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Health Care Law

HIPAA Privacy Rule Impacts Lawyers Across the Board

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In addition to advising their health care industry clients on how to comply with the regulations governing the privacy of medical records, lawyers also need to familiarize themselves with aspects of the regulations that impact their own practices.

Under the Health Insurance Portability and Accountability Act of 1996, the privacy rule, published at 45 C.F.R. Parts 160, Subparts A and B, and 164, Subpart E, prescribes the circumstances under which health care providers and health plans may use or disclose information concerning an individual's medical condition or treatment.

The rule has created a big splash and a great deal of activity among health care providers and health benefit plans that are required to comply with the regulations. But the ripples spread beyond the health care industry, and will rock the boats of all lawyers and affect some standard practices.

First, lawyers who represent clients in the health care industry are likely to be "business associates" under the privacy regulations if they use individually identifiable health information in the course of that representation.

Second, the rule is having an effect on the measures used by attorneys to

obtain protected health information in civil litigation.

Business Associates

The privacy rule requires a covered entity to enter an agreement with each of its business associates to ensure that the "individually identifiable health information" used by the associate is protected against use or disclosure in a manner that is not permitted. 45 C.F.R. §164.502(e). Business associate is defined at 45 C.F.R. §160.103, and includes any person or entity — including a lawyer — who works on behalf of a covered entity and uses or discloses individually identifiable health information.

Lawyers who represent covered entities may become business associates under a variety of circumstances. For example, a lawyer representing a physician accused of mistreating a patient in a disciplinary action before the State Board of Medical Examiners who reviews the client's patient records relevant to the case will be the physician's business associate. Or, a lawyer representing a pharmacist in a payment dispute with a health benefit plan who reviews the pharmacist's billing records will be the pharmacist's business associate. Or, a lawyer assisting a hospital in responding to a subpoena for records from a patient's auto insurance carrier who reviews the records in question will be the hospital's business associate.

In each case, the client is a covered entity, and is required by the rule to have

a business associate agreement with the lawyer before giving him/her access to individually identifiable health information, and it is incumbent on the lawyer to advise the client of this requirement. But, the requirement is more complex than it might appear.

The rule contains numerous and detailed minimum requirements for a business associate agreement (*see* 45 C.F.R. §164.504(e)) that make the agreement both long and difficult to comprehend.

In addition to the requirements, the rule permits a business associate to use the information it receives: (a) for the proper management and administration of the business associate; or (b) to carry out the legal responsibilities of the business associate, and to make disclosures required by law.

However, in addition to complying with the rule's various requirements, a lawyer who is a business associate must also comply with the professional responsibilities associated with the practice of law. These responsibilities may conflict with the obligations imposed on a business associate by the rule.

Lawyer-Client Privilege and Work Product Doctrine

The rule calls upon business associates to provide individuals with access to individually identifiable health information in the associate's possession under certain circumstances, and to provide an accounting of disclosures made upon the individual's request. The rule also calls

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upon associates to disclose their internal practices, books and records related to use and disclosure of individually identifiable health information to the secretary of the Department of Health and Human Services. These requirements raise two primary concerns for lawyers.

First, such disclosures may violate client confidences and result in disclosure of privileged information.

Second, disclosures by the attorney-business associate may result in a waiver of the lawyer-client privilege with respect to the information disclosed. For example, in investigating the measures used by a law firm to preserve the confidentiality of individually identifiable health information in its client files, the DHHS may request information from or access to a large number of client files. While the issue is not settled, such disclosures may result in the waiver of the lawyer-client privilege and of the work product doctrine related to information provided to the secretary.

However, if such a demand for privileged material is made, a lawyer might be well advised to resist it and allow a court to render a decision before making the disclosure to the DHHS.

The privacy rule's impact on lawyers as business associates is complex and raises several unsettled issues. This has prompted the Health Information Technology practice group of the American Health Lawyers Association in an Oct. 28, 2003, letter to the Office of Civil Rights (the agency in the DHHS that will enforce the Privacy Rule), to provide guidance on the "ambiguities" in the Privacy Rule as applied to lawyers as business associates. See *BNA's Health Law Reporter*, Nov. 6, 2003, at 1690-91.

Health care providers are required to keep their patients' medical records confidential under various New Jersey laws and regulations. For example: N.J.A.C. 13:35-6.5(d), a regulation of the New Jersey Board of Medical Examiners, requires that New Jersey physicians maintain the confidentiality of patient treatment records; and N.J.S.A. 26:2H-12.8(g) establishes a hospital patient's right to confidentiality of hospital treatment records.

In addition to protection under confidentiality laws, medical records are

also subject to privileges from disclosure in legal proceedings under N.J.R.E. 505 (psychologist-patient privilege) and N.J.R.E. 506 (physician-patient privilege).

To complicate matters, medical records are now subject to an additional layer of protection by the rule, which extends beyond what is traditionally thought of as the confidential medical record. See the definition of "individually identifiable health information" at 45 C.F.R. §160.103.

Lawyers frequently have reason to access a health care provider's records concerning individuals who are not their clients as part of the discovery process in the course of civil litigation, and are generally entitled to do so when the records are relevant to the case and not protected by a privilege.

Often, the most expeditious way to obtain accurate records is to get them straight from the source by using the lawyer's authority under New Jersey Court Rule 1:9-1 and Rule 4:14-7 to issue a subpoena duces tecum to the health care provider who has the records, in the name of the court clerk.

However, confidentiality laws prohibit a health care provider from disclosing a patient's medical records to anyone other than the patient or a person to whom disclosure is legally authorized (such as the parent of a minor patient), except under circumstances described in the pertinent law or regulation. In the case of the privacy rule, these circumstances are laid out at 45 C.F.R. §§164.508, 164.510 and 164.512.

The rule divides the circumstances under which a health care provider may disclose medical records for purposes other than treatment, payment or health care operations into three categories: (1) disclosure with an authorization by the patient or legal representative that conforms with the rule's requirements for a valid authorization; (2) disclosure without an authorization after the patient or legal representative is given an opportunity to object to and prohibit the disclosure, and (3) disclosure without authorization or opportunity, but only if the situation falls into one of a number of exceptions set forth in the rule.

A subpoena for medical records may be issued to a health care provider with

an attached authorization by the patient to release the records, falling in the first category; or it may be issued to the health care provider without an authorization, falling within the third category. (The second category of disclosure without authorization after opportunity to object is limited to only a few specific sets of circumstances that are not relevant to this article.)

Subpoena with Patient Authorization

Standard practice for many New Jersey attorneys in personal injury litigation involves a request made by the attorney seeking medical records to the patient's attorney for a written authorization from the patient to release the records sought. The authorization is typically provided, and then attached to a subpoena duces tecum issued by the requesting attorney, and served on the health care provider who examined or treated the patient, with notice to the other parties to the case, in accordance with New Jersey Court Rule 4:14-7.

In a typical case, the health care provider complies with the subpoena, and the records are provided on the return date set forth in the subpoena, assuming the opposing counsel has not moved to quash or limit the subpoena before the return date.

As stated above, the rule (as well as other confidentiality laws) generally permits a health care provider to disclose medical records pursuant to the patient's authorization. See 45 C.F.R. §164.508(a).

In the context of discovery in a civil suit, the limiting factors on the scope of the subpoena and authorization are largely dictated by opposing counsel, who might have objections based upon the relevance to the case of the information requested, concerns that the opposing counsel may be fishing for damning information that may or may not be relevant in the final analysis, and a more general concern for the patient's privacy.

The rule makes this last factor somewhat more tangible for both the attorney reviewing the subpoena and the patient reading the authorization form. It does this by establishing a number of rights that patients have with regard to their authorization (see 45 C.F.R.

§164.508(b)(4) and (5)) and a number of required elements for a valid authorization that are likely to prompt more input on the appropriate scope of the subpoena from the patients themselves.

In addition to the required elements, an authorization must include statements putting the patient on notice of their right to revoke the authorization in writing and warning of the potential for information disclosed pursuant to the authorization to be subject to redisclosure by the recipient.

Further, the authorization must be written in plain language and the covered entity must provide the individual with a copy of the signed authorization. An authorization is invalid if it contains false information, if it does not contain any of the required elements or if it is revoked by the patient before it is acted on by the health care provider. 45 C.F.R. §508(b)(2).

A typical preprivacy rule authorization form would probably not include several of the required elements and accordingly would not be valid under the rule. Over time, these older forms will go out of circulation as health care providers cognizant of the rule requirements reject them.

With the additional medical record confidentiality rights in place and advertised on the authorization form, personal injury defense attorneys should be prepared for a greater number of objections, pro forma and otherwise, to the scope of their medical record subpoenas, especially if their subpoenas are not drawn narrowly in the first place.

No Patient Authorization

The court rules describing the requirements for subpoenas in civil litigation do not require that the patient's authorization to release their medical records be provided to the health care provider whose records are requested by a subpoena. See New Jersey Court Rule 4:14-7.

In the past, it was not uncommon for counsel in a personal injury to issue the subpoena without attaching a patient authorization, and for the health care provider to deliver the requested medical records based upon the authority to release records implied by the subpoena.

In other types of cases — typically, disputes between a health care provider and one or more of its current or former business associates — where large numbers of records of nonparty patients are requested, soliciting patient authorizations is impractical or undesirable from the perspective of a health care provider who does not want to burden its patients with a request for an authorization, or even alert its patients to the fact that it is in a dispute with or has parted ways with one of its business associates.

The privacy rule requirements for disclosure of individually identifiable medical records in the context of civil litigation without a patient authorization are found at 45 C.F.R. §164.512(e), and provide that a covered entity may disclose protected health information in the course of any judicial or administrative proceeding: (i) in response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or (ii) in response to a subpoena, discovery request, or other lawful process that is not accompanied by an order of a court or administrative tribunal.

In addition, the covered entity must receive satisfactory assurance from the party seeking the information that reasonable efforts have been made by such party (1) 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, or (2) to secure a qualified protective order that meets the requirements of the regulation.

Working out an arrangement with the attorney who issued the subpoena to allow de-identification of the records is sometimes an option to producing the records. But this may not be feasible for the attorney who needs to use the records, or the health care provider who would have to satisfy the rule's rigorous requirements for de-identification. See 45 C.F.R. §164.514(a), (b) and (c). (The privacy rule includes a number of exceptions not discussed in this article, allowing a health care provider to release medical records, other than pursuant to a patient authorization or adjudicatory process, including in response to a law enforcement inquiry, and as necessary to

comply with workers' compensation laws. See 45 C.F.R. §164.512.)

The process that must be followed if a covered entity is to disclose medical records without a patient authorization and without a court order is described in 45 C.F.R. §164.512(e)(1)(iii).

The subpoena process described in the New Jersey Court Rules requires notice to parties to the litigation, and satisfies the requirements of paragraph 45 C.F.R. §164.512(e)(1)(iii), but only when the patient is a party to the litigation. For situations where the patient is not a party to the litigation, and the attorney issuing the subpoena is not able to notify the patient of the subpoena, the rule permits disclosure if the requesting attorney seeks a protective order or stipulation 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.

In the post-privacy rule era, protective orders intended to comply with the rule requirement should become common in cases where patient authorizations are not feasible. The rule merely *permits* the health care provider to produce medical records when a protective order meeting the requirements of 45 C.F.R. §164.512(e)(iii) is sought.

Thus, the presentation of a request for a protective order is likely to be followed by negotiations over the terms of the protective order rather than immediate production of medical records in accordance with the subpoena — especially in a case where the affected patients are not parties and have not waived their physician-patient privilege.

The rule also allows a health care provider presented with a subpoena without authorization to take matters into its own hands, notify the patient of the subpoena or seek its own protective order from the court, and then disclose the medical records. But, in some instances where no authorization is produced by the attorney who issued the subpoena, the health care provider would prefer to negotiate a satisfactory protective order to notifying large num-

bers of patients that their medical records have been subpoenaed.

The Rule seems to have raised concerns about breaches of the confidentiality of the physician-patient relationship among physicians.

In response to numerous requests for guidance, last year the New Jersey Board of Medical Examiners issued a

policy statement indicating that a physician presented with a subpoena (in the context of civil litigation) for medical records without an authorization from the patient should not release the records unless presented with a court order requiring the release.

The implication of this statement is that physicians who comply with a sub-

poena without an authorization may be violating their obligation under New Jersey law and the BME's own confidentiality regulation at N.J.A.C. 13:35-6.5, even if the requirements of 45 C.F.R. §164.512(e)(iii) are met.

Lawyers can monitor any privacy rule guidance at www.hhs.gov/ocr/hipaa. ■