AN OVERVIEW: WHAT IS HIPAA?
A Patient Advocate's Perspective
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David L. McGuffey
Elder Law Practice of Clements & McGuffey, LLC
110 W. Crawford Street, Suite 201
Dalton, GA 30720
(706) 428-0888

Purpose of this Memorandum: to provide a framework within which the Plaintiff's attorney and/or the patient advocate can navigate HIPAA and can gain access to necessary medical information.

Introduction

Confusion is the Order of the Day!

The Plaintiff bears the burden of proof at trial. Where the claim involves an injury or death, medical records and expert testimony based on those records are a necessary element of the Plaintiff's proof. Thus, access to, rather than the protection of medical records is often the Plaintiff's concern. In the present climate, objections to discovery requests are the rule rather than the exception as Defendants attempt to "hide-the-ball" prior to or during litigation. The Plaintiff's attorney must be knowledgeable concerning privacy laws and must be prepared to respond to defense objections in order to collect the information necessary to prove his or her case.

Similarly, the patient advocate cannot evaluate care and treatment provided to others without access to medical records. For this reason, the patient advocate must be knowledgeable concerning HIPAA in order to respond to health care provider objections regarding the disclosure of protected health information. An advocate who does not understand the rules will be ineffective because insufficient information will be available to evaluate the care provided and will quickly find himself or herself at a stalemate.

We know what an attorney does. What about patient advocates: A Patient Advocate serves many purposes, including acting as the liaison between Hospital personnel and the patient to answer non-medical questions and concerns. The Patient Advocate handles complaints and serves as a central unit for patients and family members to discuss anxieties, ask direct questions, resolve problems, or simply as someone who will listen.

Recently, (February 2003), the American Health Lawyers Association held a conference. There, Gordon Apple said this about HIPAA: "If you live in the desert, you have enough sense not to brush up against a friendly looking cactus. Common sense comes with experience. Unfortunately, the terrain presented by HIPAA is new to health care and the

issue of HIPAA [compliance/enforcement] is particularly hard to decipher. HIPAA Enforcement – Uncertain, but Potentially Hazardous Terrain (AHLA 2/19-21/03).

Why are health care providers so worried about HIPAA?

There are criminal and civil sanctions for non-compliance. A health care provider may be subject to civil sanctions of $100 per violation, not to exceed $25,000 per year for all violations. [42 USC 1320d-5].

On the criminal side, a person who knowingly obtains or discloses identifiable health information in violation of HIPAA may be fined not more than $50,000 or imprisoned for 1 year, or if the violation was committed under false pretenses, fined not more than $100,000 or imprisoned for 5 years. If the offense was committed with intent to sell, transfer or use identifiable health information for commercial advantage, then fines may be up to $250,000 and prison terms may be up to 10 years. [42 USC 1320d-6]

So, what is HIPAA?

1. Purpose of HIPAA.

"HIPAA" is shorthand for the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

While HIPAA covers a number of subjects, the primary focus here is on the privacy rules relating to health information.

The privacy rules are primarily found in regulations promulgated by the Department of Health and Human Services.

The regulations indicate that there are **three purposes**: "(1) ***To protect and enhance the rights of consumers by providing them access to their health information*** and controlling the inappropriate use of that information; (2) to improve the quality of heath care in the U.S. by restoring trust in the health care system among consumers, health care professionals and the multitude of organizations and individuals committed to the delivery of health care; and (3) to improve the efficiency and effectiveness of health care delivery by creating a national framework for health privacy protection that builds on efforts by states, health systems, and individual organizations and individuals." 65 FR 82462, Standards for Privacy of Individually Identifiable Health Information, December 28, 2000 (emphasis added).

The preamble to the HIPAA regulations further states: "Until now, virtually no federal rules existed to protect the privacy of health information and guarantee patient access to such information. **This final rule establishes, for the first time, a set of basic national privacy standards and fair information practices that provides all Americans with a basic level of protection and peace of mind that is essential to their full participation**

in their care. The rule sets a floor of ground rules for health care providers, health plans, and health care clearinghouses to follow, in order to protect patients and encourage them to seek needed care. The rule seeks to balance the needs of the individual with the needs of the society. It creates a framework of protection that can be strengthened by both the federal government and by states as health information systems continue to evolve." (Emphasis added).

HIPAA was designed to safeguard against a growing concern that health information would be improperly used or disclosed. The HIPAA regulations provide several examples showing how private health information has been improperly used or disclosed as justification for the rules. Those examples include the following:

> - A Michigan-based health system accidentally posted the medical records of thousands of patients on the Internet (The Ann Arbor News, February 10, 1999).
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> - A Utah-based pharmaceutical benefits management firm used patient data to solicit business for its owner, a drug store (Kiplingers, February 2000).
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> - An employee of the Tampa, Florida, health department took a computer disk containing the names of 4,000 people who had tested positive for HIV, the virus that causes AIDS (USA Today, October 10, 1996).
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> - The health insurance claims forms of thousands of patients blew out of a truck on its way to a recycling center in East Hartford, Connecticut (The Hartford Courant, May 14, 1999).
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> - A patient in a Boston-area hospital discovered that her medical record had been read by more than 200 of the hospital's employees (The Boston Globe, August 1, 2000).
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> - A Nevada woman who purchased a used computer discovered that the computer still contained the prescription records of the customers of the pharmacy that had previously owned the computer. The pharmacy data base included names, addresses, social security numbers, and a list of all the medicines the customers had purchased. (The New York Times, April 4, 1997 and April 12, 1997).
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> - A speculator bid $4000 for the patient records of a family practice in South Carolina. Among the businessman's uses of the purchased records was selling them back to the former patients. (New York Times, August 14, 1991).
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> - In 1993, the Boston Globe reported that Johnson and Johnson marketed a

> list of 5 million names and addresses of elderly incontinent women. (ACLU Legislative Update, April 1998).
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> - A few weeks after an Orlando woman had her doctor perform some routine tests, she received a letter from a drug company promoting a treatment for her high cholesterol. (Orlando Sentinel, November 30, 1997).

65 FR, at 82467.

President Clinton spoke regarding HIPAA on December 20, 2000. There, he made it clear that HIPAA was crafted to combat abuse. Employers should not be able to review medical records when making a hiring decision and health insurance companies should not be able to share health information with mortgage companies as they consider whether to approve a loan. There is no language anywhere expressing an intent to deny a patient the right to access his or her own medical records.

The regulations are drafted with the intent that consumers (patients) have control over the release of their records. This includes the right to give or without consent for most disclosures, the right to see a copy of health records, the right to request a correction to health records, the right to obtain documentation of disclosures of health records, and the right to an explanation of privacy rights and how health information may be used or disclosed. See News Release, HHS Announces Final Regulation Establishing First-Ever National Standards To Protect Patient's Personal Medical Records (12/20/00), available at http://aspe.hhs.gov/admnsimp/final/press2.htm.

The December 2000 regulations, in responding to a comment, state: "if the individual directs an access request to a covered entity that has the protected health information requested, the covered entity must provide access (unless it may deny access in accordance with this rule)." 65 FR, at 82732.

In sum, HIPAA is a shield. It is not a sword that can be used to prevent the patient from gaining access to his or her own records.[1] HIPAA's purpose is to ensure individual privacy and autonomy concerning the use of health information. The regulations refer to Justice Bradeis' words in stating "If the right to be left alone means anything, then it likely applies to having outsiders have access to one's intimate thoughts, words, and emotions." 65 FR, at 82464.

There is no private right of action under HIPAA. Anyone reviewing claims under HIPAA would be advised to review **Cort v. Ash, 422 U.S. 66 (1975)**. There, the

[1] One of the stated purposes of HIPAA is "Ensuring patient access to their medical records. Patients must be able to see and get copies of their records, and request amendments. In addition, a history of most disclosures must be made accessible to patients." See HHS Fact Sheet, http://aspe.hhs.gov/admnsimp/final/pvcfact1.htm

Supreme Court created a four part test for determining whether an implied right of action exists. **The test is:** (1) whether the statutes were created for the plaintiffs' special benefit, (2) whether there is evidence of legislative intent to create a private remedy, (3) whether a private remedy would be consistent with legislative purposes, and (4) whether the area is one traditionally relegated to the states. In the context of OBRA (nursing home resident rights), Courts have generally declined to find that a private right of action exists because health care is a subject traditionally relegated to the states. See, e.g., Brogdon v. NHC, 103 F.Supp2d 1322 (N.D. Ga. 2000).

2. History.

The Health Insurance Portability and Accountability Act (HIPAA) was signed by the President and became law on August 21, 1996 (P.L. No. 104-191). HIPAA's legislative history is found on the internet at http://thomas.loc.gov.

The "privacy" provisions of HIPAA comprise a small portion of the Act and are found at Title II, subtitle F, sections 261-264. They are codified at 42 U.S.C. § 1320d through § 1320d-8.

Congress directed HHS to make recommendations regarding how best to protect private health data and, assuming it failed to act on those recommendations, directed HHS to develop regulations. Specifically, **Section 264 of HIPAA provides** that:

"(a) Not later than 12 months after the date of enactment of this Act, the Secretary of Health and Human Services shall submit to the Committee on Labor and Human Resources and the Committee on Finance of the Senate and the Committee on Commerce and the Committee on Ways and Means of the House of Representatives detailed recommendations on standards with respect to the privacy of individually identifiable health information. (b) **The recommendations under subsection (a) shall address at least the following:**

> **(1) The rights that an individual who is a subject of individually identifiable health information should have.**
> **(2) The procedures that should be established for exercise of such rights.**
> **(3) The uses and disclosures of such information that should be authorized or required.**

(c) (1) **If legislation governing standards with respect to the privacy of individually identifiable health information** transmitted in connection with the transactions described in section 1173(a) of the Social Security Act (as added by section 262) **is not enacted by the date that is 36 months after the date of the enactment of this Act, the Secretary of Health and Human Services shall promulgate final regulations** containing such standards not later than the date that is 42 months after the date of the enactment of this Act. Such regulations shall address at least the subjects described in subsection (b). (c)(2) A regulation promulgated under paragraph (1) shall not supercede a contrary provision of State law, if the provision of State law imposes requirements,

standards, or implementation specifications that are more stringent that the requirements, standards, or implementation specifications under the regulation. (d) In carrying out this section, the Secretary of Health and Human Services shall consult with (1) the National Committee on Vital and Health Statistics established under section 306(k) of the Public Health Service Act (42 U.S.C. 242k(k)); and (2) the Attorney General." (Emphasis added).

In September, 1997, HHS delivered recommendations to Congress for protecting the privacy of individually identifiable health information. See South Carolina Medical Association v. Thompson, 327 F.3d 346, 349 (4th Cir. 2003). Congress did not pass any additional legislation. Id.; 65 FR, at 82470. Thus, under HIPAA's mandate, HHS drafted regulations that appeared in a November 3, 1999 Notice of Proposed Rulemaking (See 64 FR 59918). South Carolina Medical Ass'n, supra.

The proposed rule drew more than 50,000 comments from affected parties. Id. After several further proposals, HHS promulgated final regulations in February 2001. Id. Those rules appear at 45 C.F.R. § 164.500 through § 164.534.

The HIPAA regulations were recently challenged as an unconstitutional delegation of congressional power, as going beyond HIPAA's authority, in that HIPAA relates primarily to electronic data transmission, while the regulations apply to all health records regardless of form, and as vague. These challenges were rejected. See South Carolina Medical Ass'n, supra.

3. Other laws.

State laws more stringent than HIPAA remain in effect. Regulations define what "more stringent" means as follows: "in the context of a comparison of a provision of State law and a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter, a State law that meets one or more of the following criteria: (1) With respect to a use or disclosure, the law prohibits or restricts a use or disclosure in circumstances under which such use or disclosure otherwise would be permitted under this subchapter, except if the disclosure is: (i) Required by the Secretary in connection with determining whether a covered entity is in compliance with this subchapter; or (ii) To the individual who is the subject of the individually identifiable health information." 45 C.F.R. § 160.202.

Summaries of various state laws relating to health privacy can be downloaded at http://www.healthprivacy.org. Because we practice in Georgia and Tennessee, focusing on long term care issues, we briefly review those rules.

A. Georgia.

O.C.G.A. § 31-33-2(a)(2) provides "Upon written request from the patient or a person authorized to have access to the patient´s record under a health care power of attorney for such patient, the provider having custody and control of the patient´s record shall furnish

a complete and current copy of that record, in accordance with the provisions of this Code section. If the patient is deceased, such request may be made by a person authorized immediately prior to the decedent´s death to have access to the patient´s record under a health care power of attorney for such patient; the executor, temporary executor, administrator, or temporary administrator for the decedent´s estate; or any survivor, as defined by Code Sections 51-4-2, 51-4-4, and 51-4-5." The provider may refuse a request to deliver records to the patient if the provider reasonably determines that disclosure of the record to the patient will be detrimental to the physical or mental health of the patient. O.C.G.A. § 31-33-2(c). However, in that instance, the patient´s record shall, upon written request by the patient, be furnished to any other provider designated by the patient. Id. A provider may refuse to disclose records until a proper authorization is received with evidence of authority to sign said release. O.C.G.A. § 31-33-2(d). A fee may be charged for records. O.C.G.A. § 31-33-3.

Residents in long term care facilities have a right to access all medical records relating to their treatment. O.C.G.A. § 31-8-108(b)(6) provides: "Each resident shall have access to all information in the medical records of the resident and shall be permitted to inspect and receive a copy of such records unless medically contraindicated. The facility may charge a reasonable fee for duplication, which fee shall not exceed actual cost."

B. Tennessee.

T.C.A. § 63-2-101(a)(1) provides: "Notwithstanding any other provision of law to the contrary, a health care provider shall furnish to a patient or a patient's authorized representative a copy or summary of such patient's medical records, at the option of the health care provider, within ten (10) working days upon request in writing by the patient or such representative." T.C.A. § 63-2-101(c)(2) defines "Medical records" as "all medical histories, records, reports and summaries, diagnoses, prognoses, records of treatment and medication ordered and given, x-ray and radiology interpretations, physical therapy charts and notes, and lab reports." Medical records are subject to subpoena from a court of competent jurisdiction. T.C.A. § 63-2-101(b)(1) and (d). Section 63-2-102 provides for fees that may be charged.

Hospital records are governed by T.C.A. §§ 68-11-301 to 68-11-311. Section 68-11-304(a)(1) provides: "Unless restricted by state or federal law or regulation, a hospital shall furnish to a patient or a patient's authorized representative such part or parts of such patient's hospital records without unreasonable delay upon request in writing by the patient or such representative." The phrase "Hospital records" means "those medical histories, records, reports, summaries, diagnoses, prognoses, records of treatment and medication ordered and given, entries, X-rays, radiology interpretations, and other written, electronic, or graphic data prepared, kept, made or maintained in hospitals that pertain to hospital confinements or hospital services rendered to patients admitted to hospitals or receiving emergency room or outpatient care." T.C.A. § 68-11-302(5)(A). Section 304 provides for a fee reference furnishing records.

Prior to the execution of a nursing home admissions contract, disclosure must be provided that references the resident's right to review medical records. T.C.A. § 68-11-910(a)(3).

C. OBRA (Nursing Home Residents).

HIPAA does not alter a nursing home resident's right to access medical records.

The preamble to the final rule (December 2000 – 65 FR 82480) states: "Covered entities subject to these rules are also subject to other federal statutes and regulations." "If a statute or regulation prohibits dissemination of protected health information, but the privacy regulation requires that an individual have access to that information, the earlier, more specific statute would apply. … From our review of several federal laws, it appears that Congress did not intend for the privacy regulation to overrule existing statutory requirements in these instances." 65 FR 82482.

See 42 U.S.C. § 1395i-3(c)(1)(A)(iv) (facilities that accept Medicare residents); 42 U.S.C. § 1396r(c)(a)(A)(iv) (facilities that accept Medicaid residents); 42 C.F.R. § 483.10(b)(2) (all facilities that accept Medicare and/or Medicaid residents). Specifically, 42 C.F.R. § 483.10(b)(2) provides: The resident or his or her legal representative has the right (i) Upon an oral or written request, to access all records pertaining to himself or herself including current clinical records within 24 hours (excluding weekends and holidays); and (ii) After receipt of his or her records for inspection, to purchase at a cost not to exceed the community standard photocopies of the records or any portions of them upon request and 2 working days advance notice to the facility.

OBRA	**HIPAA**
All records pertaining to the resident may be accessed	Designated record set may be accessed; authorizes exceptions, such as psychotherapy notes.
Records must be produced within 24 hours (excluding weekends and holidays) and copies must be provided within 2 business days	Records that are on-site must be produced within 30 days, with one 30 extension permitted; records that are off-site must be produced within 60 days, with one 30 day extension permitted
Absolute right	Request may be denied under certain circumstances
42 CFR 483.10(b)(2)	45 CFR 164.524(b)

Analysis where there is conflicting federal law. (1) Is the disclosure required by other federal law. If the answer is "Yes", then it is permissible to disclose records. 45 CFR 164.512(a).[2]

[2] Required by law is limited to disclosures that are enforceable in a court of law. 45 CFR 164.501. However, a non-exclusive list of examples of what "required by law" means are provided and, among them, is the following: Medicare conditions of participation with respect to health care providers participating in the program. The same analysis should apply to providers participating in the Medicaid

The U.S. Department of Health and Human Services has posted a compilation of "questions and answers" on its website. Among them is the following:

Question: Does the HIPAA Privacy Rule permit nursing homes and other health care institutions to disclose information concerning admissions of supplemental security income (SSI) recipients to the Social Security Administration (SSA)?
Answer: Yes. SSA requires nursing homes, extended care facilities, and intermediate care facilities to report to SSA, within 2 weeks, admissions information about anyone receiving SSI who is admitted to the institution. The purpose of these reporting requirements is to prevent SSI overpayments caused by a SSI recipient's failure to timely report changes in eligibility. These requirements are stated in the Social Security Act (42 U.S.C. 1383(e)(1)(C)), and communicated through SSA's guidance and other implementation materials. The Privacy Rule permits covered entities to disclose protected health information without the individual's authorization as required to comply with this law. See 45 CFR 164.512(a).

This analysis suggests that OBRA regulations requiring disclosure to residents would likewise apply.

4. Application:

The HIPAA rules focus, in part, on encouraging "a more informed interaction between the patient and the [health care] provider during the consent process." 65 FR, at 82473. Under the regulations, a consent form must be accompanied by a notice describing the health care provider's privacy policy and the consent form must reference that privacy policy. The following summary provides an overview of HIPAA's application:

A. **When is HIPAA Effective?** Most provisions of HIPAA are effective as of April 14, 2003. There are certain exceptions to this rule for small providers. Small health plans, defined as plans with annual receipts of less than $5 million, must comply no later than April 14, 2004.

B. **Who Does HIPAA apply to?** HIPAA applies to all "covered entities" which generally include all "health plans, health care clearinghouses, and health care providers who transmit health information in electronic form in connection with any transaction. 42 C.F.R. § 164.104. In the current market, virtually all health care providers will transmit some data in electronic form, either to recover payment under Medicare, Medicaid, or from an insurance carrier. Thus, given the breadth of the regulations, HIPAA will apply to virtually all health care providers.

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program. Thus, even if there is no private right of action under HIPAA, OBRA should still apply and records may be secured in most nursing home litigation contexts. In addition, state laws which create a private right of action, such as the Georgia Bill of Rights for Residents of Long Term Care Facilities, would fit that requirement.

There is a decision tree for determining whether an entity is a "covered entity" at the CMS website. Go to www.cms.gov and click on the HIPAA link on the left hand side of the page. Then to Decision Tools.

C. **Who are Health Care Providers?** The phrase "Health care provider" is defined as "a provider of services (as defined in section 1861(u) of the Act, 42 U.S.C. 1395x(u)), a provider of medical or health services (as defined in section 1861(s) of the Act, 42 U.S.C. 1395x(s), and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business." 45 C.F.R. § 160.103. "Health care" means "care, services, or supplies related to the health of an individual. Health care includes, but is not limited to, the following: (1) preventative, diagnostic, therapeutic, rehabilitation, maintenance, or palliative care, and counseling; service, assessment, or procedure with respect to the physical or mental condition, or functional status, of an individual or that affects the structure or function of the body; and (2) sale or dispensing of a drug, device, equipment, or other item in accordance with a prescription. Id.

D. **What type of information is covered?** According to a fact sheet produced by the U.S. Department of Health and Human Services, "**All medical records and other individually identifiable health information held or disclosed by a covered entity in any form, whether communicated electronically, on paper, or orally, is covered by the final regulation.**" See HHS Fact Sheet, http://aspe.hhs.gov/admnsimp/final/pvcfact1.htm. The regulations define "Health information" as "any information , whether oral or recorded in any form or medium, that: (1) is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, 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." 45 C.F.R. § 160.103. Health information is "***Protected health information***" if it is "individually identifiable health information and is (i) transmitted by electronic media; (ii) maintained in any medium described in the definition of electronic media at § 162.103 of this subchapter; or (iii) ***transmitted or maintained in any other form or medium.***" 45 C.F.R. § 164.501 (emphasis added). Certain exclusions related to education and employment records are found at 45 C.F.R. § 164.501. "Individually identifiable health information" is "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 or 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." 45 C.F.R. § 164.501. HIPAA further defines a "**Designated record set**" as "(1) A group of records maintained by or for a covered entity that is: (i) The medical records and billing records about individuals maintained by or for a covered health care provider; (ii) The enrollment, payment, claims adjudication, and case or medical management records systems maintained by or for a health plan; or (iii) Used, in whole or in part, by or for the covered entity to make decisions about individuals." 45 C.F.R. § 164.501.

Practice Note: Consider drafting discovery requests to incorporate HIPAA's terminology. For example, in addition to requesting specific documents you are seeking, request "protected health information as that term is defined in 45 C.F.R. § 164.501" or request the "Designated record set as that phrase is defined in 45 C.F.R. § 164.501"

E. **What type of activity is covered?** "A covered entity may not use or disclose protected health information, except as permitted or required by [HIPAA]. 45 C.F.R. § 164.502. "Disclosure" means the release, transfer, provision of access to, or divulging in any other manner of information outside the entity holding the information." 45 C.F.R. § 164.501. "Use" means "with respect to individually identifiable health information, the sharing, employment, application, utilization, examination, or analysis of such information within an entity that maintains such information." 45 C.F.R. § 164.501.

F. **Minimum necessary standard.** HIPAA imposes a "minimum necessary standard" on health care providers when using or disclosing protected health information. 45 C.F.R. § 164.502(b)(1). 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. Id.

Practice Note: The "minimum necessary" standard does not apply to disclosures to the patient or pursuant to a valid authorization. 45 C.F.R. § 164.502(b)(2)(ii) and (iii). Nonetheless, when drafting medical releases, draw them broadly enough to capture all information that will be necessary to present your case. Otherwise, the health care provider may withhold certain information in an attempt to comply with the "minimum necessary" standard.

5. Internal Use of Information.

Prior to August 14, 2002, health care providers were required to secure "consent" from patients prior to any use of health care information. HHS received numerous comments describing situations where direct treatment would be inhibited by that rule. Now, health care providers are not required to secure patient consent prior to using health information for its own treatment, payment and health care operations. See 67 FR, at 53209. HIPAA expressly states that a covered entity may use or disclose protected health information for treatment, payment, or health care operations. 45 C.F.R. § 164.502(a)(1)(ii) and § 506(a) and (c).

> ***Practice note: Since HIPAA authorizes internal use and disclosure of protected health information, it does not alter the standard of care regarding how a facility uses (or should use) information within its control.***

Except as otherwise permitted or required under HIPAA, a covered entity may not use or disclose protected health information without an authorization that complies with 45 C.F.R. § 164.508(a)(1).

With respect to psychotherapy notes, an authorization is required if those notes are to be used by or disclosed to any person other than the originator of the notes in connection with treatment, except where used in connection with internal training programs or in defending itself in an action brought by the patient. 45 C.F.R. § 164.508(a)(2).

6. Who May Request Information?

HIPAA was not designed to prevent patients from accessing their own data. Thus, a covered entity may always provide access to protected health information to the patient, or pursuant to a valid authorization. 45 C.F.R. § 164.502(a)(1)(i) and (a)(1)(iv). Further, the regulations expressly provide that a patient has a right of access to inspect and copy information in a designated record set except for certain information. 45 C.F.R. § 164.524(a)(1) and (b)(1). The exceptions apply to psychotherapy notes; information compiled in reasonable anticipation of, or for use in, a civil, criminal, or administrative action or proceeding, and certain protected information subject to the Clinical Laboratory Improvements Amendments of 1988. 45 C.F.R. § 164.524(a)(1). Consult state law as well regarding a patient's right of access.

When access to records is requested, the covered entity must act on the request within 30 days. 45 C.F.R. § 164.524(b)(2). Where the request is for records not maintained on-site, the covered entity may have up to 60 days to respond. Section 524(b)(2)(ii). If the covered entity is unable to comply within the timeframe requested, it may have one 30 day extension. 524(b)(2)(iii). Regardless of whether access is granted or denied, the covered entity must inform the patient of its intent. Section 524(b)(2)(i)(A) and (B).

7. Personal Representatives.

HIPAA does not alter any laws relating to an agent's right to access health care information. Specifically, with few exceptions, a covered entity must treat a personal representative as the patient for purposes of the regulations. 45 C.F.R. § 164.502(g)(1). "If under applicable law a person has authority to act on behalf of an individual who is an adult or an emancipated minor in making decisions related to health care, a covered entity must treat such person as a personal representative under [HIPAA] with respect to protected health information relevant to such personal representation." 45 C.F.R. § 164.502(g)(2) (emphasis added). HHS received comments regarding a prior version of the rule which used the phrase "power of attorney" and, on review, deleted the phrase. The rule was clarified so that "the rights and authorities of a personal representative under this rule are limited to protected health information relevant to the rights of the person to make decisions about an individual under other law. For example, if a husband has authority only to make health care decisions about his wife in an emergency, he would have the right to access protected health information related to that emergency, but he may not have the right to access information about treatment that she had ten years ago." 65 FR, at 82634.

> ***Practice Note: When drafting powers of attorney, be certain to fully comply with all requirements relating to health care powers of attorney and draft them broadly enough to encompass all related time periods and health care procedures.***
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> ***One of the "question and Answer" sets on the DHHS website addresses whether a personal representative acting under a non-health care POA may request medical records. The answer from DHHS was "no."***

Informal decision makers, such as a family member or the responsible person for a nursing home resident may have access to protected health information "relevant to such person's involvement with the individual's care or payment related to the individual's health care." 45 C.F.R. § 164.510(b)(1)(i). If the patient is present, the health care provider must do one of the following: (1) obtain the patient's consent; (2) provide the patient with the opportunity to object and determine that there was no objection; or (3) reasonably infer that the individual does not object to the disclosure. If the patient is not present, or if incapacitated, then the health care provider may disclose protected health information is, in the exercise of professional judgment, it is determined to be in the patient's best interests. The regulations specifically state that professional judgment may be used in allowing a family member to pick up filled prescriptions, medical supplies, etc. See also 65 FR, at 82634.

Similarly, persons authorized to act for the estate of a deceased individual must be treated as the individual. 45 C.F.R. § 164.502(g)(4). However, the rule is broader for personal representatives of estates than it is for representatives of living person. "A person may be a personal representative of a deceased individual if they have the

authority to act on behalf of such individual or such individual's estate for any decision, not only decisions related to health care. We create a broader scope for a person who is a personal representative of a deceased individual because the deceased individual can not request that information be disclosed pursuant to an authorization, whereas a living individual can do so." 65 FR, at 82634.

Where the covered entity has a reasonable belief that abuse will occur, it may elect not to treat the personal representative as the individual. 45 C.F.R. § 164.502(g)(5).

"The determination about who is a personal representative under [HIPAA] is based on state or other applicable law." 65 FR, at 82634. The only requirement HIPAA adds is verification of the agent's authority. Id; 45 C.F.R. § 164.514(h). In that regard, the health care provider must obtain any documentation, statements, or representations, whether oral or written, from the person requesting the protected health information when such documentation, statement, or representation is a condition of the disclosure under section 514(h).

The health care provider must permit individuals to request and must accommodate reasonable requests by individuals to receive communications of protected health information by alternative means or at alternative locations. 45 C.F.R. § 164.522(b)(1).

> ***Practice Note: Section 164.522(b)(1) would authorize persons such as the personal representative of a nursing home resident, or attorney, to designate another location as the delivery point for protected health information***.

8. Authorizations; Proper Form.

A medical records release is invalid under HIPAA unless it complies with 45 C.F.R. § 164.508(b) and (c). Except in limited circumstances, an authorization cannot be combined with another document. 45 C.F.R. § 164.508(c)(3). An authorization can be revoked at any time except, to the extent that a covered entity has taken action in reliance on the authorization or in certain disputes over coverage where a policy of insurance was issued. 45 C.F.R. § 164.508(c)(5).

Briefly, the regulations provide that a release must include the following "core elements":

(i) A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion;

(ii) The name or other specific identification of the person or class of person authorized to make the requested use of disclosure;

(iii) The name or other specific identification or the person or class of person to whom the covered entity may make the requested use or disclosure;

(iv) A description of each purpose of the requested use or disclosure. The statement "at the request of the individual" is a sufficient description of the purpose when an individual initiates the authorization and does not, or elects not to, provide a statement of the purpose;

(v) An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure. The statement "end of the research study," "none," or similar language is sufficient if the authorization is for a use or disclosure of protected health information for research, including the creation and maintenance of a research database or research repository;

(vi) Signature of the individual and date. If the authorization is signed by a personal representative of the individual, a description of such person's authority to act for the individual must also be provided;

(vii) A statement of the individual's right to revoke the authorization in writing and the exceptions to the right to revoke, together with a description of how the individual may revoke the authorization;

(viii) A statement that the information used or disclosed pursuant to the authorization may be subject to re-disclosure by the recipient and no longer protected by this rule;

(ix) Other elements apply where the requesting party is, itself, a covered entity. Those elements are not covered herein.

See 45 C.F.R. § 164.508(c).

An authorization must be written in plain English. 45 C.F.R. § 164.508(c)(3). A form of release is attached at the end of these materials.

9. Authorization Not Required.

The HIPAA regulations outline a number of instances where no authorization is required to secure health information. Those regulations appear at 45 C.F.R. § 160.510 and 512.

A. **Emergency Situations**. No authorization is required in cases of incapacity or emergency where the health care provider is acting

consistent with a prior expressed preference and in the patient's best interests. 45 C.F.R. § 164.510((a)(3).

B. **Family and Friends**. Protected health information may be disclosed to family and friends provided: (i) if the patient is present and may object, an opportunity to object to the disclosure is provided and none is expressed; or (ii) if the patient is unable to express an objection, the covered entity determines that disclosure is in the patient's best interests and disclosure is limited to information directly relevant to the third party's involvement with the patient's health care. 45 C.F.R. § 164.510(b).

C. **Required by law**. A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of law. 45 C.F.R. § 164.512(a)(1). "Required by law" means a mandate contained in law that compels an entity to make use or disclosure of protected health information and that is enforceable in a court of law. Required by law includes, but is not limited to, court orders and court-ordered warrants; subpoenas or summons issued by a court, grand jury, a governmental or tribal inspector general, or an administrative body authorized to require production of information; a civil or authorized investigative demand; Medicare conditions of participation with respect to health care providers participating in the program; and statutes or regulations that require the production of information, including statutes or regulations that require such information if payment is sought under a government program providing public benefits." 45 C.F.R. § 164.501. Disclosures which are "required by law" must be consistent with requirements in the following:

(i) **Disclosures about victims of abuse, neglect or domestic violence**. 45 C.F.R. § 164.512(c). These are primarily disclosures to government agencies and are not discussed herein.

(ii) **Disclosures for judicial and administrative proceedings**. 45 C.F.R. § 164.512(e). A covered entity may disclosre protected health information in the course of any judicial or administrative proceeding: (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 a court order of a court or administrative tribunal, if: (A) the covered entity receives satisfactory

assurance, as described in paragraph (e)(1)(iii)[3] 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 assurances, as described in paragraph (e)(1)(iv)[4] 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)[5] of this section. A covered entity may, nonetheless disclose protected health information in response to lawful process without receiving satisfactory assurance under paragraph (e)(1)(ii)(A) or (b) if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e)(1)(iii) or to seek a qualified protective order sufficient to meet the requirements of paragraph (e)(1)(iv).

Practice Note: Since an individual may always request his or her own records, consider whether this exception would authorize access to a third party's protected health information where such information is relevant to the litigation.

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[3] Section (e)(1)(iii) provides that a covered entity receives satisfactory assurances from a party seeking protected health information if the covered entity receives from such party a written statement and accompanying documentation demonstrative that: (A) the party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address); (B) the notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and (C) the time for the individual to raise objections to the court or administrative tribunal has elapsed, and (1) no objections were filed; or (2) all objections filed by the individual have been resolved by the court or administrative tribunal and the disclosures being sought are consistent with such resolution.

[4] Section (e)(1)(iv) provides that a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that: (A) The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or (B) the party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.

[5] Section (e)(1)(v) provides that a qualified protective order means, with respect to protected health information requested under section (e)(1)(ii), an order from a court or administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that: (A) prohibits the parties 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) requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding. A form qualified protective order is included at the end of these materials.

See also Sources at §§ 9.1 through 9.3 in Hare et al Full Disclosure: Combating Stonewalling and Other Discovery Abuses (ATLA Press 1995).

(iii) Disclosures for law enforcement purposes. 45 C.F.R. § 164.512(f). These disclosures are not discussed herein.

D. **Public health activities**. Disclosure to public health authorities is authorized, but is not discussed here. 45 C.F.R. § 164.512(b)(1).

E. **Disclosures about decedents**. Covered entities may make appropriate disclosure to coroners, medical examiners and funeral directors. 45 C.F.R. § 164.512(g).

F. **Tissue donation**. Covered entities may make appropriate disclosures regarding tissue and organ donations. 45 C.F.R. § 164.512(h).

G. **Research**. Covered entities may make appropriate disclosures for research purposes where certain privacy programs are in place. 45 C.F.R. § 164.512(i).

H. **Disclosures to avert a serious threat to health or safety**. Where a covered entity, in good faith, believes that use or disclosure of protected health information is necessary to prevent a threat to health or safety, certain disclosure is permitted. 45 C.F.R. § 164.512(j).

I. **Specialized government functions**. Certain disclosures are authorized in connection with specialized government functions (e.g., military and veterans activities). 45 C.F.R. § 164.512(k).

J. **Workers compensation**. Covered entities may make disclosures necessary to comply with worker's compensation laws. 45 C.F.R. § 164.512(l).

Standing Orders: I am aware of at least one worker's compensation judge who has issued a standing qualified protective order. You might consider whether this would facilitate discovery in courts where you practice regularly and approach the senior judge about entering such an order.

In addition, information that does not identify an individual, or where there is a "very small" risk that the individual may be identified may be disclosed under certain circumstances. 45 C.F.R. § 164.514. A substantial amount of data must be redacted to comply with this rule.

10. Notices

Under section 164.520, an individual has a right to adequate notice of the uses and disclosures of protected health information and of the individual's rights and the covered entities legal duties with respect to protected health information. The notice must address the individual's right to inspect and copy protected health information. 45 C.F.R. § 164.520(b)(1)(iv)(C). The notice must also contain a statement that the covered entity is required to abide by the terms of its current notice, and must describe how any change in the notice would become effective.

> ***Practice Note: Any refusal to provide information should be compared to the covered entity's notice and, if it is inconsistent with that notice, the refusal is inappropriate.***

11. Whistleblowers.

HIPAA makes specific provision for whistleblowers. The provision, while narrow, would allow a nursing home employee, for example, to disclose information to a health oversight agency or public health authority authorized by law to investigate or otherwise oversee relevant conduct, or to an appropriate health care accreditation organization, where the employee believes in good faith that conduct is unlawful, that it violates professional or clinical standards, or that care or services endangers one or more patients, workers of the public. 45 C.F.R. § 164.502(j).

12. Law Firms.

An article in the June, 2003, issue of Health Lawyers News (page 8), makes the argument that a law firm may be a HIPAA business associate. This would be true if the covered entity provides the law form with any protected health information and demographic information (such as a list of patients) is sufficient. If so, regulations applicable to business associates will apply to law firms (primarily defense firms). For example, a business associate is subject to HIPAA rules that give a patient the right to amend protected health information. (To be discussed by I. Ellerin). Consider how that might impact the trial of your case.

Conclusion

HIPAA represents a departure from traditional methods of securing medical records. A failure to make oneself knowledgeable concerning its rules will result in delays securing records and, in certain cases, may result in the Plaintiff or patient advocate failing to secure records. The result, in such a case, might be a failure to secure information necessary to prove an injury and/or to show that care received to-date is substandard. Thus, it is incumbent on us, as the Advocate, to learn HIPAA's rules so we can navigate this new regulatory environment.

Exhibit A
Annotated Form of Release

AUTHORIZATION TO RELEASE RECORDS, INFORMATION & DATA

Patient Name: _____

Social Security Number: _____

Health Care Provider:_____

I (the above identified Patient or that Patient's personal representative) have retained the law firms identified in this Release to represent me in certain matters.[6] It is my intent and desire that my attorneys have full and complete access to any and all records, information and data in your possession, under your control or that you have access to, including but not limited to hospital records, nursing home records, doctor records, dental records, psychiatric records, drug treatment records, therapy records, diagnostic studies, lab studies, as well as any and all other records, information or data that would describe care, treatment or services rendered to the above described Patient by any health care provider or mental health care provider. I understand that the Health Insurance Portability and Accountability Act of 1996 (HIPAA), HIPAA regulations, as well as other Federal and State laws and regulations, create a right of privacy that is associated with the records, information and data covered by this release.[7] I expressly authorize you to release the Patient's records, information and data to my attorneys and, as necessary, make a limited waiver of my privacy right for the purpose of giving my attorneys access as follows:

> (1) **The information to be disclosed is as follows**:[8] I expressly authorize my attorneys to request any and all protected health information[9] including, but not limited to records, information or other data (regardless of how those items are identified) related to any and all care, treatment or services provided for the above identified Patient's physical health, mental health, or psycho-social health. Throughout the remainder of this Release, I collectively refer to all protected health information, such as the Patient's records, information and data as the "Records." This Release is intended to be general, full and all encompassing so that my attorneys can access,

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[6] This precise language is unnecessary, but is permitted. 45 C.F.R. § 164.508(b)(1)(ii) provides that valid authorization may contain elements or information in addition to the elements required by this section provided that such additional elements or information are not inconsistent with the required elements. It may, therefore, be helpful to include explanatory information for the benefit of the client or other persons. In any event, the purpose of the disclosure must be stated and this language does so in general terms. The request would also be valid if the purpose simply stated "at the request of the individual."

[7] We include this language to make it clear that HIPAA has been considered.

[8] Our release is sectioned to separately incorporate each element required by 45 C.F.R. § 164.508(c).

[9] One core element of Section 508(c)(is that the release must include a description of the information sought. While we request specific records, we also incorporate HIPAA's terminology.

without limitation, any and all Records that might help them represent me. This Release applies to any and all Records that are in your possession, under your control or that you have access to. My attorneys are further authorized to limit their request to portions of the Patient's Records and may do so by letter to you. My attorneys are further authorized to meet with and consult with any health care or mental health care provider regarding my condition or regarding any care, treatment or services that the above identified Patient received.[10]

(2) **The persons who may request disclosure are as follows**: My attorneys are James W. Clements, III and David L. McGuffey.[11] They, together with those persons working for them at the offices of Clements & McGuffey, LLC and/or the Elder Law Practice of Clements & McGuffey, LLC, are authorized to request my records. My attorney's addresses are below:

ELDER LAW PRACTICE OF CLEMENTS & McGUFFEY, LLC 110 W. CRAWFORD STREET, SUITE 201 P.O. BOX 726 DALTON, GEORGIA 30721-0726 **ATTN: DAVID L. McGuffey**	**CLEMENTS & McGUFFEY, LLC** 1010 Market Street, Suite 401 Chattanooga, Tennessee 37402 **ATTN: JAMES W. CLEMENTS, III**

(3) **The persons to whom information may be disclosed**: The information requested shall be disclosed to my attorneys identified in the preceding paragraph, or to any nurse consultant or Geriatric Care Manager who is assisting them.[12] The information requested may be sent to either of my attorney's office addresses listed above.

(4) **Term of this Release**: It is my intent that this authorization shall remain effective throughout the time during which my attorneys are representing me.[13] To the extent a term is required, this Release shall be effective for a term of not less than five (5) years from the date of execution.

(5) **Right to Revoke this Release**: I understand that I always retain the right to revoke this Release by giving written notice to my attorneys, or by delivering a copy of this release to my attorneys with the written notation that this Release is revoked. However, this Release shall not be

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[10] The definition of "disclosure" encompasses "divulging [information] in any other manner." Thus, it appears prudent to include specific authorization for conferences and/or oral communication.

[11] The name or class of persons authorized to make the request must be specifically identified.

[12] The release must specifically identify the persons or class of persons to whom the covered entity may make the disclosure.

[13] The release must include a stated term. Since it is impossible to predict how long litigation will continue, we define it in terms of the purpose of use rather than selecting a termination date. As a fail-safe designed to limit objections, we include a five-year term.

revoked while my attorneys are representing me.[14]

(6) **Disclosed Records, Information and Data may not be Protected**: I understand that the information disclosed may be subject to re-disclosure by the recipient and may no longer be protected by 45 CFR § 164.508, or other privacy laws and regulations.[15]

_____ _____

PATIENT (or Personal Representative)[16] Date

_____

WITNESS:

LEGAL AUTHORITY: IF THIS RELEASE RELATES TO NURSING HOME CARE, THEN THE REQUEST IS AUTHORIZED PURSUANT TO 42 CFR § 483.10(b)(2), AS WELL AS STATE RESIDENT RIGHTS LAWS. IF THIS AUTHORIZATION HAS BEEN SIGNED BY A PERSONAL REPRESENTATIVE AND IF REQUIRED, THEN A POWER OF ATTORNEY, LETTERS TESTAMENTARY OR LETTERS OF ADMINISTRATION ARE ATTACHED AND INCORPORATED INTO THIS RELEASE BY REFERENCE.[17]

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[14] The release must include a statement concerning the individual's right to revoke the release and how it may be revoked.

[15] The release must include a statement regarding potential re-disclosure of the protected health information.

[16] The release must be signed and dated.

[17] If the release is signed by someone other than the patient, it must include a description of the person's right to act for the patient. As a practical matter, in most cases, you should attach the power of attorney to the release to limit objections and delay.

Exhibit B
Form of Qualified Protective Order

IN THE SUPERIOR COURT OF WHITFIELD COUNTY
STATE OF GEORGIA

John Doe

v. Civil Action No. 1234

XYZ Defendant

QUALIFIED PROTECTIVE ORDER[18]

This case requires the disclosure of certain health information relating to PATIENT XYZ which is protected pursuant to the Health Insurance Portability and Accountability Act of 1996 and implementing regulations. So that the parties may engage in discovery permitted under the Civil Practice Act, the Court enters this Qualified Protective Order as follows:

1. The parties shall be allowed to request any and all protected health information relating to PATIENT XYZ from any health care provider or other covered entity in the course of this litigation, provided such request is made in good faith.
2. Upon receipt of a request for protected health information relating to PATIENT XYZ, the health care provider or covered entity, as the case may be, shall provide such information to the requesting party, and the requesting party shall pay all allowable and reasonable costs associated with the request. Within ten (10) days following receipt of said information, the requesting party shall provide copies of all protected health information that is received to all other parties to this litigation.
3. The parties are prohibited from using or disclosing the protected health information for any purpose other than this litigation. However, the parties shall be permitted to share such protected health information with any expert witness or other person who is assisting the parties in connection with this litigation.
4. At the conclusion of this litigation, the parties shall either return all protected health information to the health care provider or covered entity from whom it was requested, or shall destroy such protected health information (including all copies made).

So ORDERED this ____ day of _____, 20_____.

[18] 45 C.F.R. § 164.512(e)(1)(v). The order should be modified to address any specific concerns.