

Sixth National HIPAA Summit

- The Health Lawyer as Business Associate
- March 28, 2003
 - Session VI 3:00 pm
- Gerald E. DeLoss, Esquire
 - Barnwell Whaley Patterson & Helms, LLC
 - Charleston, South Carolina

Business Associates

- Business Associate Means a Person, Other Than a Workforce Member, Who:
 - Provides **Legal**, Actuarial, Accounting, Consulting, ..., Where the Provision of the Service Involves the Disclosure of Individually Identifiable Health Information
- Lawyers May Be Business Associates

Business Associate Agreement

- Covered Entity Must Enter Into BA Agreement With Lawyer if Using or Disclosing Protected Health Information (“PHI”)
- BA Agreement Must Contain Certain Specified Terms

Business Associate Agreement

- Specified Terms of BA Agreement Include that Business Associate Must:
 - Make its Internal Practices, Books, and Records Relating to the Use and Disclosure of Protected Health Information (“PHI”) Available to DHHS for Inspection to Determine Compliance

Attorney-Client Relationship

- Attorney-Client Privilege
 - Protections Granted to Communications Between Attorney and Client
- Work Product Doctrine
 - Protections Granted to the Work and Thoughts of Attorneys Representing Clients

Waiver/Loss of Protections

- BA Agreement Requirement That BA Attorney Must Make Internal Practices, Books, and Records Available
 - Could Result in Requiring Production of Privileged and/or Work Product Materials
 - Issue Whether Must Produce to DHHS and Whether Waives Protections as to Others

Produce to DHHS?

- Commenter on Final Rules Requested that Privileged/Work Product be Excluded
 - DHHS Refused to Amend Rule
 - DHHS Does Not Anticipate That Necessary to Access Privileged Information
 - “However, [DHHS] does not believe that it is appropriate to exempt attorneys from the business associate requirements.”

Produce to Others?

- No HIPAA Cases on Point Yet, But
 - U.S. v. MIT, 129 F.3d 681 (1st Cir. 1997)
 - MIT Required to Produce Privileged/Work Product Documents to Dept. of Defense Auditing Agency Under Defense Contract
 - IRS Then Sought Copy of Information Provided to DoD Auditing Agency for 501(c)(3) Status

Produce to Others?

- MIT Argued No IRS Access Because Information Provided Under Defense Contract Was not Voluntary Disclosure
- Court Disagreed:
 - “MIT chose to place itself in this position by becoming a government contractor.”
 - MIT Chose at Time of Defense Contract

Disclose to Others?

- MIT Held to Have Waived Attorney-Client Privilege by Entering Into Defense Contract Containing Language Requiring Production to Government
- MIT Lost Work Product Protections Because Documents Must be Produced to Potentially “Adverse Party,” e.g., DoD Auditing Agency

Disclose to Others?

- Because MIT Waived Privilege and Lost Work Product Protections Per the DoD Contractual Terms, Court Held That MIT Must Produce Information to IRS
- Majority of Other Courts Have Reached the Same Conclusion

Disclose to Others?

- Application to HIPAA Business Associate Agreements and Attorneys
- Contractual Requirement to Produce to Government, Results in Loss of Waiver as to Third Party
- Argument Could be Made by Parties in Litigation Against Covered Entity for Production That BA = Waiver/Loss

Waiver/Loss of Protections

- Impact Upon Attorney-Client Relationship
 - BA Attorney Must Make Available, or Violating BA Agreement Requirement
 - BA Attorney Who Violates BA Agreement Jeopardizes Covered Entity Client
 - Interference with DHHS Investigation

Impact Upon Attorney-Client Relationship

- BA Attorney Production of Internal Practices, Books, and Records Relating to PHI Could Reveal Information Received by BA Attorney From Other Clients
 - Jeopardize Privileged/Work Product Information Relating to a Different Client, Not Under DHHS Investigation

Avoiding Disclosure

- Business Associate Agreement
 - Insert Language That Covered Entity Client on Notice of Potential Waiver and Potentially Requesting BA Attorney to Raise Privilege/Work Product Objections
 - Insert Language With Respect to Investigation of BA Attorney's Other Covered Entity Clients

Avoiding Disclosure

- Argue That Privacy Rule Preempted by Privilege and/or Doctrine
- Under HIPAA Preemption Analysis, State Law Preempts Privacy Rule if “More Stringent”
 - Typically Means Prevents Disclosures
 - However, HIPAA Not Preempted if State Law Prevents DHHS Access

Avoiding Disclosure

- Request Exception From HIPAA
- Submit Request to DHHS
- HIPAA Applies Unless/Until DHHS Issues Determination on Why State Law (Privilege/Doctrine) Not Preempted

Other Aspects of Relationship

- Minimum Necessary Requirement
 - Covered Entity's Disclosure to Business Associates Must be Limited to Minimum Necessary to Carry Out Task
 - As a Rule, Entire Medical Record May Not be Disclosed
 - However, Covered Entity May Rely Upon Representation of Professional That Entire Record Necessary

Other Aspects of Relationship

- Privacy Rule Requires Business Associate to Return or Destroy PHI Upon Conclusion or Termination of Relationship
 - Not Required if “Not Feasible” But Then Must Extend Protections to PHI
 - Attorney Obligated to Maintain Records

Impact Upon Litigation

- Discovery Conducted During Litigation and/or Prior to Litigation Impacted by Privacy Rule
- Use or Disclosure of PHI in Civil, Criminal, or Administrative Proceedings

Impact Upon Litigation

- Covered Entity May Disclose PHI in Response to Valid Court Order
 - To Extent of Authority of Court
 - Only the Specific Information Identified in Order
 - No Other Requirement Under HIPAA
 - Check State Law

Impact Upon Litigation

- Covered Entity May Disclose PHI in Response to Subpoena or Discovery Request
 - Discovery Request: Interrogatories, Request for Production, Deposition
 - Only Produce if Accompanied by Satisfactory Assurances

Impact Upon Litigation

- Satisfactory Assurances
 - Means Requesting Party has Documentation Establishing Either One of the Following:
 - Requested/Moved For a Qualified Protective Order
 - Qualified Protective Order Restricts PHI to Only Current Suit and Provides for Destruction or Return Upon Completion

Impact Upon Litigation

- OR
- Requesting Party Has Provided Written Notice to Individual of Request
 - Sufficient Information to Place on Notice
 - Sufficient Time to Raise Objection
 - Time for Objection Has Passed, and No Objection, or
 - All Objections Resolved by the Court

Impact Upon Litigation

● Subpoenas

- HIPAA Requires Satisfactory Assurances
- South Carolina Health Lawyers Attempting to Resolve All Disputes Prior to Subpoena Served On Covered Entity
- Letter to Individual/Attorney Advising of Upcoming Subpoena and Time to Object
- Cover Letter and Enclosures to Covered Entity Receiving Subpoena