



## 2020 NRTRC TAO VIRTUAL CONFERENCE



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# VIRTUAL SESSION INSTRUCTIONS

- Audio and video are muted for all participants
- Use the Q&A feature to ask questions 
- Moderator will read questions to the speaker
- Presentation slides are posted at <https://nrtrc.org/sessions>. Recordings will be posted after the conference.

## Telehealth Policy Panel

- Moderator: Cathy Britain and Deb LaMarche
- Presenters:
  - Jeffrey Mitchell, JD, Counsel, Fletcher, Heald & Hildreth, PLC
  - Rene Quashie, JD, Vice President, Policy & Regulatory Affairs, Digital Health, Consumer Technology Association
  - Emily Wein, JD, Of Counsel, Foley & Lardner LLC
  - Mei Wa Kwong, JD, Executive Director, Center for Connected Health Policy

Consumer  
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NRTRC TAO Virtual Conference  
April 16, 2020

CTA.tech

# Agenda

- Introduction to OCR Bulletins, Guidance, and Enforcement Waivers for Telehealth
- HIPAA Privacy
  - OCR Waiver
  - FAQ Issues
- Part 2

# INTRODUCTION

- From McDermott Will & Emery: HHS Office for Civil Rights (OCR) has issued the following bulletins and guidance (collectively, the OCR COVID-19 Guidance):

OCR, COVID-19 and HIPAA:  
Disclosures to law enforcement,  
paramedics, other first responders  
and public health authorities,  
March 25, 2020

**OCR Guidance**  
3/25/20

**OCR FAQs**  
3/20/20

OCR, FAQs on Telehealth and  
HIPAA during the COVID-19  
nationwide public health emergency,  
March 20, 2020

OCR, Notification of Enforcement  
Discretion for telehealth remote  
communications during the COVID-19  
nationwide public health emergency,  
March 17, 2020

**OCR Notification**  
3/17/20

**OCR Bulletin**  
3/16/20

OCR, Bulletin: Limited Waiver of  
HIPAA Sanctions and Penalties  
During a Nationwide Public Health  
Emergency, March 16, 2020

OCR, Bulletin:  
HIPAA Privacy and  
Novel Coronavirus,  
February 3, 2020

**OCR Bulletin**  
2/3/20



# OCR WAIVER

During PHE, OCR will not impose penalties for non-compliance with HIPAA involving:

- Covered entity healthcare provider in connection with “good faith” provision of telehealth

Covered entity healthcare provider can use any “non-public facing” remote communication products that are available to communicate with patients

- Video application examples-Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, WhatsApp video chat
- Text application examples- Signal, Jabber, Facebook Messenger, Google Hangouts, WhatsApp and iMessage.

# OCR WAIVER

“Public facing”  
communication products  
are not covered by the  
waiver and cannot be used

Examples of “public facing”:

- Facebook Live
- Twitch
- TikTok

These products are  
designed to be open to  
public or allow wide and  
indiscriminate access to the  
communication



# OCR WAIVER (FAQ) – WHAT IS “BAD FAITH”?

- Criminal acts, fraud, identity theft
- Further uses or disclosures of patient data transmitted during a telehealth communication that are prohibited by the HIPAA Privacy Rule (e.g., sale of the data)
- Violations of state licensing laws or professional ethical standards that result in disciplinary actions
- Use of public-facing remote communication products, such as TikTok, Facebook Live, Twitch, or a public chat room

# OCR WAIVER

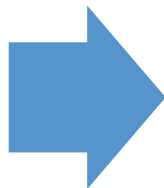
Telehealth service does not need to be related to diagnosis/treatment of COVID-19

Enforcement waiver extends to failure to enter into BAAs with vendors of non-public facing remote communications and utilization of non-HIPAA compliant remote communication products

Enforcement waivers apply only to covered entity healthcare providers (not health plans or healthcare clearinghouses)

# Informing Patients

OCR encourages notifying patients that remote communication potentially involves privacy risks and to enable all available encryption and privacy modes when using remote communication solutions



Providers need to evaluate how to notify patients and consider the methods to implement (i.e. in writing or oral and timing of notification)

# OCR WAIVER – OTHER ISSUES

No expiration date  
included in OCR  
Notification  
3/17/2020



In 3/20/2020 FAQs,  
OCR says  
enforcement  
waiver terminates  
only after it issues  
a notice to the  
public indicating so



FAQ: Providers  
should always use  
private locations  
and patients  
should not receive  
telehealth services  
in public or semi-  
public settings,  
absent patient  
consent or special  
circumstances

## 42 CFR Part 2 GUIDANCE

The Substance Abuse and Mental Health Services Administration (SAMHSA) issued guidance on March 19, 2020 addressing substance use disorder treatment

SAMHSA states Part 2's requirements to obtain written patient consent for disclosure of substance use disorder records would not apply to utilization of telehealth services if a medical emergency exists

CARES Act allows patients to consent to the use and disclosure of their substance use disorder treatment services records in accordance with HIPAA (as opposed to the more restrictive 42 CFR Part 2)