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THE IMPACT OF HIPAA ON PERSONAL INJURY PRACTICE

I. INTRODUCTION

HIPAA is the Health Insurance Portability and Accountability Act of 1996. As part of this Act, Congress told the U.S. Department of Health and Human Services (HHS) to prepare privacy regulations. 42 U.S.C. §§ 1320-2(d) and 1320-3a. Those regulations became effective on April 14, 2003. 45 C.F.R. § 160 et. seq.

The attached power point slides describe what a personal injury attorney needs to know about the basic parameters of the HIPAA regulations related to confidentiality of health information. The bottom line is that, with a few exceptions applicable to the patient, HIPAA regulations create requirements, in addition to those imposed by state law, which must be observed to obtain medical records of patients in personal injury litigation. HIPAA regulations do not remove more stringent state law limitations on the discoverability of patient records. In a few instances, HIPAA regulations improve the access of the patient/plaintiff to her/his own medical records.

The rest of this paper covers frequently asked questions by personal injury litigators about how HIPAA regulations may affect the acquisition and use of health information in personal injury litigation.

II. PI PLAINTIFF ATTORNEY’S FREQUENTLY ASKED QUESTIONS

Q: Under HIPAA how do I get a prospective client’s medical records pre-suit to evaluate whether to take a personal injury case?

A: By the same means you have used pre-HIPAA – with an authorization signed by the prospective client. Under HIPAA, the form of authorization is specified. Pre-HIPAA authorizations will need revision to comply with HIPAA requirements. State law requirements that authorizations contain specific permission to release HIV and mental health information remain. Health care providers may be more likely to require use of their own authorization form. Sample authorizations found at: www.ama-assn.org/ama/pub/category/6900.html.

Subchapter B of Article 10 of Texas House Bill 4 also contains an authorization form, which is intended to be HIPAA compliant. A copy of that portion of the bill is attached to this paper.

Q: Do I still have to comply with HIPAA if I am sending an Art. 4590i claim letter to obtain the medical records of my client/patient from a prospective healthcare defendant?

A: Yes. Between now and the effective date of the repeal of Art. 4590i, HIPAA regulations preempt the less stringent authorization required by Art. 4590i. Beginning September 1, 2003, the amended Chapter 74 of the Civil Practices and Remedies Code (which replaces Art. 4590i) requires you to provide an authorization as specified in the amendments. This form of authorization is intended to be HIPAA compliant. Failure to provide the HIPAA compliant authorization shall abate all proceedings against the healthcare provider until 60 days after such authorization is furnished.

Q: Does HIPAA regulate the disclosure of medical records that are produced by the plaintiff to the defendant in response to written discovery requests?

A: No. HIPAA only directly regulates the use and disclosure of medical information by healthcare providers and healthcare insurers (but HIPAA indirectly affects business associates of healthcare providers). HIPAA regulations do not apply to disclosures by other persons or entities who are not “covered entities” (basically, healthcare providers and healthcare insurance companies).

Q: Will HIPAA regulations prevent a healthcare provider who has been sued from furnishing a plaintiff’s records to its defense attorney?

A: No. Healthcare providers can disclose patient records to their attorneys pursuant to a Business Associate Agreement, by which the attorney agrees to limit redisclosure of medical information as provided by law.

Q: Will HIPAA regulations prevent ex parte communications between a defense attorney and healthcare providers who have not been sued?

A: Good Question. HIPAA regulations target healthcare providers and limit the circumstances under which they can disclose healthcare information to third parties, such as defense attorneys. The HIPAA regulations are silent on this exact point, but as a general rule the healthcare provider may not disclose medical information to third parties for non-treatment,
payment or healthcare operations purposes without an authorization, subpoena or court order. If the defense attorney has obtained all of the healthcare provider’s records pursuant to a HIPAA compliant authorization, further ex parte discussion of the already disclosed medical information may not be a violation of HIPAA regulations. (Note that the authorization form required by amended Chapter 74, C.P.R.C. to be completed and furnished with a medical liability claim letter states, “the health information to be disclosed extends to and includes the verbal as well as the written…”)

Q: What good are the HIPAA statute and regulations to personal injury plaintiffs and their attorneys anyhow?

A: It is not all red tape. For one thing, HIPPA regulations give a patient a right to inspect the original of his/her own medical records. Prior to HIPAA, there was no way prior to suit to obtain access to the original chart. In addition, healthcare providers may be reluctant to engage in ex parte communications with defense attorneys due to the HIPAA regulations. Third, due to HIPAA regulations, plaintiffs will have an additional body of law to prevent disclosure of medical information that is not reasonably related to the claim at issue.

III. PI DEFENSE ATTORNEY’S FREQUENTLY ASKED QUESTIONS

Q: When I have been retained pre-suit, after my client gets a claim letter, I used to get third party healthcare providers to furnish their records to me without an authorization by showing (with the claim letter) that the patient/plaintiff had put her/his medical condition in issue. Can I still do that under HIPAA?

A: No. Because of HIPAA, you will need an authorization pre-suit to get medical records from any healthcare provider (other than one you represent).

Q: If I am defending a medical provider in a medical negligence claim, does HIPAA prevent me from getting the medical records of the claimant from my own client?

A: No, but HIPAA regulations require your healthcare client to enter into a “business associate agreement” with you, which will provide limitations on your redisclosure of the records of the claimant.

Q: Under HIPAA, if a medical malpractice claimant sends notice letters to a hospital and to a physician, and both healthcare providers hire attorneys pre-suit, can these attorneys exchange copies of the medical records of each other’s clients?

A: No. HIPAA does not regulate these attorneys directly but their business associate agreements would probably restrict this. HIPAA regulations do not contain an exception to non-disclosure for this exact situation. Beginning September 1, 2003, the amended Chapter 74 of the Civil Practices and Remedies Code (which replaces Art. 4590i) requires a medical malpractice claimant to furnish a HIPAA compliant authorization with every claim letter sent. This authorization will give every claimant the right to obtain the records from all other healthcare providers whose treatment is relevant to the claim.

Q: After a suit is filed against my client in a personal injury matter, does HIPAA restrict my ability to get all the medical records I can find on the claimant, via subpoena and written question deposition?

A: Maybe. HIPAA says that healthcare providers may produce records pursuant to subpoena if a qualified protective order has been sought or if reasonable notice has been given to the patient with any objections resolved. Technically, a written question deposition notice would comply with this requirement (because notice is furnished to the plaintiff's counsel). Practically, some healthcare providers are going to insist on a HIPAA compliant authorization and will not produce records in response to a mere notary subpoena. To the extent that particular healthcare providers were insisting on an authorization pre-HIPAA due to state law requirements, nothing in HIPAA will change that. In the case of a reluctant healthcare provider you will need to either get the authorization or get a court order.

Q: Can I get a HIPAA-compliant authorization from the plaintiff under the Texas Rules of Civil Procedure?
A: Probably. If you are defending a medical malpractice claim, amended Chapter 74, C.P.R.C. will require such an authorization. In other PI cases, where the civil procedure rules provide that the plaintiff must produce all relevant medical records or an authorization to obtain them, this will be construed to mean an effective authorization.

Q: In a healthcare liability suit, if I have medical records from my healthcare provider client, provided under a business associate agreement, will the agreement allow me to redisclose the records to an expert witness?

A: Yes. If you are defending a healthcare provider who has medical records regarding the claimant, your client must, to comply with HIPAA regulations, have you sign a “business associate agreement” prior to sending you the medical records as to the claimant in question. That agreement will provide restrictions on your redisclosure of that copy of your healthcare provider client’s medical records on the claimant and will require you to obtain reasonable assurances that your expert will handle the medical records in compliance with HIPAA regulations. The business associate agreement may even ask you to obtain those assurances in writing from your expert. Other copies of your client’s medical records on the claimant obtained by other means (e.g. from the plaintiff in response to discovery) and all other medical records obtained in discovery or by written question deposition and subpoena will not be subject to such agreement or to HIPAA regulations.

Q: In personal injury litigation against other than healthcare providers/entities, does HIPAA restrict my redisclosure of a plaintiff’s medical records to third parties such as expert witnesses, trial consultants and codefendants?

A: No. HIPAA only regulates healthcare providers and insurers. Unless you have a business associate agreement that would restrict this type of disclosure, you are free to share with the defense attorney.

Q: If I get a request from a defense attorney to provide him with a copy of a plaintiff expert’s deposition regarding a closed case, in which the expert discusses otherwise protected medical information about that plaintiff, does HIPAA restrict redisclosure of that deposition?

A: No. HIPAA only regulates healthcare providers and insurers. Unless you have a business associate agreement that would restrict this type of disclosure, you are free to share with the defense attorney.
Amendments to Chapter 74 of the Texas Civil Practice and Remedies Code

requiring the furnishing of a HIPAA-compliant authorization with claim letter

(Effective September 1, 2003)

SUBCHAPTER B. NOTICE AND PLEADINGS

Sec. 74.051. NOTICE. (a) Any person or his authorized agent asserting a health care liability claim shall give written notice of such claim by certified mail, return receipt requested, to each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit in any court of this state based upon a health care liability claim. The notice must be accompanied by the authorization form for release of protected health information as required under Section 74.052.

(b) In such pleadings as are subsequently filed in any court, each party shall state that it has fully complied with the provisions of this section and Section 74.052 and shall provide such evidence thereof as the judge of the court may require to determine if the provisions of this chapter have been met.

(c) Notice given as provided in this chapter shall toll the applicable statute of limitations to and including a period of 75 days following the giving of the notice, and this tolling shall apply to all parties and potential parties.

(d) All parties shall be entitled to obtain complete and unaltered copies of the patient's medical records from any other party within 45 days from the date of receipt of a written request for such records; provided, however, that the receipt of a medical authorization in the form required by Section 74.052 executed by the claimant herein shall be considered compliance by the claimant with this subsection.

(e) For the purposes of this section, and notwithstanding Chapter 159, Occupations Code, or any other law, a request for the medical records of a deceased person or a person who is incompetent shall be deemed to be valid if accompanied by an authorization in the form required by Section 74.052 signed by a parent, spouse, or adult child of the deceased or incompetent person.

Sec. 74.052. AUTHORIZATION FORM FOR RELEASE OF PROTECTED HEALTH INFORMATION. (a) Notice of a health care claim under Section 74.051 must be accompanied by a medical authorization in the form specified by this section. Failure to provide this authorization along with the notice of health care claim shall abate all further proceedings against the physician or health care provider receiving the notice until 60 days following receipt by the physician or health care provider of the required authorization.

(b) If the authorization required by this section is modified or revoked, the physician or health care provider to whom the authorization has been given shall have the option to abate all further proceedings until 60 days following receipt of a replacement authorization that must comply with the form specified by this section.
(c) The medical authorization required by this section shall be in the following form and shall be construed in accordance with the "Standards for Privacy of Individually Identifiable Health Information" (45 C.F.R. Parts 160 and 164).

AUTHORIZATION FORM FOR RELEASE OF PROTECTED HEALTH INFORMATION

A. I, __________(name of patient or authorized representative), hereby authorize __________(name of physician or other health care provider to whom the notice of health care claim is directed) to obtain and disclose (within the parameters set out below) the protected health information described below for the following specific purposes:

1. To facilitate the investigation and evaluation of the health care claim described in the accompanying Notice of Health Care Claim; or

2. Defense of any litigation arising out of the claim made the basis of the accompanying Notice of Health Care Claim.

B. The health information to be obtained, used, or disclosed extends to and includes the verbal as well as the written and is specifically described as follows:

1. The health information in the custody of the following physicians or health care providers who have examined, evaluated, or treated __________ (patient) in connection with the injuries alleged to have been sustained in connection with the claim asserted in the accompanying Notice of Health Care Claim. (Here list the name and current address of all treating physicians or health care providers). This authorization shall extend to any additional physicians or health care providers that may in the future evaluate, examine, or treat __________ (patient) for injuries alleged in connection with the claim made the basis of the attached Notice of Health Care Claim;

2. The health information in the custody of the following physicians or health care providers who have examined, evaluated, or treated __________ (patient) during a period commencing five years prior to the incident made the basis of the accompanying Notice of Health Care Claim. (Here list the name and current address of such physicians or health care providers, if applicable.)

C. Excluded Health Information - the following constitutes a list of physicians or health care providers possessing health care information concerning __________ (patient) to which this authorization does not apply because I contend that such health care information is not relevant to the damages being claimed or to the physical, mental, or emotional condition of __________ (patient) arising out of the claim made the basis of the accompanying Notice of Health Care Claim. (Here state "none" or list the name of each physician or health care provider to whom this authorization does not extend and the inclusive dates of examination, evaluation, or treatment to be withheld from disclosure.)
D. The persons or class of persons to whom the health information of _________ (patient) will be disclosed or who will make use of said information are:

1. Any and all physicians or health care providers providing care or treatment to _________ (patient);

2. Any liability insurance entity providing liability insurance coverage or defense to any physician or health care provider to whom Notice of Health Care Claim has been given with regard to the care and treatment of _________ (patient);

3. Any consulting or testifying experts employed by or on behalf of _________ (name of physician or health care provider to whom Notice of Health Care Claim has been given) with regard to the matter set out in the Notice of Health Care Claim accompanying this authorization;

4. Any attorneys (including secretarial, clerical, or paralegal staff) employed by or on behalf of _________ (name of physician or health care provider to whom Notice of Health Care Claim has been given) with regard to the matter set out in the Notice of Health Care Claim accompanying this authorization;

5. Any trier of the law or facts relating to any suit filed seeking damages arising out of the medical care or treatment of _________ (patient).

E. This authorization shall expire upon resolution of the claim asserted or at the conclusion of any litigation instituted in connection with the subject matter of the Notice of Health Care Claim accompanying this authorization, whichever occurs sooner.

F. I understand that, without exception, I have the right to revoke this authorization in writing. I further understand the consequence of any such revocation as set out in Section 74.052, Civil Practice and Remedies Code.

G. I understand that the signing of this authorization is not a condition for continued treatment, payment, enrollment, or eligibility for health plan benefits.

H. I understand that information used or disclosed pursuant to this authorization may be subject to redisclosure by the recipient and may no longer be protected by federal HIPAA privacy regulations.

Signature of Patient/Representative

______________________________

Date