The Practical Guide to Release of Information

Rose T. Dunn, RHIA, CPA, CHPS
with
Scott A. Edelstein, Esq.

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HCPro

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Rose T. Dunn is a past president of the American Health Information Management Association (AHIMA) and recipient of AHIMA's 1997 Distinguished Member Award. She is chief operating officer of First Class Solutions, Inc., of St. Louis.

Dunn began her career as director of medical records at Barnes Hospital, a 1,200-bed teaching hospital in St. Louis that is now the flagship hospital of the BJC HealthCare system. Early in her career with Barnes, Dunn became vice president and was responsible for more than 1,600 employees and new business development.

After Barnes, Dunn joined Metropolitan Life Insurance Company, where she served as assistant vice president in MetLife's HMO subsidiary. She also has served as chief financial officer of a dual hospital system in Illinois.

Her consulting firm, First Class Solutions, focuses primarily on HIM-related services, including coding support, coding audits, and operations improvement. Dunn also serves as an expert witness for release of information lawsuits (ROI) and advisor to organizations on ROI issues.

Dunn is active in several professional associations, including the American Institute of Certified Public Accountants, American College of Healthcare Executives (ACHE), Healthcare Finance Management Association (HFMA), and AHIMA. She also holds fellowship status in ACHE, AHIMA, and HFMA and is certified in healthcare privacy and security.

She is the author of *Finance Principles for the Health Information Manager,* published by First Class Solutions, Inc.; *More with Less: Best Practices for HIM Directors* and *Coding Productivity,* both published by HCPro, Inc.; and *Haimann's Healthcare Management* published by Health Administration Press.

Dunn also has published more than 200 articles and has made numerous presentations on a variety of topics throughout the United States.

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Scott A. Edelstein is a partner in the Washington, DC, office of Squire, Sanders & Dempsey, LLP, an international law firm. In his practice, Edelstein focuses on advising healthcare providers with respect to legal and regulatory issues. He previously was a partner in the Los Angeles office of another major international health law firm.

Edelstein regularly assists hospitals and physician groups in the formation of integrated delivery systems, joint ventures, mergers and acquisitions, and medical tourism. He works closely with ambulatory surgery centers, imaging centers, e-health companies, telemedicine networks, healthcare providers, hospitals, and pharmaceutical and biomedical companies on compliance matters involving electronic health records, data privacy and security, clinical trials, technology agreements and outsourcing.

Edelstein also has managed legal matters and business development for a national health information technology company, served as corporate and legislative counsel for local and national healthcare systems, conducted and supervised regulatory compliance audits, and advised pharmaceutical and biomedical companies with respect to federal and state anti-kickback laws and the use of electronic medical records.

Los Angeles Magazine and *Legal Times* named Edelstein one of Southern California's Rising Stars in Healthcare Law in 2004, 2005, and 2006. He is a member of the American College of Healthcare Executives, the American Health Information Management Association, the American Health Lawyers Association, the Association of Telemedicine Service Providers, the Healthcare Information and Management Systems Society, and an advisory board member of the Medical Tourism Association.

A graduate of the University of San Francisco School of Law, Edelstein has a certificate in international and comparative law from Oxford University. He also has an MPA from the University of Southern California and a BA from the University of California at Berkeley.

Edelstein is a member of the bars of California, the District of Columbia, and the U.S. Supreme Court. He has written extensively on healthcare compliance issues including fraud and abuse and HIPAA privacy and security standards. He frequently lectures on healthcare compliance in the age of diminishing reimbursement and on challenges posed by electronic medical records and outsourcing.

About the Contributor

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Douglas A. Grimm is an associate in the Washington, DC, office of Squire, Sanders & Dempsey, LLP, an international law firm. In his practice, Grimm focuses on advising hospitals and physician groups with respect to operational, transactional, and reimbursement issues.

Before practicing law, Grimm served as the chief operating officer for multiple investor-owned hospitals and held positions at nonprofit hospitals and academic medical centers.

Grimm assists with cases involving Medicare payment disputes before the Provider Reimbursement Review Board and various federal courts of appeal, and interacts with the Centers for Medicare & Medicaid Services regarding Medicare reimbursement strategies and issues. He advises clients regarding federal and state fraud and abuse laws and regulations, The Joint Commission standards, and PhRMA's Code on Interaction with Healthcare Professionals. He also has advised large academic medical centers, ambulatory surgery centers, and imaging centers with respect to physician recruitment and other development strategies. His work includes drafting privacy notices and other HIPAA-related documents; medical staff rules, regulations, policies and procedures; document-retention policies; and information confidentiality policies.

Grimm graduated from South Texas College of Law with honors and served as Editor-in-Chief of the South Texas Law Review. He received an LLM with highest honors in health law from The George Washington University Law School. He holds an MHA from Virginia Commonwealth University and a BA from The College of William and Mary.

A frequent author, Grimm has written articles for the *New Mexico Law Review, San Francisco Law Review,* and *Dennis Barry's Reimbursement Advisor*. He is a member of the bar of the District of Columbia, Texas, and the U.S. Supreme Court, and a member of the American Health Lawyers Association, American College of Healthcare Executives, and the Health Law Sections of the DC Bar and the American Bar Association.

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No book is ever the product of one person's efforts, and this one is no exception. Many individuals contributed to its development, editing, formatting, and publication. I was fortunate to have some of the best working with me on this one.

We were fortunate to engage my co-author Scott A. Edelstein, Esq., who wrote detailed chapters on two important topics, e-discovery and federal preemption of state release of information laws. His associate, Douglas A. Grimm, Esq., provided research and writing assistance for those chapters. Their contribution to this book is significant. E-discovery is a relatively new concept, but healthcare organizations are experiencing its impact as they respond to requests for records and health information they now maintain in an electronic format in nontraditional locations.

Managing Editor Geri Spanek thoroughly reviewed the manuscript and offered many valuable suggestions. Senior Managing Editor Lisa Eramo and Executive Editor Ilene MacDonald conducted significant research that helped me develop the content and focus on the appropriate topics.

Many of the forms and policies in this book and on the accompanying CD-ROM came from practitioners who "live and breathe" release of information on a daily basis—Deni Bronsing, privacy officer and health information management coordinator at the Bowen Center in Warsaw, IN, and Patricia Tooley, system executive for privacy compliance at Memorial Hermann Healthcare System in Houston.

Thomas Lamb, Esq., of Wilmington, NC, generously provided a way for our readers to easily obtain detailed information about copy cost laws in all 50 states. The CD-ROM accompanying this book provides links to this valuable information via his firm's Web site.

Finally, the production staff, copyeditor and proofreader, graphic artists, and cover designer helped keep things running smoothly. They and many others behind the scenes made this book happen. I thank the entire team for their assistance.

Rose T. Dunn

Introduction

Release of information (ROI) has become the focal point of many health information management (HIM) departments and healthcare facilities. Patient interest in the content of their records, concern about identity theft, and an increasingly transient patient population moving throughout the United States and to other countries make preparing copies of medical records quickly a necessity.

Demands on the ROI team and its function have grown tremendously with the added burden of recovery audit contractors, substance abuse legislation, the Health Insurance Portability and Accountability Act of 1996, and e-discovery—the process by which litigants seek, locate, secure, and search electronic data for use as evidence.

A task that was relatively simple in the past has evolved into a far more complex one requiring extensive knowledge of record content and applicable restrictions. It also requires the ability to respond to inquiries with accuracy and sensitivity about information the requestors may access—and information they may not be able to access.

This book addresses these and other challenges.

Chapter 1 provides a foundation. It includes information about the federal laws that govern ROI and a historical overview demonstrating how the function has transitioned from a copy activity to one that requires knowledge of the regulations and the ability to decipher what may or may not be released.

Chapter 2 discusses the ROI process in greater detail and offers guidance with respect to staffing this function.

Chapter 3 explains the necessary resources—policies and procedures, technology, and consumable supplies—and complements the staffing information provided in Chapter 2.

Chapter 4 explains and analyzes various methods of structuring the ROI function.

Chapter 5 explores how to determine the costs of the ROI service.

Chapter 6 offers a case study that examines an organization contemplating the internalization of ROI activities and provides guidance with respect to preparing a business plan for submission to administration.

Chapter 7 includes a detailed discussion of varied and challenging situations that ROI staff members face daily. It offers advice on responding appropriately and with sensitivity.

Chapter 8 provides insight with respect to copy charges and the litigation they inspire.

Chapter 9 provides detailed information about a relatively new concept in civil litigation, e-discovery.

Chapter 10 discusses federal preemption of state ROI laws and uses specific examples to explain how to determine which law prevails when state and federal law conflict.

The Appendix includes a variety of useful information and tools, among them an article that summarizes the results of an ROI benchmarking survey that provided many ideas that aided in the planning of this book. The survey revealed a desire for information about regulations that affect the ROI function, policy and procedure content, the costs of ROI, staffing options, and appropriate responses to typical situations. The Appendix also provides information about an extremely useful tool on the CD-ROM that accompanies this book: links to detailed information about copy cost laws in all 50 states.

This book is for HIM department directors and managers in any healthcare setting and office managers in small physician practices. My goal is to provide sources and guidance for these administrative individuals who direct and oversee the day-to-day activities of ROI.

As always, I welcome your comments and suggestions so that we can make the second edition even better.

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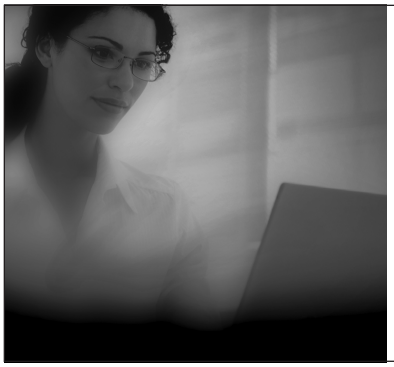

Chapter 1

What Is Release of Information?

Release of information (ROI) is the process of providing access to protected health information (PHI) to an individual or entity authorized to receive or review it. PHI is a term derived from a federal law, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), that refers to health information about a specific patient. Authorization to release this information typically is provided by the patient to whom it pertains or that patient's legal representative. However, the staff working in a healthcare organization's ROI area may be responsible for monitoring and controlling access to PHI by others within the organization as well as by those who have a right to access PHI without patient authorization.

The ROI function previously was known as the correspondence or copy desk because staff members received letters requesting copies of patient records.

Forty years ago, what has come to be known as the health information management (HIM) department was called the medical records department, and the only mail it received were requests from insurers and physicians for copies of medical records or professional journals and books. Fax machines were a rarity in both the medical records department and administration in those days. Today, the HIM department still receives conventional mail that includes requests for patient information along with glossy advertisements and the occasional professional journal that hasn't converted to an online format. But today's requests for information also come via fax and e-mail, and the requestors now include an array of third-party payers, researchers, quality improvement organizations and recovery audit contractors.

More than 40 years ago, requests for copies of patient records were sent directly to physicians who copied their records or instructed the medical record librarian to copy designated docu-

ments and mail the copies to requesting parties. In those days, a written authorization might or might not have existed. Times definitely have changed.

Today, ROI occurs in a variety of settings—hospital HIM, radiology, and human resources departments; home health agencies; physician offices; and skilled nursing facilities. Health information credentialed staff members manage the function in some, but not all, of these venues.

This decentralization of ROI has both advantages and disadvantages. One advantage is that many departments share the work, so it might not be necessary to add employees strictly for ROI. Another advantage is that each department becomes "expert" with respect to the components of its records and can address the contents of each to comply with a request.

However, the disadvantages are several:

- If a request for copies of patient records asks for "any and all documents" pertaining to the patient, then someone must copy the request and distribute it to all departments that may have records on the patient or one department must serve as the clearinghouse that gathers the records necessary to respond to the request.
- Staff in each department/location must be fully educated with respect to federal and state laws and regulations that apply to ROI and to any ROI policies implemented by the facility. Maintaining a thorough and current understanding of regulations and their nuances can be challenging, but this ensures that all departments involved in ROI remain up-to-date.
- Later chapters address an aspect of HIPAA known as "accounting of disclosures." This process results in a list of all disclosures of PHI to third parties that were not specifically authorized by the patient and were disclosed for reasons other than for treatment, collecting payment, and internal administrative activities. Collecting this information can be difficult when multiple departments or individuals throughout the organization disclose information.

These are just some of the reasons why centralizing ROI may be beneficial. Later chapters discuss other effects of centralization and how to address them when necessary.

New Formats for a New Age

Historically, releasing PHI meant providing paper copies of various documents, and this practice continues today. For example, the HR department still might provide paper copies of health insurance applications and copies of employment health testing results.

But today, releasing PHI doesn't always involve providing paper copies of a patient's records. For example, the constant chase to have films returned and the high cost of preparing duplicate films encouraged radiology departments to implement electronic radiology imaging systems. Many radiology departments have implemented picture archiving and communication systems (PACS) to eliminate the need to create radiologic films and the inherent storage requirements associated with them. PACS-equipped radiology departments often provide CDs containing requested images.

Nor is release of PHI limited to paper copies and CDs. A variety of other media environments serve this function, as well. For example, the cardiology imaging department might create and release copies of videos, and the pathology department might release slides containing treated slices of specimen. Some PHI is contained in tracing and monitoring systems such as fetal monitors, pulmonary monitoring devices, anesthesia systems, and cardiology tests.

Managing ROI has never been more challenging than it is today.

Who Requests Access to Health Information?

Health information demands are numerous. The variety of requestors includes but is not limited to:

- Other caregivers who serve the patient in the same or alternate settings
- Payers
- Payer agents who audit charges against documentation, review claims for excess payment recovery, or assess the necessity of services
- Governmental agencies such as the U.S. Department of Health and Human Services, the Occupational Safety and Health Administration, the U.S. Food and Drug

Administration, quality improvement organizations, state departments of health, and others that use the information to further their purpose

- Researchers who collect data to obtain more information about established disease conditions such as cancer or to treat conditions more effectively
- Operational teams that gauge the performance of healthcare providers and organizations by identifying pathways to provide more efficient care
- Insurers that want to evaluate the health of applicants
- Attorneys who want to determine the extent of injuries
- Patients who want to monitor their health
- Family members who need the information to obtain additional care or reimbursement for the care provided to their relative

Because this book discusses ROI throughout, distinguishing between patient consent and patient authorization is important and necessary. These terms often are used interchangeably, but there is a distinction under HIPAA. Patient consent may be obtained, but is not necessary to use the PHI for treatment, payment, or healthcare operations. Patient authorization is necessary to disclose PHI to a third party for reasons other than treatment, payment, and healthcare operations.

Refer to Figure 1.1 on the CD-ROM for a sample policy on uses of PHI for treatment, payment, and healthcare operations.

Easing the Effort

Health information exchange, system interoperability, and the expansion of electronic medical and health records help ease the process of providing information to requestors. As more documents become available online, staff members working in the ROI function will be able to accommodate requests on a more timely basis and with less effort than searching for paper documents. Few healthcare organizations have a fully electronic health record (EHR), but a discussion of typical steps involved in ROI regardless of whether one has an EHR or not, is beneficial to all.

Typical steps in the ROI process

- Receive request to access or obtain copies of a patient's record
- Confirm that the organization treated this patient and that records are available
- Log the request
- Validate that the appropriate party (typically the patient or patient's representative) authorized the request
- Validate that the request contains all necessary elements
- Reject an invalid request
- Determine the location(s) of requested components of the record
- Search for and retrieve the components
- Review the record for the specific documents requested
- Review the record for specific documentation that is to be excluded
- Prepare the copies in the mode requested or make arrangements for review of the record by the requestor
- Count the pages copied and calculate fees, if any
- Invoice or pre-bill the requestor for copies or review time
- Collect payment and mail/provide copies

Who Should Manage ROI?

The healthcare provider is the legal owner of patient records that it creates. The record is the property of the provider—not the patient. Patients however, do have the right to the information contained in the record. As the owner, the provider is responsible for deciding who may use the information, for what purpose, when and how the information in the record may be released, and what should be released. A myriad of laws and policies govern the provider's decision matrix for these items.

Rapidly emerging automation of PHI capture and storage to ensure longitudinal access to PHI for patient care is a hallmark of today's healthcare environment. Electronic medical and health records are replacing paper records in physician offices and ambulatory settings to facilitate PHI collection and access as well as to gain the economies and legibility these systems offer. The latter goal was the premise of the Institute of Medicine's recommendations.[1] The Ann Arbor Business Review, which provides market research on physician office management and medical information systems, forecasts that the market for electronic medical records is growing at an annual rate of 25.5% and that it will be a $13 billion industry by 2011.[2]

In the acute care setting, health records and PHI are contained in a variety of media in a hybrid environment that includes patient information in both electronic and paper forms. The HIM professional understands the source, creation, and flow of patient information and where the documentation that complies with the Business Record Act[3] is stored. The integration of various systems—including but not limited to radiology, cardiology, and therapies—allows HIM departments to access, monitor, and release appropriate information from the myriad of systems that exist throughout healthcare organizations. Finally, the health information professional has the knowledge and training necessary to apply the vast number of regulations that restrict or address PHI release.

Which Regulations Govern ROI?

Numerous regulations govern release of information from the patient record. The American Hospital Association has stated that in addition to documenting patient care and serving as a communication vehicle between caregivers, the purpose of the medical record is "to (1) meet the legal requirements imposed on the [provider] and (2) provide clinical data of interest to the researchers and clinical data research systems."[4]

1. Committee on Quality of Health Care in America, Institute of Medicine, Crossing the Quality Chasm: *A New Health System for the 21st Century*. (Washington, DC: National Academies Press; 2001), 166.
2. Nathan Bomey, "Medical Records Software Startup Forecasts Fast Growth," *Ann Arbor Business Review,* June 14, 2007, at *http://blog.mlive.com/ann_arbor_business_review/2007/06/medical_records_software_start.html.*
3. 28 USC §1732(a).
4. American Hospital Association. "Hospital Medical Records—guidelines for their use and release of medical information." 3 (Chicago: 1972).

The purpose of the medical record is tied directly to the use of records as evidence. Business records are defined as records made in the regular course of business at the time that, or within a reasonable time after, the recorded event occurred and under circumstances that reasonably might be assumed to accurately reflect the actual event.[5] The Business Records Act provides a foundation for the use of health records by others as evidence because the documents can be relied on with respect to the treatment of and decisions about the person to whom they pertain.

Restrictions surrounding ROI are rooted in the common law concept of "doctor-patient confidentiality." This concept prohibits a physician from disclosing information obtained from a patient or known about the patient's condition. Discussions between physicians and their patients are privileged or protected from disclosure. The attorney-client and clergy-penitent privileges provide similar protections. Other landmark laws that address ROI are:

- The **Freedom of Information Act** (5 U.S.C. §552) enacted in 1966 applies to access to most records maintained by the executive branch of the federal government, some independent federal agencies (U.S. Postal Service, Federal Communications Commission, Federal Trade Commission, Consumer Product Safety Commission, U.S. Environmental Protection Agency, Centers for Disease Control and Prevention, etc.). The Freedom of Information Act, as amended, is tied to the original **Privacy Act of 1974** (5 U.S.C. §552a), which applies to those records maintained by government-owned healthcare facilities. The Privacy Act also requires each federal agency that maintains personal records, such as medical records, to implement a system that allows the subjects of their records to review those records and to receive a copy of all or any portion thereof in a form comprehensible to him or her and to permit that individual to request amendment of a record pertaining to him or her. HIM professionals working in veterans administration facilities must comply with disclosure rules under the Privacy Act.

- The **U.S. Constitution** protects the privacy of citizens with the Fifth and Fourteenth Amendments by prohibiting unwarranted invasions of privacy by federal and state entities.

5. Roach, W. H., *Medical Records and the Law.* (Boston: Jones & Bartlett, 2003.), 384.

- The **Code of Federal Regulations** addresses the confidentiality of patient records pertaining to alcohol and drug abuse and establishes additional restrictions with respect to the disclosure of information from records of patients treated or diagnosed with these conditions in a federally assisted drug or alcohol abuse program. (Visit *www.hhs.gov/ohrp/documents/19750701.pdf.*) HIM professionals working in substance abuse rehabilitation environments must be aware of these regulations. However, most acute care facilities that provide treatment for these conditions comply with confidentiality requirements pertaining to alcohol and drug abuse patient records by including a clause in their authorization forms that allow patients to explicitly permit the release of health information that may include reference to these conditions.

- The **Health Insurance Portability and Accountability Act of 1996 (HIPAA)** (45 C.F.R. §§160 and 164) became effective in 2003 and provided greater and nationwide privacy and security protections for PHI maintained by healthcare providers and health insurance plans. HIPAA consists of a sweeping set of regulations that also address electronic transmission of health data, funding for fraud investigations, and the portability of insurance coverage. HIPAA regulations have created opportunities for many HIM professionals to serve as their organizations' privacy officers. These regulations also spawned the need for organizational procedures that address a variety of subjects including: notice of privacy practices, amendments to PHI, directory preferences, alternative methods of notification, authorization form content, timeliness of provision of copies, charges for copies of PHI, minimum necessary uses and disclosures, business associates, and uses for treatment, payment, and healthcare operations. The complete HIPAA Privacy Rule is available at *www.hhs.gov/ocr/combinedregtext.pdf.*

- E-discovery amendments to the **Federal Rules of Civil Procedure (FRCP)** address access to patient information maintained in electronic form in devices and systems not traditionally considered part of the patient record. Because FRCP governs the way civil lawsuits are conducted, the amendments significantly modify the discovery portion of litigation. The e-discovery rules will broaden the policies and procedures that HIPAA necessitated to include creation and retention of patient information in such devices as PDAs, e-mail, and various monitoring systems. They also will increase the involvement of the chief technology officer and HIM director with the pre-discovery activities of their organization's legal counsel.

- All HIM managers must have access to and knowledge of the **state laws** that govern access and disclosure of patient information or PHI in their location. State laws may be more stringent than HIPAA regulations and will preempt HIPAA provisions in these situations. States often have more stringent requirements with respect to authorizations, sensitive conditions, charges for copies, and the time allowed for providing copies to requestors.

Another must-have resource is a complete set of the organization's policies pertaining to access and disclosure of patient information. These policies often incorporate processes that apply to medical staff access to records of their own and other members' patients, the extent of law enforcement access to patient records, the manner in which requests from health or licensing authorities are processed, and other local jurisdictional issues.

Unfortunately, state and federal regulations are not always consistent with respect to ROI and patient confidentiality rights. For example, Arkansas permits physicians to deny patients or their attorneys or guardians certain medical records upon a showing of "detrimentality" (Ark. Code 16-46-106).[6] Other states, such as California and Colorado, give physicians similar rights to withhold records. Many states, including Delaware, Kansas, and Missouri, have specific regulations governing the disclosure of sensitive conditions such as HIV status. Regulations in some states, including New Jersey, Pennsylvania, and Virginia, address mental health conditions. This lack of uniformity and consistency makes it necessary for every HIM department to research the regulations that govern its activities.

Where to Find Regulations

Various sources provide information about pertinent state and federal regulations. Most states publish their laws on the Internet. They often appear on the official state Web site within the health department or health and human services department section. Other Internet listings include:

- Medical Records: Encyclopedia of Everyday Law at *www.enotes.com/everyday-law-encyclopedia/medical-records* (last accessed January 31, 2008).
- State laws for all 50 states are accessible at *www.alllaw.com/state_resources*.

6. Medical Records: Encyclopedia of Everyday Law. *http://www.enotes.com/everyday-law-encyclopedia/medical-records* (last accessed January 31, 2008).

The American Health Information Management Association (AHIMA) has an extensive library of articles, practice briefs, and guidance available through its Web site and Body of Knowledge. AHIMA members have unrestricted access to the organization's Web site. Much information on the Web site also is accessible to nonmembers as a public service.

The state hospital association maintains a comprehensive library of regulations and a pulse on what is happening in the legislature. Ask your state hospital association to add your facility to its mailing list for legislative and regulatory information.

Ask your facility's attorney to provide copies of pertinent laws governing confidentiality, ROI, content of authorizations, and the order of consent.

Finally, every state has an HIM association. Many state associations (component state associations) publish state-specific legal manuals that address ROI and other practice-related guidance. To find your state association visit: *www.ahima.org/directory/csa.asp.*

Summary

ROI is an ideal career option for anyone who enjoys understanding the legal side of medicine. This aspect of HIM requires understanding the medical record, its creation, and the manner in which documentation flows to fulfill the different information needs of a variety of requestors. ROI affords extensive interaction with the public, a rare experience for HIM staff members who often specialize in and work in areas such as coding and transcription.

Resources

American Health Information Management Association. *"Laws and Regulations Governing the Disclosure of Health Information* (Updated)" (Chicago: 2002).

American Health Information Management Association. *"E-Discovery: Preparing for the Coming Rise in Electronic Discovery Requests"* (Chicago: 2007).

American Health Information Management Association. *"Release of Information: The Basics"* (Chicago: 2001).

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