

2005 HIPAA Summit Annual Conference

*The Courts (Begin to) Speak....
the HIPAA Privacy Rule and Litigation*

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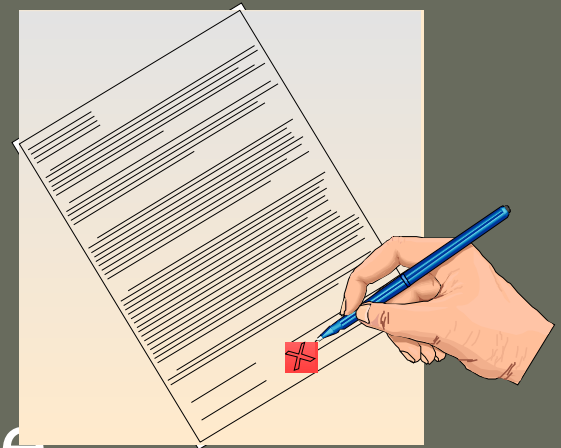
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History of HIPAA

- President Clinton signed into law on August 21, 1996
- DHHS issued Privacy Regulations November 3, 1999
- Privacy Regulations became effective April 14, 2003

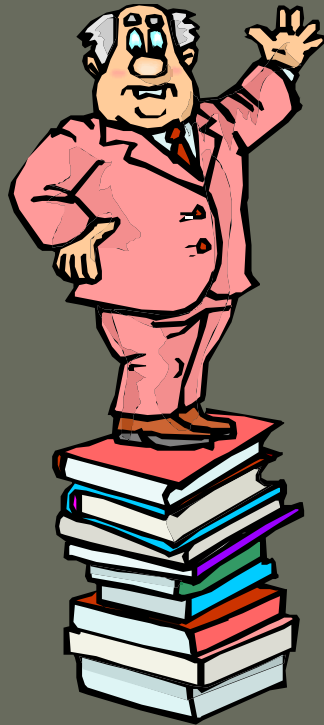


What Are The Privacy Regulations?

- A “covered entity” may not disclose protected health information unless:
 - Compliant Authorization
 - Compliant Subpoena
 - Compliant Court Order
 - Authorized by the Privacy Regulations
- Also governs security of records and “PHI”



Constitutionality Challenge



- *South Carolina Medical Association v. Thompson*

HIPAA was not an unconstitutional delegation of congressional authority. HIPAA criminal statutes are not unconstitutionally vague.



Constitutionality Challenge

- *Citizens for Health v. Thompson*
 - HIPAA and the HIPAA Regulations do not violate the First, Fourth, Fifth and Ninth Amendments of the United States Constitution



Constitutionality Challenge

- *Association of American Physicians & Surgeons, Inc. v. United States Department of Health and Human Services*
 - HIPAA Regulations do not violate the First and Tenth Amendments to the United States Constitution



Constitutionality Challenge

- *Association of American Physicians & Surgeons, Inc.*
 - In that case, the District Court for the Southern district of Texas left open the possibility that Section 160.310(c) of the HIPAA Regulations might violate the Fourth Amendment to the United States Constitution
 - The District Court reasoned that the matter was not yet ripe because the Secretary had not yet exercised his authority under Section 160.310(c) of the HIPAA Regulations with respect to any of the plaintiffs in the case



State v. Federal Law



- HIPAA preempts state privacy laws, unless state law “more stringent”
- The stricter provision survives
- Six (6) part test §160.202



What Law Applies In Federal Court?

- If the case involves a “federal question,” then federal law and the HIPAA regulations always apply
- If the case does not involve a federal question, the “substantive” state law applies but federal “procedural” law applies as well



The Abortion Cases

- *National Abortion Federation v. Ashcroft*
 - (“*NAF I*”)
 - The court found that NY CPLR 4504 “remains the law in areas in which New York State has the authority to regulate, but it has not become the law in areas within the federal domain”
 - HIPAA and the HIPAA Regulations, not FRE Rule 501, control evidentiary privileges related to medical records in federal proceedings



The Abortion Cases

- *National Abortion Federation v. Ashcroft*
 - (“*NAF II*”)
 - *NAF I* does not apply in Illinois because Illinois law is “more stringent” than HIPAA
 - Disclosures must conform to Illinois law not HIPAA



The Abortion Cases

- *Northwest Memorial Hospital v. Ashcroft*
 - Overturns NAF II. Illinois medical privacy laws do not govern in federal question case.
 - HIPAA itself does not create an evidentiary privilege
 - Privileges should be analyzed under FRE not HIPAA preemption analysis
 - HIPAA is procedural



The Abortion Cases

- *United States v. The Louisiana Clinic*
 - Medicare and Medicaid Fraud
- *Helping Hand LLC v. Baltimore County*
- *Hutton v. City of Marinez*
- *Crenshaw v. Mony Life Ins. Co*



Disclosures in Judicial Proceedings

- *Creely v. Genesis Health Ventures, Inc.*
Covered entity as party to litigation may not refuse court order based upon HIPAA
- *Dept. of CFS v. Florida State Adv. Council*
Disclosure permissible per § 164.512(e) if no independent privilege exists
- *Ordon v. Karpie* Court compelled a party to litigation to sign an authorization



Oral Communications With Treating Physicians

- *Law v. Zuckerman*
- *Keshecki v. St. Vincent's Medical Center*
- *Brown ex. Rel. Estate of Browne v. Horbar*
- *Steele v. Clifton Springs Hospital & Clinic*
- *Smith v. American Home Products Corp.,
Wyeth-Ayerst Pharmaceutical*
- *Stempler v. Speidell*



Disclosure to State Boards

- *Solomon v. State Board of Physician Quality Assurance*
 - HIPAA permits disclosures of medical records to a licensure or disciplinary agency, such as the Board
 - See Section 164.512(d) of the Privacy Regulations



No Private Cause Of Action



- HIPAA does not give rise to a private cause of action
- *Logan v. Department of Veterans Affairs*



Criminal Prosecution

- *Gibson Case*
 - Healthcare worker disclosed patient information to get four credit cards in patient's name and incurred \$9,000 debt
 - Plea agreement: 10-16 months jail/home confinement, restitution to credit card company and patient for identity theft
 - Eligible for \$250,000 fine and 10 years prison



What Have We Learned?



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Case List

- *Abbott v. Good Shepherd Medical Ctr.*, 04-1273, 2005 WL 318575 (D.C. OR January 18, 2005)
- *Association of American Physicians & Surgeons, Inc. v. United States Department of Health and Human Services*, 224 F. Supp. 2d 1115 (S.D. TX 2002)
- *Beard v. City of Chicago*, No. 03-C03527, 2005 WL 66074 (N.D. Ill. January 10, 2005)
- *Bigelow v. Sherlock*, 04-2785, 2005 WL 283359 (E.D. La. February 4, 2005)
- *Browne ex. rel. Estate of Browne v. Horbar*, ___ N.Y.S.2d ___, 2004 WL 2827657 (Sup. Ct. 2004)
- *Citizens for Health v. Thompson*, 03-2267, 2004 WL 765356 (E.D. Pa., April 2, 2004)
- *Creely v. Genesis Health Ventures, Inc.*, No. 04-CV-0679, 2004 WL 2943661 (E.D. Pa. December 17, 2004)
- *Crenshaw v. Mony Life Ins. Co.*, 318 F. Supp. 2d 1015 (S.D. Ca. 2004)
- *Department of Children and Family Services v. Florida State Advocacy Council*, 884 So. 2d. 1162 (Fla. 2d. 2004)



Case List

- *Harmon v. State of Texas*, No. 01-02-00035-CR, 2003 WL 21665488 (Tex. App.- Houston [1st Dist.] 2003)
- *Hawes v. Golden*, No. 03CA008398, 2004 WL 2244448 (Ohio App. 9 Dist. September 22, 2004)
- *Helping Hand LLC v. Baltimore County*, 295 F. Supp 2d 595 (D.C. Md. 2003)
- *Hutton v. City of Martinez*, 219 F.R.D. 164 (N.D. Ca. 2003)
- *Johnson v. Parker-Hughes Clinics*, No. 04-4130, 2005 WL 102968 (D. Minn. January 13, 2005)
- *Keshecki v. St. Vincent's Medical Center*, 785 N.Y.S. 2d 300 (N.Y. Sup. Ct. 2004)
- *Law v. Zuckerman*, 307 F. Supp. 2d 705 (D.C. Md. 2004)
- *Lemieux v. Tandem Healthcare of Florida, Inc.*, 862 So. 2d. 745 (Fla. 2d. 2004)
- *Lewis v. Clement*, 766 N.Y.S.2d 296 (N.Y. Sup. Ct. 2003)
- *Logan v. Department of Veterans Affairs*, No. 02-701, 2004 WL 3168183 (D.D.C. July 28, 2004)
- *National Abortion Federation v. Ashcroft*, No. 03 Civ. 8695(RCC), 2004 WL 555701 (S.D.N.Y., March 19,2004) ("NAF I")



Case List

- *National Abortion Federation v. Ashcroft*, No. 04 C 55, 2004 WL 292079 (N.D.Ill. Feb. 4, 2004) (“NAF II”)
- *Northwestern Memorial Hospital v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004)
- *Ordon v. Karpie*, 223 F.R.D. 33 (D.C. Conn. 2004)
- *People v. Bercume*, No. 2001-3338, 2004 WL 2566428, 2004 N.Y. Slip. Op. 24437 (N.Y. Sup. Ct. Nov. 9, 2004)
- *Smith v. American Home Products Corp., Wyeth-Ayerst Pharmaceutical*, 855 A.2d 608 (N.J. Super. Ct. Law Div. 2003)
- *Smith v. Unemployment Appeals Comm’n*, No. 2D04-286, 2005 WL 229870 (Fla. App. Dist. February 2, 2005)
- *Solomon v. State Board of Physician Quality Assurance*, 155 Md. App. 687, 845 A.2d 47, (Md. Ct. Spec. App. 2002)
- *South Carolina Medical Association v. Thompson*, 327 F.3d. 346 (4th Cir. 2003)
- *Steele v. Clifton Springs Hospital & Clinic*, 788 N.Y.S.2d 587 (N.Y. Sup. Ct. 2005)



Case List

- *Teger v. Healy*, 4 Misc.3d 1025(A), --- N.Y.S.2d ----, 2004 WL 2112647, 2004 N.Y. Slip Op. 51049(U) (N.Y.Sup. Mar 23, 2004)
- *United States v. Diabetes Treatment Centers of America*, No. Civ. 99-3298, 01-MS-50(MDL(RCL), 2004 WL 2009416 (D.D.C. May 17, 2004)
- *United States v. The Louisiana Clinic*, No. Civ. A. 99-1767, 2002 WL 31819130 (E.D. La. December 12, 2002)
- *University of Colorado Hospital Authority v. Denver Publishing Co.*, 340 F. Supp.2d 1142 (D.C. Co. 2004)
- *Westbury Medical Care, P.C. v. Lumbermens Mutual Insurance Company*, 786 N.Y.S.2d 685, (District Court Nassau County 2004)
- *Zaborac v. Mutual Hospital Service, Inc.*, No. 1:03CV-LJM-WTL, 2004 WL 2538643 (S.D. Ind. October 7, 2004)

