MEDICAL RECORDS, PRIVACY REGULATIONS, AND DISCOVERY: DISPELLING THE RUMORS

by Patrick Koontz

When the Federal Health Insurance Portability and Accountability Act of 1996=s Privacy Regulations (the APrivacy Regulations@) went into effect on April 14, 2003, the stage was set for one of the most significant changes in the medical records discovery process in recent history, or so many people seem to think. Rumors abound that nonparty requests for production signed only by an attorney are now worthless. Now, as the rumors go, all discovery requests involving medical records require a judge=s signature, and attorneys need an authorization to conduct depositions of a health care provider. The purpose of this article is to discuss the interaction of the HIPAA Privacy Regulations (the APrivacy Regulations@) and the discovery process by addressing some of the more common misconceptions about that interaction.

CAN HEALTH CARE PROVIDERS DISCLOSE HEALTH CARE INFORMATION ABOUT THEIR PATIENTS AS PART OF THE DISCOVERY PROCESS WITHOUT AN AUTHORIZATION FROM THE PATIENT?

Yes. The Privacy Regulations are designed to set a federal floor for the protection of the privacy of patients= medical and medical billing information (said information referred to hereinafter as AProtected Health Information@ or APHI@), not to eliminate discovery of that information. The Privacy Regulations permit disclosure of PHI Ain the course of any judicial or administrative proceeding@ without obtaining an authorization from the patient or giving the patient an opportunity to object to the disclosure. 45 C.F.R. 164.512(e). However, there are different requirements for response based on whether or not the discovery request is an order of the court.

DO THE PRIVACY REGULATIONS REPLACE THE CURRENT DISCOVERY PROCESS WITH AN AONLY BY AUTHORIZATION@ SYSTEM?

No. The Privacy Regulations require most health plans, clearinghouses, and providers who perform certain transactions electronically, defined collectively as ACovered Entities,@ to take action to reasonably prevent the unauthorized use and disclosure of PHI under their control. However, the Privacy Regulations state that a Covered Entity Amay 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 such law.@ 45 C.F.R. 164.512(a)(1). The term Arequired by law@ is defined in the Privacy Regulations as Aa mandate contained in law that compels an entity to make a 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 . . . or an administrative body authorized to require the production of information; a civil or an authorized investigative demand . . . and statutes or regulations that require the production of information . . .@ 45 C.F.R. 164.501.

It is important to emphasize that the regulations specifically permit disclosures pursuant to statutes and regulations, such as state and federal discovery rules, requiring production of information. Of course, health care providers and attorneys should keep in mind that any state law that is more stringent than the Privacy Regulations will preempt the Privacy Regulations. In very general terms, laws and regulations are considered more stringent when they prohibit a use or disclosure that is allowed by the Privacy Regulations or provide a patient with greater access or control over his or her information. These sections of the Privacy Regulations make clear that the Privacy Regulations are designed to uphold and enforce, with minor modifications, the existing discovery process, not replace it.

CAN AN ATTORNEY ATTEND A DEPOSITION AT WHICH PHI WILL BE DISCLOSED WITHOUT AN AUTHORIZATION FROM THE PATIENT?

Yes. The attorney=s presence at the deposition is merely one type of disclosure permitted as Arequired by law@ under 45 C.F.R. 164.512(a)(1) and/or Apursuant to judicial or administrative proceedings@ by 45 C.F.R. 164.512(e), as applicable.

CAN A HEALTH CARE PROVIDER RESPOND TO NONPARTY REQUESTS FOR PRODUCTION ISSUED BY COUNSEL WITHOUT A PATIENT AUTHORIZATION?

Yes. In attempting to develop compliance plans that are as straightforward as possible, many entities have opted for the overly cautious approach, from a Privacy Regulations stance, of refusing to comply with a nonparty request for production and subpoena duces tecum in the absence of either (1) an authorization from the patient who is the subject of the records or (2) a court order signed by a judge. However, the Privacy Regulations and Indiana law permit an entity to disclose records pursuant to a valid nonparty request for production and subpoena duces tecum without an authorization from the patient.

The Privacy Regulations deal with responses to subpoenas primarily in 45 C.F.R. 164.512. As noted previously, responses to subpoenas are included in the definition of what is Arequired by law.@ Generally, a response is required by law when the discovery request (1) compels the responding entity to disclose the information and (2) is enforceable in a court of law. While a subpoena issued by an attorney is generally recognized under the terms of Indiana Trial Rule 34 and Indiana law as compelling a response of some kind and as being enforceable in a court of law, the Privacy Regulations create some confusion as to whether such a subpoena meets the definition of a Asubpoena . . . issued by the court@ that would fit under the Privacy Regulation=s definition of what is Arequired by law@ under 45 C.F.R. 164.501.

The confusion is primarily created when noting that the Privacy Regulations separately address responses to Asubpoenas and summons issued by the court@ in 45 C.F.R. 164.512(a)(1) and responses Ato a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court@ in 45 C.F.R. 164.512(e). The implication is that there may be instances in which a nonparty request for production accompanied by a subpoena duces tecum is not an Aorder of the court.@ However, under Indiana law, such subpoenas are issued on behalf of the court, even when signed by an attorney, and are therefore orders of the

court. Ind. TR 45. In Indiana, Trial Rule 45 allows Aan attorney admitted to practice law in this state, as an officer of the court, [to] issue and sign [a] subpoena *on behalf of (a) a court* in which the attorney has appeared for a party; or (b) a court in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court where the attorney has appeared for a party in that case.@ (Emphasis added.) Based on this language, one can argue that a nonparty request for production and subpoena duces tecum executed by an Indiana attorney are always issued Aon behalf of a court@ and are always orders of the court. The argument can be carried further that a response to an order of the court is Arequired by law@ under the Privacy Regulations. It should be noted that the language of Federal Trial Rule 45 is substantially similar to the language of Indiana Trial Rule 45.

If a health care provider is not convinced that a nonparty request for production is an order of the court, the Privacy Regulations offer other avenues for adequate response. For example, 45 C.F.R. 164.512(e) permits responses to subpoenas if the subpoena provides Asatisfactory assurances@ that the party issuing the subpoena either (1) made a reasonable effort to notify the patient of the request for information; or (2) has taken steps to secure a qualified protective order that protects the PHI during and after the dispute. Fortunately for Indiana attorneys, the satisfactory assurances provisions of the Privacy Rules differ only slightly from the notice requirements of Indiana Trial Rule 34(C). Requesting attorneys must still provide the notice and opportunity to object to the nonparty request for production required by Indiana Trial Rule 34(C). To comply with the Privacy Regulations, they should additionally include a Astatement@ regarding and Adocumentation@ supporting their compliance with the notice or protective order provisions of the Privacy Regulations. Indiana attorneys who plan to use 45 C.F.R. 164.512(e) as the basis for compelling a response to their nonparty request for production should be sure to comply with the Asatisfactory assurances@ requirements when sending the request to the health care provider.

In addition to offering several avenues for justifying response to nonparty requests for production, 45 C.F.R. 164.512 and Indiana Trial Rule 34(C) make clear that Covered Entities enjoy additional protections from liability by requiring notification of the patient of the request and giving the patient an opportunity to object. By making providers aware of these provisions and the fact that the patient has failed to object to the disclosure in the course of litigation, the provider may be more comfortable responding.

ARE ALL DISCOVERY RESPONSES SUBJECT TO THE MINIMUM NECESSARY STANDARD?

No. The minimum necessary standard generally requires Covered Entities, and business associates who have contractually agreed to be bound by the standard, to reasonably limit the amount of information they use or disclose to the minimum amount necessary to accomplish the purpose of the use or disclosure. 45 C.F.R. 164.502(b)(1). This standard often results in guesswork by the entity maintaining the information. In the context of nonparty requests for production, for example, entities may have little or no understanding of the purposes for which the information is requested and have only the face of the requesting documentation to guide them in limiting their response. Fear of violating the minimum necessary standard has led many entities that maintain PHI to reject all but the most detailed subpoenas. Attorneys can work to avoid rejection of their subpoenas by crafting them in a

manner that makes the information requested and the purpose of the request as clear as possible.

Attorneys should also be prepared to educate those responding to a subpoena about the exceptions to the minimum necessary standard. For example, disclosures that are Arequired by law,@ such as those pursuant to a court order, are not subject to the limitations of the standard. 45 164.502(b)(2)(v). However, disclosures that are required by law are limited to disclosing only that information necessary to comply with the law. Responses to a valid, nonparty subpoena, for instance, must disclose only that information as authorized by the terms of the subpoena. 65 FR 82525. So, even when the minimum necessary standard does not apply, careful crafting of the subpoena is necessary.

CONCLUSION

Attorneys issuing discovery requests should be careful to draft those requests with an eye toward making it as easy as possible for the health care provider to understand the nature of the allowed response and the authority for it. Discovery requests should include a short recitation of the authority granted by the privacy regulations and the trial rules that allow the entity holding the records to respond. Attorneys should also work to educate health care providers on the discovery issues related to the Privacy Regulations to alleviate confusion and prevent disputes.

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