

HIPAA in the Everyday Practice of Law

**Louisiana Society of Hospital Attorneys
2002 Health Law Symposium**



HIPAA & the Practice of Law

Questions and issues #1

1. Are attorneys business associates?
2. Safeguards in their offices
3. How minimum necessary applies to them?
4. Court reporters?
5. Federal subpoenas?



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Questions and issues #2

1. Requests for restrictions on disclosure
2. Requests for amendments
3. Peer review records
4. Filing PHI into records of proceedings
5. Workers' compensation



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Questions and issues #3

1. Copy requests by patient's attorney
2. Mandatory reporting of crimes
3. Attorney authorizations
4. EMTALA emergencies vs. HIPAA emergencies
5. PCF and medical review panels



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Overview of Privacy Regulations



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Privacy

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

(c) REGULATIONS.—

(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.



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Five Basic Features of Privacy Regulations

1. No use or disclosure unless permitted
2. Permitted uses & disclosures
3. Other patient rights
4. Administrative requirements
5. Miscellaneous provisions



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1. No use/disclosure unless permitted

- “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).

- What is “protected health information”?



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1. No use/disclosure unless permitted

– Specific Disclosure Issues

a. Organizational Issues (§504)

- Hybrids and healthcare components
- Affiliates
- Business associate contracts

b. Disclosure Issues

- De-identification (§514)
- Minimum necessary (§514)
- Personal representative (§502)
 - CC Art. 2315 heirs in R.S. 40:1299.96



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1. No use/disclosure unless permitted

– Business Associates in litigation:

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



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1. No use/disclosure unless permitted

– Business Associates in litigation:

- Attorneys' business association obligations
 - Not use or further disclose
 - Use appropriate safeguards
 - Report unauthorized use
 - Ensure subcontractor agrees to same restrictions
 - Assist with access, amendment and accounting
 - Make internal books, and records available
 - Return or destroy at the end of the relationship



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1. No use/disclosure unless permitted

– Business Associates in litigation:

- Sanctions for violations
 - No penalties to provider unless they know of a pattern of violations
 - Termination of contract “if feasible”
 - » Insurers??
 - Report to Secretary



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1. No use/disclosure unless permitted

- “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”



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2. Permitted Uses/Disclosures

- A. For treatment, payment and healthcare operations (formerly “consent”) (§506)
- B. With authorization (§508)
- C. “Opt-opt” situations (§510)
- D. Exceptions (§512)
- E. Patient (§524)



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2. Permitted Uses/Disclosures

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

- Formerly “consent”
- Now tied to Notice of Privacy Practices
- Still need form under Louisiana law



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2. 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



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2. Permitted Uses/Disclosures

B. With authorizations (§508)

- Specific form
 - Authorizations to attorneys will need to meet form requirements
 - May want to consider informing attorneys now.
- No longer additional requirements



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2. Permitted Uses/Disclosures

C. "Opt-outs" (§510)

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



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2. Permitted Uses/Disclosures

D. Exceptions (§512)

a) required by law

- Includes court orders

b) public health activities

- includes child abuse

c) victims of abuse, neglect or domestic violence

(Continued)



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2. Permitted Uses/Disclosures

D. Exceptions (§512)

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.



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2. Permitted Uses/Disclosures

D. Exceptions (§512) *(continued)*

- 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



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2. Permitted Uses/Disclosures

D. Exceptions (§512) *(continued)*

- k) specialized government functions
- l) worker's compensation
 - Louisiana specific discussion in privacy revisions



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2. Permitted Uses/Disclosures

D. Exceptions (§514) *(continued)*

- m) fundraising
- n) underwriting



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2. Permitted Uses/Disclosures

E. Patient (§524)

See next section



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3. Other Patient Rights

- A. Notice of privacy protections (§520)
- B. Requests for additional protections (§522)
- C. Access (inspection and copying) (§524)
- D. Amendment (§526)
- E. Accounting for disclosures (§528)



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3. Other Patient Rights

- A. Notice of privacy protections (§520)
 - Right to notice
 - Content
 - Providing notice
 - Acknowledgement
 - NOTE: Be careful to understand and structure how this is done in emergencies



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3. Other Patient Rights

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



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3. Other Patient Rights

C. Access (§524)

- Right to inspect and copy
 - Must be in “designated record sets”
 - Doesn’t include peer review or quality assurance



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3. Other Patient Rights

C. Access (§524) *(cont.)*

- Unreviewable grounds for denial
 - Including information compiled in anticipation of litigation
- Reviewable grounds for denial
 - Review process
- Copy charges and timeliness



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3. Other Patient Rights

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



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3. Other Patient Rights

D. Amendment (§526) *(cont.)*

- Acceptance
 - Transmittal
- Denial
 - Grounds (accurate & complete, not your record, etc.)
 - Right to submit statement
 - Rebuttal



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3. Other Patient Rights

E. Accounting for disclosures (§528)

- Right to accounting
- 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



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4. Administrative Requirements (§530)

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



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5. Miscellaneous Provisions

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



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