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HIPAA and Law Firms—Does Your Office Comply?

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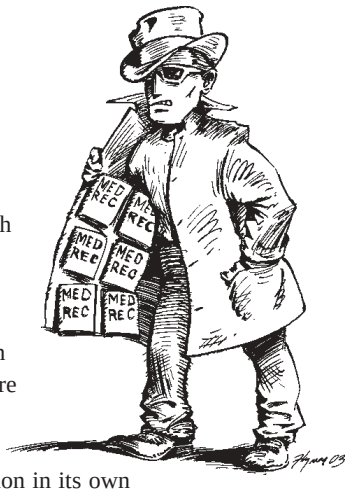

On April 14, 2003, millions of health care providers became subject to new and broad-ranging confidentiality requirements. These are contained in the privacy regulations implementing the Health Insurance Portability and Accountability Act of 1996, otherwise known as HIPAA. Because they will have such a dramatic effect upon how health care providers conduct their business, it is likely that they will have an impact upon lawyers who provide services to health care providers and lawyers who regularly depend upon medical records to evaluate their cases.

A. HIPAA Overview

In 1996, before the terrorist attacks, SARS, war in Iraq, and the downturn in the economy, one of the primary concerns among health care consumers was a fear that their medical records would be published on the internet against their will. As a result, the Congress required the Department of Health and Human Services (DHHS) to pass regulations that would govern the privacy of electronic medical records.

Several years, and tens of thousands of pages of debate later, the DHHS enacted the privacy regulations now codified *45 C.F.R. §160.101 et seq.* This article cannot discuss all of the privacy requirements, but understanding several key concepts will help lawyers survive HIPAA.

First, HIPAA creates a classification of "protected health information," which includes any information that describes the provision of or payment for health care that relates to past, present or future physical or mental health of an individual. The DHHS drafted this definition as broadly as possible to include any potential sources of medical information that a patient might provide to health care providers.

Second, HIPAA places limitations upon how a health care provider may "use" protected health information in its own practice. All uses are subject to a "minimum necessary disclosure" principle that requires the health care provider to limit any staff member's access to the medical records to those strictly necessary for job-based functions. In addition, HIPAA requires health care providers to take appropriate security measures to ensure that medical records are not inadvertently disclosed to employees or other patients.

Third, HIPAA places limitations upon how a health care provider may "disclose" protected health information to third parties. Although there are certain disclosures that do not require the patient's consent, such as suspected child abuse or national security reasons, many potential disclosures require the health care provide to provide an "opt out." A patient may also authorize disclosures that are not explicitly permitted under the HIPAA regulations. If a health care provider knowingly makes a disclosure that is not permitted by the regulations or approved by the patient, the health care provider can face civil and criminal penalties.

Fourth, because the DHHS has jurisdiction only over health care providers, it has forced the providers to enter "business

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Mark Your Calendar

April 28-30, 2004

Spring National Legal Malpractice Conference
Loews Miami Beach Hotel
Miami, Florida

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HIPAA and Law Firms

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associate agreements" with any third parties whom the provider maintains a business relationship that requires the disclosure of medical records. For example, if a hospital wants to hire a law firm to conduct risk management services, the law firm must sign a business associate agreement stating that it will not use or disclose any medical records in an improper manner. Through the business associate agreements, the DHHS has gained control over a broad range of business dealings between health care providers and their contractors.

B. Representation of Non-Health Care Providers and Entities

HIPAA will probably have the least impact when a lawyer does not represent a health care provider, hospital, health plan, or other entity covered by HIPAA. For example, in a potential lawsuit arising from an automobile accident, the lawyer representing the driver probably needs only to obtain copies of the patient's medical records. Some problems have arisen, however, because health care providers are afraid to release medical records, even for legitimate and lawful reasons, because of potential HIPAA liability.

What those health care providers are forgetting is that HIPAA allows health care providers to release their entire files with proper authorization. The key to obtaining those records is making sure that you use a HIPPA-compliant release. For a release to be valid it must not only specifically describe the information to be released, but it must also: (1) specifically identify the patient whose medical records will be released; (2) specifically identify the health care provider who is authorized to make the disclosure; (3) specifically identify the reason for the request, such as to evaluate potential claims for legal proceedings; (4) specifically identify an expiration date or an event upon which the authorization terminates; (5) provide for the patient's signature; (6) inform the patient that he or she may revoke the authorization at any time; (7) inform the patient that the health care provider may not condition future treatment upon the signing of the authorization; and (8) inform the patient that information disclosed to third-parties may be redisclosed and no longer be protected by HIPAA.

If an authorization fails to contain all of these essential terms, it is invalid, and a health care provider cannot release the patient's medical records. If suit has already been filed an attorney is still having a tough time obtaining medical records, HIPAA allows for disclosure of medical records in judicial and administrative proceedings, including subpoena.

C. Representation of Health Care Providers and Entities

Things are much trickier when a lawyer represents a health care provider, hospital, health plan or other covered entity **and** the lawyer will be receiving medical records or other protected health information. For example, in medical malpractice litigation, defense counsel is likely to be considered "business associates" subject to HIPAA's requirements. This will require the health care provider to ensure that the defense counsel has signed a valid business associate agreement before releasing protected health information.

A business associate agreement must provide that, among other things, the business associate: (1) will not use or further disclose the protected health information, except as permitted by contract or law; (2) will use appropriate safeguards to prevent the unauthorized use or disclosure of protected health information; (3) will report any unauthorized uses or disclosures to the health care provider; (4) will ensure that any subcontractors agree to maintain the confidentiality of the medical records. In litigation, this would require attorneys to ensure that experts, court reporters, copy services and other litigation support entities will not disclose medical records except as contemplated in a contract between the attorney and the subcontractor; (5) will make its own records and policies available for the health care provider's review and inspection; (6) will destroy any protected health information in its possession at the conclusion of the agreement; (6) will authorize the termination of the agreement if the business associate fails to comply with its obligations under the agreement.

The important thing for lawyers providing services to health care providers is to remember is that the business associate agreement binds them to the same obliga-

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Attention Young Lawyers And Law Students
The Levit Essay Contest Is Now Accepting Entries!

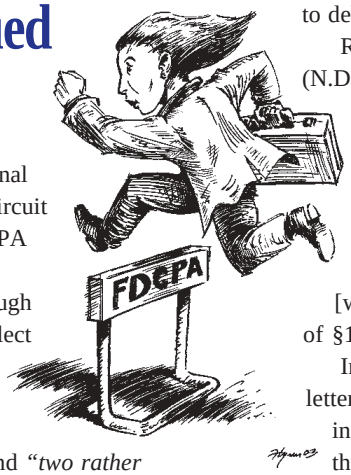
The 2004 Bert W. Levit Essay Contest, co-sponsored by the ABA Standing Committee on Lawyers' Professional Liability and the San Francisco law firm of Long & Levit, LLP, is now accepting entries. The contest, open only to law students and young lawyers, offers a $5,000.00 cash prize and an all-expense paid trip to the ABA Spring National Legal Malpractice Conference to be held in Miami, Florida on April 28-30, 2004. The deadline for entries is January 15, 2004.

The format for this year's contest will be similar to that of last year, i.e., it asks contestants to draft a judicial opinion based upon a detailed fact scenario. The Levit Essay contest encourages original thought, innovative approach, and quality research and writing.

Complete details, including topic, rules, format and deadlines for the 2004 contest are available on the Web at www.abalegalservices.org/lpl/levit.html, or by contacting Glenn Fischer, Assistant Staff Counsel for the Standing Committee on Lawyers' Professional Liability, 541 North Fairbanks Court, Chicago, Illinois 60611, (312) 988-5755, fischerg@staff.abanet.org

Getting Paid Without Getting Sued

By Heather Linn Rosing, Klinedinst PC



Attorneys practicing in today's environment have a lot on their minds- how to be keep up with the latest updates in the law, how to make sure lawsuits are filed with sufficient cause, how to keep the client sufficiently informed as to developments. And, although some attorneys are not aware of it, there's another area of concern for many practitioners—debt collection laws. "But I'm not a debt collection attorney!" you say. But you may not need to be a full-time debt collection specialist to be subject to certain collections laws. While various states have their own special laws, the federal standards are set forth in the Fair Debt Collection Practices Act, or the FDCPA, 15 U.S.C.A. §§ 1692 et seq. The FDCPA passed into law in 1977, and was amended in 1986.

The first step for the diligent and concerned attorney is to determine if he qualifies as a "debt collector." A "debt" is broadly defined as a consumer obligation to pay money relating to a personal, family, or household purpose.

A "debt collector" is "any person who uses any instrumentality of interstate commerce or the mails in any business whose principal purpose is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." If you are a person who operates a debt collection business, you probably are a "debt collector," and probably know all about the FDCPA. The real question is, what kind of practicing attorney qualifies as someone who regularly collects or attempts to collect debts? Could you qualify? Answering this question requires a closer look at the case law.

The seminal case of *Heintz v. Jenkins* (1995) 514 U.S. 291, confirmed that attorneys were no longer exempt from the FDCPA. In that case, an attorney was hired to try to collect on a car loan. The attorney wrote a letter that allegedly sought amounts not covered in the original contract. The 7th Circuit found that the FDCPA applied to attorneys who regularly, through litigation, try to collect consumer debt.

In affirming the 7th Circuit, the Supreme Court found *"two rather strong reasons for believing that the Act applies to the litigating activities of lawyers."* **First**, the Court, relying upon the Black's Law Dictionary definition of debt collection, found that the term "debt collector" encompasses lawyers who regularly try to obtain payment of consumer debts through legal proceedings.

Second, the Court pointed out that the 1896 amendments to the FDCPA deleted the exception for attorneys. Based on this, the Court commented that "one would think that Congress intended that lawyers be subject to the Act whenever they meet the general 'debt collector' definition."

A good portion of this opinion discusses the obvious questions. Couldn't any attorney who litigates a collection case fall within the parameters of the FDCPA? How can an attorney effectively litigate within the statutory constraints? The attorney-petitioner in that case used these very questions to try to persuade the Court that the FDCPA does not and should not apply to debt collection activities in the context of litigation. The Court disagreed, reasoning that it is perfectly possible to litigate a debt collection case without violating the FDCPA.

The cases after *Heintz* provide some guidance on what an attorney has to do to qualify as a "regular" player in the debt collection world who is subject to the FDCPA. Some cases say to look at the facts on a case by case basis. Other cases look at the total amount of the attorney's practice devoted to debt collection.

Recent cases such as *Irwin v. Mascott* (N.D. Cal. 2000) 112 F.Supp.2d 937, discuss some of the things that attorneys do that violate the FDCPA. The District Court in *Irwin* found that the debt collection company and its in-house counsel were liable for "falsely representing that its dunning letters [were] from attorneys," in violation of §1692e(3).

In that case, the company sent collection letters on attorney letterhead signed by its in-house counsel, and some of the letters threatened litigation. The attorney, at most, scanned a spreadsheet with debtor data, and signed all of the letters generated by the spreadsheet. The attorney admitted that he did not review the debtor information in any detail until actual litigation was considered. The court found that because the in-house counsel did not assess each collection situation before the letters were sent, the letters were not really from an attorney in any meaningful sense, and therefore should not have been on letterhead and signed by the attorney. The court commented, "Abuses by attorney debt collectors are more egregious than those of lay collectors, because a consumer fears more an attorney's improper threat of legal action than that of a debt collection employee who is not an attorney."

The bottom line is that the attorney "debt collector" must be cognizant of what he can't do or say, and know the consequences for violating the rules. The FDCPA prohibits false or misleading representations, and abusive or unfair practices. It lists many specifics. For example, a debt collector should avoid misrepresenting the amount or characterization of a debt; making repeated annoying phone calls; using obscenity; telling certain third parties that the consumer owes a debt; accepting certain postdated checks; and using postcards to try to collect. If the rules are violated, the violator will be held responsible for actual damages, "additional damages" not to exceed $1,000 (in non-class action cases), and reasonable attorney's fees.

lpl Advisory is a bi-annual newsletter published by the American Bar Association Standing Committee on Lawyers' Professional Liability for the news and information exchange needs of the lawyers' professional liability community.

Message From the Chair

On behalf of the Standing Committee, I welcome you to the Fall 2003 National Legal Malpractice Conference in scenic La Jolla. Once again the Committee and conference speakers have worked hard to prepare an excellent program that I am certain you will find educational and useful.

I am honored to serve as the Committee's chair for another year and I look forward to working with all of you. I also want to welcome our two new members of the Committee—Kathleen Ewins and Lorrie Vick who have been appointed for three-year terms.

I want to note the contributions of Nancy Marshall and Bill McGuire, whose terms on the Committee have expired. Nancy and Bill have worked actively on our Conference and other projects. On behalf of all of us, I thank them for their service.

With the able assistance and dedication of Glenn Fischer, the Committee is in the process of expanding its website and I encourage you to visit the demonstration of the site at the conference registration table in La Jolla. The new "members only" page and eMembership in the National Legal Malpractice Data Center offer you great content all in one location on the web.

I also want to call your attention to the Levit Essay contest described on page two. Please encourage the young lawyers and law students you know to participate in this challenging and interesting competition.

Finally, I ask you to mark your calendars for the Spring Conference, which will be held at the Loews Miami Beach Hotel in Miami on April 28-30, 2004. The program, which is in the initial planning stage, promises to be another excellent one.

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tions that HIPAA imposes upon health care providers. If a business associate uses or discloses protected health information in an impermissible manner, the DHHS may punish the health care provider for the business associate's lapses. For this reason, any claims representative or defense counsel defending health care professionals should develop policies and procedures to ensure that uses and disclosures of protected health information are made appropriately. HIPAA adds an additional complication to the attorney-client relationship, but it is one that lawyers representing health care providers and entities must recognize and respect to provide full and adequate representation.

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