Insurance Litigation:  
Navigating Complex HIPAA Privacy Rules in the Discovery of Key Medical Records  
Complying With Federal and State Laws on HIPAA Authorization Forms, Subpoenas, Discovery Requests, and Protective Orders

WEDNESDAY, JULY 9, 2014  
1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today’s faculty features:

Sidney J. Hardy, McCranie Sistrunk Anzelmo Hardy McDaniel & Welch, New Orleans  
Michael P. Lowry, Thorndal Armstrong Delk Balkenbush & Eisinger, Las Vegas

The audio portion of the conference may be accessed via the telephone or by using your computer’s speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact Customer Service at 1-800-926-7926 ext. 10.
**Tips for Optimal Quality**

**Sound Quality**
If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial 1-866-869-6667 and enter your PIN when prompted. Otherwise, please send us a chat or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

**Viewing Quality**
To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.
For CLE purposes, please let us know how many people are listening at your location by completing each of the following steps:

• In the chat box, type (1) your company name and (2) the number of attendees at your location

• Click the SEND button beside the box

If you have purchased Strafford CLE processing services, you must confirm your participation by completing and submitting an Official Record of Attendance (CLE Form).

You may obtain your CLE form by going to the program page and selecting the appropriate form in the PROGRAM MATERIALS box at the top right corner.

If you'd like to purchase CLE credit processing, it is available for a fee. For additional information about CLE credit processing, go to our website or call us at 1-800-926-7926 ext. 35.
If you have not printed the conference materials for this program, please complete the following steps:

• Click on the ^ symbol next to “Conference Materials” in the middle of the left-hand column on your screen.

• Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today’s program.

• Double click on the PDF and a separate page will open.

• Print the slides by clicking on the printer icon.
INSURANCE CLAIMS LITIGATION:
OBTAINING MEDICAL RECORDS UNDER HIPAA,
STATE AND FEDERAL COURT RULES

Wednesday, July 9, 2014
1:00 P.M. Eastern

SIDNEY HARDY
McCranie Sistrunk AnzelmO
Hardy McDaniel & Welch LLC
www.mcsalaw.com

MICHAEL P. LOWRY
Thorndal Armstrong Delk
Balkenbush & Eisinger, P.C.
www.thorndal.com
YOUR PRESENTERS

SIDNEY J. HARDY
McCranie Sistrunk Anzelmo
Hardy McDaniel & Welch LLC
909 Poydras Street, Suite 1000
New Orleans, LA 70112
T) 504-846-8407
F) 800-977-8810
shardy@mcsalaw.com
Blog: http://mcsalaw.com/category/blog/

MICHAEL P. LOWRY
Thorndal Armstrong Delk Balkenbush & Eisinger, P.C.
P.O. Drawer 2070
Las Vegas, NV 89125-2070
T) 702-366-0622
F) 702-366-0327
mlowry@thorndal.com
Blog: compellingdiscovery.com
• Discussing HIPAA’s impact upon liability claims.

• Not discussing application to worker’s compensation claims.
I. **Impact of HIPAA on Obtaining Medical Records in Insurance Claims**

A. Uncertainty in the legal field as to how to handle a patient’s medical records
   - Does the mere handling of protected health information trigger requirements of HIPAA compliance?
   - What if a third party requests medical records already in our possession from my firm?
   - What if the plaintiff refuses to sign the authorization?
   - Are ex-parte interviews with plaintiff’s physicians/care personnel permissible?
   - What do I do with the medical records once litigation concludes?
I. **Impact of HIPAA on Obtaining Medical Records in Insurance Claims**

B. HIPAA’s Chilling Effect on Discovery:
Some courts say HIPAA limits contact with a plaintiff’s physician to formal discovery through depositions and interrogatories

- HIPAA applies to first responders; interviews of EMTs and paramedics are prohibited
II. Overview of HIPAA Privacy Rules

The Beginning: What is HIPAA?

→ Health Insurance Portability Accountability Act.

→ HITECH Act Omnibus Final Rule
  45 C.F.R. §§ 160 and 164
What is HITECH?

- The Health Information Technology for Economic and Clinical Health Act

- Compliance Date of September 23, 2013

- Expands definition of “business associate” to include patient safety organizations, health information organizations, and subcontractors
II. Overview of HIPAA Privacy Rules

Core Elements of Final Omnibus Rule

(1) Privacy Rule
45 C.F.R. §§ 160 and 164

(2) Security Rule
45 C.F.R. § 164.302 to 164.318, Subpart C

(3) Breach Notification Rule
45 C.F.R. § 164.402 et seq.
** HIPAA preempts state law, unless state law is more stringent**

TO WHOM DOES HIPAA APPLY?

• HIPAA only applies to “covered entities” and “business associates” of covered entities who handle protected health information.

• Are you a covered entity, or a business associate of a covered entity under HIPAA?

• No? HIPAA does not apply, but normal discovery rules apply re medical records, privileged information, etc.

• Yes? The fun begins and HIPAA compliance is required.
HIPAA Applies to Attorneys Via HITECH

- HITECH’s definition of a business associate includes *attorneys* who provide services for covered entities if those attorneys are handling personal health information.

- A lawyer is classified as a business associate for HIPAA requirements if he/she “provides, other than in the capacity of a member of the workforce of such covered entity, legal ... services to or for such covered entity, or to or for an organized health care arrangement in which the covered entity participates, where the provision of the service involves the disclosure of protected individually identifiable health information from such covered entity or arrangement, or from another business associate of such covered entity or arrangement, to the person.”

45 C.F.R. §160.103(a).
• Plaintiff/patient in medical malpractice case gives her medical records to her attorney. Is the plaintiff’s attorney now subject to HIPAA?

• Defendant doctor gives plaintiff/patient’s records to defense counsel. Is defense counsel now subject to HIPAA?
APPLYING HIPAA: THE PRIVACY RULE

Because of computerization and increased electronic transmission of health information, and recognizing the need to guarantee certain protections to patients’ privacy, Congress added a note to 42 U.S.C.A. §1320d-2

Covered Entities may not use or disclose an individual’s protected health information for purposes unrelated to treatment, payment, healthcare operations, or certain defined exceptions without first obtaining the individual’s prior written authorization.
The Security Rule

- Established standards and procedures for securing electronic PHI from unauthorized access

- Meant to safeguard against unintentional disclosure of electronic protected health information, either by mistake or thievery

- Does it apply to non-electronic PHI?
“Somehow your medical records got faxed to a complete stranger. He has no idea what’s wrong with you either.”
Breach Notification Rule

• Process by which alleged and known breaches are investigated

• Breach is the “acquisition, access, use, or disclosure of protected health information . . . which compromises the security or privacy of the protected health information.”

• Does not include situations where PHI is disclosed/acquired unintentionally by a member of a covered entity if disclosure/acquisition was made in good faith, in scope of authority, and did not result in further use or disclosure.
• If a breach occurs, who must be notified? The breaching party must notify
  o Affected individuals 45 C.F.R. § 164.404 (a)(1)
  o The Department of Health and Human Services 45 C.F.R. § 164.408
  o The media, if PHI of more than 500 people was disclosed 45 C.F.R. § 164.406

• When must they be notified?
  (1) Must be within reasonable time, and in all cases no later than 60 days from the discovery of the breach.
**CONTENTS OF BREACH NOTIFICATION**

- Must include in plain language
  - a brief description of what happened, including,
  - the date of the breach,
  - the date of the discovery of the breach (if known),
  - a description of the PHI disclosed,
  - any steps the affected individual should take to protect themselves from potential harm as a result of the breach
  - a brief description of what the covered entity is doing to investigate the breach, to mitigate the harm and to protect against further breaches

- Contact procedures for affected individuals to ask questions or to learn additional information, which “shall include” a toll-free number, an email address, website, or postal address.
## Tiered System of Monetary Penalties:

<table>
<thead>
<tr>
<th>Penalty Tier</th>
<th>Business Associate’s Culpability Level</th>
<th>Penalty Per Incident</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tier 1*</td>
<td>Did not know and could not have known of the HIPAA violation</td>
<td>$100 - $50,000</td>
</tr>
<tr>
<td>Tier 2*</td>
<td>Knew, or would have known through reasonable due diligence that an act or omission violates HIPAA, but did not act with willful neglect.</td>
<td>$1,000 - $50,000</td>
</tr>
<tr>
<td>Tier 3</td>
<td>Acted with willful neglect, but took corrective actions within 30 days</td>
<td>$10,000 - $50,000</td>
</tr>
<tr>
<td>Tier 4</td>
<td>Acted with willful neglect and took no corrective action and took no corrective actions within 30 days</td>
<td>$50,000</td>
</tr>
</tbody>
</table>

* Timely corrective is an affirmative defense to Tier 1 and Tier 2 violations.

• Cignet Health of Prince George’s County, MD; HIPAA Civil Monetary Penalty, February 4, 2011

• Cignet denied 41 patients access to their own medical records between 09/08 and 10/09.

• The Privacy Rule requires that a Covered Entity like Cignet provide a patient with a copy of their medical records within 30, and no later than 60, days of the patient’s request.

• Cignet then refused to cooperate in investigations.

• Fined $4,300,000.
A Mass General employee forgets documents on a subway.
The documents included a patient schedule containing protected health information of ("PHI") of 192 patients, and billing forms with PHI for 66 of those patients. This included PHI of patients with HIV/AIDS.
Mass General’s security?
A rubber band!
Fined $1,000,000.
Can I Be Sued for a HIPAA Violation?

- Maybe
- HIPAA does not create a private cause of action.
- But July, 2013 *Hinchy v. Walgreens* resulted in $1.44m verdict against Walgreens.
• Assume slip/fall liability scenario.
• Defendant wants to independently obtain medical information.
• How?
"According to your HIPAA release form I can’t share anything with you."
GET AN AUTHORIZATION

• Ask Plaintiff for an authorization.
• What must it contain?
  o Name of the person authorized to make the requested use or disclosure
  o Name of person to whom the covered entity may make the requested use or disclosure
  o A description of each purpose of the requested use or disclosure
  o An expiration date or event
  o A dated signature
• 45 C.F.R. § 164.508(c)(1) et seq.
CONTENT OF AN AUTHORIZATION

- Patient must affirm knowledge right to revoke the authorization in writing and either the exceptions to that right and a description of how the individual can revoke the authorization, or a reference to the required notice, if the notice has that information.

- An individual may revoke the authorization if he/she does so in writing, except to the extent that the covered entity has taken action based on an authorization.

- Covered entity may not condition care, payment, or coverage on authorization.

- The potential for re-disclosure by the recipient of disclosed information.

45 C.F.R. § 164.508(c)
A covered entity may only charge “reasonable” cost-based fees for providing medical records to patients. 45 C.F.R. § 164.524(c)

TIP #1 - Remember to include all the necessary HIPAA elements:
1. Name of the person authorized to make the requested use or disclosure
2. Name of the person to whom the covered entity may make the requested use or disclosure
3. A description of each purpose of the requested use or disclosure.
4. Expiration date or event.
5. A dated signature.

TIP#2 - Remember required content.
1. Patient’s right to revoke authorization
2. Covered entity may not condition care, payment, or coverage on authorization.
3. The potential for re-disclosure.

TIP #3 – Whose authorization to use?
Covered entities often insist on using their own authorization forms. *Be sure it complies with required elements.*

TIP #4 – Be cognizant of expiration date or event. *Does the authorization cover the time frame for the records you need?*
What if Plaintiff Refuses?

- If Plaintiff refuses to execute HIPAA authorization, can one be compelled?

- It depends on the jurisdiction.


- Criticism: Reads Rule 34 in manner that contradicts intent of Rule 1.
III. ALTERNATIVE METHODS FOR OBTAINING MEDICAL RECORDS (WHEN PLAINTIFF REFUSES)

- Common complaint: Without an authorization, medical providers ignore subpoenas because they fear HIPAA more than contempt.

- HIPAA permits two methods to medical records information may be obtained without a subpoena. If followed and the providers still ignore the subpoena, the court has contempt powers.

- May need to educate local providers & judges.
• Get a qualified protective order.

• PHI may be disclosed in response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if the covered entity receives satisfactory assurance from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order.

45 C.F.R. §164.502(e)(1)
**Definition: Satisfactory Assurance**

- What is a satisfactory assurance?

- A covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:
  - The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or
  - The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.
DEFINITION: QUALIFIED PROTECTIVE ORDER

- A qualified protective order means an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:
  
  (A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and

  (B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

45 C.F.R. § 164.512(e)(1)(v)
The Problems with Option 1

- Plaintiff will not approve protective order.
- Court will not grant protective order.
- Provider will not honor protective order.
- Time
Getting Records Without an Authorization: Option 2

- Just send a subpoena.

- PHI may be disclosed if the covered entity receives satisfactory assurance from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request.
**Definition: Satisfactory Assurance Using a Subpoena**

- Different definition than for a qualified protective order.
- A covered entity receives satisfactory assurances from a party seeking protected health information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:
  
  (A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);

  (B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and

  (C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:

    (1) No objections were filed; or

    (2) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.

- 45 C.F.R. § 164.512(e)(1)(iii)
Notwithstanding the other requirements, a covered entity may disclose protected health information in response to lawful process without receiving satisfactory assurance, if the covered entity makes reasonable efforts to provide notice to the individual similar to a subpoena or to seek a qualified protective order.

- 45 C.F.R. § 164.512(e)(1)(vi)
THE PROBLEMS WITH OPTION 2

- Provider will not honor the subpoena.

- Educating judges.

- Upside? May be faster than Option 1. Does not require waiting for record authorizations to arrive before beginning to gather records.
• Can I just skip the records & just call the treating physicians on the phone?

• Maybe. It seems to depend on state law.
Ex Parte Interviews Are OK?

- If a qualified protective order consistent with HIPAA has been executed, defense counsel may then conduct an ex parte interview.
- Plaintiffs compelled to execute HIPAA-compliant authorizations permitting opposing counsel to conduct ex parte, off-the-record interviews with plaintiffs’ treating physicians, provided physicians were informed on counsel’s identity and interest, and that discussions were voluntary and limited to medical condition at issue.
• NRS 49.235 in Nevada creates a doctor-patient privilege.

• NRS 49.235(3) voids the privilege “[a]s to written medical or hospital records relevant to an issue of the condition of the patient in any proceeding in which the condition is an element of the claim or defense.”

Can a defendant respond to providers who submit medical bills for payment?

Yes, but...


Underscores need to also consider state law.
HIPAA In Reverse

• Can a plaintiff get a defendant’s medical records?

• HIPAA still applies.

• Has defendant has put his medical condition in contention?
**What if Patient is NOT a Party?**

- Can I get a non-party’s medical records without an authorization?
- Court has authority to order disclosure of non-party patient information, subject to a protective order, without conducting a contradictory hearing or having the parties obtain the patient’s consent.
- “Twofold” protective order.
After the Records Arrive

- Don’t become a breach.

- Best practices?

- Remember to redact as necessary before filing with court. FRCP 5.2. If you forget, rules governing procedure in the federal courts do not give rise to a private cause of action. Living Designs, Inc. v. E.I. Dupont de Nemours, 431 F.3d 353, 372 (9th Cir. 2005). This does not prevent sanctions.
QUESTIONS?

WWW.COMPELLINGDISCOVERY.COM