

THE IMPACT OF HIPAA'S PRIVACY RULES ON
THE DISCOVERY OF HEALTH INFORMATION
DURING LITIGATION

Michael D. Shalhoub
Anthony M. Maragno
99 Park Avenue
Heidell Pittoni Murphy & Bach LLP
New York, NY 10016
212.286.8585

About The Authors

Mike Shalhoub is a partner in the HPM&B's New York office. Mr. Shalhoub is a trial lawyer whose practice concentrates in the defense of business, professional and insurance interests that have been brought into litigation over products liability, medical and professional liability, employment discrimination and commercial disputes. Active in the courtroom, Mr. Shalhoub has resolved at the trial stage over 80 cases, including a number of jury verdicts, in products liability, medical malpractice, employment discrimination, coverage, construction accidents and general liability.

Mr. Shalhoub is active in the FDCC and DRI, and is currently the Chair of DRI's Medical Liability and Health Care Law Committee.

Anthony Maragno is an associate in the HPM&B's New York office. Mr. Maragno's practice concentrates on medical malpractice defense, commercial litigation, employment discrimination, and contracts. Mr. Maragno is a former prosecutor for the Suffolk County District Attorney's Office.

THE IMPACT OF HIPAA'S PRIVACY RULES ON THE DISCOVERY OF HEALTH INFORMATION DURING LITIGATION

I. INTRODUCTION

The Health Insurance Portability and Accountability Act of 1996¹ (hereinafter “HIPAA”) was enacted by Congress to “improve portability and continuity of health insurance coverage in the group and individual markets.”² To achieve this end, Congress enacted Subtitle F of Title II of HIPAA, which is entitled “Administrative Simplification.”³ The “Administrative Simplification” provisions require the implementation of standards by the Secretary of Health and Human Services (hereinafter “the Secretary”) to facilitate the electronic transmission of health information.⁴ The “covered entities” required to comply with these regulations include health plans, health care clearinghouses, and health care providers.⁵

The enactment of HIPAA has materially changed the way that medical records are handled in litigation involving claims of personal injury or wrongful death. The purpose of this article is to briefly lay out the regulatory framework, and then analyze the cases that have been decided concerning the application of HIPAA to medical records in litigation involving allegations of personal injury.

¹ HIPAA, Pub. L. No. 104-191, 110 Stat. 1936 (1996).

² H.R. Rep. No. 104-496, at 1, 66-67, reprinted in 1996 U.S.C.C.A.N. 1865, 1865-66.

³ HIPAA, Pub.L.No. 104-191, 262(a), 110 Stat. 1936 (1996); codified as 42 USCA Sections 1320d through 1320d-8.

⁴ Id.

⁵ 42 USCA § 1320d(1)(a)

Section 1320d-2 of the United States Code states the following:

(a) Standards to enable electronic exchange.

(1) In general. The Secretary shall adopt standards for transactions, and data elements for such transactions, to enable health information to be exchanged electronically ...

A plain reading of the statute suggests that Congress provided the Secretary with the authority to promulgate regulations concerning “electronically” exchanged health information only. The Secretary nevertheless established regulations governing the disclosure, privacy, and protection of medical information that is in both electronic and non-electronic form.⁶ These regulations can be found in Title 45 of the Code of Federal Regulations, Parts 160 and 164, and are referred to as the “Privacy Rules.” The Privacy Rules provide the circumstances under which a “covered entity” may disclose “protected health information.”

“Protected health information”, as defined by the Secretary, concerns health information that is individually identifiable.⁷ Health information that “does not identify an individual and with respect to which there is no reasonable basis to believe that the

⁶ 45 CFR 45 §§ 160.103 & 164.500; *but see*, 42 USCA §§ 1320d-2, 1320d-4 (1998), which require health plans to conduct electronic transactions when requested, either directly or through a clearinghouse. As these statutes imply that the information must be kept in electronic form anyway, the significance of the distinction between health information in electronic and non-electronic form may not be that important with respect to judicial interpretation of the Privacy Rules; *see also*, Eric Wymore, Current Public Law & Policy Issue: It's 1998, Do You Know Where Your Medical Records Are? Medical Record Privacy After The Implementation Of The Health Insurance Portability And Accountability Act of 1996 (hereinafter “Current Public Law”), 19 Hamline J. Pub. L. & Pol’y 553, n. 14 (Spring, 1998)(discussing the Federal Privacy Act of 1974 and the prerequisites to the application of the “Administration Simplification” provision of HIPAA.)

⁷ 45 CFR § 160.103

information can be used to identify an individual”, is not “protected health information” and therefore does not fall under the auspice of the Privacy Rules.⁸

The Secretary’s authority to promulgate regulations concerning the privacy of health records that are not in electronic form has been unsuccessfully challenged.⁹ The Fourth Circuit and a federal trial court in Texas have determined that since the definition of “Health Information”, as provided by Congress in Section 1320d-1, includes information “whether oral or recorded in any form or media”, the Secretary is empowered to regulate the privacy of medical records that are in either electronic or non-electronic form.¹⁰ The District Court in the Association of American Physicians & Surgeons case reasoned that “regulating non-electronic as well as electronic transmissions of health information effectuates HIPAA’s intent to promote the computerization of medical information and to protect the confidentiality of this health information.”¹¹ The Court also wrote that “[t]herefore, even if HIPAA did not expressly allow [the Secretary] to regulate the transmission of non-electronic as well as electronic health information, the provisions of the Privacy Rule promulgated by [the Secretary] are reasonably related to the purpose of HIPAA, the enabling legislation, and should be sustained.”¹²

The Fourth Circuit held that Congress did not unconstitutionally delegate legislative power to the Secretary and that the HIPAA preemption provisions are not

⁸ 45 CFR § 164.514

⁹ *See, South Carolina Medical Association, et. al. v. Tommy G. Thompson, et. al.*, 327 F.3d 346, 353-354 (4th Cir. 2003); The Association of American Physicians & Surgeons, Inc. et. al. v. U.S. Dept. of Health And Human Services, et. al., 224 F.Supp.2d 1115 (SDTX 2002)

¹⁰ South Carolina Medical Association, 327 F.3d at 353; The Association of American Physicians & Surgeons, Inc., 224 F.Supp. at 1127.

¹¹ The Association of American Physicians & Surgeons, Inc., 224 F.Supp. at 1127.

¹² *Id.*

impermissibly vague under the Due Process Clause of the Fifth Amendment.¹³ Further, a challenge to the validity of HIPAA under the First, Fourth, and Tenth Amendments has also failed.¹⁴

II. OVERVIEW OF THE “PRIVACY RULES”

In general, the Privacy Rules provide that a “covered entity” may disclose protected health information to the patient¹⁵, in compliance with a HIPAA compliant authorization¹⁶, for the treatment, payment, or management of health care operations¹⁷, and pursuant to an agreement between the covered entity and the patient.¹⁸

The Privacy Rules also permit disclosure of otherwise protected health information in the context of judicial and administrative proceedings.¹⁹ Specifically, disclosure is permitted in response to a court order.²⁰ Further, disclosure is permitted in response to a “subpoena, discovery request, or other lawful process” if either the “covered entity receives satisfactory assurance ... 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 “the covered entity receives satisfactory assurance ... that reasonable efforts have been made ... to

¹³ South Carolina Medical Association, 327 F.3d at 349-352 & 354-355

¹⁴ The Association of American Physicians & Surgeons, Inc., *supra*, note 9 (The District Court held that the plaintiffs did not have standing to sue)

¹⁵ 45 C.F.R. § 164.502(a)(1)(i)

¹⁶ 45 C.F.R. §§ 164.502(a)(1)(iv), 164.508

¹⁷ 45 CFR §§ 164.502(a)(1)(ii), 164.506

¹⁸ 45 CFR §§ 164.502(a)(1)(v), 164.510

¹⁹ 45 CFR § 164.512(e)

²⁰ 45 CFR §§ 164.512(e)(1)(i), 164.512(e)(1)(ii)

secure a qualified protective order.”²¹ In short, without a court order, the HIPAA regulations require a party to a litigation seeking protected health information to choose between providing the covered entity with proof of “notice” to the patients at issue that the information has been requested, or seeking a “qualified protective order.”²²

The regulations provide that a “covered entity” receives “satisfactory assurances” that the patients affected by the disclosure of the health information have notice when the covered entity receives a “written statement and accompanying documentation” that demonstrates the following:

- (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 proceeding; and
- (C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:

²¹ Id.

²² 65 FR 82462; See, Campos v. Payne, et. al., N.Y.L.J., October 14, 2003, at 20 (N.Y. Civ. Ct.)

- (1) No objections were filed; or
- (2) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.²³

The Privacy Rules also provide that a covered entity “receives satisfactory assurance” that reasonable efforts have been made to secure a qualified protective order if:

- (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.²⁴

²³ 45 CFR § 164.512(e)(1)(iii)

²⁴ 45 CFR § 164.512(e)(1)(iv)

A “qualified protective order” is defined in the Privacy Rules as an order of a court or of an 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.²⁵

The Privacy Rules also permit disclosure for law enforcement purposes in compliance with a court-ordered warrant, a subpoena or summons issued by a judicial officer, a grand-jury subpoena, or an administrative request, such as an administrative subpoena or summons, and a civil or an authorized investigative demand.²⁶

There is no federal physician-patient privilege, either by statute or at common law.²⁷ Further, in general, the federal courts have not recognized a constitutional right to privacy in one’s medical records.²⁸ Rather, Congress has primarily left it to the states to

²⁵ 45 CFR § 164.512(e)(1)(v)

²⁶ 45 CFR § 164.512(f)(1)

²⁷ See, Whalen v. Roe, 429 U.S. 589, 602 n.28, 51 L.Ed.2d 64, 97 S.Ct. 869 (1977); Gilbreath v. Guadalupe Hosp. Found. Inc., 5 F.3d 785, 791 (5th Cir. 1993).

²⁸ See, Whalen v. Roe, *supra*, note 27; Doe v. Wigginton, 21 F.3d 733, 740 (6th Cir. 1994) Taylor v. Best, 746 F.2d 220, 225 (4th Cir. 1984); Adams v. Drew, 906 F.Supp. 1050 (EDVA 1995); *but see*, Doe v. City of New York, F.3d 264, 267 (2d Cir. 1994)(holding that “individuals who are infected with the HIV virus

determine the level of privacy afforded to medical information maintained by health care entities.²⁹ The HIPAA Privacy Rules could therefore potentially provide protection for a patient's medical records in federal questions cases that was previously absent.³⁰

Although a number of states have enacted legislation protecting patients' medical information³¹, the HIPAA regulations impact the discovery of health information in state court litigation, as well as federal courts applying state law, because of the HIPAA preemption provision.³² Specifically, a state privacy statute is preempted by HIPAA unless "the provision of State law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification" of the Privacy Rules.³³

Covered entities were not required to comply with the Secretary's regulations until April 13, 2003.³⁴ Despite this compliance date, some courts nevertheless required that covered entities, when disclosing health information, comply with the Privacy Rules on the grounds that the regulations manifest a strong federal policy towards protecting the

clearly possess a constitutional right to privacy regarding their condition"); A.L.A. v. West Valley City, 26 F.3d 989, 990 (10th Cir. 1994)("There is no dispute that confidential medical information is entitled to constitutional privacy protection.")

²⁹ See, Confidential Medical Information, Before the Senate Comm. On Labor & Human Resources, 105th Cong. (1997)(testimony of Donna Shalala, Sec'y of Health & Human Servs.), available in Westlaw, USTESTIMONY, 1997 WL 566029; Current Public Law, *supra*, note 6.

³⁰ United States v. Sutherland, 143 F.Supp.2d 609, 612 (WDVA 2001)(the regulations promulgated by the Secretary indicate a "strong federal policy to protect the privacy of patient medical records"); United States of America Ex. Rel. Mary Jane Stewart, et. al. v. The Louisiana Clinic, et. al., 2002 U.S. Dist. Lexis 24062.

³¹ For analysis on the diversity of state statutes covering the privacy of medical records, see Current Public Law, *supra*, note 6.

³² 45 CFR § 160.203

³³ *Id.*

³⁴ 45 CFR § 164.534; "Small Health Plans", however, which are defined under 45 CFR § 160.103 as a health plan with annual receipts of \$5 million or less, are not required to comply with these regulations until April 14, 2004.

privacy of a patient's medical records.³⁵ One court, however, when presented with the issue of whether a criminal-defendant's medical records should be suppressed because the disclosure of these records to law enforcement personnel was not in accordance with the Secretary's regulations, did not ground its decision on the Privacy Rules because the disclosure was done in the "pre-enforcement stage" which the court believed would pose a risk of rendering an impermissible advisory opinion.³⁶

Although HIPAA does not create a private right of action³⁷, "covered entities" that were not a party to a litigation have refused to disclose health information in that litigation fearing penalties for impermissible disclosure under either state laws or HIPAA.³⁸ Under these circumstances, courts have thus far been willing to craft protective orders that require disclosure of the pertinent health records to the parties involved in the litigation while simultaneously ensuring that the privacy rights of non-parties are protected in accordance with the Privacy Rules.³⁹

³⁵ See, United States of America v. Sutherland, *supra*, note 30; United States of America Ex. Rel. Mary Jane Stewart, et. al. v. The Louisiana Clinic, et. al., *supra*, note 30.

³⁶ Tapp v. State of Texas, 108 SW3d 459, 462-463 (14th Dist. 2003). However, since the medical records in this case were obtained by a grand-jury subpoena, the disclosure of the medical records was authorized under 45 CFR § 164.512(f)(1)(ii)(B). For example, in Harmon v. State of Texas, 2003 Tex. App. Lexis 6172 (2003), a criminal-defendant drove his car into a concrete barrier in April of 2001. The defendant was taken to the Hospital, where a blood test was performed and revealed that his blood alcohol content was .18. The prosecution obtained a grand-jury subpoena for his medical records. The defendant moved to suppress the records, in part, under HIPAA. The Court held that even if the HIPAA regulations were "effective" at the time the grand-jury subpoena was issued, disclosure "under HIPAA is permissible without an individual's permission when the information is disclosed for law enforcement purposes and is obtained pursuant to a grand-jury subpoena."

³⁷ Swift v. Lake Park High School Dist., 2003 U.S. Dist. Lexis 18684 (EDIL 2003); See, J.S. Christie, Jr., The HIPAA Privacy Rules From A Litigation Perspective, 64 Ala. Law. 126 (March 2003) (suggesting that since the HIPAA Privacy Rules create duties of care with respect to health information, "one might expect to see the HIPAA privacy Rules used as part of state law tort actions.")

³⁸ See, United States of America v. Sutherland, *supra*, note 30; Hutton v. City of Martinez, et. al., 2003 USDC Lexis 19852 (NDCA 2003)

³⁹ See, United States of America v. Sutherland, *supra*, note 30; Hutton v. City of Martinez, et. al., *supra*, note 38; see also, 45 USC §§ 1320d-5, 1320d-6 (provides the monetary penalties and periods of

Some parties to litigation have also objected to the scope of the disclosure of health information under the HIPAA Privacy Rules.⁴⁰ In these cases, the courts have been unwilling to permit a litigant to use the protections afforded by the Privacy Rules as a shield to deny their adversary access to health information that is relevant to the litigation.⁴¹

III. COURT DECISIONS CONCERNING THE IMPACT OF HIPAA'S PRIVACY RULES ON THE DISCOVERY OF HEALTH INFORMATION DURING LITIGATION

We will now examine the cases which have been decided as of the writing of this article regarding the scope of the effect of the HIPAA regulations on the collection of medical records in litigation.

In United States of America v. Sutherland⁴² the defendant was a physician accused of unlawfully distributing and dispensing controlled substances. The government issued subpoenas to a non-party hospital to compel production of the pharmacy records of the defendant's patients.⁴³ The hospital moved to quash the

incarceration that can be assessed for a covered entity's non-compliance or wrongful disclosure of protected health information)

⁴⁰ See, United States of America, Ex. Rel., Mary Jane Stewart, et. al. v. The Louisiana Clinic, 2002 U.S. Dist. Lexis 24062 (EDLA 2002); Horn v. Hernandez, N.Y.L.J., October 15, 2003, at 19 (Sup. Ct.); Lewis v. Clement, et. al., 2003 NY Misc. Lexis 1171 (2003).

⁴¹ Id.

⁴² 143 F. Supp.2d 609 (WDVA 2001).

⁴³ Id., at 610.

subpoena on the grounds that disclosure of the information would subject it to civil liability under state law in West Virginia.⁴⁴

The District Court reasoned that as “this is a federal criminal matter, state laws of procedure do not apply” and “patients have no expectation of privacy in medical records with regard to federal criminal proceedings because there is no federal physician-patient privilege.”⁴⁵ Although compliance with the Secretary’s regulations was not required at the time the subpoena was issued, the District Court considered the regulations to be “persuasive in that they demonstrate a strong federal policy of protection for patient medical records.”⁴⁶

The Court held that the government in this criminal proceeding had a “compelling interest” in obtaining the prescription records.⁴⁷ As the government’s subpoena was not accompanied by a court order and was not a grand-jury subpoena, however, the Court did not rely on Section 164.512(e)(1)(i) or 164.512(f) to justify disclosure of the pharmacy records in issue. Instead, consistent with Section 164.512(e)(ii), the court crafted a protective order that it felt provided “reasonable assurances” to the Hospital that the affected patients would have notice and an opportunity to object to the disclosure of these records.

⁴⁴ Id., at 610-611.

⁴⁵ Id., at 611.

⁴⁶ Id., at 612.

⁴⁷ Id., at 613.

The Court held that the government, “in accord with the Standards issued by the Secretary”, is required to “provide written notice prior to production of the subpoenaed records to the last known address of each individual whose records are sought under the subpoena.”⁴⁸ The Court also stated that the “notice must inform the individual that he or she may object to the disclosure within five business days” and that “all objections by the government or by affected individuals” will be resolved prior to the start of trial.⁴⁹

In Hutton v. City of Martinez, et. al.⁵⁰ the plaintiff alleged that his civil rights were violated when an out-of-shape police officer shot him in the back because the officer was incapable of pursuing the plaintiff on foot. The police officer was named as a defendant. Plaintiff served various discovery demands seeking information about the officer’s physical condition on the day of the alleged shooting.⁵¹ The officer’s worker’s compensation carrier, however, declined to produce any medical records concerning the officer’s work-related back injury.⁵² Apparently, the defendant-officer had no objection to the production of these records for the purposes of this litigation.⁵³ The plaintiff also subpoenaed the claims person who handled the officer’s workers compensation claim for the back injury for a deposition.⁵⁴ When the claims person was produced for the deposition, however, her attorney instructed her not to answer any questions regarding

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ 2003 USDC Lexis 19852 (NDCA 2003)

⁵¹ Id.

⁵² Id.

⁵³ Id.

⁵⁴ Id.

the officer's worker's compensation file on the grounds that the testimony was not permitted under HIPAA.⁵⁵

The Court held that HIPAA did not preclude the production of the records requested in this case because, consistent with Section 164.512(e)(iv), the parties agreed to a protective order that would adequately safeguard the defendant officer's privacy interests.⁵⁶ Although the Court's decision did not state the terms of the protective order, presumably the order, in keeping with the spirit of 45 CFR Section 164.512(e)(v), required that the information be used only within the pending litigation and that the material be returned to the covered entity or destroyed at the end of the litigation.⁵⁷

In Lemieux v. Tandem Health Care of Florida, et. al.⁵⁸ the plaintiff was involved in a car accident and was hospitalized at Lakeland Regional Medical Center (hereinafter "Lakeland").⁵⁹ He was treated there by non-party Dr. Greenberg. The patient was later transferred to Arbors, which is an in-patient rehabilitation facility and a defendant in the case.⁶⁰ While at Arbors, he was treated by non-party Dr. Fielding.⁶¹ The plaintiff also received treatment there from non-party Dr. Goll, who is the physician who eventually discharged him from Arbors.⁶² Drs. Goll, Greenberg, and Fielding were not employees or agents of Arbors.⁶³

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ 2003 Fla. App. Lexis 16128 (2nd Cir. 2003)

⁵⁹ Id.

⁶⁰ Id.

⁶¹ Id.

⁶² Id.

⁶³ Id.

The plaintiff sued Arbors for negligent hiring and retention and “for various violations of Chapter 400 of the Florida statutes.”⁶⁴ During the discovery proceedings the plaintiff filed a motion seeking court approval to conduct ex-parte discussions with the aforementioned physicians.⁶⁵ Florida has a physician-patient privilege that is grounded in statutory law.⁶⁶ Florida’s statutory physician-patient privilege authorizes disclosure of a patient’s medical records under four circumstances: (1) To other health care providers involved in the care and treatment of the patient; (2) if permitted by written authorization from the patient; (3) if compelled by subpoena; and (4) to attorneys, experts, and other individuals necessary to defend the physician in a medical negligence action in which the physician is or expects to be a defendant.⁶⁷

The Court determined that, under the Florida statute, Drs. Goll, Fielding, and Greenberg could not engage in an ex parte discussion with Arbors’ attorneys since these physicians were not employees of Arbors, were not currently treating the patient, and the disclosure was not from one health care provider to another, but rather, from one health care provider to “the attorney” of another health care provider.⁶⁸ The Court also stated

⁶⁴ Id.; *See*, 29 Fla. Stat. § 400.0061 (“Chapter 400 of the Florida statutes” refers to laws governing the “safety, and welfare of the residents” of long-term care facilities.) Although the court also noted that it was “germane to our analysis” that the complaint did not state a cause of action for medical malpractice, the decision does not address why the analysis would have been different if this claim had been alleged.

⁶⁵ Id.

⁶⁶ Id.; 29 Fla. Stat. § 456.057(6) provides that “except in a medical negligence action or administrative proceeding when a health care practitioner or provider is or reasonably expects to be named as a defendant, information disclosed to a health care practitioner by a patient in the course of the care and treatment of such patient is confidential and may be disclosed only to other health care practitioners and providers involved in the care and treatment of the patient, or if permitted by written authorization from the patient or compelled by subpoena at a deposition, evidentiary hearing, or trial for which proper notice has been given.”

⁶⁷ Lemieux v. Tandem Health Care of Florida, et. al., *supra*, note 58.

⁶⁸ Id.

that nothing prevented Arbors from serving these treating physicians with a subpoena to appear for a deposition.⁶⁹

In a footnote, the Court wrote that HIPAA did not preempt the Florida's statutory physician-patient privilege even though the Florida statute does not require that the entity disclosing medical information provide written notice to the patient that he could object to the disclosure.⁷⁰ The court reasoned that the Florida statute, although "procedurally" less strict, is "substantively" more strict than the Privacy Rules because Section 164.512(e)(1)(ii) of Title 45 of the Code of Federal Regulations requires that a covered entity only receive "satisfactory assurance" that the patient who is the subject of the protected health information has been given notice of the intended disclosure.⁷¹ Under the Florida statute, however, disclosure based on notice alone is not permitted.⁷²

In United States of America, Ex. Rel., Mary Jane Stewart, et. al. v. The Louisiana Clinic⁷³ the plaintiffs brought a *qui tam* action alleging that the defendant-physicians and medical clinic defrauded the federal government by presenting false claims for reimbursement of medical services provided to Medicare and Medicaid participants. The plaintiff requested various medical records concerning non-party patients.⁷⁴ Defendant Dr. Flood moved for a protective order, asserting that the medical records, if produced

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Id.

⁷² Id.

⁷³ 2002 U.S. Dist. Lexis 24062 (EDLA 2002)

⁷⁴ Id.

with patient identifying information, would result in civil liability to the non-party patients under Louisiana state law.⁷⁵

A Louisiana statute provides that disclosure of medical records is authorized only “after a contradictory hearing with the patient and after a finding by the court that the release of the requested information is proper.”⁷⁶ The court held that the Louisiana statute did not apply because the action, which was commenced under the authority of a federal statute, was exclusively a federal question case and because it was preempted by HIPAA.⁷⁷ The Court reasoned that as the Louisiana statute permitted disclosure under the facts of this case without the patient’s consent, it did not adequately address the “form, substance, or the need for express legal permission from an individual, who is the subject of the individually identifiable health information”, as required by Section 160.202(4) of Title 45 of the Code of Federal Regulations.⁷⁸

Nevertheless, the Court held that disclosure of the medical information at issue was permitted under Section 164.512(e) of Title 45 of the Code of Federal Regulations.⁷⁹ The Court held that since the plaintiffs and defendants “have complied with the HIPAA regulations at issue by seeking an appropriate protective order and that the court has

⁷⁵ Id.

⁷⁶ La. Rev. Stat. § 13:3715.1(B)(5)

⁷⁷ Id.

⁷⁸ 45 USC § 160.202 provides, in pertinent part, that “[m]ore stringent means, 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: . . . (4) With respect to the form, substance, or the need for express legal permission from an individual, who is the subject of the individually identifiable health information, for use or disclosure of individually identifiable health information, provides requirements that narrow the scope or duration, increase the privacy protections afforded (such as by expanding the criteria for), or reduce the coercive effect of the circumstances surrounding the express legal permission, as applicable.”

⁷⁹ Id.

authority to order disclosure of nonparty patient information, subject to such a protective order, without conducting a contradictory hearing or having the parties obtain the patient’s consent”, disclosure was permitted.⁸⁰

The court crafted a protective order that required a “twofold” production of the records: First, the defendants were required to produce a set of “unredacted” documents to plaintiffs’ counsel. The Court reasoned that the plaintiffs “must be allowed to see the patient names so that they can investigate the validity of the claims for services rendered to those patients.” Second, a set of “redacted” records were to be provided and were permitted to be used by any party for any pretrial purpose.⁸¹

The court order also provides that “no more than two paralegals employed by counsel of record and one expert per party retained in connection with this litigation” were permitted to review these records.⁸² Further, “all persons to whom such information is disclosed must sign an affidavit that must be filed into the record, agreeing to the terms of the protective order and submitting to the jurisdiction of this Court for enforcement of those terms.”⁸³ Finally, the court ordered that the scope of the disclosure of the health information be restricted only to the litigation at hand.⁸⁴

⁸⁰ Id.

⁸¹ Id.

⁸² Id.

⁸³ Id.

⁸⁴ As a corollary, the Court permitted the United States, which previously declined to intervene in this action, to receive these documents and disclose them to the Department of Justice pursuant to its function as a “health oversight agency” in accordance with 45 USC § 164.512(d)(1), and not just solely for the purposes of this litigation.

In Horn v. Hernandez⁸⁵ the plaintiff commenced an action in New York State Supreme Court to recover damages arising from two motor vehicle accidents. The plaintiff alleged in the bill of particulars that she became “sick, sore, lame and disabled ... and suffers great physical and mental pains.” One of the defendants requested that the plaintiff provide an authorization for her psychiatric records.⁸⁶ In response, the plaintiff moved for a protective order, claiming that the court is without authority to compel the production of the authorizations because of HIPAA preemption.⁸⁷

The court rejected the plaintiff’s argument that it was without “jurisdiction” to require the release of these psychiatric records.⁸⁸ The court stated that the Privacy Rules specifically authorize the court to compel the production of the authorization under Section 164.512(e)(1)(i).⁸⁹ The Court reasoned that HIPAA does not impede “the authority of this court to order a party in action before it to disclose medical, dental or other health information and/or records to adversarial parties by directing the party whose physical, emotional and/or mental condition is in controversy to execute authorizations permitting the release of health information deemed conditionally protected under the general provisions of HIPAA and its regulatory framework.”⁹⁰

⁸⁵ *Supra*, note 40.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

The Court held that since the plaintiff placed her mental and emotional condition in controversy in the lawsuit, she waived her psychiatrist-patient privilege and ordered the production of an authorization for the release of those records.⁹¹

The case of Lewis v. Clement, et. al.⁹² involved the dissolution of a dental partnership, and the issue before the New York State Supreme Court was whether the plaintiff, who was one of group's partners, was entitled to the patient records of the other members of the dental practice. The defendants asserted that the plaintiff was only entitled to the records of those patients that he actually treated while a partner with the group.⁹³ The court recognized the New York common law principle that a former partner is only entitled to the records of patients with whom a patient-physician relationship was created during the existence of the partnership.⁹⁴

The defendants, however, also argued that under HIPAA they were not permitted to share any files with the plaintiff.⁹⁵ The court noted that since the "parties herein do not dispute that [the group] transmitted health information in electronic form", it is therefore a "covered entity" under HIPAA.⁹⁶ The court held that the records related to the plaintiff's patient's at the group were required to be disclosed to the plaintiff since "HIPAA cannot be used as a sword or shield in disputes between partners as it relates to the sharing of patient records."⁹⁷ The court went on to write that if "the physician (the

⁹¹ Id.

⁹² 2003 NY Misc. Lexis 1171 (2003)

⁹³ Id.

⁹⁴ Id.

⁹⁵ Id.

⁹⁶ Id.

⁹⁷ Id.

covered entity) has a relationship with a patient, the remaining partners may not refuse to provide files by virtue of HIPAA”, as long as there was a physician-patient relationship.”⁹⁸

IV. ANALYSIS

As of this writing, we are eight months past the date by which ‘covered entities’ were required to comply with the HIPAA Privacy Rules. This article discusses each of the reported decisions which addresses the impact of the Privacy Rules on the discovery of health information in litigation. Of course, there are not yet many decisions. However, already, the practical effects of the Privacy Rules have been felt in litigation practice.

The HIPAA regulations have changed the way that defense firms gather medical records, protect the records that have been gathered, send records to experts and others for review, and dispose of records which have been gathered. In those jurisdictions where ex parte communications with treating physicians were permitted, that practice must be re-examined in light of HIPAA.

Another potential area of concern for covered entities and their business associates is potential civil tort liability for impermissible disclosure of identifiable health information. As discussed above, the Privacy Rules expressly state that no federal private right of action is created. The question of whether a state law cause of action will exist will depend of course on each individual state. One commentator (see footnote 37 herein) feels that since the HIPAA Privacy Rules create duties of care with respect to

⁹⁸ Id.

health information that the potential for state tort actions exist. To date, we have seen no reported cases in this regard.

As demonstrated by the holdings in the *United States of America v. Sutherland* and *United States of America, Ex. Rel., Mary Jane Stewart, et. al. v. The Louisiana Clinic*, some federal courts have interpreted HIPAA as creating a ‘pseudo’ federal statutory physician-patient privilege. The HIPAA Privacy Rules only restrict the disclosure of health information “covered entities.” In both cases, the courts determined that the health information at issue was relevant and material. However, instead of simply ordering the covered entity to disclose the health information, which would have addressed the “covered entities” concerns under Section 164.512(e)(1), the courts used the Privacy Rules as a guideline to impose conditions on disclosure to protect the privacy of non-parties.

However, an important question left unanswered by the *United States of America v. Sutherland* case is the following: “What grounds, if asserted by a non-party, would be sufficient to deny a party to a litigation access to health information of a non-party that is otherwise material and relevant?” Although this question remains open, what is clear is that there will be a potential for significant litigation delays based on this court’s interpretation of HIPAA. The court ordered that insofar as a non-party objects to the disclosure of his or her health information, a hearing must take to trial to “resolve” the issue. Depending, of course, on the number of non-parties objecting to the disclosure of their health information, this interpretation of HIPAA could impose litigation significant burdens.

In contrast, the court in United States of America v. The Louisiana Clinic, did not leave open the possibility of having several “hearings” prior to trial to determine whether non-parties’ health information is discoverable. The court, however, crafted a “twofold” protective order and limited the number of persons within each party’s law firm who were able to review these records to two paralegals and one expert. The question that remains is what relief party has if a further expert is needed? Apparently, they will be required to show cause as to why the additional disclosure of the health information is necessary.

These issues do not appear to surface when the health information involves a party. As demonstrated by the Hutton and Horn, a litigant will not be permitted to use HIPAA as a means to deny their adversary access to health information that is material to the case. As demonstrated in Hutton, however, a litigant, when seeking to obtain health information from a non-party “covered entity”, will at a minimum be required to obtain an authorization or seek a “qualified protective order.”

Although published court decisions concerning the application of the Privacy Rules in litigation are few in number, it is clear that the Privacy Rules will need to be addressed by litigants whenever there is the potential need for the discovery of health information for the prosecution or defense of their case. For this reason, it is important for all practitioners to become reasonably acquainted with the Privacy Rules and understand the potential impact that they will have on each case. Further, insofar as

covered entities are potentially exposed to statutory penalties under HIPAA and state tort claims, covered entities should ensure that their legal departments are abreast of the Privacy Rules and corresponding case law.

Until the HIPAA Privacy Rules are addressed with greater frequency in appellate courts, we anticipate that there will be some degree of uncertainty for litigants and non-party “covered entities” as to when or under what conditions identifiable health information is properly disclosed under the Privacy Rules.