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HIPAA: A New Weapon In DUI Cases

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On April 14, 2003 the first-ever federal privacy standards to protect patients' medical records and confidential information took effect as part of the Health Insurance Portability and Accountability Act of 1996 (*HIPAA*). These new regulations restrict the disclosure of medical information by doctors, hospitals, health plans, pharmacies, and other health care providers. HIPAA expressly preempts state law but states are at liberty to enact more stringent regulations. 45 C.F.R. § 160.203.

HIPAA applies to health plans, health clearinghouses, and health care providers (covered entities). The statute defines a health care provider as "a provider of medical or health services, 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. § 160.102. In other words, the ambulance which responds to an accident scene, the rescue personnel who transport an accident victim to the hospital, and most certainly, the treating hospital, come within the purview of these new regulations. Furthermore, "health information" includes any information relating to the past, present, or future mental or physical condition of an individual, including the person's identity. 45 C.F.R. § 160.103.

HIPAA creates three broad categories of permitted "uses and disclosures' of protected medical information: First, the statute contemplates information which can never be released unless the patient consents, such as psychotherapy notes. The second category outlines conditions under which confidential information may be released after the patient has been given notice and an opportunity to object. Finally, the statute addresses situations when consent or an opportunity to object is not required. However, under this last category, there are numerous statutory conditions which limit the content of disclosed information and the manner in which it may be disclosed. 45 C.F.R. § 164.508-512. Most significant for our purposes is 45 C.F.R. § 164.512(f), which regulates disclosures to law enforcement.

Disclosure to law enforcement of patients' medical information without a patient's consent is permitted by 45 C.F.R. § 164.512(f) only subject to a court order or subpoena. Additionally, a covered entity may disclose health information about a person who is the victim of a crime only if the individual consents to such disclosure.

Significant Questions

This new mandate raises a number of significant questions in a DUI investigation involving an accident or injuries:

✓ Can police officers walk into an emergency room and make inquiry about the medical condition (i.e. blood test results or whether the person has suffered serious bodily injury) of a person who has just been brought for treatment as the result of an accident?

✓ Is the hospital even allowed to reveal the identity of such person?

✓ What happens when hospital staff call the police to inform them about a patient who is possibly DUI?

✓ Can emergency rescue personnel disclose to the police information about the injuries of an accident victim?

The answer to these and other questions can have a profound impact on the outcome of a DUI case.

Let's examine at typical scenario: A and B are in a two car accident and both are injured. After a few minutes police and emergency rescue arrive at the scene while A is still in her car and B is lying on the ground. Both parties are taken to the emergency room.

Being inveterate sleuths, police officers enter the emergency room and speak to both rescue personnel and hospital staff, whereupon they are informed by emergency rescue of the identity of driver A and the extent of her injuries, which are classified as serious. Additionally, police officers are told by an eager doctor that B has a steering wheel deformity on his chest and that his blood test shows he is DUI. Based on this information police officers order a blood draw of B and he is eventually charged with causing serious bodily injury while DUI.

Multiple Violations of HIPAA

We have just witnessed multiple violations of HIPAA. The first issue is whether emergency medical technicians (EMT) and the hospital are a covered entity under the act, and if they are, may police use information obtained from EMT's and hospital staff.

If emergency rescue personnel and the hospital fall within the statutory definition of a covered entity, then disclosure of any information including the person's identity and injuries without the patient's consent is a violation of federal law. Because there is a dearth of case law in this area, we turn to the statute for answers.

Under 45 C.F.R § 160.102(a)(3), HIPAA applies to any health care provider who transmits any health information in electronic form in connection with a covered transaction. Before coming to a conclusion, we must first determine if the business or agency is health care provider as defined by the statute, if it conducts covered transactions, and whether patients' information is transmitted electronically. If the answer to all these questions is yes, then we have a covered entity.

First, we address whether EMT's and the hospital are a health care provider. The statute defines a health care provider as a business or agency which furnishes health care or bills or receives payment for health care in the normal course of business. 45 C.F.R. § 162.1101. This definition is obviously applicable to a hospital. However, whether EMTs will fall within this definition will hinge upon whether the agency furnishes health care. The primary function of emergency rescue is to furnish emergency medical attention. In fact, because emergency rescue personnel dispense medical treatment akin to doctors, New York courts have held that the physician-patient privilege applies to fire rescue. People v. Mirque, 195 Misc. 2d 375, 758 N.Y.S. 2d 471 (County Court, Bronx Co. 2003), People v. Hanf, 159 Misc. 2d 748, 611 N.Y.S. 2d 85 (County Court, Monroe Co., 1994). Therefore, EMT should be classified as a business or agency which furnishes health care in the regular course of business.

The next step will determine whether the business or agency conducts a covered transaction. A covered transaction is essentially a request for payment. If there is no direct claim because reimbursement is based on a mecha-

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nism other than charges or reimbursement rates for specific services, then the covered transaction is the transmission of medical information for reporting health care.

In other words, even if the agency does not directly bill for health care, any transmission of a patient's medical information will be considered a covered transaction. While hospitals almost always bill for health care or file claims and are reimbursed for services rendered, emergency rescue departments usually operate under a budget and do not directly bill for their services. However, they routinely transmit patient information to hospitals and other agencies. This is considered a covered transaction; thus, emergency and fire rescue should be classified as an agency which conducts covered transactions. Additionally, free clinics usually store and transmit patient information; therefore, they should also be deemed to conduct covered transactions.

Last, we must determine whether any of the covered transactions are transmitted in electronic form. 45 C.F.R. § 160.102 (a)(3). This includes any electronic media or storage media such as computers, magnetic tape or disk, optical disk ,etc. 45 C.F.R. § 160.103. Given the current prevalence of computers, it is almost certain that any hospital will store and transmit patient information electronically. In order to determine whether an EMT department stores or transmits patient information electronically, it is necessary to ascertain the procedure used by an individual department.

However, information transmitted via telephone or radio transmissions consisting of information which previously existed in electronic form is considered an electronic transmission. In almost every case there is some form of communication between the ambulance and the hospital when an injured person is being transported to the emergency room. This is classified as an electronic transmission.

The law is that if emergency rescue personnel and hospitals are indeed covered by HIPAA, they are prevented from disclosing confidential medical information absent compliance with the requirements of the statute. HIPAA now requires a court order, subpoena, grand jury subpoena, or, under limited circumstances, an administrative request before such medical information can be disclosed to law enforcement without the patient's consent. 45 C.F.R. § 164.152(f). Under these circumstances, the prosecution must surmount two obstacles.

First, police cannot question medical personnel immediately after the accident in order to establish probable cause to arrest or order a blood draw. For instance, in the example above HIPAA was violated when police learned from the hospital that B had a steering wheel deformity and when the results of his blood test were disclosed. Furthermore, the EMT's also violated HIPAA when they disclosed A's confidential medical information without her consent. It might be added parenthetically that without this information police have no probable cause to order a blood draw from B. Finally, if police obtain confidential medical information about a patient in violation of HIPAA, such information cannot subsequently be used as the basis to obtain a subpoena for the defendant's medical records

Another issue arises when police enter the emergency room and question EMT's and hospital staff. When law enforcement is allowed unrestricted access to emergency rooms, confidential medical information of every patient being treated is compromised, in violation of HIPAA regulations. This new Privacy Rule requires covered entities to safeguard patients' medical information, including the person's identity. 45 C.F.R. § 306-318.

Consequently, doctor's offices and hospital waiting rooms are now required to ensure their patient's privacy by restricting access to medical records and to certain areas. For example, covered entities such as in the above example may not maintain directories with information about patients unless the patient consents. Furthermore, the patient must be informed about the information to be included in the directory and to whom the information may be released. In addition, the patient must be given the opportunity to restrict the content of the information, to whom it is disclosed, or opt out of being included in the directory altogether. Also, covered entities may use patient sign in sheets or call out patients' names in waiting rooms, so long as the information disclosed is

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appropriately limited. 45 C.F.R. 164.510.

These types of disclosures fall under the Incidental Disclosures Clause which permits certain disclosures which occur as a by-product of an otherwise permitted disclosure. However, these disclosures are permitted only to the extent that the covered entity has applied reasonable and appropriate safeguards and has implemented the minimum necessary standard. 45 C.F.R. § 164.502. This is a two- prong test:

First, when using or disclosing protected health information a covered entity must make reasonable efforts to limit such information to the minimum necessary to accomplish the intended purpose of the use.

Second, such entity must implement physical safeguards to protect patients' information. Possible safeguards include: reasonably limiting access to certain areas, ensuring that the area is supervised, escorting non-employees through restricted areas, or placing patient charts in their holders with identifying information facing the wall or otherwise covered, rather than having the information visible to anyone who walks by.

Allowing police unfettered access to emergency rooms is a common practice which falls outside the Incidental Disclosures Clause. The Clause contemplates situations where disclosure is incidental to medical treatment. When police enter a hospital emergency room the purpose is investigative and in no way related to medical treatment and thus falls outside of the clause. This means that any information obtained by police, such as in the illustration above, is obtained in violation of HIPAA.

State Law Preempted

HIPAA expressly preempts state law. Although states are free to promulgate more strict legislation, they are bound by the minimum standards set by this act. 45 C.P.R. § 160.203. State laws on the subject are varied and courts have grappled with the issue, often with inconsistent results. For instance, in the case of State v. Johnson, 814 So 2d 390, 27 Fla. L. weekly S250 (Fla. Supreme Court, 2002) the State subpoenaed the Defendant's medical records without giving notice to the Defendant as required by state law[1]. The trial court suppressed the medical records. The Florida Supreme Court reversed the trial court's decision and ruled that when the state makes a good faith effort to comply with the statute, it should not be precluded from obtaining the medical records and using them at trial.

One month later, the Florida Second District Court of Appeals was presented with the same issue. In the case of Thomas v. State, 820 So 2d 382, 27 Fla. L. Weekly D1251 (Fla. 2nd DCA, 2002) the Defendant was transported to the hospital following a car accident where the police requested and obtained from the medical staff the blood alcohol content of the blood drawn in the course of medical treatment. The State made no good faith effort as required by Johnson.

While stating that the officer's verbal request for the nurse to tell him the blood test results did not constitute the type of governmental misconduct that would warrant exclusion of the medical records subsequently obtained through a subpoena, the Court ruled that the records were not subject to suppression. These cases illustrate the lack of uniformity which HIPAA seeks to address.

In the example above, the Florida Supreme Court held that if the state shows a good faith effort to comply with the statute, then illegally obtained medical records are admissible, while the District Court of Appeals ruled that even evidence obtained as a result of a willful violation of the statute is admissible (the Thomas case is currently under appeal before the Florida Supreme Court). In contrast, HIPAA does not provide for a good faith exception, nor does it distinguish between verbal or written information. Any unauthorized disclosure of medical information is a violation of the statue.

Most states recognize the confidentiality of medical records and thus require the government to obtain a subpoena or similar judicial procedure in order to compel their discovery by the state.[2] However, in the majority of DUI cases which involve accidents and medical attention, the crucial stage of evidence gathering occurs at the accident scene or shortly thereafter at the emergency room, well before a subpoena or court order is obtained.

In some cases where the Defendant is seriously injured or unconscious, impairment can

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only be established through medical information obtained at the hospital. It at this stage that either probable cause to arrest and charge the defendant is obtained or information which will later be used to secure a subpoena is gathered.

In order to facilitate evidence gathering at this early juncture, some states have enacted legislation which either permits or requires medical personnel to alert police if a test conducted on a person brought for treatment at a medical facility reveals the presence of alcohol. For example, in Florida the Implied Consent Law allows a health care provider who becomes aware, as a result of a blood test performed in the course of treatment, that a person's blood-alcohol level exceeds the legal limit to notify law enforcement.[3] The Arizona statute goes even further by making it a misdemeanor when a person who collects blood, urine or any other bodily substance fails to turn over to police a portion of that sample for testing.[4] HIPAA contains a provision which permits disclosure as required by law. Under these terms the above-cited Arizona law is permissible because disclosure is required. In contrast, the Florida statute is contrary to HIPAA because disclosure is discretionary.

The issues raised by this new legislation have yet to be tested before the courts. In fact, as of the publication of this article, there are only two cases in the entire country in which HIPAA has been reported as a defense in a DUI case. In Tapp v. State, 108 S.W. 3d 459 (Tex.-App.-Hous., 14th Dist., 2003) the Defendant in a DUI case argued that his medical records were obtained in violation of HIPAA. The Texas Court of Appeals for the 14th District ruled that covered entities are only required to comply with the regulations after April 14, 2003, and any action taken during the pre-enforcement stage cannot constitute a violation. The same court addressed the issue two months later in an unpublished memorandum opinion in the case of Harmon v. State, No. 01-02-00035-NR, 2003 WL 2166 5488 (Tex.-App. 1st Dist., 2003) where the defendant's blood-alcohol test results were obtained by the State pursuant to a grand jury subpoena. The Court held that because the test results in question were obtained pursuant to a subpoena, there was no violation of HIPAA. However, while ruling that a defendant does not have a fourth amendment privacy interest in medical records containing blood-alcohol test results taken by hospital personnel solely for medical purposes, the Court did not address the issue of whether HIPAA creates a statutory right to privacy.

Remedy

Once courts rule that a violation of HIPAA has occurred in the context of a DUI or criminal investigation, the next issue will be what is the appropriate remedy? State and federal courts have held that the exclusionary rule is the appropriate remedy in a state court when evidence is obtained in violation of a federal statute. State v. Fratello, 835 So 2d. 312, 28 Fla. L. Weekly D134 (Fla. 4th Dist. Court Appeals, 2003) (evidence obtained in violation of federal wiretap statute suppressed); State v. Trotter, 230 A. 2d 618, 4 Conn. Cir. Ct. 185 (Conn. Circuit Court, 1967) (court recognized exclusionary rule where evidence has been gained in violation of the accused's rights under the Constitution or federal statutes); Cruz v. Alexander, 477 F. Supp. 516 (US Dist. Court, S.D., NY, 1979) (Conviction in state court based on evidence obtained in violation of federal wiretapping statute is fundamentally defective and results in miscarriage of justice). When evidence is obtained in violation of a federal statute which is expressly binding on the states, the government should not be allowed the benefit of such evidence.

The effects of HIPAA will be far-reaching. Multiple defenses can be raised under this new statute and it can be a powerful new weapon for defense counsel. The issue is ripe for litigation and it should be brought before the courts without delay, before Congress takes notice and amends the statute to make it inapplicable to DUI cases.

Endnotes

[1] Fla. Stat. Ann. § 395.3025.

[2] Fla. Stat. Ann. § 395.3025 (hospital records obtainable only by consent or subpoena); Ann. Cal. Penal Code § 1543 (procedure to obtain disclosure of medical records to law enforcement); Colorado Rev. Stat. Ann. § 6-18-103 (privacy of health information); Colorado Cal. Penal Code § 18-4-412 (theft of medical records or medical informa-

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tion).

[3] Fla. Stat. Ann. § 316.1933 (2)(a) 1.

[4] A.R.S. Ann. § 28-1388.

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Dealing With The Percipient Witness

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In many drunk driving cases, much of the testimony against the defendant will come from police officers and prosecution expert witnesses. Other evidence will be generated from the defendant, for example, chemical test results, statements, performance on field sobriety tests and the like.

However, in some drunk driving cases, particularly those involving a traffic accident, there will often be testimony to supplement that of the police officer, and that testimony will come from fact or percipient witnesses. The testimony of such witnesses is important for several reasons:

- Some may be able to establish the driving element of the *corpus dilecti*, because in many cases the police officer will not have arrived at the scene until after an accident occurred.
- Lay opinion of that percipient witness on the issue of intoxication may be admissible. *See* Fed.R.Evid. 701 and applicable state counterparts.

Note: Even though in many cases the testimony will be deemed admissible, defense counsel should still attempt to keep the opinion out on foundational grounds, if possible. Or, at a minimum, if the opinion is allowed into evidence, the percipient witness should be cross examined on the bases of the opinion and the ability to determine both generally, and under the specific circumstances presented, whether the defendant was under the influence of alcohol.

- The percipient witness may be able to testify about statements made or visual observations concerning a defendant even if the witness is not allowed to render a lay opinion regarding intoxication.

First Things First

One of the first things the defense counsel needs to do is to find out who the percipient witnesses are. This requires both a review of police reports and other formal discovery in the criminal case, but investigative work as well. There may be percipient witnesses who were at the scene of an accident or who otherwise observed conduct of the defendant before, during or even after the event at issue. Each may be helpful to the defense. Once the identity of the witnesses is obtained, defense counsel needs to determine which of these witnesses will likely testify for the prosecution and offer troublesome and problematic testimony for the defense.

If it appears that any of the percipient witnesses will be proffered by the prosecution to offer a lay opinion, the planning for a foundational challenge should take place. Defense counsel should attempt to limit the percipient witnesses to things observed: How did the defendant look? How did the defendant walk? What did the defendant say? However, they should be prohibited from rendering an opinion or any conclusion about the defendant's intoxication. The court may not allow a lay witness to testify whether the defendant was "under the influence" of alcohol. There is a difference between being under the influence of alcohol and

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