



# 11<sup>th</sup> National HIPAA Summit

## HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996

Washington D.C.  
September 9, 2005



# HIPAA, Business Relationships and the Law



# CHALLENGES OF HIPAA COMPLIANCE ON BUSINESS DECISIONS

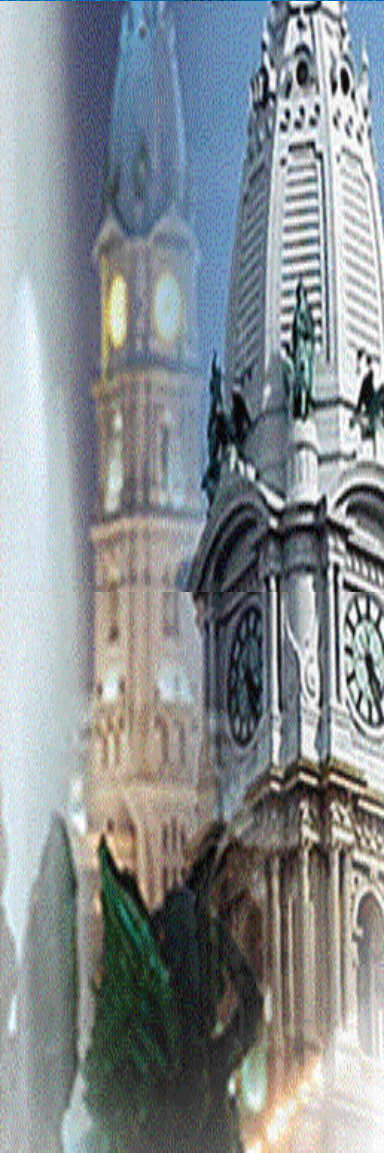


- Sonya L .C. Springer, Deputy City Solicitor



# OVERVIEW

- Liability-Employer Perspective
  - Clarification of Sanctions
  - Corporate Criminal Liability
- Liability-Business Associates
  - Practical Implications on Business Relationships

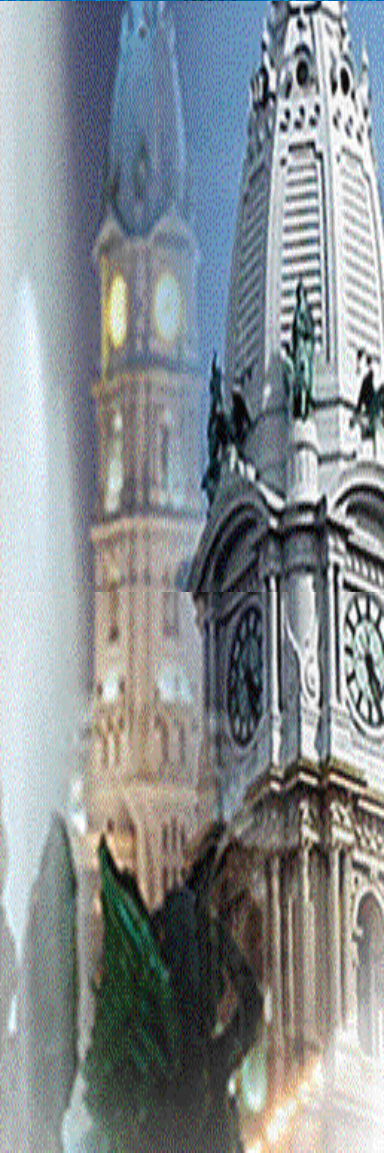


# CLARIFICATION OF SANCTIONS



# Update

- United States vs. Gibbons
  - August 2004
  - Criminal case where covered entity employee misuses patient information
- Attorney General's Office Memorandum  
Scope of Criminal Enforcement Under 42 U.S.C. 1320d-6
  - June 1, 2005



# Three Important Lessons from Attorney General's Memo on Criminal Enforcement

1. “If the covered entity is not an individual, general principals of corporate criminal liability will determine the entity’s liability and that of individuals within the entity, including director, officers, and employees.”
2. “...at least in limited circumstances, the criminal liability of the entity has been attributed to individuals in managerial roles, including, at times to individuals with no direct involvement in the offense.”
3. Knowledge of the facts that constitute the offense is enough!

§ 2136 Liability based on acts of officers, employees, or agents

As in the case of torts, <sup>49</sup> the general rule prevails that a corporation may be criminally liable for the acts of an officer, employee, or agent committed when exercising authorized powers on its behalf, and without proof that his act was expressly authorized or approved by the corporation.<sup>50</sup> The same rule applies to the activities of corporate employees that may result in the imposition of civil penalties,<sup>51</sup> civil forfeitures,<sup>52</sup> or administrative sanctions<sup>53</sup> on the corporation. The corporation may be held responsible, even though its employees or agents acted contrary to express instructions when they violated the law, so long as they were acting for the benefit of the corporation and within the scope of their actual or apparent authority.<sup>54</sup> However, corporations are liable, civilly or criminally, only for the acts of their agents who are authorized to act for them in the particular matter that gave rise to the criminal charge.<sup>55</sup> While acts committed by corporate employees outside the scope of their employment for their sole benefit are not imputed to the corporation,<sup>56</sup> there is no requirement that the agent be working for the exclusive benefit of the corporation for **corporate criminal liability** to exist.<sup>57</sup> **A corporation is accountable for its employee's conduct if it is motivated, at least in part, by a desire to serve the corporation, but this need not be the sole motivation.<sup>58</sup> And even if the employees were acting in their own interests when they committed a crime, the corporation may still be criminally liable for the failure of its supervisors to detect and stop the wrongdoing, either in intentional disregard of the law or in plain indifference to its requirements.<sup>59</sup>**



# Case Studies

- United States vs. Demauro 581 F.2d 50, 1978
  - “Under a respondeat superior theory of corporate criminal liability, the master's liability would depend on whether the servant's acts were within the scope of the employment. To be within the scope of the employment, the servant's conduct must be the kind which he is authorized to perform, must occur substantially within the authorized limits of time and space, and must be actuated at least in part, by a desire to serve the master.”
  - “assuming the inapplicability of the doctrine of Respondeat superior to conduct of bribed corporate employees claimed by Chemical to have been acting on their own, the bank might nevertheless be criminally liable for the conduct of its supervisory employees who had either intentionally disregarded the law or had acted with plain indifference to its requirements.”

# Case Studies

- Standard Oil Company of Texas v. United States of America 307 F.2d 120, 1962
  - The employees actions of moving and reassigning oil in violation of the law did not benefit the corporation, the doctrine of respondeat superior did not apply. Since there was no evidence of corporate knowledge or benefit from the criminal activity of the employees, the corporations convictions were reversed.



# PRACTICAL IMPLICATIONS ON BUSINESS RELATIONSHIPS



# Before HIPAA

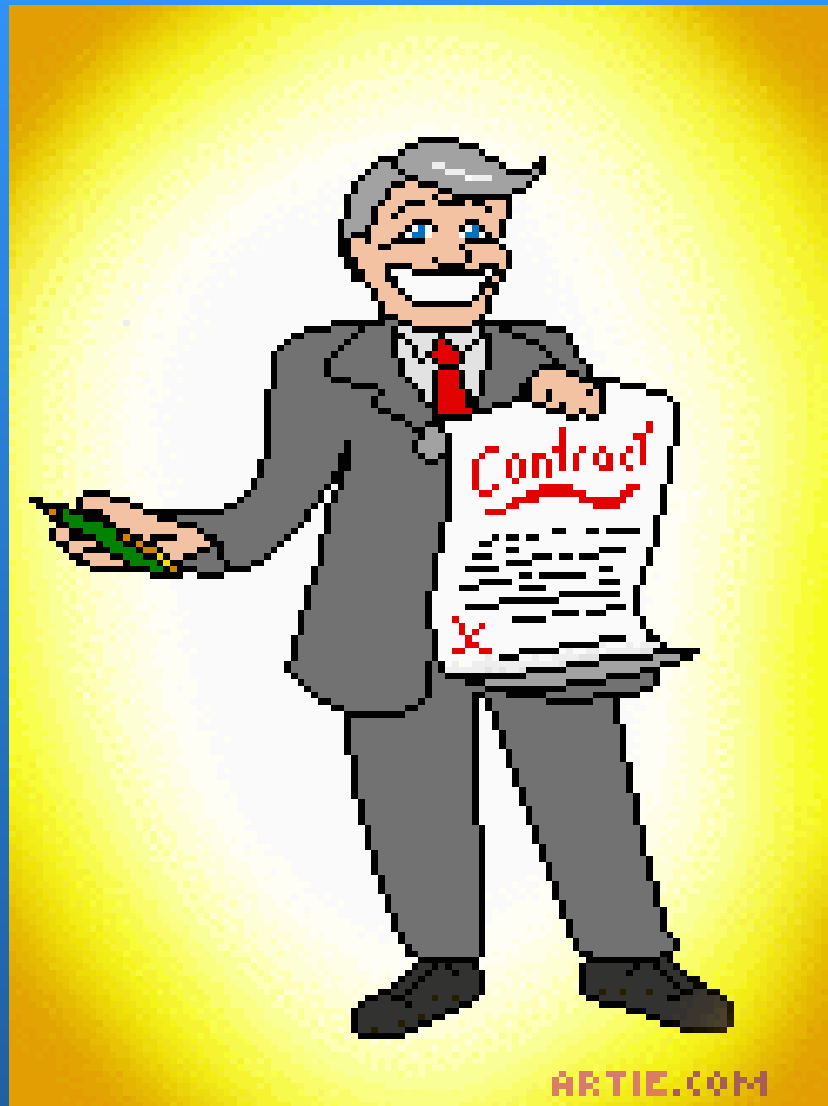
## How were contractors chosen?

- Request for Proposals
- Lowest Responsive bidder
- Reputation in the industry
- Recommendations



# Worst Case Scenario

- Lawsuit
  - Indemnification provisions
  - Insurance
- Loss of reputation





# That was then (Before HIPAA) Now your entity may face. . .

- JAIL
- FEDERAL INVESTIGATION
- CIVIL MONETARY PENALTIES
- LOSS OF PATIENT CONFIDENCE
- LAWSUITS

# KNOW YOUR BUSINESS ASSOCIATE



But, how closely should you look over their shoulders?





# Risk Analysis

- What does this B.A. do for me?
- How much PHI do they receive?
- How do they transmit information?
- Have I been uncomfortable with their past practices/employees/level of professionalism?
- How satisfied am I with the B.A.'s satisfactory assurances?
- Operational versus legal tug of war



# Practical Implications on Business Relationships

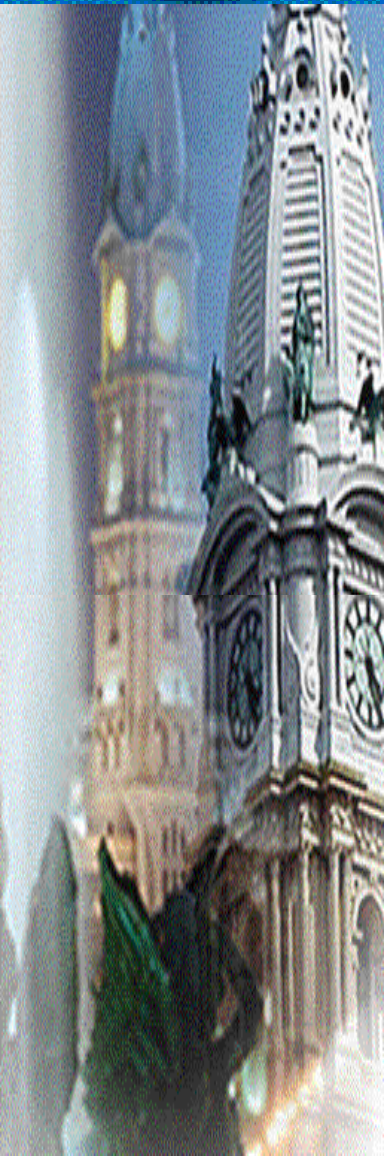
- Need clearly defined roles and lines of supervision between covered entity staff and business associates staff.
  - TRAINING
  - CONFIDENTIALITY AGREEMENTS
- Reevaluate the amount of information you are disclosing to and receiving from the B.A.



# Practical Implications on Business Relationships

- Reevaluate the kind and amount of business information you request from your B.A.
  - Once you find out that they are not operating within the parameters of HIPAA you **MUST** do something about it.



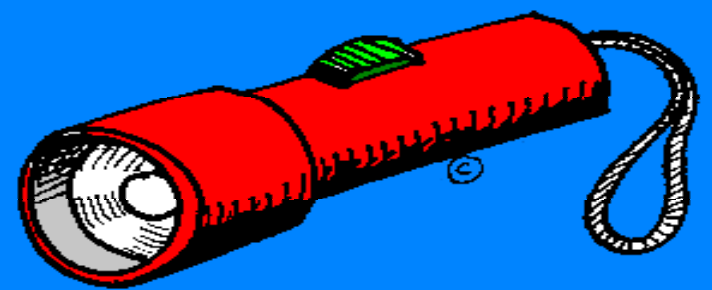


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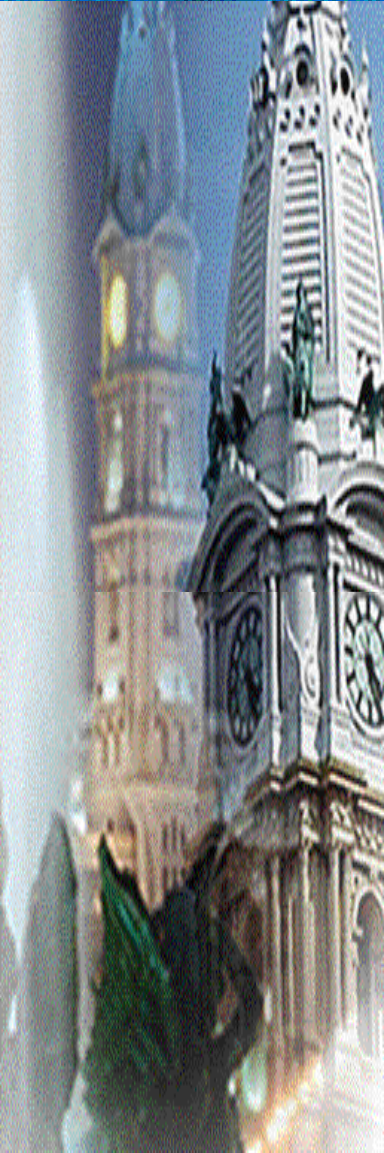
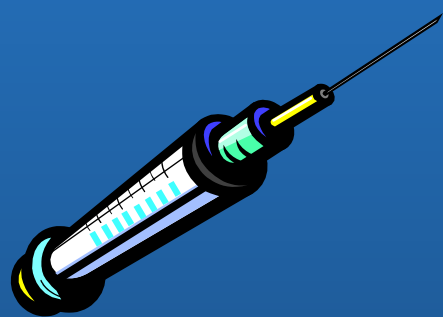
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**THERE ARE DIFFERENCES BETWEEN  
HIPAA PRIVACY AND SECURITY  
WHEN IT COME TO BUSINESS  
ASSOCIATES.**





# PRIVACY REGULATIONS

## FAQ ID#236

Is a covered entity liable for, or required to monitor, the actions of its business associates?

- No. The HIPAA Privacy Rule requires covered entities to enter into written contracts or other arrangements with business associates which protect the privacy of protected health information; but covered entities are not required to monitor or oversee the means by which their covered entities carry out privacy safeguards or the extent to which the BA abides by the privacy requirements of the contract. Nor is the covered entity responsible or liable for the actions of its business associates.



# SECURITY REGULATIONS

## FAQ ID# 4735

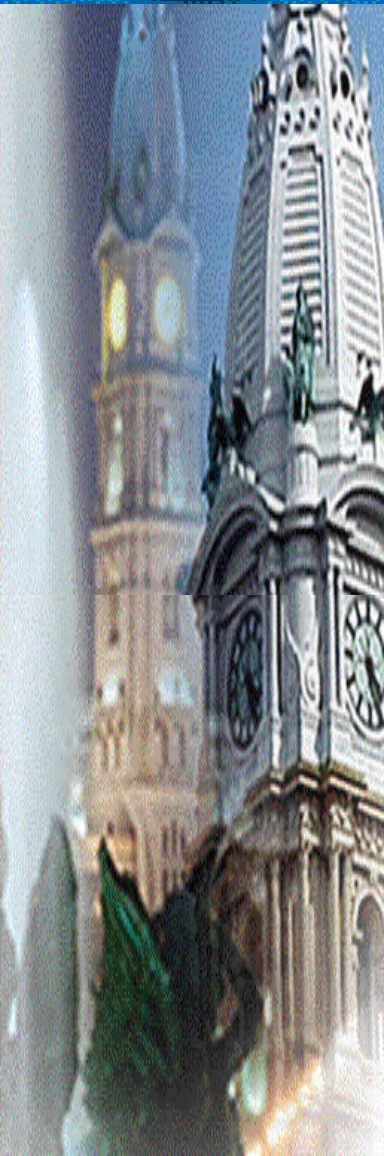
Must business associates report security incidents to the covered entity? If so, which must be reported and what level of detail is required when a business associate reports security incidents?

- Although a BA may not be a HIPAA covered entity subject to the HIPAA Security Rule, it would nevertheless be contractually obligated, through its business associate contract, to report such security incidents to the covered entity. . .
- The contracts between a covered entity and its business associate could serve as the vehicle to establish the covered entity's specific reporting requirements and should be developed to meet the entity's specific needs. The covered entity and BA must document the specifics of the reporting requirements, including the frequency, level of detail, format and other relevant considerations (eg., in aggregate or per incident, weekly or monthly).



# Questions?

- Always check both the security and privacy's FAQ's for updates.







# USEFUL WEBSITES

- [www.hipaagives.com](http://www.hipaagives.com)
- [www.hhs.gov](http://www.hhs.gov)
- [www.wedi.org](http://www.wedi.org)
- [www.hippaadvisory.com/action/HIPAAALINKS/government\\_links.htm](http://www.hippaadvisory.com/action/HIPAAALINKS/government_links.htm)
- [www.cms.hhs.gov](http://www.cms.hhs.gov)



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