

# HIPAA Preemption in Illinois

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# Preemption Principles

- Sect. 160.203 of the final Privacy Rule
- If contrary, preempted unless meets exception

# Preemption Analysis

- Several Steps
  - ◆ Is the law contrary?
  - ◆ Is the law more stringent?
  - ◆ Is it a reporting law?
  - ◆ Is it applicable to health plans for certain purposes? Does it require a health plan to report information for audit, evaluation, licensure or certification

# Is the law “contrary”?

- CE would find it impossible to comply with both state and federal requirements
- Provision of State law stands as an obstacle to the full purposes and objectives of part C of title XI or sect. 264 of Pub. L. 104-191

# “Contrary”? Example #1

- 410 ILCS 305/9 AIDS Confidentiality Act says need consent to release HIV test results except for certain enumerated purposes, including:
- 410 ILCS 305/9(b) Any person designated in a legally effective release of the test results executed by the subject of the test or the subject’s legally authorized representative.
- Ok to release to those named in a consent.

# Example #1 Answer

- Not “impossible” to comply with both.
- Law is not “contrary.”

# Is the law “more stringent”?

- There are 6 subparts to the definition of “more stringent”.
  - ◆ State law restricts when HIPAA would allow, unless required by Secretary for compliance or to the individual who is subject of IIHI.
  - ◆ Permits greater individual right to access or amend. Doesn't preempt minor and parent issues.
  - ◆ Provides greater information to the individual.

# Is the law “more stringent” (continued)?

- There are 6 subparts to the definition of “more stringent”
  - ◆ Increases privacy protections in authorization or consent.
  - ◆ More detailed information or longer duration with record-keeping requirements or accounting of disclosures.
  - ◆ Greater privacy protection to the individual.



# “More Stringent” Definition

- “More stringent” means, “in the context of a comparison of State law and a standard, requirement, or implementation specification . . . A State law meets on or more of the following criteria: (4) . . . With respect to the form or substance of an authorization or consent for use or disclosure of [IIHI] , provides requirements that narrow the scope or duration, increase the privacy protections afforded (such as by expanding the criteria for), or reduce the coercive effect of the circumstances surrounding the authorization or consent, as applicable. Sect. 160.202

# “More Stringent” Example #2

- 410 ILCS 305/9 AIDS Confidentiality Act says need consent to release HIV test results except for certain enumerated purposes, including:
  - ◆ 410 ILCS 305/9(f) Health facility staff committees for the purposes of conducting program monitoring, program evaluation or service reviews.

## Example #2 - Answer

- Sounds like “health care operations”.
- HIPAA requires consent for health care operations.
- Could say law is preempted.
- Law is not “more stringent”. Does not increase privacy protections afforded.
- Argue: Get HIPAA consent and comply with both so not contrary.

# “Public Health” Reporting

- 160.203(c) saves provisions of State law which provide “for the reporting of disease or injury, child abuse, birth, or death, **or for the conduct of public health surveillance, investigation, or intervention.**”

# “Public Health” Example #3

- 410 ILCS 305/9(a) states in part that “A physician may notify the **spouse** of the test subject, . . . .provided that the physician has first sought unsuccessfully to persuade the patient to notify the spouse . . . . This paragraph shall not create a duty or obligation under which a physician must notify the spouse of the test results, nor shall such duty or obligation be implied.

# Example #3

- Issue-Whether disclosure by a physician to a spouse can be considered a public health intervention?
- No controlling case law.

# Example #3 - Definition of “Public Health”

- A “public health authority” means “an agency or authority of . . . a State, a territory, a political subdivision of a State or territory . . . **or a person or entity action under a grant of authority from** or contract with such public agency, including the employees or agents of such public agency or its contractors or persons or entities to whom it has granted authority, that is responsible for public health matters as part of its official mandate.”  
164.501.

# Example #3 - Possible Answers

- Assume you want to save the law. What do you argue?
- The law:
  - ◆ Physician disclosure to spouse is optional, not required
  - ◆ Is physician a person under a grant of authority of public health
  - ◆ Is it part of the physician's official mandate



# Keep in Mind

- LHD can still do contact tracing
  - ◆ Maybe physician should just notify local health department
  - ◆ Could amend the law to make clear that physician is under grant of authority with official mandate
- Preemption issue is not clear

# Mental health records

- Illinois law says POA - property can get MH records.
- Policy is to decide whether to pay bills

# Example #4 - Answer

- POA-Property in Illinois is not authorized to make health care decisions
- 164.502(g)(2) says honor applicable law if “authority to act on behalf of an individual . . . In making decisions related to health care
- Law is preempted
- Should state ask for waiver

# Hospital Records - Example #5

- 210 ILCS 85/6.17 “No member of a hospital’s medical staff and no agency or employee of a hospital shall disclose the nature or details of services provided to patients, except that the information may be disclosed to . . .those parties responsible for peer review, utilization review, quality assurance, risk management or defense of claims brought against the hospital arising out of the care. . . .”

# Example #5 - Burger v. Lutheran General

- Decision by Illinois Supreme Court on 10/18/01 holding statute constitutional.
- Amendment to Hospital Licensing Statute addressing use and ownership of medical records.
- Allows hospital staff and counsel to talk for risk management and medical malpractice defense.
- Statute over-ruled Petrillo v. Syntex Laboratories.

# Example #5 - Answer

- “Health care operations” - peer review, quality assurance, legal services.
- Disclosure for TPO allowed after obtain consent.
- Illinois law says don't need consent.
- When would you treat at a hospital without a consent?
- Use the HIPAA-compliant consent because don't treat without it.