

DRC Meeting – 10/21/11

RE: ARS § 12-2293(B)

Analysis and proposed amendment provided by legal counsel to Arizona Hospital and Healthcare Association

### **Problems with Amendments to § 12-2293(B)**

Currently, subsection (1) allows a health care provider to deny access to a patient's medical records to a patient or his or her health care decision maker, if the health care provider determines that access is reasonably likely to endanger the life or physical safety of the patient (or anyone else). The provision mirrors a virtually identical provision in the HIPAA Privacy Rule (45C.F.R. § 164.524(a)(3)(i)). The provision could apply where, for example, a doctor does not want to share a psychiatric patient's records with the patient, because the doctor believes that it might cause the patient to try to harm himself. It also could apply where a doctor believes that a patient's representative might try to harm the patient if the representative were allowed to see the patient's records.

The Committee's proposed amendment would limit this provision to only requests for access made by an adult patient or an adult patient's representative. But HIPAA provides this protection for requests by minors as well. Thus, the Committee's amendments would create a large gap in protection for minors, because the amendments would not allow a health care provider to deny a minor access to his own records. Thus, if these amendments were enacted, a doctor could not, for example, withhold a minor's records from the minor himself if the doctor thought that access could prompt the minor to harm himself (or someone else).

As currently written, Subsection (B)(3) allows a health care provider to deny a request by a patient's health care decision maker to access the patient's medical records, if the health care provider determines that access is reasonably likely to cause substantial harm to the patient (or anyone else). This provision also mirrors a virtually identical provision in the HIPAA Privacy Rule (45 C.F.R. § 164.524(a)(3)(iii)). This provision could apply where, for example, where a doctor believes that an adult son or daughter who acts as a health care decision maker for an elderly parent might harm the parent if granted access to the parent's medical records. This section creates more circumstances that a provider may deny access to a patient's health care decision maker than it may for the patient. That is because the standard for denying record access to a health care decision maker (reasonably likely to cause substantial harm to the patient or another person, which could include psychological or financial harm) is lower than for denying record access to the patient (reasonably likely to endanger the life or physical safety of the patient or another person.).

The proposed amendment would limit this provision to requests for access made by a minor patient or a minor patient's representative. This would eliminate the protection HIPAA provides for *adult* patients who have health care decision makers (such as adult patients who are incapable of making their own health care decisions due to age or mental incapacity). For example, the amendments would not allow a doctor to withhold

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records from an elderly patient's adult son if the doctor thought it was reasonably likely that the elderly patient would suffer substantial emotional or financial harm as a result of that access, rather than physical harm.

### **Suggested Alternative Amendments**

Because the proposed amendments are inconsistent with HIPAA, we recommend making different amendments to alleviate the confusion presented by the current statutory language. We suggest simply removing the reference to health care decision makers in subsection (1), so that it is clear that subsection (1) applies only to requests for access by patients. Subsection (3) would continue to apply to requests for access by patients' health care decision makers. Thus, we suggest amending section (B) as follows:

B. A health care provider may deny a request for access to or copies of medical records or payment records if a health professional determines that either:

1. Access by the patient ~~or the patient's health care decision maker~~ is reasonably likely to endanger the life or physical safety of the patient or another person.

....

3. Access by the patient's health care decision maker is reasonably likely to cause substantial harm to the patient or another person.