

The First National HIPAA Summit

Washington, DC

Professional Responsibility Issues for Attorneys, Accountants and Other Professionals in

HIPAA Implementation and Compliance

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The purpose of this session is to increase the sensitivity of the attendees to issues of legal and other ethics and professional responsibilities issues, relevant to those practitioners of the art and profession of lawyering and other professionals, who will counsel providers, suppliers, vendors and others involved in the for-profit and not-for-profit provision of health care services and goods.

This session will provide a forum for discussion among practitioners in light of special issues relating to the new and different transactions, relationships, affiliations and contracts that are emerging, and more particularly with the emergence of HIPAA and other privacy, confidentiality and security concerns as a major factor in operations and management. Because of the unique nature of the subject matter, the session is designed to

stimulate thought and discussion, and will not be a lecture: in the presenter's experience, interactive dialogue tends to facilitate thought and reflection on issues often vague and contradictory and to prompt later recollection of issues to be considered in light of specific facts and circumstances.

Specific issues follow:

1. How should the initial decision to take on representation be made, what about informal initial conversations (out of the office) without ultimately being retained and what about advance waivers of disqualification (and "sneak attack" disqualification): when will before-the-game chatter get the next batter tossed out of game?
2. Who does legal counsel and who does the law firm represent (and are the rules different for each) - a corporation, the public trust, management, directors, fiduciaries, stockholders, and/or all the foregoing, and when and how are their respective interests diverse and adverse and is there a converse, and what about being "counsel for the deal" – get real?
3. Should or can counsel be personal counsel to one of the individuals/joint venturers in a group and/or counsel to an institutional provider (or "system sibling") involved in the transaction and does that preclude effective and permitted representation, and for how long and with respect to what?

4. “You already have zero privilege: get used to it...” (with appreciation to Scott McNealy of Sun Microsystems for give me the idea) -- Lawyer-client privilege - what is it, who has it, who can waive it, how to preserve it, and will you deserve it?
5. Attorney work product - what is it, what is protected, how does work product differ from privileged communications or confidential information or secrets?
6. Secrets and confidences - whose are they and how are they to be protected, and can public knowledge still be a secret, and if so what can you say, and how do they differ from privileged information?
7. Civil vs. criminal matters and representation of charitable institutions, and how to handle "everyone's doing it and if you do you might get caught but a lot of others likely would have the same problem and would the government ever want to do so much to so many about what to some is so little..." advice - do elephants fly?
8. Supposed internal law firm "walls" and holes in the same – lawyering in the era of multinational law firms and even conglomerates.
9. Multidisciplinary practice issues.

10. Representation with respect to the same issues in different forums and taking positions which are inconsistent or taking appeals which might overturn a result favorable to one client or another.
11. Tax advice and dealing with the Internal Revenue Service as distinguished from anti-fraud and abuse advice and dealing with the Office of the Inspector General - tax return preparer liability, aiding and abetting, conspiracy, obstruction of justice, objection and withdrawal.
12. Accountants - what they know can and will be used against you: “Danger - Broken Privilege Ahead”, protections for a law firm retaining an independent contractor, and diligence in due diligence privilege-loss-avoidance.
13. Past, present and future clients and mergers and consolidations, and when does the lawyer-client relationship begin and end?
14. Obligation, if any, to provide updated advice and if so to whom?
15. Dealing with state and federal agencies and their respective lawyers: an officer of the court.
16. The Fifth Amendment Privilege and corporations and other entities.

17. Billing practices and record-keeping, including privilege issues and criminal incrimination and discovery: "Until the expiration of four years after the furnishing of the services called by this Agreement, the Manager shall make available upon request to the United States Department of Health and Human Services ('HHS'), the United States Comptroller General and their representatives, this Agreement and all other books, documents and records as are necessary to certify the nature and extent of the costs incurred by the Owner in purchasing services under this Agreement, and if the Manager provides such services through a subcontract worth \$10,000 or more over a twelve-month period with a related organization, the subcontract shall also contain a clause permitting access by the HHS, the United States Comptroller General and their representative to books and records of the related organization."

18. Legal malpractice insurance: claims made, facts and circumstances, prior acts, tall tales, short tails, noses and coverage of other body parts, and drop-down, cut-through, manuscript, cost reimbursement, retentions, punitive damages, directors and officers coverage, and the like.

19. Legal opinions vs. letters and memos: what they are, what they should be, what they mean, and what you risk, including out-of-state practice issues and collection of fees.

20. Post-Columbia/HCA and post-Kansas City law and lore: anti-fraud and abuse, lawyer liability, lawyer advice, lawyer malpractice, lawyer reincarnation and lawyer incarceration.
21. Retention letters and retainers, retainer letters and retention.
22. Internal and infernal law firm policies, practices and procedures.
23. The State Attorney General and the public trust (fiduciary mistrust?) doctrine –Allegheny and all the rest.
24. Technology, including posting to online service discussion forums, and use (and misuse) of cellular phone and electronic mail and so-called file erasure and floppy disks (“Do you know where that floppy disk has been?”), are faxes “in writing”, is the “delete” key really a “hide” key, using “Hotmail”, “Documents” on the “Start” menu and under “File”, and practicing “Safe Computing”.
25. Phone mail: do you listen from outside of your office, and if so who else is listening.
26. Representation of multiple parties and the absence of privilege and confidentiality:

**‘MEMORANDUM REGARDING CONFLICTS OF INTEREST
AND COUNSEL**

The purpose of this Memorandum is to evidence and confirm the consent of the signatories below to having the law firm of American and Health including the Messrs. Lawyers and Association provide legal services to each and all of them both in connection with the contractual negotiations relative to the acquisition of the Happy Hills hospital and related contractual, corporate and other matters involving the same and, upon request by any of them, with their respective personal and business affairs.

There have been and will be discussions of these services with these signatories individually and collectively from time to time. Each of these signatories understands that its/his/her interests with respect to any such legal services may be inconsistent with or adverse to the interests of one or more of the other of the signatories; and that therefore each of these signatories, if so desired, is entitled to the advice and counsel of a lawyer and a law firm not providing or not having provided legal services to any one or more of the others of them.

Each of the signatories understands that each and all of them may have differing interests (including every interest that could adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse, or otherwise differing) and that its/his/her interests may be inconsistent with or adverse to the interests of one or more of the others of the signatories. Therefore each of the signatories, if so desired, is entitled to the advice and counsel of a law firm and a lawyer not representing or not having represented any one or more of the others of them.

Furthermore, each of the signatories understands that there is no attorney-client privilege, and no confidentiality obligation on the part of the law firm of American and Health including the Messrs. Lawyers and Association, between and among the signatories with respect to all such matters. Thus what one signatory tells a lawyer in such law firm is not required to be kept confidential from the other signatories. Furthermore, in the event of a dispute between one signatory and the others that is not resolved among all of the signatories without litigation, such law firm will withdraw and will not be able to represent any of such signatories with respect to such dispute.

Nevertheless, and after full consideration of potential inconsistencies, conflicts of interest, and confidentiality concerns and their respective rights to separate legal services, each of the signatories has requested the law firm of American and Health including the Messrs. Lawyers and Association, to represent each of them personally with respect to such facility and related corporate and other matters involving the matters referenced above. And in this connection, each of these signatories waives any lawyer/client privileges and attorney work product protections or other entitlements to confidentiality insofar as communications with and by the law firm of American and Health including the Messrs. Lawyers and Association are concerned; but without hereby giving anyone else any right or entitlement to assert any waiver as aforesaid.

Each of these signatories acknowledges that it/he/she has read and voluntarily decided to sign this Memorandum and thereby to confirm its/his/her agreement to and acknowledgment of the accuracy of what is set forth above.

Executed under seal as of August 18, 2000.”

27. Representation of limited partnership and limited partners and general partners, or limited liability company and limited liability company members: is counsel to the partnership or company also counsel to any of or each of or some of the limited partners and members?
28. “Strategic Misrepresentation” and other such common but questionable acts and omissions: “Too much puffing can be dangerous to your health...”.
29. First offers, best offers, last offers, only offers and flat out lies.
31. Principle vs. principal: conflicts of interest, conflicts with interest, interest in conflicts: keep your eye on principle -- integrity transplantation is major surgery and no amount of principal can help.
32. “Internet electronic mail from Alan S. Goldberg, Esquire, agoldberg@goulstorrs.com c/o Goulston & Storrs, 400 Atlantic Av., Boston, MA 02110, voice (617) 482-1776, fax (617) 574-4112. This communication is intended only for the use of the individual or entity named as the addressee. It may contain information which is privileged and/or confidential under applicable law. If you are not the intended recipient or such recipient's employee or agent, you are hereby notified that any dissemination, copy or disclosure of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us at (617) 574-4068

(ask for Mr. Goldberg's secretary, Ms. Kellie Puleo) or via return Internet electronic mail to kpuleo@goulstorrs.com and expunge this communication without making any copies. Thank you for your cooperation.”

33. If and to the extent, and so long as, required by the provisions of 42 U.S.C. 1171 et seq. enacted by the Health Insurance Portability and Accountability Act of 1996 and regulations promulgated thereunder, but not otherwise, BUSINESS PARTNER does hereby assure Customer that BUSINESS PARTNER will appropriately safeguard protected health information made available to or obtained by BUSINESS PARTNER. In implementation of such assurance and without limiting the obligations of BUSINESS PARTNER otherwise set forth in this Agreement or imposed by applicable law, BUSINESS PARTNER hereby agrees to comply with applicable requirements of law relating to protected health information and with respect to any task or other activity BUSINESS PARTNER performs on behalf of Customer, to the extent Customer would be required to comply with such requirements. The agreement of BUSINESS PARTNER set forth in the two next preceding sentences, and the additional provisions relating to permitted and required uses and disclosures thereof that shall be from time to time provided to BUSINESS PARTNER by Customer in accordance with applicable law, constitute a contract between Customer and BUSINESS PARTNER establishing the permitted and required uses and disclosures of such protected health information by BUSINESS PARTNER. In amplification and not in limitation of the provisions of this Agreement including this Section of this Agreement, BUSINESS PARTNER agrees that BUSINESS PARTNER will:

(A) Not use or further disclose such information other than as permitted or required by this Agreement;

(B) Not use or further disclose the information in a manner that would violate the requirements of applicable law, if done by Customer;

(C) Use appropriate safeguards to prevent use or disclosure of such information other than as provided for by this Agreement;

(D) Report to Customer any use or disclosure of such information not provided for by this Agreement of which BUSINESS PARTNER becomes aware;

(E) Ensure that any subcontractors or agents to whom BUSINESS PARTNER provides protected health information received from Customer agree to the same restrictions and conditions that apply to BUSINESS PARTNER with respect to such information;

(F) Make available protected health information in accordance applicable law;

(G) Make BUSINESS PARTNER's internal practices, books, and records relating to the use and disclosure of protected health information received from Customer available to the Secretary of the United States Health & Human Services for purposes of determining Customer's compliance with applicable law (in all events, BUSINESS PARTNER shall immediately notify Customer upon receipt by BUSINESS PARTNER of any such request, and shall provide Customer with copies of any such materials);

(H) At termination of this Agreement, return or destroy all protected health information received from Customer that BUSINESS PARTNER still maintains in any form and retain no copies of such information; and

(I) Incorporate any amendments or corrections to protected health information when notified pursuant to applicable law.

If and to the extent required by the provisions of 42 U.S.C. 1171 et seq. enacted by the Health Insurance Portability and Accountability Act of 1996 and regulations promulgated thereunder, but not otherwise and only from and after Customer elects to cause this sentence to take effect and to be a part of this Agreement (which Customer may, but need not, unilaterally cause to occur by notice to BUSINESS PARTNER thereof, whereupon the following portion of this sentence shall automatically take effect prospectively from and after the date of such notice), the individuals whose protected health information is disclosed under this Section of this Agreement shall be intended third party beneficiaries of the provisions of this Section of this Agreement.

Without limiting the rights and remedies of Customer elsewhere set forth in this Agreement or available under applicable law, Customer may terminate this Agreement without penalty or recourse to Customer if Customer determines that BUSINESS PARTNER has violated a material term of the provisions of this Section of this Agreement.

BUSINESS PARTNER agrees that this Agreement may be amended from time to time by Customer if and to the extent required by the provisions of 42 U.S.C. 1171 et seq. enacted by the Health Insurance Portability and Accountability Act of 1996 and regulations promulgated thereunder, in order to assure that this Agreement is consistent therewith."

along with a standard Medicare program disclosure paragraph for your consideration:

"Record Maintenance and Retention. To the extent applicable and if and so long as required by law and subject to applicable law regarding the privacy and confidentiality of individually identifiable health information, BUSINESS PARTNER will comply with the requirements of 42 U.S.C. 1395x(I) *et seq.* and 42 CFR §420.300 *et seq.* on behalf of

Customer and the Hospital Facility, and in this connection BUSINESS PARTNER shall keep detailed records (including, without limitation, accounts, vouchers, receipts, invoices, correspondence, memoranda, drawings, and similar data, whether in written form, records, transcriptions or tapes) of all services performed and costs incurred under this Agreement; shall retain such records throughout the term of this Agreement and for a four (4) year period following the conclusion of such term; and shall permit such records to be examined and copied by Customer, the Secretary of the U.S. Department of Health and Human Services, the Comptroller General, and/or any of the foregoing person's duly authorized representatives. BUSINESS PARTNER shall also permit examination and copying of such records by any of Customer or the Hospital Facility's lenders and by regulatory and health insurance authorities and reimbursement agents, if such third parties require such examination and/or copying as a condition for advancing funds to or reimbursing Hospital Facility or granting permits or approvals to Hospital Facility. All such examinations and copying shall be upon such reasonable terms as BUSINESS PARTNER may reasonably impose and shall be at no cost to BUSINESS PARTNER. The provisions set forth in this Section shall be included in all contracts for services entered into by BUSINESS PARTNER relating to goods and services provided to Hospital Facility, the cost or value of which is ten thousand dollars (\$10,000.00) or more over a twelve (12) month period, including, without limitation, contracts for both goods and services in which the service component is worth ten thousand dollars (\$10,000.00) or more over a twelve (12) month period. In all events, BUSINESS PARTNER shall immediately notify Customer upon BUSINESS PARTNER's receipt of any such request for examination or copies of such materials and any other books, documents and records, and shall provide Customer with copies of any such materials simultaneously with such examination or any transmittal of the same in accordance with any such request."

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