Structuring Indemnification Provisions in Business Associate Agreements
Allocating and Transferring Risk in Healthcare Contracting

Thursday, February 26, 2015
1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today’s faculty features:

Marcia L. Augsburger, Partner, DLA Piper, Sacramento, Calif.
Rachel V. Rose, JD, MBA, Houston

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 1-866-819-0113 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.
Continuing Education Credits

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 word balloon button to send
Structuring Indemnification Provisions in Business Associate Agreements

Rachel V. Rose, JD, MBA
rvrose@rvrose.com

Marcia Augsburger, JD
marcia.augsburger@dlapiper.com

Matthew Fisher, JD
mfisher@mirickoconnell.com

February 26, 2015
Disclaimer

THE INFORMATION PRESENTED IS NOT MEANT TO CONSTITUTE LEGAL ADVICE. CONSULT YOUR ATTORNEY FOR ADVICE ON A SPECIFIC SITUATION.
Overview

I. Whether and when to include indemnification provisions
II. Considerations when determining whether to include indemnification provisions in a BAA
III. Best practices for negotiating and structuring indemnification provisions
Legislative History

- 1996 - HIPAA (Public Law 104-191) – need for consistent framework for transactions and other administrative items.
- 2010 – Privacy and Security Proposed Regulations (Feb. 17, 2010)
Risk Assessment Components

- Due Diligence by assessing PHI through the continuum of care and billing.
- “Define and confine the circumstances where PHI may be used or disclosed by covered entities, business associates and subcontractors.”
- National Institute of Technology Standards
  - Have you identified the ePHI within your organization?
  - What are the external sources of PHI/ePHI?
- OCR’s Guidance on HIPAA Risk Analysis Requirements
Acts related to PHI that fall under the purview and the subsequent enforcement of the HITECH Act:

“accesses, maintains, retains, modifies, records, stores, destroys or otherwise holds, uses or discloses unsecured protected health information”
KEY DEFINITIONS

- **Confidentiality** – “the property that data or information is not made available or disclosed to unauthorized persons or processes.”

- **Integrity** – “the property that data or information have not been altered or destroyed in an unauthorized manner.”

- **Availability** - “the property that data or information is accessible and useable upon demand by an authorized person.”
"A “business associate” is a person or entity, other than a member of the workforce of a covered entity, who performs functions or activities on behalf of, or provides certain services to, a covered entity that involve access by the business associate to protected health information."

**Business associate includes:** (i) A Health Information Organization, E-prescribing Gateway, or other person that provides data transmission services with respect to protected health information to a covered entity and that requires access on a routine basis to such protected health information. (ii) A person that offers a personal health record to one or more individuals on behalf of a covered entity. (iii) A subcontractor that creates, receives, maintains, or transmits protected health information on behalf of the business associate.
What Is a BAA?

- A contract.
- Required under HIPAA.
- Several items must be included – for example:
  - Establishment of permitted and required disclosures and uses
  - Non-disclosure of information
  - Appropriate safeguards
  - Breach notification
Is Indemnification Required in a BAA Under HIPAA?

No.
What is Indemnification?

- “To save harmless; to secure against loss or damage; to give security for the reimbursement of a person in case of an anticipated loss falling upon him. Also to make good; to compensate; to make reimbursement to one of a loss already incurred by him.”  
  Cousins v. Paxton & Gallagher Co., 122 Iowa. 405, 98 N. W. 277.

- Law Dictionary: What is INDEMNIFY? definition of INDEMNIFY (Black’s Law Dictionary)
Types of Indemnification Provisions

- Broad Form
- Intermediate Form
- Limited Form
The BAA, Indemnification and Additional Considerations

- Relationship between the parties.
- Type of indemnification.
- Has due diligence been done?
- Are the parties located internationally?
- Have state and international laws been considered?
- How does the indemnification clause impact arbitration and other related contracts?
Indemnification and Lawyers’ Professional Rules of Responsibility

- Many states do not allow it.
  - Ex: North Carolina, New York, Illinois, Indiana, Kansas, Missouri, Arizona and Florida
  - Found in State Bar ethics opinions - NYC Bar Association Ethics Opinion 2010-3

- Under the New York Rules of Professional Conduct, attorneys signing hold harmless agreements along with their clients is a violation of Model Rules 1.8(e), possibly creating a conflict of interest. In addition, it is in violation of NY Model Rule 1.7(a).
Considerations:
Should you include indemnity provisions in BAAs?
Considerations: Should you include indemnity provisions in BAAs?

- Who do you represent?
Considerations: Should you include indemnity provisions in BAAs?

- Who do you represent?
  - CEs want BAs to back up their representations
  - And BAs want their subs to put their money where their mouth is
Considerations: Should you include indemnity provisions in BAAs?

- Who do you represent?
  - For CEs, an opportunity to shift risk
Considerations: Should you include indemnity provisions in BAAs?

- Who do you represent?
  - BAs and sub-contractors see indemnity clauses as posing even more risk in a new risk environment
Considerations: Should you include indemnity provisions in BAAs?

- Who do you represent?
  - Some may pose no risk or low risk
But do indemnity provisions add more risk than CEs and BAs already bear?
But do indemnity provisions increase the risk that CEs and BAs otherwise bear?

I agree to take reasonable measures to safeguard and protect PHI...
But do indemnity provisions increase the risk that CEs and BAs otherwise bear?
But do indemnity provisions increase the risk that CEs and BAs otherwise bear?
Considerations: Implied indemnity

In what states are your clients operating
Considerations: Implied indemnity

In what states are your clients operating

- other than fear and trepidation?
Does the state recognize implied indemnity . . .

• Where there is an integrated written contract containing no express indemnity provision?
Does the state recognize implied indemnity?

Authorities in all states support implied indemnity

Except ...
Douglas Asphalt Co. v. Georgia Dep't of Transp., 319 Ga. App. 47, 49 (2012) ("[U]nless the words of a contract explicitly show an agreement to indemnify another party for his own negligence, such an agreement cannot be implied.").
In states where implied indemnity arises from a contract, do you need an indemnity provision?

Am. Nat. Prop. & Cas. Co. v. Ensz & Jester, P.C., 358 S.W.3d 75, 84 (Mo. Ct. App. 2011) ("It has been widely accepted for decades that indemnity may, in some instances, arise from a contractual relationship even if the parties did not expressly include an indemnity clause in the contract.") (quoting Wells Dairy Inc. v. Am. Indus. Refrigeration, Inc., 762 N.W. 2d, 463, 471 (Iowa 2009)).

Kaleel Builders, Inc. v. Ashby, 161 N.C. App. 34, 38; 587 S.E.2d 470 (2003) ("A right of indemnity implied-in-fact stems from the existence of a binding contract between two parties that necessarily implies the right. The implication is derived from the relationship between the parties, circumstances of the parties' conduct, and that the creation of the indemnitor/indemnitee relationship is derivative of the contracting parties' intended agreement.").
Does applicable state law recognize implied indemnity?


- *Chenery v. Agri-Lines Corp.*, 115 Idaho 281, 285 (1988) ("Equitable indemnity is founded on common law notions of justice, and unless explicit statutory language abrogates such common law concepts, they remain viable.").

- "As explained by the Ninth Circuit, the principle of implied equitable indemnity is designed to prohibit one from profiting by his own wrong at the expense of one who is either free from fault or negligent to a lesser degree. The ultimate goal is to do what is fair or just, and implied equitable indemnity may be entirely proper if it is simply fairer to shift the burden of loss." *Brewer Envtl. Indus., LLC v. Matson Terminals, Inc.*, 2011 WL 1637323 (D. Haw. Apr. 28, 2011) (quoting *Hydo–Air Equipment, Inc. v. Hyatt Corp.*, 852 F.2d 403, 406 (9th Cir.1988)).

- *Booker v. Sears Roebuck & Co.*, 1989 Ok. 156; 785 P.2d 297, 299 (" . . . the duty [indemnification] may be implied by operation of law and is just as enforceable as if an express indemnification agreement had been entered into by the parties.").
Does applicable state law recognize implied indemnity?

- *Wells Dairy, Inc. v. American Indus. Refrigeration, Inc.*, 762 N.W.2d 463, 470-71 (Iowa 2009) (finding that "an implied contractual duty to indemnify may arise from a contractual relationship that lacks an express obligation to indemnify where there are 'independent duties' in the contract to justify the implication" but adding implied indemnity did not arise from "plain vanilla contracts").

- *Harsh Int'l v. Monfort Indus.*, 266 Neb. 82, 88; 662 N.W.2d 574 (2003) ("Although we indicated . . . that a contract of indemnity could be implied, we discussed the issue in terms of a special relationship.").
Does applicable state law recognize implied indemnity?

Some May Require Special Relationship or Independent Duty


But as between a CE and BA or BA and sub, such a relationship and duty arises from HIPAA.
So, do you need an indemnity provision?

Perhaps in Iowa, Nebraska, etc. and other states, to explicitly describe the special relationship or independent duty giving rise to the obligation to indemnify, or . . .
So, do you need an indemnity provision?

- Perhaps to expressly limit an obligation to indemnify

The parties hereto agree that neither of them will have any obligation to indemnify, defend or hold each other harmless from and against claims, costs, damages, liabilities, expenses, fines, and/or penalties arising from or relating to the use, receipt, storage and/or transmission of PHI under this agreement.

And/or

Each party will bear its own legal fees and costs . . .
Party A hereto specifically agrees to indemnify, defend and hold harmless Party B and its officers, directors, employees, affiliates, agents, licensors, and business partners, from and against any and all claims, costs, damages, liabilities, expenses, fines, and penalties (including legal fees and costs) arising from or relating to the creation, use, receipt, storage and/or transmission of PHI under HIPAA, state privacy laws, and/or any other foreign or domestic, federal, state or local law or regulation. Party B will have the right, but not the obligation, to select legal counsel, to assume the exclusive defense and control of any matter subject to indemnification by Party A, to participate through counsel in any defense of any claim and to approve any settlement. Party B agrees to cooperate in any defense under this provision and that Party A may not settle any claim without Party B’s prior written consent.
Indemnity Provisions Will Be Enforced As Written


- Gloucester Holding Corp. v. U.S. Tape & Sticky Prods., LLC, 832 A.2d 116, 129 (Del. Ch. 2003) (indemnity provisions should be strictly interpreted and not enlarged by the court).

- Higgins v. Kleronomos, 121 Ill. App. 3d 316, 319 (Ill. App. Ct. 1984) ([C]ourts will not, because a more equitable result might be reached thereby, construe into the contract provisions that are not therein.).


- Buchwald v. Univ. of Minnesota, 573 N.W.2d 723, 726 (Minn. Ct. App. 1998) (indemnity agreements should be construed according to their plain meaning in a manner that allows the intent of the parties to prevail).

- Myers Building Indus., Ltd. v. Interface Tech., Inc., 13 Cal. App. 4th 949, 968-969 (Cal. App. 2d Dist. 1993) ("An indemnity agreement is to be interpreted according to the language and contents of the contract as well as the intention of the parties as indicated by the contract.").
Some courts will “do justice.”

- *Rosado v. Proctor & Schwartz, Inc.*, 66 N.Y.2d 21, 24; 494 N.Y.S.2d 851, 484 N.E.2d 1354 (1985) (“Indemnity, on the other hand, arises out of a contract which may be express or may be implied in law 'to prevent a result which is regarded as unjust or unsatisfactory.'”)

Some courts may not.

- *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 255 P.3d 268, 274 (Nev. 2011) (“When the duty to indemnify arises from contractual language, it generally is not subject to equitable considerations; rather, it is enforced in accordance with the terms of the contracting parties' agreement.”).

**Note:** If the BAA contains an arbitration clause, absent language to the contrary, arbitrators sit in equity.
State Law: Comparative Fault or “All Or Nothing”?

- **Nassif v. Sunrise Homes, Inc.**, 739 So. 2d 183, 185 (La. 2009) ("because the party seeking indemnification **must be without fault**, a weighing of the relative fault of tortfeasors has no place in the concept of indemnity.").

- **Paul v. Bogle**, 192 Mich. App. 479, 490 (1992) (party has right to indemnification under common law or implied contract provided the party can show it was not at fault).

- **Rotec, Div. of Orbitron, Inc. v. Murray Equip., Inc.**, 626 N.E.2d 533, 535 (Ind. Ct. App. 1993) ("In the absence of any express contractual or statutory obligation to indemnify, such action will lie only where a party seeking indemnity is without actual fault but has been compelled to pay damages due to the wrongful conduct of another for which he is constructively liable.").


- **Gray v. Leisure Life Indus.**, 165 N.H. 324, 328; 77 A.3d 1117 (2013) (“[A]n implied agreement to indemnify …is based upon the fault of the indemnitor as the source of the indemnitee's liability in the underlying action and, conversely, the indemnitee's **freedom from fault** in bringing about the dangerous condition.").
Comparative Fault or “All Or Nothing”? 

So, in states where “a weighing of the relative fault of tortfeasors has no place in the concept of indemnity,” a contract provision apportioning liability based on fault may be appropriate. Example:

CE employee loses laptop containing patient billing information

Vendor hired to encrypt PHI on CE laptops overlooked employee’s laptop
In states that do not recognize comparative fault or to allocate liability based on fault:

The parties hereto agree to indemnify, defend and hold each other harmless from and against any and all claims, costs, damages, liabilities, expenses, fines, and penalties (including legal fees and costs) arising from or relating to the use, receipt, storage and/or transmission of PHI under HIPAA, state privacy laws, and/or any other foreign or domestic, federal, state or local law or regulation, in proportion to each parties’ fault.
And in other states, to impose a one-sided obligation.

Party A hereto specifically agrees to indemnify, defend and hold harmless Party B and its officers, directors, employees, affiliates, agents, licensors, and business partners, from and against any and all claims, costs, damages, liabilities, expenses, fines, and penalties (including legal fees and costs) arising from or relating to the creation, use, receipt, storage and/or transmission of PHI under HIPAA, state privacy laws, and/or any other foreign or domestic, federal, state or local law or regulation.

But see, e.g., Great Atl. & Pac. Tea Co., Inc. v. Yanofsky, 380 Mass. 326, 334 (1980) (recognizing implied contractual indemnity but noting it is not available to indemnify one against their own negligence).
What if the integrated written BAA contains an express one-sided indemnity provision?
These provisions are probably enforceable where courts been clear that express indemnity provisions preempt the principles of implied indemnity and that equitable considerations do not apply. See, e.g., Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc., 255 P.3d 268, 274 (Nev. 2011).

One-Sided Indemnity Provisions

➢ Is there a legal argument that the provision should be interpreted as reciprocal?

(“What’s good for the goose . . .”)
One-Sided Indemnity Provisions

➢ Is there a legal argument that the provision should be interpreted as reciprocal?

_E.g._ Consider one-sided attorney’s fees provisions in California, Hawaii, Montana, Utah, Oregon

(“What’s good for the goose . . .”)
### Attorneys’ fees provisions in BAAs?

<table>
<thead>
<tr>
<th>State</th>
<th>One-Sided Attorneys’ Fees Provisions Interpreted as Reciprocal?</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Connecticut</td>
<td>No, with exceptions2</td>
<td>Reciprocal interpretation where “contracts or leases in which the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes”). Conn. Gen. Stat. Ann. § 42-150bb (Deering’s 2013).3.</td>
</tr>
<tr>
<td>Delaware</td>
<td>No, with exceptions2</td>
<td>Reciprocal in specific types of contracts (installment contracts and lease-purchase agreements). Del. Code Ann. tit. 6, §§ 4344, 7613 (Deering’s 2013).</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>No</td>
<td>Wis. Ave. Assocs., Inc. v. 2720 Wis. Ave. Coop. Ass’n, 441 A. 2d 956, 965 (D.C. 1982) (“...contracting parties generally are free to agree that attorneys' fees will be borne by a particular party....”).</td>
</tr>
<tr>
<td>Georgia</td>
<td>No</td>
<td>Suarez v. Halbert, 246 Ga. App. 822, 824 (2000) (“As a general rule, Georgia law does not provide for the award of attorney fees even to a prevailing party unless authorized by statute or by contract. When awarded by statute, such fees may be obtained only pursuant to the statute under which the action was brought and decided.”) (internal quotations and citations omitted).</td>
</tr>
</tbody>
</table>
Will likely be interpreted as reciprocal in . . .

<table>
<thead>
<tr>
<th>State</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hawaii</td>
<td>Rev. Stat. § 607-14 (allowing prevailing party in action to recover attorneys' fees if other party would have been entitled to those fees under written contract)</td>
</tr>
<tr>
<td>Missouri</td>
<td><em>Boone Valley Farm, Inc. v. Historic Daniel Boone Home, Inc.</em>, 941 S.W.2d 720, 721-22 (Mo. Ct. App. 1997) (noting that absent a contractual provision, a court could award attorneys' fees to &quot;balance the equities. . . . The equitable balancing of the benefits is permissible only in very unusual circumstances, [which] has been interpreted to mean an unusual type of case, or extremely complicated litigation wherein the legal actions taken by the parties significantly differ from other actions taken by other parties in similar situations, or by others trying to achieve the same result. Further, it is the nature of the lawsuit, not the facts, that determines whether a case is unusual.&quot;)) (internal citations and quotations omitted).</td>
</tr>
<tr>
<td>Montana</td>
<td>Mont. Code Ann. § 28-3-704 (Whenever . . . one party to the contract or obligation has an express right to recover attorney fees from any other party to the contract or obligation in the event the party having that right brings an action upon the contract or obligation, then in any action on the contract or obligation all parties to the contract or obligation are considered to have the same right to recover attorney fees . . . .&quot;; Lasar v. Bechtel Power Corp., 223 Mont. 491, 494 (1986) (&quot;Section 28-3-704, MCA, grants a reciprocal right to attorney's fees when the party from whom one is requesting fees has an express right to attorney's fees. When plaintiff in a suit for indemnity does not have an express right to attorney's fees for that action, and no agreement otherwise exists between them, the defendant is not entitled to reciprocal attorney fees.&quot;)</td>
</tr>
</tbody>
</table>
Will likely be interpreted as reciprocal in . . .

<table>
<thead>
<tr>
<th>State</th>
<th>Provision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oregon</td>
<td>Or. Rev. Stat. Ann. § 20.096(1) (&quot;In any action or suit in which a claim is made based on a contract that specifically provides that attorney fees and costs incurred to enforce the provisions of the contract shall be awarded to one of the parties, the party that prevails on the claim shall be entitled to reasonable attorney fees in addition to costs and disbursements, without regard to whether the prevailing party is the party specified in the contract and without regard to whether the prevailing party is a party to the contract.&quot;); Or. Rev. Stat. Ann. § 20.096(2) (noting subsection (1) cannot be waived).</td>
</tr>
<tr>
<td>Utah</td>
<td>Utah Code Ann. § 78B-5-826 (&quot;A court may award costs and attorney fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney fees.&quot;);</td>
</tr>
<tr>
<td>Washington</td>
<td>Wash. Rev. Code Ann. § 4.84.330 (&quot;In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.&quot;).</td>
</tr>
</tbody>
</table>
Reciprocal interpretation for leases or specified types of contracts:

- Del. Code Ann. tit. 6, §§ 4344, 7613;
- N.H. Rev. Stat. Ann. § 361-C:2; Sears Mortgage Corp. v. Rose, 134 N.J. 326, 354, 634 A.2d 74, 88 (1993) (noting New Jersey law allows courts, in their discretion to "award [] counsel fees . . . in an action upon a liability or indemnity policy of insurance, in favor of a successful claimant");
Exceptions based on “tort-of-another” or equitable indemnity doctrines:

- **Beavers v. Kaiser**, 537 N.W.2d 653, 658 (N.D. 1995) ("One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action.");

- **State ex rel. Oklahoma Accountancy Bd. v. Townshend**, 81 P.3d 75, 76 (Okla. App. Ct. 2003) (recognizing that "where the wrongful acts of the defendant have involved the plaintiff in litigation with others, or have placed him in such relation with others as to make it necessary for him to incur attorney's fees to protect his interests, attorney's fees being recoverable in such cases as one of the elements of damages flowing from the original wrongful act of the defendant");

- **Town of Winnsboro v. Wiedeman-Singleton, Inc.**, 307 S.C. 128, 130 (1992) ("The damages which can be claimed under equitable indemnity may include the amount the innocent party must pay to a third party because of the at-fault party's breach of contract or negligence as well as attorney fees and costs which proximately result from the at-fault party's breach of contract or negligence.");
Exceptions based on “tort-of-another” or equitable indemnity doctrines:

- **Long v. Abbruzzetti, 254 Va. 122, 128 (1997)** ("[W]e recognized that, in the absence of contractual or statutory liability, attorneys' fees incurred in present or previous litigation between the same parties generally are not recoverable. However, we also stated that when a breach of contract has forced a plaintiff to maintain or defend a suit against a third person, the plaintiff may recover reasonable attorneys' fees incurred by him in the former suit.");

- **Hall v. Gregory A. Liebovich Living Trust, 731 N.W.2d 649, 654 (Wis. Ct. App. 2007)**.
Considerations: Should you include indemnity provisions in BAAs?

- Who do you represent?
- What does state law address?
- Who is likely to sue?
Considerations: Should you include indemnity provisions in BAAs?

- Who do you represent?
- What does state law address?
- Who is likely to sue?
  - Covered Entity
  - Business Associate
  - Sub-Contractor
  - Third Party
Considerations: Should you include indemnity provisions in BAAs?

- Who do you represent?
- What does state law address?
- Who is likely to sue?
- **Who is likely to cause harm / who has control?**
  - Covered Entity
  - Business Associate
  - Sub-contractor
  - Others
Considerations: Should you include indemnity provisions in BAAs?

- Who do you represent?
- What does state law address?
- Who is likely to sue?
- Who is likely to cause harm?
- Will the harm always be caused by a breach of the BAA or is some other cause possible or probable?
Considerations: Should you include indemnity provisions in BAAs?

- Who do you represent?
- What does state law address?
- Who is likely to sue?
- Who is likely to cause harm?
- Will the harm likely be caused by a breach of the BAA?

*Long v. Abbruzzetti*, 254 Va. 122, 128 (1997) ("[W]e recognized that, in the absence of contractual or statutory liability, attorneys' fees incurred in present or previous litigation between the same parties generally are not recoverable. However, we also stated that when a breach of contract has forced a plaintiff to maintain or defend a suit against a third person, the plaintiff may recover reasonable attorneys' fees incurred by him in the former suit.")
Best Negotiating Practices

- Who do you represent?
  - Covered entity?
  - Business Associate?
  - Subcontractor?
- What is your client’s goal?
- What role will each party play?
Covered Entity Considerations

- Confidence in business associate
- Utilize “standard form” for all business associate agreements?
- What extent of damages want covered?
- Level of sophistication
Business Associate Considerations

- How much leverage
- Seek mutual obligation?
- Put limit on any indemnification provided
- Other responsibilities? – professional obligations depending on type of BA
- Put pressure on covered entity by proposing own form BAA
- How handle subcontractor
Structural Considerations

- Impact on and of liability insurance
- Can other parties benefit
- If provision consistent with public policy
- Mutuality
- Limit on damages
- Scope of actions covered
Structural Considerations

- Carve outs for certain acts
- What is reality party can meet obligations
- General limitation of liability necessary?
- Leave out altogether?
Questions and Contact Information

Rachel V. Rose, JD, MBA
Attorney at Law, PLLC
rvrose@rvrose.com
713 907-7442

Marcia Augsburger, Partner
DLA Piper LLP (US)
marcia.augsburger@dlapiper.com
916.930.3255

Matthew Fisher, JD, Associate
Mirick, O'Connell, DeMallie & Lougee, LLP
mfisher@mirickoconnell.com
508.929.1648