DISCLAIMER: *The information below is supplied by members for informational purposes only and is not to be considered legal advice by competent counsel. Members should consult their own attorneys to ensure they are in compliance with HIPAA and privacy laws. APsaA will make available to members guidance and interpretations of HIPAA provided by the federal government, as it has in the past.*

How to handle telephone, peer-review interviews:

The Executive Council of APsaA adopted a resolution in 1989 on this subject generally discouraging participation in such reviews and I believe the arguments against such reviews are even stronger today. You can read the 1989 resolution in APsaA Practice Bulletin #6 at:

http://www.apsa.org/sites/default/files/private_files/Bulletin%206.pdf

Look for item number C(2) on page 8. (The pages aren't numbered so you'll have to count down to page 8 to find it.)

That being said, you should be aware of the following restrictions on such reviews under existing federal law, restrictions which insurance companies certainly know about but seem to be trying to evade through their bullying or conning individual uninformed therapists and patients:

(1) The HIPAA Privacy Rule

(a) You MAY NOT disclose to the insurance company (including a peer reviewer employed by the company) any information which you keep exclusively in "psychotherapy notes" with the exception of those data items which are excluded in the Privacy Rule's definition of psychotherapy notes. Theoretically you could disclose that information with a specific authorization from the patient BUT the patient has no reason to give you such an authorization because the insurance company is EXPLICITLY prohibited from refusing to pay a claim because the patient doesn't authorize the disclosure of psychotherapy notes.

The statement from the Federal Register which was posted on this list describing psychotherapy notes is in conflict with the actual text of the Privacy Rule which takes precedence. Specifically, at least in New York State, psychotherapy notes are not the same as "Personal Notes" or "process notes". This is a confused and confusing subject which you can read more about here in comments submitted to HHS in 2010 regarding the HITECH Act:

http://mosher.com/privacyrule/mosher2010comments.pdf

(b) For information which is NOT in your psychotherapy notes (i.e., information which is in the other part (i.e., the "main" part) of your record you may only be asked for the MINIMUM NECESSARY information which the insurer needs to process the claim. UNDER CURRENT LAW, it is up to YOU, (see

below) not up to the insurer to decide what and how much that information is. You should NEVER have to disclose or submit your entire record. The insurer is PROHIBITED from asking you for more than that MINIMUM.

Since individual therapists are usually too intimidated by bullying insurers to assert this point, the professional organizations, the APA and APsaA, have made a determination of what is the minimum necessary amount of information you may disclose and you should rely on that. See, e.g.:

http://bit.ly/MinimumNecessaryAPA

(2) THE HITECH ACT

The original Privacy Rule was predicated on the idea that insurers and therapists would work out their disagreement about Minimum Necessary so in that Rule it said that both parties would make their own determination as to what was the Minimum Necessary information and they negotiate and agree. That didn't happen.

So HHS commissioned a STUDY of the issue which you can read here:

Main Page: http://aspe.hhs.gov/datacncl/reports/MHPrivacy/index.htm

Study's focus on "Minimum Necessary:
http://aspe.hhs.gov/datacncl/reports/MHPrivacy/Chap-1.htm#A

The bottom line is that the study found out that providers and insurers disagree about what is the "minimum necessary" amount of information required to process a claim (duh!), are unlikely to agree in the future, and suggested that legislation might be required to resolve the issue. Therefore in the HITECH ACT, which modified the Privacy Rule Congress passed a provision which instructs HHS to issue guidance as to what is the "minimum necessary" information. HOWEVER, the Act also temporarily changed the Rule so that UNTIL HHS ISSUES SUCH GUIDANCE ONLY THE PERSON MAKING THE DISCLOSURE DETERMINES THE "MINIMUM NECESSARY" -- THAT'S YOU! -- and that's what I was referring to above. But once again, I suggest that you not try to go it alone on this. Rely on the APA and APsaA "minimum necessary" documents. HHS has never issued the guidance so the temporary provision is still in effect.

See: http://www.hipaasurvivalguide.com/hitech-act-13405.php

(3) THE PARITY LAW

It is important to recognize that under the parity law, if you are an out of network provider then your services are covered at the same level as the MED/SURG care for out of network treatment under the same policy. The applies to how the deductibles are calculated.

More importantly, the law prohibits so called "fail first" provisions for psychotherapy if there are no similar provisions for Med/Surg. This means that the company cannot dictate that a patient try a (possibly cheaper) treatment and fail to improve before they will approve a different treatment which is more costly. Psychoanalysis is an approved treatment under Medicare for a variety of diagnoses which are listed on the APsaA WWW site. So if the policy does not have a "fail first" provision for MED/SURG

then the insurer cannot, as I see it, insist on CBT which is presumably cheaper than analytic treatment if the patient prefers analytic psychotherapy.

http://www.apsa.org/IndicationsforPsychoanalyticTherapy

In my opinion, the information above should be rolled into a FORMAL statement BY APsaA which those of you who want to do telephone reviews should read to the reviewer at the start of the review and the statement should end with a strong indication that if the insurer violates the Privacy Rule or the HITECH Act during the review that you will report him or her and the company to the HHS Office for Civil Rights or to the Department of Labor (for violations of the Parity Law.) Those guys can be very tough on insurers who cross the line and insurers know that.

Ideally you should also record the call and let the reviewer know that you are doing this.