



DRI The Voice
of the
Defense Bar

Lawyers and HIPAA

Teleconference

Tuesday, August 19, 2003

3:00 p.m. – 4:30 p.m. Eastern

2:00 p.m. – 3:30 p.m. Central

1:00 p.m. – 2:30 p.m. Mountain

12:00 Noon – 1:30 p.m. Pacific

Presented by:

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A generic CLE certificate of attendance and sign-in sheet is included at the end of the materials. Please complete and fax to DRI at 312-795-0747

Lawyers and HIPAA

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Consider the following questions:

1. When are attorneys covered by the Privacy Standards as “business associates”? (p. 9)
2. What safeguards must attorney/business associates have in their offices? (p. 9)
3. What other requirements must attorney/business associates meet? (p. 9)
4. How does the “minimum necessary” rule apply to attorneys? (p. 10)
5. Are court reporters, copy services, experts, and others business associates? (p. 10)
6. How will patient requests for restrictions on disclosures effect litigation? (p. 12)
7. Can requests for amendments of medical records be used for litigation advantage? (p. 12)
8. Does a patient have access to peer review records? (p. 12)
9. When and how will copy requests and charges be handled differently? (p. 13)
10. How are mandatory injury reportings affected? (p. 16)
11. Will subpoenas and other discovery be handled differently? (p. 13)
12. What must an attorney do to file medical information into records of proceedings? (p. 14)
13. What limitations are imposed in criminal proceedings? (p. 16)
14. How are workers’ compensation cases treated differently? (p. 14)
15. Will authorizations be more difficult? (p. 15)

Background

History

The Clinton healthcare reform proposal failed

One of the main political drivers was widespread public concern over portability and preexisting conditions

Replaced with incremental reform proposals

Health Insurance Reform Act of 1995 (a/k/a the Kennedy-Kassebaum Health Care Reform Bill) was the one that became Public Law 104-191 – The Health Insurance Portability and Accountability Act of 1996 (“HIPAA”)

What HIPAA Actually Says

The Preamble

“To amend the Internal Revenue Code of 1986 to improve portability and continuity of health insurance coverage in the group and individual markets, to combat waste, fraud, and abuse in health insurance and health care delivery, to promote the use of medical savings accounts, to improve access to long-term care services and coverage, to simplify the administration of health insurance, and for other purposes.”

Subtitle F--Administrative Simplification

SEC. 261. PURPOSE.

It is the purpose of this subtitle to improve the Medicare program under title XVIII of the Social Security Act, the medicaid program under title XIX of such Act, and the efficiency and effectiveness of the health care system, by encouraging the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information.

Applicability

- “Covered Entities”
 - health plans
 - health care clearing houses
 - healthcare providers who transmit electronically
- “Protected Health Information”

Compliance Time Frames

- Transaction & Code Set Rule
Final rule published August 17, 2000
Extension deadline October 15, 2002
Effective date October 16, 2003
- Security
Final rule published February 20, 2003
Effective date April 21, 2005
- Privacy
Final Rule published December 28, 2000
Effective April 14, 2003

Privacy

SEC. 264. RECOMMENDATIONS WITH RESPECT TO PRIVACY OF CERTAIN HEALTH INFORMATION.

(c) REGULATIONS.—

(1) IN GENERAL.--If legislation governing standards with respect to the privacy of individually identifiable health information transmitted in connection with the transactions described in section 1173(a) of the Social Security Act (as added by section 262) is not enacted by the date that is 36 months after the date of the enactment of this Act, the Secretary of Health and Human Services shall promulgate final regulations containing such standards not later than the date that is 42 months after the date of the enactment of this Act. Such regulations shall address at least the subjects described in subsection (b).

(2) PREEMPTION.--A regulation promulgated under paragraph (1) shall not supercede a contrary provision of State law, if the provision of State law imposes requirements, standards, or implementation specifications that are more stringent than the requirements, standards, or implementation specifications imposed under the regulation.

Penalties

- "Violations" - \$100 each, up to \$25,000 per year
- "Wrongful" use or disclosure - \$50,000 and/or up to 1 year
- "Under false pretenses" - \$100,000 and/or up to 5 years
- "Commercial" or "malicious" - \$250,000 and/or up to 10 years

Overview of Privacy Regulations

45 CFR Part 164 except where indicated

Five Basic Features of Privacy Regulations

- I. General concepts
- II. Permitted uses & disclosures
- III. Other patient rights
- IV. Administrative requirements
- V. Technical provisions

I. General Concepts

A. The “basic rule”

– “A covered entity may not use or disclose an individual’s protected health information, except as otherwise permitted or required by this subpart.” § 164.502(a).

B. Specific Disclosure Issues

1. Organizational Issues (§504)
 - Hybrids and healthcare components
 - Affiliates
 - Business associate contracts
2. Disclosure Issues
 - De-identification (§514)
 - Minimum necessary (§514)
 - Personal representative (§502)

II. Permitted Uses/Disclosures

A. For treatment, payment & health care operations (§506)

- What are “healthcare operations”?
 - Quality
 - Credentialing
 - Underwriting
 - Legal services (arguably includes filing into proceedings)
 - Planning and development
 - Management and administrative

B. With authorizations (§508)

- Specific form
Authorizations to attorneys will need to meet form requirements
- No longer additional requirements

C. "Opt-outs" (§510)

- Directory information
Including pastoral care
- Involvement in care and notification
When the patient is present
In the patient's absence

D. Exceptions

- (§512) – references are to subsections
 - a) required by law
Includes court orders
 - b) public health activities
includes child abuse
 - c) victims of abuse, neglect or domestic violence
 - d) health oversight activities
 - e) judicial and administrative proceedings
"Satisfactory assurances"
State subpoenas
Federal subpoenas
 - f) law enforcement purposes
Reporting burns, gun shots, etc.
Information on victims, suspects, etc.
 - g) decedents
Including coroners and investigations
 - h) organ, eye, tissue donation
 - i) research purposes
 - j) to avert serious threat to health or safety
Duty to warn
 - k) specialized government functions
Inmates
 - l) worker's compensation

- (§514) – references are to subsections
 - f) fundraising
 - g) underwriting

E. Patient (§524)

III. Other Patient Rights

A. Notice of privacy protections (§520)

- Right to notice
- Content
- Providing notice
- Acknowledgement

B. Requests for additional protections (§522)

- Right to request additional restrictions
 - No obligation to comply
 - Could be used as obstacle to discovery
- Right to request alternative communication
 - Must accommodate if reasonable

C. Access (§524)

- Right to inspect and copy
 - Must be in “designated record sets”
 - Doesn’t include peer review or quality assurance
- Unreviewable grounds for denial
 - Including information compiled in anticipation of litigation
- Reviewable grounds for denial
 - Review process
- Copy charges and timeliness

D. Amendment (§526)

- Right to offer
 - Opportunity to change bad evidence, to “insert” favorable evidence, etc.
 - Should consult risk manager or legal counsel before accepting amendment
- Acceptance
 - Transmittal
- Denial
 - Grounds (accurate & complete, not your record, etc.)
 - Right to submit statement
 - Rebuttal

E. Accounting for disclosures (§528)

- Right to accounting

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- Almost all disclosures excluded
 - Disclosures to insurer or counsel for risk management or claim management not accountable
 - Disclosures for subpoenas, court orders, workers' compensation are accountable

IV. Administrative Requirements (§530, except where indicated)

- privacy officer
- training
- safeguards & security
- complaints to the covered entity
- policies and procedures
- documentation
- sanctions
- verification (§514)

V. Technical Provisions

- Preemption of State Law (160 CFR 201 et seq.)
- Compliance and Enforcement (160 CFR 300 et seq.)
- Transition provisions (§532)

Selected Issues

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I. Attorney Business Associate Issues

A. When Are Attorneys Business Associates?

§ 160.103 Definitions. *Business associate*:

(1) ... *business associate* means ... a person who:

(i) On behalf of such covered entity ..., but other than in the capacity of a member of the workforce ..., performs, or assists in the performance of:

(A) A function or activity involving the use or disclosure of IIHI, including claims processing or administration, ... billing, ... practice management ... ; or

(B) Any other function or activity regulated by this subchapter; or

(ii) Provides, other than in the capacity of a member of the workforce ..., legal, actuarial, accounting, consulting, ... to or for such covered entity ... where the provision of the service involves the disclosure of IIHI from such covered entity ... , or from another business associate of such covered entity or arrangement, to the person.

B. What safeguards must attorneys offices have?

§ 164.504 Uses and disclosures: organizational requirements.

* * *

(2) Implementation specifications: business associate contracts. A contract between the covered entity and a business associate must:

* * *

(ii) Provide that the business associate will:

* * *

(B) Use appropriate safeguards to prevent use or disclosure of the information other than as provided for by its contract;

C. What other requirements must a BA meet?

§ 164.504 Uses and disclosures: organizational requirements.

* * *

(2) Implementation specifications: business associate contracts. A contract between the covered entity and a business associate must:

* * *

(ii) Provide that the business associate will:

- (A) Not use or ... disclose the information other than as permitted or required ...;
 - (B) Use appropriate safeguards ... ;
 - (C) Report ... any use or disclosure ... of which it becomes aware;
 - (D) Ensure that any agents, including a subcontractor ... agrees to the same restrictions and conditions ...;
 - (E) Make available ... for access;
 - (F) Make available ...for amendment and incorporate any amendments ...;
 - (G) Make available ... to provide an accounting ...;
 - (H) Make its internal practices, books, and records relating to the use and disclosure .. to the Secretary ...; and
 - (I) At termination of the contract, if feasible, return or destroy ...or ... extend the protections....
- (iii) Authorize termination of the contract

D. Court Reporters and Other “Indirect” BAs

Business Associates in litigation:

- “Direct” business associates
 - Insurers
 - Attorneys
 - Experts
- “Indirect” business associates
 - Court reporters
 - Copy services
 - Computer services

E. How does “minimum necessary” apply to attorneys?

“Minimum Necessary” (§514)

a. Exceptions

treatment, patient requests, incidental disclosures
“required by law”

Court orders & subpoenas

b. Routine uses

Identify people who need access to PHI

Identify what PHI they need access to

Limit their access to the needed PHI

c. Routine disclosures and requests

d. Non-routine uses, disclosures and requests

f. Reliance on professional business associates

e. “Entire record requests”

II. Litigation Issues

A. Effect of patient restriction disclosure requests?

§ 164.522 Rights to request privacy protection for protected health information.

- (a) (1) Standard: right of an individual to request restriction of uses and disclosures.
- (i) A covered entity must permit an individual to request that the covered entity restrict:
 - (A) Uses or disclosures of protected health information about the individual to carry out treatment, payment, or health care operations; and
 - (B) Disclosures permitted under § 164.510(b).
 - (ii) A covered entity is not required to agree to a restriction.
 - (iii) A covered entity that agrees to a restriction under paragraph (a)(1)(i) of this section may not use or disclose protected health information in violation of such restriction, except that, if the individual who requested the restriction is in need of emergency treatment and the restricted protected health information is needed to provide the emergency treatment, the covered entity may use the restricted protected health information, or may disclose such information to a health care provider, to provide such treatment to the individual.

B. Amendment Requests as Litigation Strategy

§ 164.526 Amendment of protected health information.

- (a) Standard: Right to amend.
- (1) Right to amend. An individual has the right to have a covered entity amend protected health information or a record about the individual in a designated record set for as long as the protected health information is maintained in the designated record set.
 - (2) Denial of amendment. A covered entity may deny an individual's request for amendment, if it determines that the protected health information or record that is the subject of the request:
 - (i) Was not created by the covered entity, unless the individual provides a reasonable basis to believe that the originator of protected health information is no longer available to act on the requested amendment;
 - (ii) Is not part of the designated record set;
 - (iii) Would not be available for inspection under § 164.524; or
 - (iv) Is accurate and complete.

C. Limitations on the Patient's Right of Access

§ 164.524 Access of individuals to protected health information.

- (a) Standard: access to protected health information.
 - (1) Right of access. Except as otherwise provided in paragraph (a)(2) or (a)(3) of this section, an individual has a right of access to inspect and obtain a copy of protected health information about the individual in a designated record set, for as long as the protected health information is maintained in the designated record set, except for:
 - (i) Psychotherapy notes;
 - (ii) Information compiled in reasonable anticipation of, or for use in, a civil, criminal, or administrative action or proceeding; and
 - (iii) Protected health information maintained by a covered entity that ... subject to the Clinical Laboratory Improvements Amendments of 1988

D. Copy Cost limitations

§ 164.524 Access of individuals to protected health information.

* * *

- (c) Implementation specifications: provision of access. If the covered entity provides an individual with access, in whole or in part, to protected health information, the covered entity must comply with the following requirements.

* * *

- (4) Fees. If the individual requests a copy of the protected health information or agrees to a summary or explanation of such information, the covered entity may impose a reasonable, cost-based fee, provided that the fee includes only the cost of:
 - (i) Copying, including the cost of supplies for and labor of copying, the protected health information requested by the individual;
 - (ii) Postage, when the individual has requested the copy, or the summary or explanation, be mailed; and
 - (iii) Preparing an explanation or summary of the protected health information, if agreed to by the individual as required by paragraph (c)(2)(ii) of this section.

Preamble to December 28, 2000 final rule, 65 FR, page 82557.

"Covered entities may not charge any fees for retrieving or handling the information or for processing the request....Fees for copying and postage provided under state law, but not for other costs excluded under this rule, are presumed reasonable. If such per page costs include the cost of retrieving or handling the information, such costs are not acceptable under this rule.... We do not intend to affect the fees that covered entities charge for providing protected health information to anyone other than the individual. "

E. Will subpoenas & discovery be handled differently?

§ 164.512 (e) Standard: disclosures for judicial and administrative proceedings.

- (1) Permitted disclosures. 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, if:
 - (A) The covered entity receives satisfactory assurance ...that reasonable efforts have been made ... to ensure that the ...subject of the PHI ...has been given notice of the request; or
 - (B) The covered entity receives satisfactory assurance...that reasonable efforts have been made ... to secure a qualified protective order

F. What is required to file protected health information into proceedings?

§ 164.506 Uses or disclosures to carry out treatment, payment, or health care operations.

(a) Standard: Permitted uses and disclosures. Except with respect to uses or disclosures that require an authorization under § 164.508(a)(2) and (3), a covered entity may use or disclose protected health information for treatment, payment, or health care operations as set forth in paragraph (c) of this section, provided that such use or disclosure is consistent with other applicable requirements of this subpart.

§ 164.530 Administrative requirements.

* * *

(c) (1) Standard: safeguards.

* * *

(ii) A covered entity must reasonably safeguard protected health information to limit incidental uses or disclosures made pursuant to an otherwise permitted or required use or disclosure.

G. How are workers' comp cases effected differently?

§ 164.512 (l) Standard: disclosures for workers' compensation.

A covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers' compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault.

H. Will authorizations be more difficult?

§ 164.508 Uses and disclosures for which an authorization is required.

(a) Standard: authorizations for uses and disclosures.

(1) Authorization required: general rule. Except as otherwise permitted or required by this subchapter, a covered entity may not use or disclose protected health information without an authorization that is valid under this section. When a covered entity obtains or receives a valid authorization for its use or disclosure of protected health information, such use or disclosure must be consistent with such authorization.

III. Criminal Law Issues

A. What limitations effect criminal proceedings?

§512 (f) Standard: disclosures for law enforcement purposes. A covered entity may disclose protected health information for a law enforcement purpose to a law enforcement official if the conditions in paragraphs (f)(1) through (f)(6) of this section are met, as applicable.

(1) Permitted disclosures: pursuant to process and as otherwise required by law. A covered entity may disclose protected health information:

- (i) As required by law including laws that require the reporting of certain types of wounds or other physical injuries...; or
- (ii) In compliance with and as limited by the relevant requirements of

* * *

(C) An administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, provided that:

- (1) The information sought is relevant and material to a legitimate law enforcement inquiry;
- (2) The request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and
- (3) De-identified information could not reasonably be used.

(2) Permitted disclosures: limited information for identification and location purposes. Except for disclosures required by law as permitted by paragraph (f)(1) ..., a covered entity may disclose PHI in response to a law enforcement official's request ... for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person, provided that:

- (i) The covered entity may disclose only the following information: (A) Name and address; (B) Date and place of birth; (C) Social security number; (D) ABO blood type and rh factor; (E) Type of injury; (F) Date and time of treatment; (G) Date and time of death, if applicable; and (H) A description of distinguishing physical characteristics, including height, weight, gender, race, hair and eye color, presence or absence of facial hair (beard or moustache), scars, and tattoos.
- (ii) Except as permitted by paragraph (f)(2)(i) of this section, the covered entity may not disclose for the purposes of identification or location under paragraph (f)(2) of this section any protected health information related to the individual's DNA or DNA analysis, dental records, or typing, samples or analysis of body fluids or tissue.

B. Injuries Requiring Mandatory Reporting

§ 164.512 Uses and disclosures for which an authorization, or opportunity to agree or object is not required.

* * *

(f) Standard: disclosures for law enforcement purposes. A covered entity may disclose protected health information for a law enforcement purpose to a law enforcement official if the conditions in paragraphs (f)(1) through (f)(6) of this section are met, as applicable.

(1) Permitted disclosures: pursuant to process and as otherwise required by law. A covered entity may disclose protected health information:

(i) As required by law including laws that require the reporting of certain types of wounds or other physical injuries, except for laws subject to paragraph (b)(1)(ii) or (c)(1)(i) of this section; or

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Prior to joining Adams and Reese, Gregory D. Frost was a partner in a Baton Rouge based law firm, where he concentrated his legal practice on healthcare and health information law. Mr. Frost is experienced in HIPAA and health information issues, and was one of the first attorneys in the country to receive the Certified in Healthcare Privacy designation by the American Health Information Management Association. His representation of physicians; not-for-profit, for-profit and governmental hospitals; other types of health care providers; and health care trade associations has involved licensure and other regulatory matters, Medicare, Medicaid and workers' compensation reimbursement issues, defense of civil and criminal fraud prosecutions, transactional matters and litigation involving healthcare providers. He also coordinates governmental relations services to various trade associations and individual companies.

Mr. Frost was vice president of Legal and Governmental Affairs of the Louisiana Hospital Association for over eight years. He has lectured at Louisiana State University, Tulane University and the University of Louisiana at Lafayette and regularly speaks before trade and professional organizations and legal audiences. Mr. Frost served on the adjunct faculty of the College of St. Francis and is the organizer of the HIPAA Privacy WorkGroups. In addition to numerous articles on health law issues, he is the editor of *Louisiana Medical Records Law*, which is currently in use as a textbook at two Louisiana colleges. He has also edited *Managed Care, Collections and Related Issues*, and the *Workers' Comp Medicals Handbooks*. Mr. Frost was a founding director of the Louisiana Society of Hospital Attorneys, and currently serves as its Secretary. He is also a member of the American Health Lawyers Association, the American Bar Association, the Association of Louisiana Lobbyists and the Louisiana State and Baton Rouge Bar Associations

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Dates

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Jennifer Cout, Director of Education

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Presenter: Overall Effectiveness

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