

# HIPAA Privacy Rule Implementation Status Report

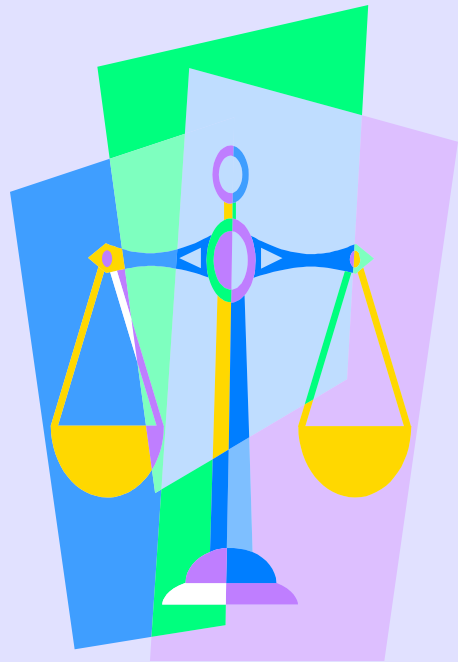
Richard M. Campanelli, J.D.

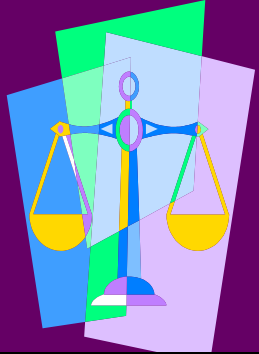
Director, Office for Civil Rights

Before the

The Tenth National HIPAA Summit

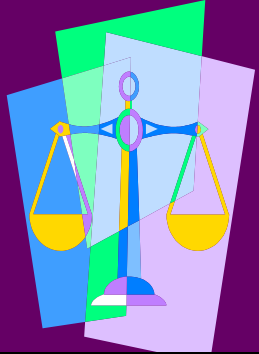
April 8, 2005





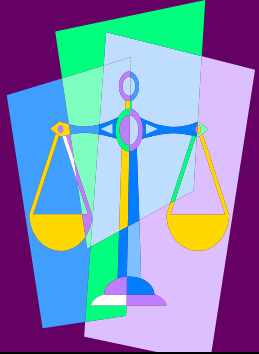
# Status of Complaints (Through March 31, 2005)

- ◆ 11,920 logged in nationally, 65% already closed
- ◆ Most common closure reasons:
  - Non-jurisdictional (Not Covered Entity or Violation alleged predated 4/14/2003)
  - Allegation not prohibited by the Privacy Rule
  - Matter was resolved through voluntary compliance and technical assistance



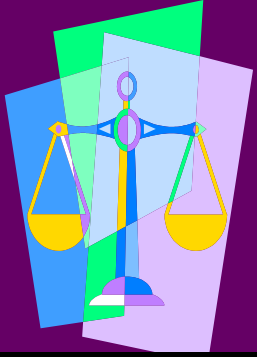
# Entities Most Complained Against (as of 3/31/2005)

- ◆ Private Practices
- ◆ General Hospitals
- ◆ Pharmacies
- ◆ Outpatient Facilities
- ◆ Group Health Plans



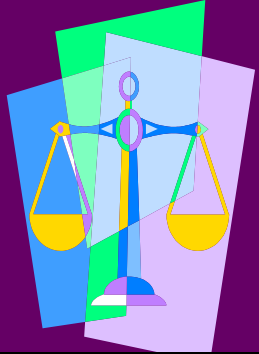
# Common Allegations (through March 31, 2005)

- ◆ Impermissible Uses/Disclosures
- ◆ Inadequate safeguards
- ◆ Access to records denied or charged excessive fees
- ◆ Failure to adhere to minimum necessary procedures
- ◆ Failure to obtain a valid authorization where one is required



# Disclosing PHI in Litigation

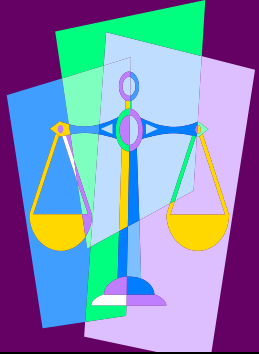
- ◆ Permitted uses/disclosures of PHI for litigation include, for example:
  - Required by law (e.g., court-ordered)
  - Payment (e.g., collection action)
  - With individual's authorization
  - **§164.512(e)—*judicial and administrative proceedings***
  - ***For covered entity's (CE) health care operations***



# Disclosing PHI in Litigation

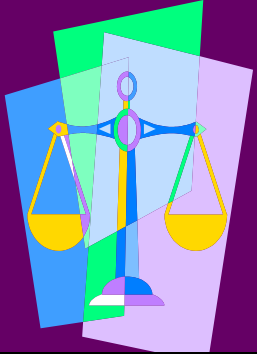
Whether litigation uses and disclosures fall under §164.512(e) or health care operations (hco) ***depends on whether the covered entity is a party to the proceeding***

- CE non-party: §164.512(e)
- CE party: health care operations



# Disclosing PHI in Litigation: CE as Non-Party

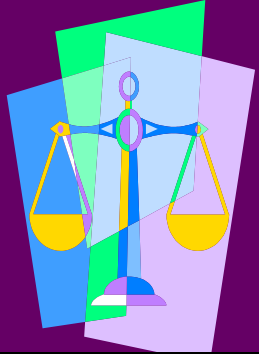
- ◆ When CE is a non-party, it may disclose PHI for judicial or administrative proceedings if in response to:
  - Order of a court or administrative tribunal
  - Subpoena, discovery request, or other lawful process, on satisfactory assurance of notice or qualified protective order



# Satisfactory Assurances: Non-Party CE Disclosures

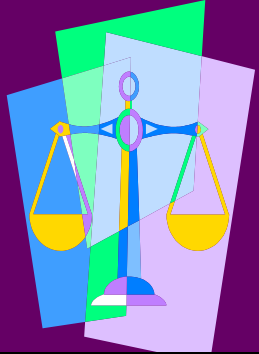
- ◆ Documentation that notice was provided to the individual's lawyer is sufficient
- ◆ Copy of subpoena/other request may be sufficient if on its face it shows
  - Adequate notice was provided
    - Sufficient detail to allow objections
  - Time for objections lapsed without objection, or all objections resolved





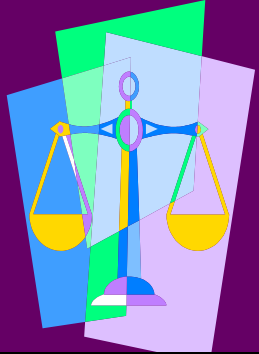
# Disclosing PHI in Litigation: CE as a Party

When CE is a party to the proceeding, it may use or disclose PHI for litigation as part of its health care operations



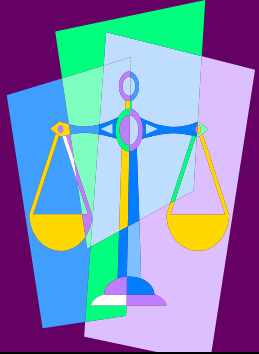
# Disclosing PHI in Litigation

- ◆ Minimum necessary applies
  - CE may reasonably rely on lawyer's minimum necessary representation when sharing information with lawyer who is workforce or business associate
  - Lawyer, as workforce or business associate, must apply minimum necessary to its disclosures



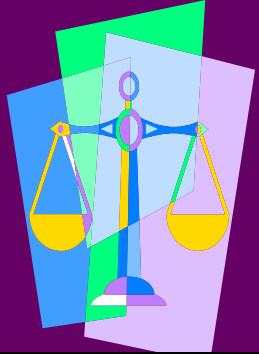
# Lawyers and Minimum Necessary

- ◆ When lawyer discloses minimum necessary PHI, depending on context, it may mean something more than mere relevance, e.g.,
  - De-identification
  - Stripping direct identifiers
  - Removing certain health or treatment information not pertinent to issue raised in litigation



# Lawyer/BAs and their Agents

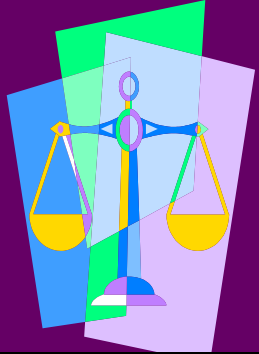
- ◆ BA contract requires BA/lawyers to ensure that their agents or subcontractors protect privacy, just as the lawyer must.
  - Includes 3rd parties that further lawyer's legal services to CE, e.g., other legal counsel, jury consultants, file managers, investigators, litigation support personnel
  - Does not include opposing counsel, fact witness, others not assisting lawyer in providing legal services to client



# Using and Disclosing PHI to an Interpreter

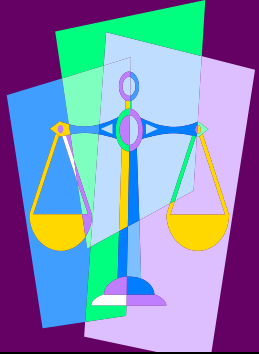
- ◆ When interpreter is
  - Workforce member of CE
  - or
  - BA of CE

No authorization of the individual is required



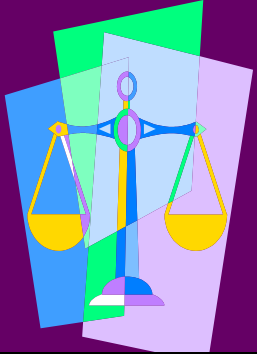
# Interpreter Identified by Individual

- ◆ When interpreter is identified by individual as involved in care, CE may
  - Ascertain that individual agrees or does not object to disclosure to interpreter
  - or
  - Exercising professional judgment, reasonably infer from the circumstances that individual does not object to disclosure to interpreter



# Application in Provider Setting

- ◆ No employee, volunteer or contractor is available to competently interpret for an individual
  - Provider identifies and contacts a telephone interpreter service
  - Interpreter explains to patient that interpreter is available to assist
- ◆ From context, provider may judge whether individual wants this assistance (§164.510(b))
- ◆ Provider may then reasonably infer that individual does not object to disclosure of PHI to interpreter



# Title VI of Civil Rights Act of 1964

- ◆ Covered entities may also have obligations under Title VI of the Civil Rights Act of 1964 to take reasonable steps to provide meaningful access to LEP persons
- ◆ Consult OCR's guidance on Title VI obligations to LEP persons for important discussion of other considerations in providing language services