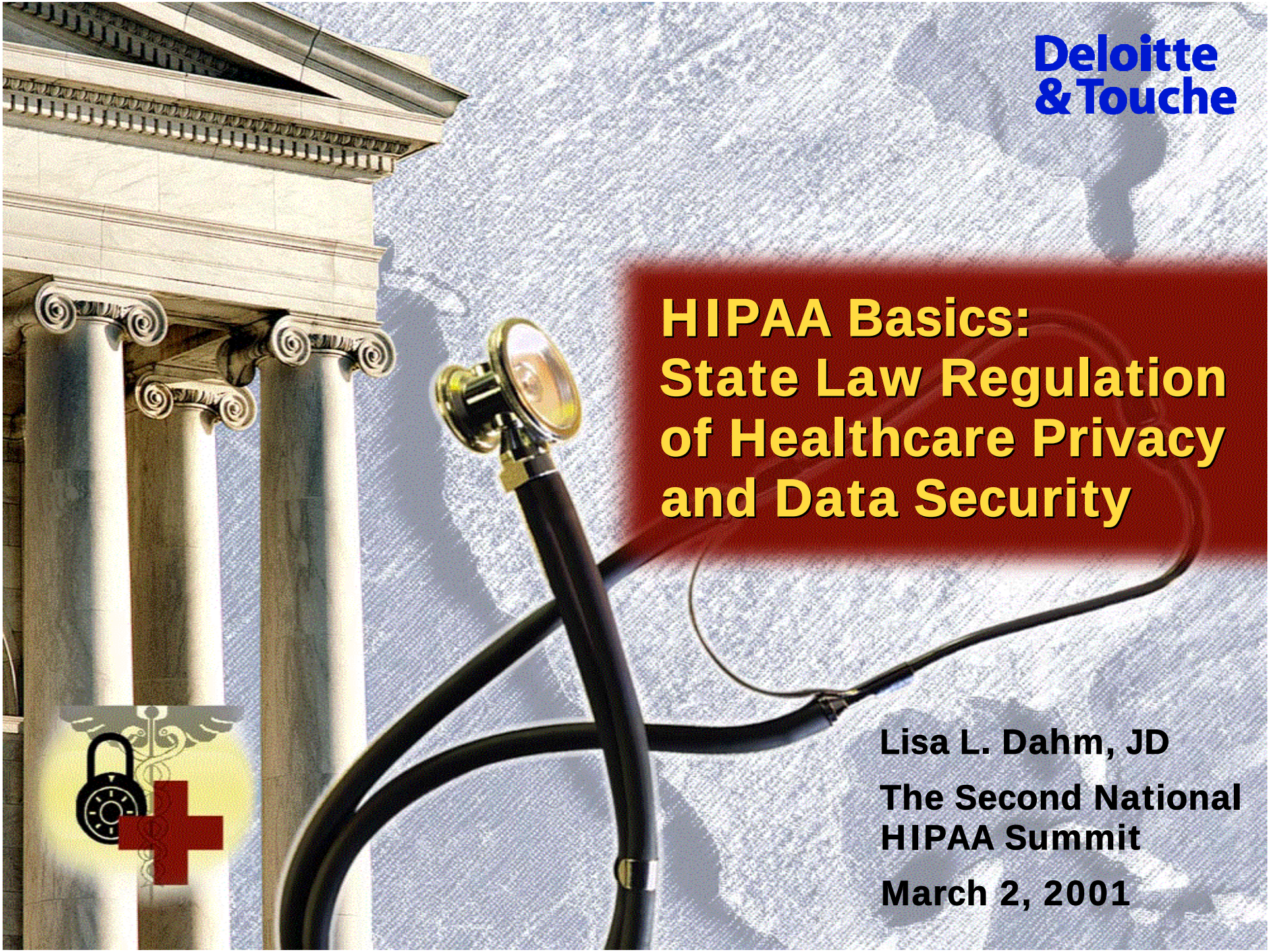
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HIPAA Basics:
State Law Regulation
of Healthcare Privacy
and Data Security
Lisa L. Dahm, JD
The Second National
HIPAA Summit
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Effect on State Law – HIPAA, Sec. 1178

- General Rule: HIPAA will supersede any contrary provision of State law
  - Includes provisions of State law that require medical, billing, or health plan records to be maintained or transmitted in written rather than electronic form

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Effect on State Law – HIPAA, Sec. 1178 Exceptions

(1) HIPAA will not supersede a contrary provision of State law if the Secretary of HHS determines the provision of State law is necessary:

- to prevent fraud and abuse;
- to ensure appropriate State regulation of insurance and health plans;
- for State reporting on health care delivery or costs;
- for other purposes.

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Effect on State Law – HIPAA, Sec. 1178 Exceptions (cont'd.)

(2) HIPAA will not supersede a contrary provision of State law if the provision of State law addresses controlled substances.

(3) HIPAA will not supersede a contrary provision of State law if the provision of State law is subject to Section 264 (relates to the privacy of individually identifiable health information).

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The Final Privacy Regulations – Preemption of State Law (Subpart B)

- Contrary
  - A covered entity would find it impossible to comply with both the State and federal requirements or
  - The provision of State law is an obstacle to compliance and enforcement of HIPAA

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The Final Privacy Regulations – Preemption of State Law (Subpart B)

- More stringent – in comparing the provision of State law with a standard, requirement, or implementation of the Privacy Regulations, the State law:
  - Restricts a use or disclosure that would be allowed under the Privacy Regulations
  - Provides the individual with greater access to or amendment of his/her health information
  - Provides more information to the individual

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The Final Privacy Regulations – Preemption of State Law (Subpart B)

- More stringent – in comparing the provision of State law with a standard, requirement, or implementation of the Privacy Regulations, the State law:
  - Narrows the scope or duration of the consent or authorization
  - Requires a longer retention of health information or provides more detailed information to the individual relating to an accounting of disclosures
  - Provides greater privacy protection for the individual

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Final Privacy Regulations – General Rule (§160.203)

- Tracks the language of Section 1178
- State law will be preempted if a standard, requirement, or implementation specification of the Privacy Regulations is contrary to a provision of State law

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Final Privacy Regulations – General Rule (§160.203) (cont'd.)

- Additional clarifications:
  - Defines "other purposes" as those which serve a compelling need related to public health, safety, or welfare
  - Requires the Secretary to determine that the intrusion into privacy is warranted when balanced against the need to be served
  - Additional exceptions for State reporting

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Exception Determinations (§160.204)

- Defines the process for requesting an exception determination to except a provision of State law from preemption
  - Request must be in writing
  - Request must be submitted to the Secretary, and the Regulations control until a determination is made

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Exception Determinations (§160.204) (cont'd.)

- The request for an exception determination must include:
  - The State law for which the exception is requested;
  - The particular standard, requirement, or implementation specification for which the exception is requested;
  - The part of the standard or other provision that will not be implemented or the additional data that will not be collected based on the exception;

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Exception Determinations (§160.204) (cont'd.)

- The request for an exception determination must also include:
  - How health care providers, health plans, and other entities would be affected by the exception;
  - The reasons why the State law should not be preempted; and
  - Any other information the Secretary may request

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Duration of Effectiveness of Exception Determinations (§160.205)

- An exception determination granted remains in effect until:
  - Either the State law or the federal standard, requirement, or implementation specification that formed the basis for the exception is materially changed such that the ground for the exception no longer exists, or
  - The Secretary revokes the exception based on a determination that the ground supporting the need for the exception no longer exists

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Example 1: Contrary Provision

- A covered entity may disclose protected health information without the consent of the individual who is the subject of the information if the disclosure is to a health care practitioner or health care facility that is rendering care to the individual. (Texas Proposed HB 1221 – Section 181.056(1))
- HIPAA Privacy Regulations require health care providers to obtain the individual's consent . . . prior to using or disclosing protected health information to carry out treatment, payment, or health care operations. (§164.506(a)(1))

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Example 1: Contrary Provision (cont'd.)

- Provision of Texas law is contrary to the HIPAA Privacy Regulations
  - A health care provider would find it impossible to comply with both the Texas law and the Privacy Regulations
- The provision meets none of the "more stringent" criteria such that it would provide greater privacy protection to the individual

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Example 1: Contrary Provision (cont'd.)

- Requesting an "exception determination"
  - Must identify all purposes of the State law that would support its surviving preemption
  - Must define the projected effect of a granted exception on the covered entity submitting the request for the exception
  - Must define the projected effect of a granted exception on other covered entities who would be affected by the exception
  - Must define the reasons why the State law should not be preempted by the HIPAA Privacy Regulations
  - Must put request in writing and submit it to DHHS

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Example 2: State Law More Restrictive

- A health care payer may not send mail addressed to an individual regarding any health topic, including generic material regarding sensitive health information. (Texas Proposed HB 1221 – §181.102(b))
- HIPAA Privacy Regulations allow a covered entity to send a marketing communication targeted to individuals based on their health status or condition provided the covered entity and the communication meet specific requirements. (§164.514(e)(3)(ii))

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Example 2: State Law More Restrictive (cont'd.)

- Provision of Texas law is contrary to the HIPAA Privacy Regulations
  - A health care provider would find it impossible to comply with both the Texas law and the Privacy Regulations
- The provision meets two of the "more stringent" criteria:
  - The provision prohibits a use or disclosure that would otherwise be permitted under the HIPAA Privacy Regulations
  - The provision provides greater privacy protection for the subject individual

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Example 2: State Law More Restrictive (cont'd.)

- Requesting an "exception determination"
  - Must identify all purposes of the State law that would support its surviving preemption
  - Must define the projected effect of a granted exception on the covered entity submitting the request for the exception
  - Must define the projected effect of a granted exception on other covered entities who would be affected by the exception
  - Must define the reasons why the State law should not be preempted by the HIPAA Privacy Regulations
  - Must put request in writing and submit it to DHHS

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Example 3: State Law More Restrictive

- No provider of health care . . . may require a patient, as a condition of receiving health care services, to sign an authorization, release, consent, or waiver that would permit the disclosure of medical information that otherwise may not be disclosed under Section 56.10 or any other provision of law. (Cal. Civ. Code – §56.37(a))
- HIPAA Privacy Regulations allow a health care provider to condition treatment on the provision of a consent by the individual. (§164.506(b)(1))

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Example 3: State Law More Restrictive (cont'd.)

- Provision of California law is contrary to the HIPAA Privacy Regulations
  - A health care provider would find it impossible to comply with both the California law and the Privacy Regulations
- The provision meets three of the "more stringent" criteria:
  - The provision prohibits a use or disclosure that would otherwise be permitted under the HIPAA Privacy Regulations
  - The provision increases the privacy protections afforded by the consent requirement, but
  - The provision provides greater privacy protection for the subject individual

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Example 3: State Law More Restrictive (cont'd.)

- However, this provision conflicts with one of the "more stringent" criteria:
  - The provision increases (does not reduce) the coercive effect of the circumstances surrounding the consent

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Example 3: State Law More Restrictive (cont'd.)

- Requesting an "exception determination"
  - Must identify all purposes of the State law that would support its surviving preemption
  - Must define the projected effect of a granted exception on the covered entity submitting the request for the exception
  - Must define the projected effect of a granted exception on other covered entities who would be affected by the exception
  - Must define the reasons why the State law should not be preempted by the HIPAA Privacy Regulations
  - Must put request in writing and submit it to DHHS

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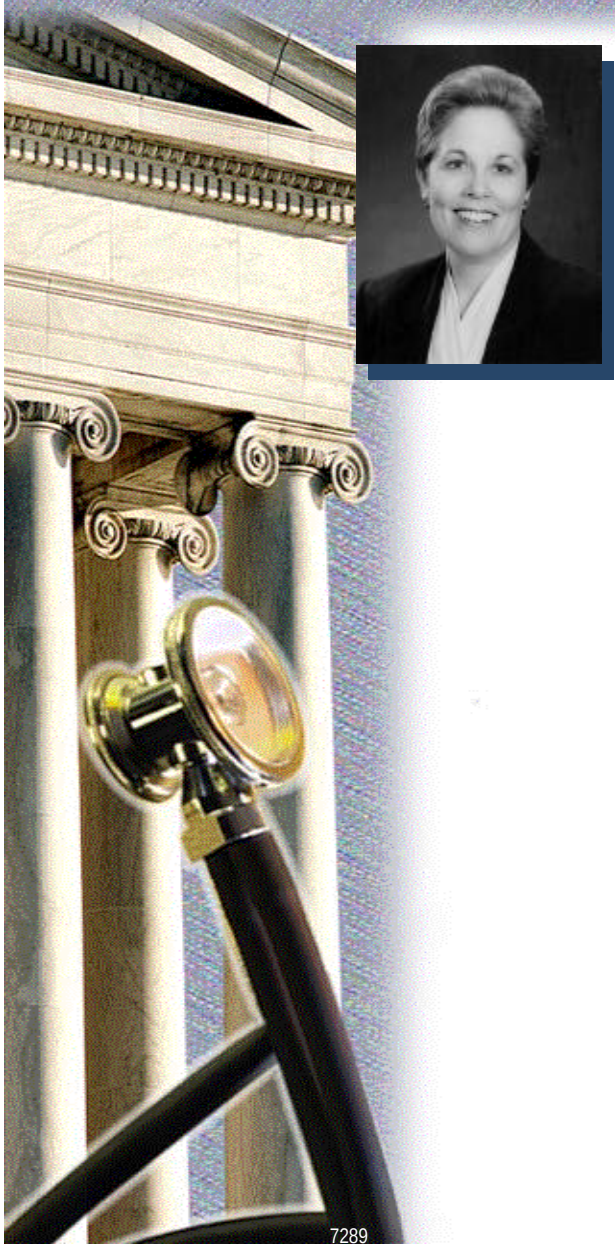
Questions

Biography: Lisa L. Dahm



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Relevant Experience

Ms. Dahm is a Senior Manager with Deloitte & Touche, LLP specializing in healthcare. Her experience in the healthcare industry spans more than 25 years. Prior to her graduation from law school in 1995, Ms. Dahm worked for healthcare information systems vendors, healthcare providers, and her own and another Big Five consulting firm. Before joining Deloitte & Touche, Ms. Dahm spent three years as in-house counsel for a major Integrated Delivery System located in Houston, Texas where she helped draft the System's Corporate Compliance Program, served on the Corporate Compliance Committee, responded to requests and subpoenas for business and health information, served on the System's Institutional Review Board, and advised the System on and drafted required policies, procedures, credentialing activities, and all types of contracts.

Ms. Dahm authored a monograph on patient confidentiality laws in the United States for the American Health Lawyers Association which was published in June 1999, and has written numerous articles and papers on HIPAA and other legal topics. She is a recognized expert on privacy and confidentiality, and a frequent speaker at healthcare, HIPAA, and legal regional and national conferences across the United States.

Ms. Dahm is a member of the National HIPAA Advisory Services Task Force and assisted in creating the firm's approach to providing HIPAA services to its healthcare clients. She has conducted numerous executive briefings for healthcare clients to assist them in raising awareness of HIPAA, and has managed and participated in HIPAA Privacy and other healthcare Risk Assessments. Ms. Dahm has extensive and comprehensive knowledge and understanding of healthcare laws and regulations with particular emphasis on fraud and abuse, physician transactions, Stark, and confidentiality statutes and regulations.

Ms. Dahm received her J.D. (*magna cum laude*) from South Texas College of Law in 1995, and was admitted to the Bar in Texas the same year.

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