

**INTRODUCTORY FREQUENTLY ASKED QUESTIONS
REGARDING HIPAA, PRIVILEGE AND CONFIDENTIALITY
IN THE MEDICAL-LEGAL PARTNERSHIP MODEL**

Medical-legal partnership site (“MLP Site”) operations often involve communications between legal staff and referring clinicians, the use of interpreters, the presence of volunteer pro bono counsel, patient “shadowing,” and communications with patients and their family members. Often these communications and activities implicate federal and state privacy laws (e.g., HIPAA), mandatory reporting laws, confidentiality, and privilege issues. Below we address a number of common questions regarding MLP Site operations, describe the principal legal considerations for each, and make a number of general recommendations.

Please note that although our discussion of these issues provides what we hope will be useful insight into successful MLP Site operations, it is important to note that we do not address specific state law considerations. In addition, our analysis and conclusions will be impacted by the specific operations of, and the partnerships maintained by, each individual MLP Site. Consultation with counsel for your health care institution partners is critical.

1. Do MLP Sites have to comply with HIPAA Privacy and Security Requirements?

The Health Insurance Portability and Accountability Act of 1996 and its related regulations (collectively “HIPAA”) establish requirements regarding the privacy and security of individually identifiable health information. HIPAA only applies directly to Covered Entities (i.e., most providers, healthcare plans and healthcare clearinghouses) and thus will not directly apply to MLP Sites that operate as part of independent legal services organization (“Independent MLP Sites”). Independent MLP Sites may be asked, however, to enter into HIPAA-compliant Business Associate (“BA”) contracts by their healthcare partners. These agreements, at a minimum, and among other requirements, will: (i) establish the permitted and required uses and disclosures of the protected health information (“PHI”); (ii) require the MLP Site to use appropriate administrative, physical and technical safeguards to prevent inappropriate use or disclosure of the PHI; (iii) require the MLP Site to report inappropriate uses or disclosures of PHI; and (iv) require the MLP Site to ensure that any MLP Site agents or subcontractors receiving PHI from the Site will abide by the requirements of the BA agreement.

In light of these standard requirements, and general risk management considerations, we recommend that Independent MLP Sites develop general policies and procedures addressing the use and disclosure of PHI and other sensitive information obtained from clients during the course of advocacy. Privacy and security policies generally address, among other things, use and disclosure of PHI, standards for access, use of electronic systems and email, improper use or disclosure reporting, training requirements and discipline for noncompliance.

Alternatively, MLP Sites operating under the corporate structure of the hospital, health center, or clinic (i.e., as a department or division within such an institution) will need to coordinate their privacy efforts with their healthcare partner's Privacy Officer. MLP Sites will find that most healthcare partners have already adopted HIPAA compliance policies and will require an MLP Site developed as a division or department of the provider to conduct its operations in accordance with those policies. The scope and extent of the application of these policies to the MLP Site operations will often be determined as a result of discussions and negotiations with the MLP Site's healthcare partner.

As MLP Sites will want to protect their relationships with these healthcare partners, they should consider their partners' compliance obligations when developing operational plans and strategies. Ensuring that HIPAA- and state law-compliant consent and authorization forms are obtained during the intake process will greatly help to protect these healthcare partners. MLP Sites may want to work proactively with their healthcare partners' Privacy Officers to make sure that their operations are integrated into their partners' HIPAA and confidentiality compliance strategy.

2. Can MLP Sites send messages containing client medical information via email?

Use of email as a means to transmit PHI or other confidential information is not specifically prohibited by HIPAA or other federal law. However, MLP Sites should carefully restrict the transmission of PHI, whether to third parties or to internal legal or clinical team members, via unprotected (e.g., unencrypted) email systems. MLP Sites that are granted access to and use their healthcare partner's email systems will need to comply with their healthcare partner's policies and procedures governing the use of these systems. Healthcare partners' email systems often have security measures in place and MLP Sites will enjoy greater flexibility with regard to the use of emails between legal staff and clinicians if they have access to those protected systems.

3. Will the presence of interpreters or pro bono volunteers jeopardize the privileged nature of communications between MLP Site legal staff and clients?

The presence of pro bono legal volunteers or interpreters who provide assistance to MLP legal teams generally will not adversely affect the otherwise privileged nature of a communication. Communications generally only qualify as privileged if they take place exclusively between an attorney and a client or potential client, for the purpose of providing legal advice. The presence of third parties during an otherwise privileged conversation will generally destroy the privilege with respect to the subject matter of that communication. A common exception to this rule, however, permits third parties to be present without destroying privilege if their presence is necessary to the lawyer in rendering legal advice. This exception generally permits interpreters and other lawyers' agents to be exposed to communications without waiving privilege.

Interpreters often work in dual capacities: (1) as employees or contractors of the MLP Site's healthcare partner, and (2) as occasional in-kind support for an MLP Site. Similarly, pro bono volunteers generally work for outside law firms and are not full-time participants on an MLP Site team. In each of these cases it will be

important to ensure that the interpreter or pro bono volunteer understands the privileged nature of the communications he or she participates in and understands his or her role in assisting the legal team in its representation of MLP Site clients. When possible, we recommend that MLP Sites have these individuals sign acknowledgement forms documenting this understanding. Such acknowledgements help to confirm individuals' understandings regarding their role as a part of the legal advocacy team, and serve to document this understanding in the event the privileged nature of a conversation is challenged.

Keep in mind that although disclosures to interpreters and members of the legal team will generally not affect the otherwise privileged nature of a communication, disclosures of privileged information to third parties *outside the scope of legal representation* will likely act as a waiver of privilege. For example, disclosure of privileged information to referring physicians and other members of a client's medical team may destroy privilege as to that matter. Consequently, MLP Sites should work to carefully limit the nature and scope of any disclosures (in particular case status updates) to referring clinicians and other providers.

4. Can an MLP Site inform referring clinicians of the progress of the MLP Site's representation of the referred patient?

It is generally appropriate for an MLP Site to provide basic case status updates to referring clinicians, so long as updates do not include detailed information that would compromise the confidentiality of information provided to the MLP Site by the client or jeopardize the privileged nature of communications with the client. MLP Sites may elect to include language in client release/authorization forms that indicates that clients are being asked to approve the delivery of case status updates to the referring provider. See #3 (last paragraph).

5. Does it matter whether members of an MLP Site's client advocacy team are "mandated reporters" required to report findings of abuse or neglect?

Yes. Fostering open and honest rapport with clients is a significant challenge for any legal advocacy organization, and is made even more difficult if an MLP Site informs clients that team members may have public health and welfare reporting obligations. Many states maintain mandatory reporting laws requiring certain classes of professionals to report findings of child abuse, neglect, and other health or safety concerns regarding children. Often the rules regarding mandatory reporting do not require an individual to have a professional relationship (e.g., a patient-provider relationship) with the person at risk to trigger reporting obligations. Generally the individuals or entities required to report abuse, neglect or other safety concerns include hospitals, clinics, physicians, social workers, licensed teachers and other classes of licensed professionals.

MLP Site staff often include licensed professionals with obligations as mandated reporters. Lawyers are generally not considered to be mandatory reporters, although states' rules of professional conduct dictate when lawyers may report potential danger to clients or other members of the public. MLP Sites should familiarize themselves with their state reporting obligations, identify mandated reporters participating on a client service team, and examine the implications of its service team composition.

If a client service team includes one or more mandated reporters, the MLP Site will need to consider whether to limit the mandated reporter's exposure to confidential or privileged information and whether clients and their representatives should be informed of such team members' reporting obligations. In addition, where the mandated reporter is an employee of the MLP Site's healthcare partner, the MLP Site should have a dialogue with the healthcare partner's general counsel to address how mandated reporting scenarios should be handled.

6. How can an MLP Site clearly identify its client(s) and define the scope of representation?

Like other providers of legal services, MLP Sites inevitably will encounter cases during which conflicts develop between family members (or between the client and his or her legal representative); MLP Sites also will confront situations where the client(s) seeks assistance outside the scope of what the MLP Site agreed to, or has the capacity and expertise to, assist with. These challenges are compounded when serving patients impacted by complex phenomena like domestic violence, when a suspicion/allegation of abuse or neglect arises during the course of case advocacy, and when working with children and adolescents whose status as minors implicates special considerations.

It is important for MLP Sites to structure their intake, expectation-setting, and engagement processes in ways that account for these challenges. Strategies for successful intake include: development of policies regarding how many adults can participate in the intake session (or, in the case of an adolescent, whether any adult can participate); use of pre-intake and post-intake "scripts" (documented and standardized in writing even if only delivered verbally to the patients) clearly communicating the purpose of the intake interview session and how the MLP Site will ultimately convey to the client its determination as to whom it will represent and what the agreed-upon scope of work is; and use of engagement letters clearly defining the identified client(s) and the scope of advocacy. If desired, such letters or scripts could clearly state that the MLP Site's representation is of the child only and will not extend to the child's legal representatives unless specifically agreed upon in writing.

7. Can pro bono volunteers "shadow" MLP Site legal staff while they conduct client meetings? Yes. Pro bono volunteers providing service to MLP Sites should be considered part of the MLP team during the course of their pro bono activities. Such lawyers are ethically bound to maintain the confidentiality of the information learned during meetings with MLP clients. We recommend that MLP Sites formally engage firms agreeing to provide pro bono support and document the nature and scope of the engagement. Firm engagement letters should describe the fact that pro bono volunteers will work on behalf of the MLP Sites to provide legal representation to MLP Site clients and that all pro bono volunteers shall be obligated to maintain the confidentiality of the information obtained during the course of providing the pro bono services.

8. Can MLP Site legal staff or pro bono volunteers "shadow" clinicians during patient medical appointments?

MLP Sites should expect that their healthcare partners will be required by HIPAA and state confidentiality laws to maintain the confidentiality of PHI and be prohibited from disclosing PHI except for treatment, payment and healthcare operations purposes. Most commonly, these protections are secured by barring the exposure of PHI unless the patient has first executed HIPAA- and state law-compliant authorization/consent forms.

If an MLP Site seeks to initiate a “shadowing” program like this, it should consult with General Counsel for its healthcare partner. It is possible that mutually agreeable consent/authorization language could be incorporated into the provider’s screening documentation.

Although an argument can be made that the purpose of MLP Site involvement with patients is to address health-related legal issues in a manner that benefits treatment, and therefore MLP staff are part of the health care team, it is unclear whether such an argument would be accepted by courts as an appropriate rationale for disclosure of PHI absent prior informed consent by the patient.

9. Do clinicians need to obtain a patient’s consent prior to making a referral to an MLP Site?

MLP Sites should recognize that referring clinicians generally work for HIPAA Covered Entities and, therefore, are required to protect PHI. Supplying an MLP Site with a patient’s name and contact information, and confirming the individual’s status as a patient, will constitute a disclosure of PHI under HIPAA. Because of the privacy issues that may arise as a result of these disclosures, MLP Sites should engage in a dialogue with their healthcare partner’s general counsel to determine whether the provider will require patients to sign an authorization/consent form prior to the provider’s clinicians making referrals to the MLP Site.

Healthcare partners may institute differing approaches to pre-referral authorizations based on whether the MLP Site is independent from or integrated with its healthcare partner, or whether the MLP Site has signed a Business Associate agreement with its healthcare partner. Regardless of whether a provider obtains written pre-referral consents, MLP Sites should confirm that at least a verbal consent has been obtained and document nature and date of that consent.

(The authors are aware that MLP Sites could opt to structure referrals differently, having clinicians give patients the MLP Site contact information and then expecting the patients to contact the MLP Site independently. This approach would not require an authorization/consent from the patient; however, this strategy appears significantly less effective in connecting patients to needed legal advocacy.)