have a written policy on how they send accounts to third-party debt collectors, among other changes.

The Collaborative was successful in helping agencies and health care providers work together on compliance.

Medical debt continues to be an issue addressed in state laws, and ACA keeps members updated in *ACA Daily*, *Collector* magazine, on the ACA Huddle and monthly State Guide Cohort webinars.

When you hear about an issue there or through other connections, reserve time in your regular meetings or a call with your third-party collection agency partner to talk about it. Explain the impact you are seeing and ask them to join in on advocacy on the issue with you or ACA.

Make Your Voice Heard

If there is a public meeting on the issue you are tracking, sign up to comment or submit a letter.

ACA can help with talking points or written communications, but when legislators and regulators can hear from constituents and impacted businesses, those stories stick in their minds.

Encourage your provider peers to do the same and mention your business relationship and any common impacts the proposed law or regulation has.

Connect with ACA

The activity in medical debt credit reporting and state and federal legislation aimed at medical debt regulations, as well as actions by the CFPB, are top of mind with ACA.

If you want to learn more and help advocate, we're just a phone call or email away.

Email ACA's advocacy team at advocacy@acainternational.org, visit the online Advocacy Resource Center or call our Member Services Team at (800) 269-1607 to connect with a member of the advocacy team.

DATAWATCH

Financial Challenges Continue as Hospital Expenses Rise

According to a new report from the American Hospital Association (AHA), the rising cost of health care is posing ongoing financial difficulties for hospitals and health systems, with hospital expenses growing faster than Medicare reimbursement over the past four years.

The study found that between 2019 and 2022, hospital expenses increased by 17.5%, while Medicare reimbursement only rose by 7.5% over the same time, and AHA expects this trend to continue in 2023 without congressional action.

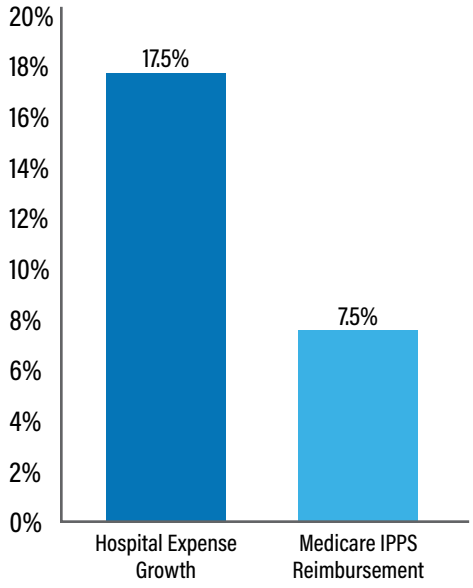
Beginning in 2022, COVID-19 spikes increased patient demand, causing hospital staffing shortages to worsen. In order to cover manpower vacancies, hospitals regularly turned to health care staffing companies.

In most cases, labor costs make up about half of a hospital's budget, but between 2019 and 2022, these expenses rose by 20.8%, mostly as a result of the growing use of contract employment firms. Compared to pre-pandemic levels, total contract labor costs increased by 258% in 2022, according to statistics from Syntellis Performance Solutions.

Additionally, hospital supply expenses per patient rose 18.5% from 2019 to 2022, exceeding inflation growth by nearly 30%.

Source: FY 2020-2022 IPPS Final Rule https://bit.ly/40MVN50

Cumulative Hospital Expense Growth is More Than Double the Cumulative Increases in Medicare IPPS Reimbursement, 2019-2022



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