HIPAA and Medical Records

A Primer for the Personal Injury Lawyer

Congress' efforts to provide additional privacy protection for medical records are laudable. Personal injury attorneys, however, must recognize the effects of those efforts and modify their form authorization for medical records accordingly.

BY CRAIG D. TINDALL

In the early 1990s, the Bush Administration encouraged the health care industry to address the ever-escalating costs associated with administrating the health care system in America. An industry working group was formed and determined that standardization of the technological aspects of health care administration would be highly beneficial. The group called for federal legislation to force this standardization. That recommendation was incorporated into the much broader health plan advocated by the Clinton Administration, which later failed in Congress.

The idea of standardization in health care communications survived, however, and a bill that was more focused on the administrative cost aspects of the problem was introduced in the House. With substantial industry support, the bill passed through a joint committee and was eventually enacted in August 1996 as the Health Insurance Portability and Accountability Act (HIPAA).[1]

During HIPAA's evolution, concerns were raised about the security of sensitive health information about individuals that the legislation would require be transmitted electronically. In response to these concerns, requirements for privacy protection were added to the bill. The task of developing regulations to implement the privacy and other provisions of HIPAA ultimately fell to the Department of Health and Human Services (HHS).[2]

In 2002, HHS adopted The Standards for Privacy of Individually Identifiable Health Information—commonly referred to as the Privacy Standards.[3] The Privacy Standards seek to protect a comprehensive range of individual health information. Protected is any information that is created or received by a covered entity, which includes almost all medical providers and employer health plans. That information must relate to a patient's physical or mental health condition, the provision of health care to an individual, or the payment for the provision of health care to an individual.[4] It is protected by HIPAA only if it identifies the patient or there is a reasonable basis to believe that the information can lead to identity of the patient.[5]

The fact is, virtually all of the medical information that a personal injury attorney needs to handle a claim falls within the purview of the Privacy Standards. Even if some information is technically outside HIPAA, the uncertainties surrounding implementation of the Act's regulations will make access to that information difficult.

Most personal injury practitioners have probably experienced some minor impact of the Privacy Standards. That impact will only grow. The larger health care providers were required to be in compliance with the HIPAA Privacy Standards by April 15, 2003[6]; all providers that fall within HIPAA's broad ambit must comply with the Privacy Standards by April 15, 2004.[7]

HIPAA's Impact

Since its passage, HIPAA's nationwide impact has been significant. Confusion and consternation were generated as HHS gave birth to volumes of proposed and then final regulations. The development of all these regulations marshaled a legion of consultants to march upon all the various entities terrified of the intended—and unintended—consequences of these regulations. For example, Gartner, Inc., a respected research and consultant firm, estimates that just in the health care industry alone, which is only a portion of the economy affected by HIPAA, the average annual budget allocated for HIPAA compliance is $1.4 million. The total average cost of compliance per affected entity is estimated to be $5.7 million. Twenty-one percent of that budgeted amount will be spent on consultants, and another 29 percent is slated to go to internal administrators.

HIPAA Compliant Authorizations

What does all this upheaval, confusion and concern mean to an attorney practicing personal injury law? Quite a bit, at least until all the nuisances of HIPAA's implementation are settled. When the HIPAA Privacy Standards become completely effective, almost every medical provider[8]

will be prohibited from disclosing health information[9] to third parties, including attorneys, without a valid authorization signed by the patient.[10]

The gathering of medical records has long been a time-consuming, often frustrating challenge. Securing complete medical records is, however, critical to both plaintiff and defense attorneys handling personal injury actions. Medical record administrators in hospitals and doctors' offices, for example, recently have been inundated with information about HIPAA and its requirement and have become even more cautious than they have been when fulfilling any type of record request. It is very likely that uncertainties and rampant misunderstandings about the Privacy Standards will make it even more difficult for attorneys to gather the records they need to fairly resolve personal injury claims.

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Careful medical records administrators will correctly require that authorizations compliant with the requirements of the Privacy Standards accompany requests for release of medical information. Unfortunately, inevitable are inappropriate denials of valid requests due to misinformed administrators exercising excessive small doses of good judgment. Notwithstanding this inevitability, most requests will be processed relatively efficiently if attorneys make a diligent effort to comply with the authorization requirements of the standards.

Compliance with the authorization requirement is not necessary in all personal injury situations.[11] Although the requirement is broadly applicable, the Privacy Standards provide an exception for disclosure of medical information "in the course of any judicial and administrative proceedings."[12] But this exception would be of little use to a plaintiff's attorney seeking to secure medical records before a proceeding is filed.

Moreover, as a practical matter, reliance on the legal proceeding exception requires more effort on the part of an attorney than merely securing a valid authorization when that is possible. To begin with, the exception requires a court or administrative order.[13] The procedural aspects and unavoidable delays involved make this option unattractive.

Alternatively, the request for medical records could be accompanied by a subpoena and "satisfactory assurance" that the requestor has either made a reasonable effort to provide the patient with notice or has secured a "qualified protective order."[14]

The regulations define "satisfactory assurance" as a written statement and accompanying documentation that shows that a good faith attempt was made by the requestor to provide written notice to the patient.[15] A "qualified protective order" is defined by regulation as an order of the appropriate tribunal restricting disclosure to the purpose of the proceedings and destruction of the information at the end of those proceedings.[16]

Although reliance on the legal proceeding exception may be necessary in some situations, it involves a process that is much more complex than simply securing a valid authorization from the patient. Therefore, at least in the majority of personal injury cases, there is little reason for attorneys to look to the exception for legal proceedings.

Requirements for Valid Authorizations

What, then, is a valid authorization? The Privacy Standards define such an authorization as one that is written in "plain language"[17]—a term not specifically defined—and that contains specific "core elements" and "required statements."[18] The required core elements[19] of a valid release are:

1. A description that identifies the requested information in a "specific and meaningful fashion"[20];
2. The name or other specific identification of the person or entity authorized to make the request for information[21];
3. The name or other specific identification of the persons or entity to which the requested information may be disclosed[22];
4. A description of the purpose for which the information is requested[23];
5. An expiration date or expiration event that relates to the individual or the purpose for which the information is requested[24]; and
6. A dated signature of the patient or the patient's representative with a description of the representative's authority to act on behalf of the patient.[25]

In addition to the core elements, a valid authorization must contain certain required statements.[26] The form of these statements is not specified. Instead, the regulations, so far as they relate to authorizations used in personal injury matters,[27] state that the language used in the authorization must be adequate to place the patient on notice[28] of the following:

1. The right to revoke the authorization in writing[29]
2. The potential for the information to

be further disclosed to others without the protection of the HIPAA regulations[30]

At first blush, these requirements do not seem too onerous, and in fact they generally are not. State statutes have for some time protected the privacy of medical records.[31] As a result, form authorizations used to secure the release of these records have incorporated most of the core elements. The required statements, however, are less likely to be found in most form agreements.

Modifying existing form authorizations to incorporate these statements would not be an arduous task. Therefore, compliance with the Privacy Standards generally should be painless for attorneys handling personal injury matters. The devil is in the details, though, and there are areas that present potential problems and warrant further consideration.

Problem Areas

One core element that might be lacking from form authorizations currently in use is a statement of purpose for which the information is requested. Adding a generic purpose statement should suffice. After all, the regulations provide that a description such as "end of the research study" or even "none" are sufficient, at least in the context of medical research.[32] The regulation, however, provides only this specific allowance, which raises a question as to whether such general descriptions are limited to authorizations pertaining to medical research or whether this is an example and non-particularized descriptions are acceptable in other situations as well. Unfortunately, the regulations offer no guidance on this issue, and overly zealous medical records administrators may require more definitive statements than are practical or justified for litigation purposes.

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The Privacy Standards also require that an expiration date or event be stated in the authorization. The vagaries of litigation present some practical problems in setting a specific date for expiration of the authorization. Though a date could be set far enough in the future to reasonably accommodate litigation needs, the better practice may be to identify an event upon which the authorization will expire. The patient's attorney handling a personal injury action may be less than comfortable using an event, as opposed to a specific date, because the event may be so far in an uncertain future. Nevertheless, the goal for both sides in personal injury matters is to avoid having to have the patient sign another authorization, which commonly leads to delays in processing a claim and increases the potential for incomplete sets of medical records. This common goal could be used to advocate for a reasonable event-based expiration.

When litigation is under way, using as the expiration of the authorization the ultimate dismissal of the action should fulfill the expiration core requirement and still address the litigants' practical needs. Some might argue for use of a date set by the court or procedural rules for discovery cutoff. However, there are so many variables that may require or benefit from the use of the authorization after that date, including the testimony of the medical provider,[33] that such a cutoff date should not be the first alternative. Similarly, when litigation has not been initiated, there is no reason to foresee any legitimate objection to expiration of the authorization upon settlement of all claims or the dismissal of a legal action associated with the medical information.

Another area that may lead to problems is the standards' requirement that medical providers limit the disclosure of information to that which is the "minimum necessary" to accomplish the intended purpose.[34] Most often, medical record authorizations in personal injury cases request for good reasons all of the records maintained by a medical provider that pertain to a particular patient. Whether a description of the requested records that asks for "all records" is sufficiently a "specific and meaningful fashion" may be subject to debate. Unfortunately, the regulations do not define the term "specific and meaningful fashion." Consequently, an authorization that allows "all medical records" may be questioned when, in fact, that is precisely what the attorney desires and what the patient is either willing or required to disclose. If the records requested can be reasonably restricted, that probably should be done. In some instances, however, there is no easy way around asking for "all medical records." An attorney can only hope to avoid a protracted discussion over that type of request because, as of yet, there has not been any definitive resolution to this issue.

It is foreseeable that a few medical record administrators, relying on this "minimum necessary" standard, might unilaterally decide that only certain records are all that are needed to fulfill a specific

request. The requesting attorney may never know that his or her request has been restricted and that records, including some that might weigh heavily on the resolution of the matter at hand, have been withheld.

To combat this problem, authorizations should request that the medical records administrator identify any record withheld with sufficient particularity to support further effort to secure full disclosure should the requestor believe it necessary. Furthermore, the medical records administrator should be asked to warrant under oath that all requested records have been fully disclosed or identified as withheld.

These requests could be ignored, and there are no ramifications if they are. But at least the attorney will have made all reasonable efforts to address this potential problem. As has always been the case, the only way to be assured that all medical records have been disclosed is to ask the medical provider to hand over his or her file during a deposition.

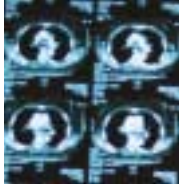
Psychotherapy, Psychological and Psychiatric Records

Under HIPAA, psychotherapy notes are provided more protection than other types of medical records. The current common practice is to include records for mental and emotional treatment to a long list of the types of records that are being requested. The Privacy Standards prohibit that practice.

Though requests for other types of medical records can be requested in one authorization, which would most likely be the case in the context of personal injury litigation, requests for psychological and psychiatric records must be presented in a distinctly separate authorization.[35] Consequently, when mental or emotional damages are claimed and supported by treatment, attorneys should secure separate authorizations for the disclosure of these types of records.

Conclusion

The Privacy Standards were developed to



prevent the abuses of broad, vague consents that some medical providers secure from their patients.[36] Though most health care providers were careful with patient information, some providers and insurance companies have used broadly drafted authorizations to justify disclosure of medical information for purposes not intended or understood by the patient.[37]

Because the Privacy Standards were initially developed to address that situation, application of these regulations to the disclosure of medical information to attorneys in personal injury matters may prove to be rather clumsy. There will undoubtedly be occasions where the regulations will be erroneously applied and may frustrate the need for legitimate disclosure. But close adherence to the regulations and incorporation of these suggestions should limit those situations.

Finally, it may help attorneys to state clearly on the authorization form that it is compliant with HIPAA. Such a statement would, at the very least, demonstrate to the recipient that the requesting attorney has a certain degree of knowledge about the Act and its requirements. More important, the statement may discourage the record administrator from arbitrarily limiting disclosure of medical information. Of course, that representation should be accurate.

One goal of personal injury attorneys is to gather all pertinent medical records to resolve a claim as quickly and efficiently as possible. HIPAA and its regulations may make it slightly more difficult to obtain that goal, at least for the time being. That difficulty derives not from the requirements of HIPAA but from the uncertainty of how the Act and regulations are to be implemented and how they will be enforced. With experience, medical providers and their record administrators will undoubtedly become more comfortable with this complex law. When that occurs, the practice of gathering medical records will probably be no easier than it was before HIPAA—but at least it should not be significantly worse.

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endnotes

1. Health Insurance Portability and Accountability Act, Pub. L. No. 104-191 (1996) (HIPAA).
2. HIPAA, § 264.
3. 45 C.F.R. parts 160 and 164.
4. 45 C.F.R. § 164.501.
5. *Id.*
6. 45 C.F.R. § 164.534.
7. *Id.*
8. Lisa Vaas, *Cashing In on HIPAA*, EWEEK, Mar. 3, 2003, available at www.eweek.com/article2/0,3959,910352,00.asp.
9. HIPAA Privacy Standards apply to health plans, health care clearinghouses, and—most important for the purposes of this article—any "health care provider who transmits any health information in electronic form." 45 C.F.R. § 160.102(a). Most medical providers in this country transmit health information electronically, usually for the purpose of billing. As of Oct. 16, 2003, Medicare administration will require all submissions for payments be made electronically, Administrative Simplification Compliance Act, Pub. L. No. 107-105 (2001); *see also* Interim Final Rule Electronic Submission of Medicare Claims, 68 Fed. Reg. 48805 (August 15, 2003), which will increase the applicability of HIPAA.
10. "Health information" is defined by the HIPAA Privacy Standards as "any information, whether oral or recorded in any form or medium, that (1) is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and (2) relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual." 45 C.F.R. § 160.103.
11. 45 C.F.R. § 164.508(a)(1): "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 it use or disclosure of protected health information, such use or disclosure must be consistent with such authorization." *See also* 45 C.F.R. § 164.512, enumerating uses and disclosures for which an authorization or opportunity to agree or object is not required.

    See e.g., Diane Kutzko, Gilda L. Boyer, Deborah J. Thoman & Nicholas L. Scott, *HIPAA in Real Time: Practical Implications of the Federal Privacy Rule*, 51 DRAKE L. REV. 403 (2003). State law, however, may still require some form of authorization. *See e.g.*, A.R.S. § 12-2235 (prohibiting a doctor from disclosing patient information without patient consent).
12. 45 C.F.R. § 164.512(e).
13. *Id.* § 164.512(e)(1)(i).
14. *Id.* § 164.512(e)(1)(ii). *See also id.* § 164.512(e)(1)(vi), which allows the covered entity—not the requesting attorney—to secure the notice or to secure the qualified protective order. One can easily imagine this alterative occurring only under exceedingly rare circumstances.
15. *Id.* § 164.512(e)(1)(iii). The notice must include sufficient information about the litigation or proceeding in order to allow an objection to disclosure to be made and time for an objection to be presented and ruled upon. *Id.* § 164.512(e)(1)(iii)(A) and (B).
16. *Id.* §§ 164.512(e)(1)(iv) and (v).
17. *Id.* § 164.508(c)(3).
18. *Id.* § 164.508(b)(1)(i).
19. *Id.* § 164.508(c)(1).
20. *Id.* § 164.508(c)(1)(i).
21. *Id.* § 164.508(c)(1)(ii).
22. *Id.* § 164.508(c)(1)(iii).
23. *Id.* § 164.508(c)(1)(iv). The regulation considers that the "statement 'at the request of the individual' is a sufficient description of the purpose when an individual initiates the authorization and does not, or elects not to, provide a statement of the purpose."
24. *Id.* § 164.508(c)(1)(v).
25. *Id.* § 164.508(c)(1)(vi).
26. *Id.* § 164.508(c)(2).
27. One required statement applies to notice of the right of the entity covered by HIPAA to condition treatment, payment, enrollment, or eligibility for benefits on the patient signing the authorization. 45 C.F.R. § 164.508(c)(2)(ii). In personal injury matters, most often defendants will not be entities covered by HIPAA, at least for the purposes of the personal injury claim. Claims related to medical malpractice against a hospital or provider that is a covered entity raises an interesting issue and, because that situation is outside the more general scope of this article, further legal advice should be sought. Nevertheless, it is apparent that this provision was not intended to apply in that context. Such an entity, however, may best serve its interest by stating in the authorization that future service, payment, etc., will not be denied by the patient's refusal to sign the authorization, if that is in fact the case.
28. *Id.*
29. *Id.* § 164.508(c)(2)(i).

30. *Id.* § 164.508(c)(2)(iii).
31. *E.g.*, A.R.S. § 12-2235; COLO. REV. STAT. § 13-90-107 (2002) (providing that a physician may not testify without patient consent); IOWA CODE § 622.10(3) (2003) (setting out procedures for obtaining consent or authorization to disclose medical information in the context of litigation); MD. ANN. CODE, *Health-General*, § 4-301; WIS. STAT. ANN. 905.04(2) (1993) (establishing that "a patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition"). The courts in some states without an explicit statute recognize the confidentiality of medical records. *See e.g., State v. Walker*, 376 So.2d 92, 94 (La. 1979) (holding that a physician may not disclose the patient's diagnosis without the latter's "express consent"); *State v. O'Neill*, 545 P.2d 97, 104 (Or. 1976) (extending privilege to physician's entries in hospital records); *Heinemann v. Mitchell*, 220 N.E.2d 616, 617 (Ohio 1966) (finding that hospital records that contain confidential communications are privileged). *See also* TEX. R. EVID. 509(b)(2) (establishing that "records of the identity, diagnosis, evaluation or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed").
32. 45 C.F.R. § 164.508(c)(1)(vi).
33. But see note 13 and accompanying text, which describe the exception to the Privacy Standard for disclosure of medical information during judicial or administrative proceedings. Notwithstanding this exception and the argument that a patient waives certain doctor–patient confidentiality when making a personal injury claim, a broadly worded authorization for release of medical information should address any uncertainty on the part of the medical provider.
34. 45 C.F.R. § 164.502(b): "When using or disclosing protected health information or when requesting protected health information from another covered entity, a covered entity must make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request."
35. *Id.* § 508(b)(3)(ii). The regulations distinguish between psychotherapy records and psychological and psychiatric records but allow all of these types of records to be included on one authorization.
36. Peter A. Winn, *Confidentiality in Cyberspace: The HIPAA Privacy Rules and the Common Law*, 33 RUTGERS L.J. 617, 646 (2002).
37. *Id.*, citing Richard C. Turkington, *Medical Records Confidentiality Law, Scientific Research, and Data Collection in the Information Age*, 24 J.L. MED. & ETHICS 113, 115 (1997).