HIPAA Compliance During Litigation and Discovery
Safeguarding PHI and Avoiding Violations When Responding to Subpoenas and Discovery Requests

WEDNESDAY, SEPTEMBER 12, 2012

1pm Eastern   |   12pm Central   |   11am Mountain   |   10am Pacific

Today’s faculty features:

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HIPAA Compliance During Litigation and Discovery

Wednesday, September 12, 2012
1 – 2:30 p.m. (ET) | Noon – 1:30 p.m. (CT) | 10 – 11:30 a.m. (PT)

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Health Insurance Portability and Accountability Act of 1996 ("HIPAA")

“No, it’s not a female Hippopotamus, anyone else know?”
HIPAA Core Elements

- The Privacy Rule
- The Security Rule
- Breach Notification Rule

- HIPAA is the floor, not the ceiling:
  - The more restrictive of HIPAA or applicable state law always applies.
HITECH ACT AND HIPAA

• Privacy Rule
  – Substantially the same
  – Heightened requirements for business associate agreements
  – Proposed rulemaking to modify standard for accounting of disclosures

• Security Rule
  – Now expressly required of business associates

• Breach Notification Rule
  – New to HIPAA
  – Encryption as a strategy to mitigate risk
• HIPAA and its implementing regulations place constraints on the release of individually identifiable “protected health information” by health care providers to litigants.

Citation: 45 C.F.R. 164.512(e)
• HIPAA does not permit health care providers to respond to “a subpoena, discovery request, or other lawful process that is not accompanied by an order of court or administrative tribunal” unless the health care provider “receives satisfactory assurance . . . from the party seeking the information” of “reasonable efforts” to (i) provide appropriate notice to the affected patient or (ii) secure a qualified protective order.

Citation: 45 C.F.R. 164.512(e)
Litigation Risk

• Prepare for litigation
  • Before there is a break in protocol
    • In drafting policies, procedures
    • In training
    • In responding to requests
    • In operations and reimbursement litigation
  • Authorizations, disclosures to attorneys
  • Waivers
Primary Methods of Obtaining Medical Records Pursuant to HIPAA

- Patient request
- Patient authorization of third party
- Subpoena or other discovery order
- Court or administrative order

Reminder: In all cases, must follow the more restrictive of HIPAA or applicable state law.
Patient Request for Medical Records

- Patients have the right to request copies of most medical records, whether in paper or electronic form
- Requestor must be patient, patient’s parent or guardian, or caregiver (with patient’s permission)
- Request must be made in writing
- Providers required to keep HIPAA records for six years (state law may require longer)
- In limited cases the provider may refuse the request (e.g., mentally ill patient at risk of self-harm)
- Potential more rigorous accounting of disclosures may be requested in future
• The first-ever civil money penalty of $4.3 million

• Cignet violated 41 patients’ rights by denying them access to their medical records when requested between September 2008 and October 2009.
  – The HIPAA Privacy Rule requires that a Covered Entity provide a patient with a copy of their medical records within 30 (and no later than 60) days of the patient’s request.
  – The CMP for these violations is $1.3 million.

• Cignet failed to cooperate with OCR’s investigations of the complaints and produce the records in response to OCR’s subpoena.
  – Covered Entities are required under law to cooperate with the Department’s investigations.
  – The CMP for these violations is $3 million.
When patient is a party

- Patient is plaintiff and requests own records
- Patient and provider both parties
  - Patient has placed medical condition in question – waiver
  - Still may need and can obtain authorization for provider to use records
Patient is a party but provider is not

- Opposing party seeks patient’s medical records from non-party provider
  - Typically through subpoena
  - Provider should insist on patient authorization
  - If not, inform patient of subpoena and obligation to produce records if subpoena not quashed
  - Move to quash subpoena
Health Insurance Portability and Accountability Act of 1996 (HIPAA)

• Permits disclosure of medical records when requested by patient
  – 45 C.F.R. 164.502(a)(1)(i)
  – 45 C.F.R. 164.524

• Permits disclosure with valid authorization
  – 45 C.F.R. 164.502(a)(1)(iv)
  – 45 C.F.R. 164.508
HIPAA Authorization

- Describe information to be disclosed
- Who authorized to disclose
- Who authorized to receive
- Purpose of disclosure
- Expiration date or event
- Signed and dated by patient
- Must include statement re right to revoke, potential for disclosure by recipient
Statements Required for Effective Authorization

The patient must affirm knowledge of:

• The right to revoke the authorization
• No conditioning of care, payment, or coverage on the authorization
• The potential for redisclosure

Citation: 45 C.F.R. 164.508(c)(2)
When patient(s) not a party

• Most difficult case
• May arise in variety of contexts
  – Malpractice (records of all other patients who had this procedure)
  – Business torts (records of all patients who were told disparaging comments)
  – Contract claims (list of all patients treated in violation of non-competition agreement)
  – Records of others bitten by neighbor’s dog
Patient not a party

- If provider is a party
  - Request for Production of Documents from adverse party
  - Court Order

- If provider not a party
  - Subpoena
  - Court Order

- Could be seeking records of multiple patients
Qualified Protective Orders

Parties agree to:

• No other disclosure for any purpose other than the litigation or proceeding for which the information was requested

• Return or destroy disclosed protected health information at the conclusion of the litigation or proceeding

Citation: 45 C.F.R. 164.512(e)(1)(ii)&(v)
Preparing Draft Orders

- Be narrow or expansive depending on purpose
- Specify that documents be labeled “Confidential” or similar
  - If PHI is in electronic form, specify encryption requirement
- Include non-disclosure requirement (see qualified protective orders)
- Require Receiving Party to certify in writing the return or secure destruction at the conclusion of litigation of all proprietary information (including PHI)
- Seal the record
Subpoenas

Provider needs “satisfactory assurance” of:

• Written notice to the patient
• Information about the case sufficient for raising an objection
• Time period for objection elapses (follow state law or court rules)

Citation: 45 C.F.R. 164.512(e)(1)(ii)(A)&(e)(1)(iii)
Various Exceptions

- Workers’ compensation cases
  - HIPAA exception, see 45 C.F.R. 164.512(1)
- Drug and alcohol treatment records
  - Court order required after showing good cause, see 42 U.S.C. 290dd-2 and 42 C.F.R. Part 2
- HIV/AIDS information
  - HIPAA silent but take note of applicable state law
- Mental health records
  - Redisclosure limitations
- Psychotherapy notes
  - Patient authorization required per 42 C.F.R. 165.508(a)(2)
- Patient Safety
  - 42 C.F.R. 164.524(a)(3)
HIPAA – Without Authorization

• Permits disclosure where “required by law”

• 45 C.F.R. 164.512 (a):
  – Involving victims of abuse, neglect or domestic violence (§ 164.512(c))
  – For judicial and administrative proceedings (§ 164.512(e))
  – For law enforcement purposes (§ 164.512(f))

• Disclosure must comply with and is limited by requirements of law
• 45 C.F.R. 164.512(e)

• Permits disclosure in response to
  – Court or administrative order
  – Subpoena
  – Discovery request or other lawful process in the course of judicial or administrative proceeding

• If certain requirements are met
Provider must release only the patient records or information “expressly authorized” by the court order.
Subpoena or Discovery Request requirements

- Provider must
  - Receive satisfactory assurance from requesting party that reasonable efforts have been made to ensure that patient has been given notice of request
  - Receive satisfactory assurance that reasonable efforts have been made by requesting party to secure a qualified protective order OR
  - Itself make reasonable efforts to notify patient or seek qualified protective order
“Satisfactory Assurance” regarding providing notice to patient

- Written statement from requesting party and documentation demonstrating
  - Requesting party made good faith attempt to provide written notice to patient
  - The notice included sufficient information to permit patient to object
  - The time for patient to raise objections has elapsed and either
    - No objections filed OR
    - All objections resolved in favor of disclosure
“Satisfactory Assurance” regarding qualified protective order

• Written statement from requesting party and documentation demonstrating
  – Parties to dispute have agreed to a qualified protective order and have presented it to court OR
  – The requesting party has requested a qualified protective order from the court
"We all deal with it differently."
HIPAA Loopholes

• “Satisfactory assurance”
  – Not required to actually notify patient – just make good faith effort
  – Not required to obtain a qualified protective order – just have presented to or requested from court

• And what about disclosure to requesting party?
HIPAA Preemption

- HIPAA supersedes contrary provisions of state law
- BUT state law providing “more stringent” protection of privacy **not preempted**
  - Prohibits or restricts use or disclosure that would otherwise be permitted under HIPAA
  - Narrows scope or duration, increases privacy protections **OR**
  - Provides greater privacy protection
State Laws

- Physician-patient privilege
- Laws regarding confidentiality of medical records
- Patient’s Bill of Rights
- State constitutional law
Physician-Patient Privilege

- May vary by state
- Information acquired in attending the patient
  - Information communicated to physician by patient
  - Information gathered by physician through examination
- Communications are privileged (i.e., exempt) from discovery, even if HIPAA would permit
- Physician-patient privilege often applies to hospital
State Laws Regarding Confidentiality of Medical Records

- Independent regulatory duty of hospital to maintain the confidentiality of medical records
- Reports and records of health authorities
- HIV-related information
- Records of mental health facilities
- Drug and alcohol abuse records
- Applicable to particular facilities
  - Birth Centers
  - Home health care agencies
  - Long-term care facilities AND others
Patient’s Bill of Rights

• Adopted by individual states

• Patient has right to have records treated as confidential except as otherwise provided by law

• Person admitted to hospital has right to privacy and confidentiality of records pertaining to treatment except as otherwise provided by law

• Records not to be released without patient’s approval
Constitutional Right of Privacy

- Right of privacy of medical records
- Right “to be let alone”
- May be superseded by compelling state interest in information
  - Such as non-identifying information regarding donor of tainted blood
• **Rost v. State Board of Psychology** (1995)

• Psychologist subject to disciplinary action for releasing records per subpoena

• “At the time Rost released ... records..., she did not seek the consent of her client, professional legal advice or the imprimatur of a judge”

• Compares privilege with code of ethics
Responding to Authorization or Subpoena

- Know state law requirements
- Confirm jurisdiction
  - State law applies to federal court subpoenas
  - Out-of-state subpoena may be honored under the Uniform Foreign Depositions Act – but check state law
- Be a stickler for the rules
- Follow the time requirements
  - These will be determined by state law
- Even when a request is proper, provide only the minimum necessary amount of information to satisfy the request or subpoena
NOTICE TO HEALTH CARE ENTITIES

A COPY OF THIS SUBPOENA DUCESTECUM HAS BEEN PROVIDED TO THE INDIVIDUAL WHOSE HEALTH RECORDS ARE BEING REQUESTED OR HIS COUNSEL. YOU OR THAT INDIVIDUAL HAS THE RIGHT TO FILE A MOTION TO QUASH (OBJECT TO) THE ATTACHED SUBPOENA. IF YOU ELECT TO FILE A MOTION TO QUASH, YOU MUST FILE THE MOTION WITHIN 15 DAYS OF THE DATE OF THIS SUBPOENA.

YOU MUST NOT RESPOND TO THIS SUBPOENA UNTIL YOU HAVE RECEIVED WRITTEN CERTIFICATION FROM THE PARTY ON WhOSE BEHALF THE SUBPOENA WAS ISSUED THAT THE TIME FOR FILING A MOTION TO QUASH HAS ELAPSED AND THAT:

NO MOTION TO QUASH WAS FILED; OR

ANY MOTION TO QUASH HAS BEEN RESOLVED BY THE COURT OR THE ADMINISTRATIVE AGENCY AND THE DISCLOSURES SOUGHT ARE CONSISTENT WITH SUCH RESOLUTION.

IF YOU RECEIVE NOTICE THAT THE INDIVIDUAL WHOSE HEALTH RECORDS ARE BEING REQUESTED HAS FILED A MOTION TO QUASH THIS SUBPOENA, OR IF YOU FILE A MOTION TO QUASH THIS SUBPOENA, YOU MUST SEND THE HEALTH RECORDS ONLY TO THE CLERK OF THE COURT OR ADMINISTRATIVE AGENCY THAT ISSUED THE SUBPOENA OR IN WHICH THE ACTION IS PENDING AS SHOWN ON THE SUBPOENA USING THE FOLLOWING PROCEDURE:

PLACE THE HEALTH RECORDS IN A SEALED ENVELOPE AND ATTACH TO THE SEALED ENVELOPE A COVER LETTER TO THE CLERK OF COURT OR ADMINISTRATIVE AGENCY WHICH STATES THAT CONFIDENTIAL HEALTH RECORDS ARE ENCLOSED AND ARE TO BE HELD UNDER SEAL PENDING A RULING ON THE MOTION TO QUASH THE SUBPOENA. THE SEALED ENVELOPE AND THE COVER LETTER SHALL BE PLACED IN AN OUTER ENVELOPE OR PACKAGE FOR TRANSMITTAL TO THE COURT OR ADMINISTRATIVE AGENCY.

Citation: Va. Code 32.1-127.1:03
Tips

• Know your state statutes and local rules, and follow the more restrictive rule
• Careful drafting is crucial
• HIPAA requires minimum necessary disclosure
• Do not have paralegal sign requests or other subpoena documents
• Do not allow Business Associates to respond to subpoenas without at least providing notice
  – Ensure your Business Associate Agreement contains appropriate language regarding the process to be followed when they receive a subpoena or Court Order
E-Government Act of 2002

- Pleadings and court documents are going online
- Remove “personal identifiers” such as:
  - Social security numbers
  - Financial account numbers
  - Dates of birth
  - Names of minor children
- Check local rules for standards and compliance dates

Citation: 42 U.S.C. 3500 et seq.
Local Court Rules

- Be careful of local court rules about e-filings
“You can’t just walk in and ask to access patient records. HIPAA would call that fantasizing.”
When HIPAA Does NOT Apply

• When PHI is received as a result of an authorization or subpoena

• But . . .
  – State law may apply
  – Common law liability principles may apply
  – Professional ethics rules may apply