

**HIPAA IN A NUTSHELL:
A Synopsis of How the HIPAA Privacy Rules Impact
Ex Parte Communications**

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In 1996 Congress passed the Health Insurance Portability and Accountability Act (HIPAA) out of concern that millions of American workers were without health insurance coverage when they changed employers because insurance plans for new employers typically excluded coverage for preexisting conditions. HIPAA seeks to protect workers by allowing health insurance plans to be portable so that workers who changed jobs could keep their existing health insurance. In addition to providing insurance protection for workers, HIPAA regulates the use and disclosure of individually identifiable health care information and it also preempts state law to the extent that a state's law is contrary to the provisions of HIPAA. This article gives an overview of HIPAA and then focuses primarily on the basic discovery related requirements and issues concerning the HIPAA privacy rules.

OVERVIEW

Who is subject to the HIPAA Privacy Rules?

HIPAA applies specifically to “covered entities with respect to protected health information.”¹ Under HIPAA, a covered entity is either: (1) a health plan; (2) a health care clearinghouse; or (3) a health care provider who transmits any health information in

¹ 45 C.F.R. § 164.500(a)

electronic form in connection with a transaction covered by subchapter 45 C.F.R. §

160.103. These three core terms are defined as follows:

- (a) “health plan” –any individual or group plan that provides, or pays the cost of, medical care, including Group Health Plans, Health insurance Issuers, HMOs, and numerous government programs providing health coverage or benefits. This definition does not include life, disability or worker’s compensation plans.
- (b) “health care clearinghouse”-entities that process Health Information received from another entity.
- (c) “health care provider”-providers of medical or health services or any other persons or organizations who furnish, bill, or are paid for health care in the normal course of business.

Based on the foregoing definitions, practitioners should be aware that providers of health care and those who make payments towards the cost of medical care will likely be required to adhere to the HIPAA privacy rules.

What kind of health care information is protected under the HIPAA privacy rules?

HIPAA prohibits a covered entity from using or disclosing an individual’s protected health information unless the covered entity is authorized to do so by the individual or is permitted or required by the HIPAA privacy rules to use or disclose the information. HIPAA defines “protected health information” as:

information that is a subset of health information, including demographic information collected from an individual, and:

- (1) is created or received by a health care provider, health plan, employer or health care clearinghouse; and

(2) relates to the past, present or future physical or mental health condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and

- (i) that identifies the individual; or
- (ii) with respect to which there is a reasonable basis to believe the information can be used to identify the individual.²

Practically speaking, any information that a covered entity creates or receives about a patient that could identify the patient is “individually identifiable health information” and any information about such a patient, whether in written, electronic, or oral form, is protected health information (PHI).

How can protected health information be used or disclosed?

In general, a covered entity is prohibited from using or disclosing PHI. However, a covered entity is allowed to use or disclose PHI under the following limited circumstances:

- (i) disclosure to the individual that is the patient or the patient’s representative;
- (ii) for treatment, payment or health care operations;
- (iii) in response to an authorization;
- (iv) in response to an agreement [written or oral];
- (v) in a judicial or administrative proceeding;
- (vi) to a business associate;
- (vii) as required by law;
- (viii) for marketing and fundraising activities.³

² 45 C.F.R. § 164.501.

Who is covered by the Business Associates Exception.

HIPAA permits a covered entity to disclose PHI to a business associate and allow a business associate to create or receive PHI on its behalf, so long as the covered entity receives “satisfactory assurance” that the business associate will safeguard the PHI. HIPAA defines “business associate” as a person, other than a member of a health care provider’s workforce, who either (1) performs services for the health care provider involving the use or disclosure of PHI or (2) provides services to the covered entity which require the covered entity to disclose PHI to the person. In terms of legal discovery, a defense lawyer that represents the covered entity (including their staff, experts, etc.) would be considered a business associate of the covered entity that he or she represents and therefore the covered entity is able to disclose PHI to the defense lawyer without violating HIPAA.

HIPAA PRIVACY RULES AND EX PARTE DISCOVERY

Disclosures permitted in Judicial and Administrative Proceedings.

For the average practitioner, the judicial and administrative proceedings exception to the general use or disclosure rule is where the “rubber meets the road” insofar as legal discovery is concerned. HIPAA describes the permitted disclosures for judicial and administrative proceedings as follows:

- (1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

³ 45 C.F.R. § 164.502(a)(1)

- (i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or
- (ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:
 - (A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or
 - (B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.⁴

To summarize, the only way that PHI should be used or disclosed in a judicial or administrative proceeding is if (1) the patient provides express authorization for the use or disclosure; (2) a court order is obtained to procure the use or disclosure or (3) if a subpoena, discovery request or other lawful process is sought.

⁴ 45 C.F.R. §164.512(e)

The debate that has arisen in the discovery arena is whether the HIPAA privacy rules prohibit defense lawyers from having ex parte meetings or interviews with the plaintiff's treating physicians. The plaintiff's bar takes the position that HIPAA prohibits ex parte contact with the treating physicians and the defense bar staunchly oppose this view. Nowhere in HIPAA is the issue of ex parte communications with a patient's treating physician addressed. Neither HIPAA nor its legislative history answer the question of whether such ex parte communications are permitted or prohibited. Likewise, the Alabama Supreme Court has not issued an opinion regarding whether HIPAA prohibits ex parte communications with treating physicians.

Because HIPAA does not specifically address the "ex parte communication" issue, any argument raised by plaintiffs that HIPAA forbids such communications will likely prove unsuccessful. In fact, the defense bar will undoubtedly argue to the trial court that because HIPAA is silent with respect to the "ex parte" issue, Alabama law is not preempted and should therefore be applied. Under Alabama law, defense attorneys are permitted to engage in ex parte communications with the plaintiff's treating physician under certain circumstances.⁵ Consequently, the defense bar will argue that because HIPAA does not preempt Alabama law with respect to ex parte communication with the plaintiff's treating physician, the trial court should allow this form of informal discovery.

However, while the HIPAA statute does not address the ex parte issue precisely, there are some persuasive arguments that can be raised to support the proposition that

⁵ See *Romine v. Medicenters of America, Inc.*, 476 So.2d 51 (Ala. 1985); *Mull v. String*, 448 So.2d 952 (Ala. 1984). The Alabama Supreme Court has held that a defense attorney is allowed to engage in ex parte communications with a plaintiff's treating physician so long as there is not a statutory physician-patient privilege and/or coercive or improper conduct on the part of the defense attorney seeking the disclosure.

certain HIPAA disclosure requirements effectively make ex parte communications with treating physicians impracticable.

Court Orders, Subpoenas, Discovery Request or Other Lawful Process.

A strategy that can be employed by plaintiff's counsel to prevent ex parte contact with the plaintiff's treating physician is for counsel to file a protective order early in the litigation process.⁶ Plaintiff's counsel can take the initiative by filing a motion for protective order shortly after the complaint has been filed and as part of the proposed protective order plaintiff's counsel can ask the court to prevent all ex parte communications with plaintiff's treating physicians.

While it is true that Alabama law allows ex parte communications, and defense counsel will assuredly make this argument, HIPAA has regulated the methods in which all requests for and disclosure of PHI from a covered entity are to be made. As noted above, § 164.512(e)(1) states that a covered entity may disclose protected health information (i) in response to an order of a court or administrative tribunal, or (ii) in response to a subpoena, discovery request, or other lawful process that is not accompanied by an order of a court or administrative tribunal. Aside from the plaintiff giving his or her authorization, these are the only methods by which PHI is to be disclosed pursuant to HIPAA. Consequently, if HIPAA is to be taken literally, even if the defense in a given case is permitted to talk ex parte with treating physicians under Alabama law, HIPAA has added the requirement of obtaining a court order to be issued to the treating physician as a preliminary step in the discovery process.

In other words, plaintiffs should point out to the trial court that §164.512(e)(1) set forth the methods by which PHI can be disclosed. By its very nature an ex parte

⁶ See Appendix A: A sample HIPAA protective order.

communication is not information derived from a subpoena, discovery request or process. Therefore, in order to engage in the type of informal discovery sought by ex parte communications, it is likely that defense attorneys will at least have to obtain a court order pursuant to §164.512(e)(1)(i). Because a court order is likely required, plaintiff's counsel is free to file a motion for protective order at the beginning of the litigation process and seek to have the trial court issue an order prohibiting ex parte contact with treating physicians.

Why should a proposed protective order prohibit ex parte contact with the treating physician? The defense will view the requirement to obtain a court order prior to any ex parte contact as a mere formality given that the law in Alabama permits such contacts with the plaintiffs treating physician. It is important to note, however, HIPAA not only specifies the methods by which PHI may be disclosed it also places limits on the manner in which PHI is to be disclosed.

The HIPAA privacy rules require that “when using or disclosing protected health information or when requesting protected information from another covered entity, a covered entity must make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request.”⁷ When disclosure of PHI is made on a routine or recurring basis, the “minimum necessary” requirement forces covered entities to implement policies and procedures that limit the protected health information disclosed to the amount reasonably necessary to achieve the purpose of the disclosure.⁸ For all other disclosures, a covered entity must develop criteria designed to limit the protected health information disclosed to the

⁷ 45 C.F.R. § 164.502(b)(1)

⁸ 45 C.F.R. § 164.514(d)(3)

information reasonably necessary to accomplish the purpose for which the disclosure is sought.⁹

Section 164.502(b)(2)(i) lists several circumstances in which the minimum necessary requirement will not apply to the use or disclosure of PHI. Disclosures made in a judicial and administrative tribunal are not among the list. Therefore, the minimum necessary requirement applies to uses and disclosures of PHI made during the course of a lawsuit. Specifically, the minimum necessary requirement should have a significant impact on whether defense lawyers are allowed to have ex parte contact with plaintiff's treating physicians.

Plaintiff's counsel should argue in their motion for protective order that the minimum necessary requirement essentially limits disclosure by treating physicians (covered entities) to that information reasonably necessary to satisfy a request that is relevant to the medical condition at issue in plaintiff's lawsuit. Such a requirement is clearly designed to safeguard and protect the plaintiff's PHI. Because the U.S. Congress has deemed the plaintiff's PHI worthy of being safeguarded, plaintiff's counsel should argue for access to any contact or interviews by the defense with plaintiff's treating physicians in order to object to the disclosure or use of PHI beyond minimum necessary disclosures.

A disclosure of PHI during an ex parte interview could irreparably harm the plaintiff because the plaintiff would have no way of knowing for sure that his or her PHI has been disclosed, as required by HIPAA, to the minimum extent necessary. Additionally, the plaintiff would not have the opportunity to object (or seek an additional protective order if necessary) to overly broad disclosures of PHI until after the

⁹ *Id.*

disclosures were made. If plaintiff's counsel is allowed to attend the interviews between defense counsel and plaintiff's treating physicians, both of the foregoing concerns can be alleviated.

In addition to the minimum necessary requirement, HIPAA's accounting requirements provides plaintiff's counsel with another argument as to why the trial court should enter a protective order prohibiting *ex parte* communications. Pursuant to the HIPAA privacy rules, a patient has a right to receive an accounting of disclosures of PHI made by a covered entity in the six (6) years prior to the date on which the accounting is requested, except for the following types of disclosures:

- (i) disclosures made for purposes of treatment, payment or health care operations;
- (ii) disclosures made to the patient that is the subject of the PHI;
- (iii) disclosures made pursuant to an authorization;
- (iv) disclosures that occurred prior to the compliance date for the covered entity.¹⁰

Whenever a patient requests an accounting, the covered entity has sixty (60) days after the request to provide for each disclosure: the date of disclosure; the name and address of the person or entity receiving the disclosure; a description of the PHI disclosed; and a statement of the basis for the disclosure.¹¹

By informing the trial court that the plaintiff is entitled to a description of the PHI to be disclosed, plaintiff's counsel may be able to persuade the court that it would be more efficient and equitable if plaintiff's counsel observed any interview or questioning

¹⁰ 45 C.F.R. §164.528(a)(1).

¹¹ 45 C.F.R. §164.528(b) and 45 C.F.R. §164.528(c).

of plaintiff's physicians first hand. First, plaintiff's counsel's access to the communication, along with a court reporter or tape recorder (video or audio), would insure the accuracy of the information that is disclosed. The plaintiff would not have to rely on the physician's memory of the oral disclosure of his or her PHI.

Additionally, the physician's time and resources would have to be duplicated if the physician is subjected to both an ex parte communication with defense counsel and then later is required to provide to plaintiff a description of the same communication. Inclusion of plaintiff's counsel in any communications between the defense lawyer and the treating physician would eliminate the need for the plaintiff to ask for a description of the PHI and thereby save all parties involved time and money.

CONCLUSION

Even if a trial court does not prevent defense counsel from having ex parte communication with plaintiff's treating physician, a protective order may still be useful in defining and narrowing the parameters of defense counsel's ex parte interviews. By relying on the same arguments set forth above plaintiff's counsel should seek, alternatively, a motion for protective order that requires defense counsel who desires to engage in ex parte communication with plaintiff's treating physician to: (1) provide plaintiff's counsel with reasonable notice of the time and place of the proposed interview; (2) provide both plaintiff's counsel and the physician with a description of the anticipated scope of the interview; and (3) provide clear and conspicuous notice to the physician that his or her participation in any ex parte communication is voluntary.

Although HIPAA does not prohibit ex parte communications on its face, the fact remains that HIPAA's core purpose is to safeguard a patient's PHI. Therefore, it should

be argued at the very minimum that restrictions such as the three mentioned above be put in place to promote the purpose and underlying rationale established by HIPAA. Because Alabama law does not have specific parameters in place regarding how ex parte interviews with a plaintiff's treating physician are to be conducted, an argument could be raised that Alabama law with respect to this subject is contrary to the objectives of HIPAA and is therefore preempted by HIPAA's preemption clause.

With respect to civil discovery, all of the nuances of the HIPAA Privacy Rules have yet to be discovered. However, as more judicial guidance and interpretation of the rules become available uniformity may be reached with respect to the allowance or disallowance of defense counsel's ex parte interviews with a plaintiff's treating physician. Until then, plaintiff's counsel who are concerned about such ex parte contact can use HIPAA to advance arguments as to why this form of informal discovery should be prohibited.

APPENDIX

A

IN THE CIRCUIT COURT OF
_____ COUNTY, ALABAMA

| | | |
|--------------|---|---------------|
| JOHN H. DOE, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | CV-2003-_____ |
| |) | |
| ACME, INC. |) | |
| |) | |
| Defendants. |) | |

HIPAA ORDER IN CIVIL ACTION

This Court authorizes any non-party who is provided with a subpoena requesting the production of documents or commanding attendance at deposition or trial to disclose Protected Health Information in response to such request or subpoena. This Order is intended to authorize such disclosures pursuant to 45 C.F.R. § 164.512(e) of the Privacy Regulations issued pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Further, pursuant to 45 C.F.R. § 164.512(e)(1)(v), this Order is also a Qualified Protective Order and all parties and attorneys are hereby:

- (A) Prohibited from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and
- (B) Required to return to the covered entity or to destroy the protected health information (including all copies made) at the end of the litigation proceeding.

Nothing in this Court Order shall be deemed to relieve any party or attorney of the requirements of the Alabama Rules of Civil Procedure, including but not limited to, the Rules relating to depositions, non-party subpoenas, and trial subpoenas. Nothing in this

Court Order permits disclosure of confidential communications, made for the purposes of diagnosis or treatment of a patient's mental or emotional condition, including alcohol or drug addiction, nor does this Order permit disclosure of records or information relating to HIV testing or sexually transmitted disease which are protected from discovery by any statute, court rule or decision.

Nothing in this Order authorizes any party or any attorney for any party to release, disclose, exchange, submit, or share any Protected Health Information to any other person or entity not unrelated to this litigation.

Pursuant to Rule 26 of the Alabama Rules of Civil Procedure, the Defendant's attorney(s) may request interviews with any of the Plaintiff's treating physicians or any other covered entity concerning Plaintiff's Protected Health Information. However, in the exercise of its discretion, this Court hereby *prohibits* all ex parte communications between the Defendants, their attorneys, agents, insurers, or other representatives and the Plaintiff's treating physician or other covered entity. The Defendant's attorney shall provide the attorney for the Plaintiff with an opportunity to be present at any informal interview or meeting with the Plaintiff's treating physicians or any other covered entity by giving the Plaintiff's attorney reasonable advance notice of the time, place and location for any such interview or meeting.

Once reasonable advance notice has been provided by the Defendant's attorney to the Plaintiff's attorney, the Defendant's attorney may schedule the interview or meeting with Plaintiff's treating physicians or other covered entity, provided however, that in all instances where such interviews or meetings are sought the attorney for the Defendant

communicate with clarity to the treating physician or covered entity that said interview or meeting is voluntary.

DONE and ORDERED this the _____ day of _____, 20____.

CIRCUIT JUDGE