THE IMPACT OF HIPAA’S PRIVACY RULES ON
THE DISCOVERY OF HEALTH INFORMATION
IN LITIGATION:
UPDATED
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

Cases which interpret and apply the regulations promulgated under The Health Insurance Portability and Accountability Act of 1996 (hereinafter “HIPAA”) continue to be decided. This article builds upon the materials presented at the FDCC meeting in Hawaii.

The Health Insurance Portability and Accountability Act of 1996 was enacted by Congress to “improve portability and continuity of health insurance coverage in the group and individual markets.” To achieve this end, Congress enacted Subtitle F of Title II of HIPAA, which is entitled “Administrative Simplification.” 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. The “covered entities” required to comply with these regulations include health plans, health care clearinghouses, and health care providers.

The enactment of HIPAA materially changes 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.

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

(a) Standards to enable electronic exchange.

---

5 Id.
6 42 USCA § 1320d(1)(a).
In general. The Secretary shall adopt standards for transactions, and data elements for such transactions, to enable health information to be exchanged electronically …

Though a plain reading of the statute suggests that Congress provided the authority to promulgate regulations concerning “electronically” exchanged health information only, regulations were promulgated governing the disclosure, privacy, and protection of medical information that is in both electronic and non-electronic form. 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. Health information that “does not identify an individual and with respect to which there is no reasonable basis to believe that the information can be used to identify an individual”, is not “protected health information” and therefore does not fall under the auspices of the Privacy Rules.

The Secretary’s authority to promulgate regulations concerning the privacy of health records that are not in electronic form has been unsuccessfully challenged. The Fourth Circuit

---

7 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.)

8 45 CFR § 160.103.

9 45 CFR § 164.514.

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. \(^{11}\) 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.” \(^{12}\) 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.” \(^{13}\)

The Fourth Circuit held that Congress did not unconstitutionally delegate legislative power to the Secretary and that the HIPAA preemption provisions are not impermissibly vague under the Due Process Clause of the Fifth Amendment. \(^{14}\) Further, a challenge to the validity of HIPAA under the First, Fourth, and Tenth Amendments has also failed. \(^{15}\)

### II. OVERVIEW OF THE HIPAA “PRIVACY RULES”

In general, the Privacy Rules provide that a “covered entity” may disclose protected health information to the patient, \(^{16}\) in compliance with a HIPAA compliant authorization \(^{17}\), for

---

\(^{11}\) South Carolina Medical Association, 327 F.3d at 353; The Association of American Physicians & Surgeons, Inc., 224 F.Supp. at 1127.


\(^{13}\) Id.

\(^{14}\) South Carolina Medical Association, 327 F.3d at 349-352 & 354-355.

\(^{15}\) The Association of American Physicians & Surgeons, Inc., supra, note 9 (The District Court held that the plaintiffs did not have standing to sue).

\(^{16}\) 45 C.F.R. § 164.502(a)(1)(i).

\(^{17}\) 45 C.F.R. §§ 164.502(a)(1)(iv), 164.508.
the treatment, payment, or management of health care operations, and pursuant to an agreement between the covered entity and the patient.

The Privacy Rules also permit disclosure of otherwise protected health information in the context of judicial and administrative proceedings. Specifically, disclosure is permitted in response to a court order. 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 secure a qualified protective order.” 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.”

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

---

20 45 C.F.R. § 164.512(e).
21 45 C.F.R. §§ 164.512(e)(1)(i), 164.512(e)(1)(ii).
22 Id.
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

(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.24

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.25

---

24 45 CFR § 164.512(e)(1)(iii).
25 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.26

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.27

There is no federal physician-patient privilege, either by statute or at common law.28 Further, in general, the federal courts have not recognized a constitutional right to privacy in one’s medical records.29 Rather, Congress has primarily left it to the states to determine the level of privacy afforded to medical information maintained by health care entities.30 The HIPAA Privacy Rules could therefore potentially provide protection for a patient’s medical

26 45 CFR § 164.512(e)(1)(v).
27 45 CFR § 164.512(f)(1).
29 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 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.”)
records in federal questions cases that was previously absent.\textsuperscript{31} Although a number of states have enacted legislation protecting patients’ medical information\textsuperscript{32}, 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.\textsuperscript{33} 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.\textsuperscript{34}

Covered entities were not required to comply with the Secretary’s regulations until April 13, 2003.\textsuperscript{35} 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 privacy of a patient’s medical records.\textsuperscript{36} 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.\textsuperscript{37}

\textsuperscript{31} 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.

\textsuperscript{32} For analysis on the diversity of state statutes covering the privacy of medical records see Current Public Law, supra, note 6.

\textsuperscript{33} 45 CFR § 160.203.

\textsuperscript{34} Id.

\textsuperscript{35} Id. 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.

\textsuperscript{36} 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.

\textsuperscript{37} 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 Tax. App. Lexis 6172 (2003), a criminal-defendant drove his care into a concrete barrier in April of 2001. The defendant was taken to the Hospital, were a blood test was performed and revealed that his blood alcohol content was .18. The prosecution obtained a grand-
Although HIPAA does not create a private right of action, “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. 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.

Some parties to litigation have also objected to the scope of the disclosure of health information under the HIPAA Privacy Rules. 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.

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.

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 with an individual’s permission when the information is disclosed for law enforcement purposes and is obtained pursuant to a grand-jury subpoena.”

38 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.”)


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


42 Id.
In United States of America v. Sutherland 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. The hospital moved to quash the subpoena on the grounds that disclosure of the information would subject it to civil liability under state law in West Virginia.

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.” 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.”

The Court held that the government in this criminal proceeding had a “compelling interest” in obtaining the prescription records. 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.

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.

---

44 Id., at 610.
45 Id., at 610-611.
46 Id., at 611.
47 Id., at 612.
48 Id., at 613.
to the last known address of each individual whose records are sought under the subpoena.”

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.

An interesting and instructive case involving the intersection of HIPAA, state court medical record privilege rules, and a federal court proceeding is Northwestern Memorial Hospital v. Ashcroft, 362 F.3d 923; 2004 U.S. App. LEXIS 5724 (7th Cir. 2004). In Northwestern, an action was brought in the Southern District of New York challenging the constitutionality of the Partial Birth Abortion Act. In the course of that proceeding, subpoenas were served on Northwestern seeking redacted medical records of certain patients who had undergone abortions performed by a plaintiff and expert witness in the New York action. The New York district court judge issued an order authorizing, but not requiring the Illinois hospital to disclose the records after redaction of patient identifying information. The Illinois district court judge quashed the subpoenas on the grounds that HIPAA barred their disclosure. As discussed above, if state law is more stringent than HIPAA, then the more stringent state law will apply. Here, Illinois law bars the disclosure of even redacted medical records. Hence, the Illinois district court judge reasoned that HIPAA prevented their disclosure and quashed the subpoena.

On appeal to the Seventh Circuit, the Court held that even more stringent state court law on medical record privacy does not impose ‘state evidentiary privileges on suits to enforce federal law.’ The more stringent state privilege will apply to diversity lawsuits, but will not apply, despite HIPAA, to federal question lawsuits such as the statutory constitutionality dispute.

49 Id.
50 Id.
before the court. The court also mentioned that more stringent state court rules will not apply to “the litigation of federal employment discrimination cases, social security disability cases, ERISA cases, Medicare and Medicaid fraud cases, Food and Drug Administration cases, and the numerous other classes of federal case in which medical records whether of the parties or of nonparties would not be privileged under federal evidence law.”

The Seventh Circuit went on to hold that it does not believe that HIPAA created a privacy ‘privilege; rather, it is merely procedural in terms under what circumstances protected health information can be released. The court also rejected the trial court’s creation of a federal common law privilege for abortion records.

Still, the Seventh Circuit held that the subpoenas for the medical records should be quashed because the burden of compliance (including the potential for the ‘leaking’ of the medical records, or the discovery of patient identities through clever sleuthing) outweighed their probative nature.\(^{51}\) The dissent argued that redacted medical records do not reveal protected health information with identifying characteristics, and that therefore HIPAA did not apply.

In [Hutton v. City of Martinez, et. al.][52] 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.\(^{53}\) The officer’s worker’s compensation carrier, however, declined to produce any medical records concerning the officer’s work-related back injury.\(^{54}\) Apparently,

\(^{51}\) In the New York district court case, the district court judge directed that a hospital produce redacted medical records. On appeal to the Second Circuit, the Government withdrew its request for the records. See [National Abortion Federation v. Ashcroft][55], 2004 U.S. Dist. LEXIS 4530 (SDNY 2004).

\(^{52}\) 2003 USDC Lexis 19852 (NDCA 2003).

\(^{53}\) Id.

\(^{54}\) Id.
the defendant-officer had no objection to the production of these records for the purposes of this litigation. The plaintiff also subpoenaed the claims person who handled the officer’s workers compensation claim for the back injury for a deposition. When the claims person was produced for the deposition, however, her attorney instructed her not to answer any questions regarding the officer’s worker’s compensation file on the grounds that the testimony was not permitted under HIPAA.

The Court held that HIPAA did not preclude the production of the records 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. 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.

In Lemieux v. Tandem Health Care of Florida, et. al. the plaintiff was involved in a car accident and was hospitalized at Lakeland Regional Medical Center (hereinafter “Lakeland”). 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. While at Arbors, he was treated by non-party Dr. Fielding. The plaintiff also received treatment there from non-
party Dr. Goll, who is the physician who eventually discharged him from Arbors. Drs. Goll, Greenberg, and Fielding were not employees or agents of Arbors.

The plaintiff sued Arbors for negligent hiring and retention and “for various violations of Chapter 400 of the Florida statutes.” During the discovery proceedings the defendant filed a motion seeking court approval to conduct ex-parte discussions with the aforementioned physicians. Florida has a physician-patient privilege that is grounded in statutory law. 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.

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

---

64 Id.
65 Id.
66 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.
67 Id.
68 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.”
another health care provider.\textsuperscript{70} The Court also stated that nothing prevented Arbors from serving these treating physicians with a subpoena to appear for a deposition.\textsuperscript{71}

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.\textsuperscript{72} 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.\textsuperscript{73} Under the Florida statute, however, disclosure based on notice alone is not permitted.\textsuperscript{74}

In \textit{United States of America, Ex. Rel., Mary Jane Stewart, et. al. v. The Louisiana Clinic}\textsuperscript{75} 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.\textsuperscript{76} Defendant Dr. Flood moved for a protective order, asserting that the medical records, if produced with patient identifying information, would result in civil liability to the non-party patients under Louisiana state law.\textsuperscript{77}

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

\begin{footnotes}
\item[70] Id.
\item[71] Id.
\item[72] Id.
\item[73] Id.
\item[74] Id.
\item[76] Id.
\item[77] Id.
\end{footnotes}
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. The reasoning here was very similar to the reasoning of the Seventh Circuit in the National Abortion case discussed above. 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.

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. 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 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.

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’

---

79 Id.
80 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.”
81 Id.
82 Id.
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.\(^83\)

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.\(^84\) 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.”\(^85\) Finally, the court ordered that the scope of the disclosure of the health information be restricted only to the litigation at hand.\(^86\)

In *Horn v. Hernandez*\(^87\) 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.\(^88\) 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.\(^89\)

\(^83\) Id.
\(^84\) Id.
\(^85\) Id.
\(^86\) Id.
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.
\(^87\) *Supra*, note 40.
\(^88\) Id.
\(^89\) Id.
The court rejected the plaintiff’s argument that it was without “jurisdiction” to require the release of these psychiatric records. 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). 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.”

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.

The case of Lewis v. Clement, et. al. 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. 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.

90 Id.
91 Id.
92 Id.
93 Id.
95 Id.
96 Id.
The defendants, however, also argued that under HIPAA they were not permitted to share any files with the plaintiff. 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. 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.” The court went on to write that if “the physician (the 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.

In A Helping Hand, LLC v. Baltimore County, Maryland, et. al., 295 F.Supp.2d 585 (DCMD 2003), plaintiff alleged that the defendants violated the Americans with Disabilities Act and the Due Process Clause of the Fourteenth Amendment by improperly prevented it from locating a methadone treatment clinic in Baltimore County.

Plaintiff moved for a protective order to bar the defendants from obtaining medical information concerning Helping Hand’s patients during discovery. This information was considered by the Court to be important because whether Helping Hand’s patients are “individuals with disability” under the ADA is a threshold issue in the litigation. If they are not, then plaintiff has no grounds to argue that the defendants interfered with the ADA rights of its patients.

Defendants argued that since the issue of whether one is afforded “disability status” requires “individual assessment”, they are entitled to the information about Helping’s Hand’s

---

97 Id.
98 Id.
99 Id.
100 Id.
clients. Helping Hand argued that the information was privileged under HIPAA and the State of
Maryland’s patient-psychotherapist privilege.

The Court held that HIPAA does not prevent disclosure of the information. The Court
held that “even assuming the patient data is covered by HIPAA, the HIPAA regulations permit
discovery of protected health information so long as a court order or agreement of the parties
prohibits disclosure of the information outside the litigation and requires return of the
information once the proceedings are concluded.” (citing 45 CFR § 164.512(e). The Court wrote
that “while no such order or agreement is yet in effect, the parties presumably could obtain one.”

The Court also held that the Maryland provision cited by plaintiff did not apply because,
under FRE 501, the lawsuit is governed under federal law. As there is a federal privilege for
confidential communications between a patient and a psychotherapist, federal law, and not state
law, applied. As Helping Hand did not even assert the federal privilege, the Court held that
disclosure of the records was warranted.

The Court, however, held that it would be sufficient for the purposes of this lawsuit if
defendants were to obtain only (1) Helping Hand’s general policies and practices in accepting
patients and (2) the typical characteristics of the patients Helping Hand serves. The Court
reasoned that the “general” information about the “typical patients” of Helping Hand is sufficient
in light of the “extremely sensitive” information and because “association with even a single
person meeting the statutory criteria may afford Helping Hand a claim.”

In Law v. Zuckerman, CBD-01-1429 (Maryland Federal District Court 2/27/04),
Magistrate Judge Charles Day held that defense counsel in a medical malpractice action was
barred from having an ex parte conversation with a non party treating physician based on
HIPAA. Maryland, like some other states, permits defense counsel to have ex parte
conversations with treating physicians where the plaintiff’s medical condition is in issue. The
court held that although there is a specific provision of Maryland Law enabling such contact,
HIPAA is more stringent and bars such contact. Clicking on this link will open a copy of the
court’s decision.

In a federal court case in Kansas\(^\text{101}\) which involved a defense counsel in an employment
case serving subpoenas to obtain medical records without putting plaintiff’s counsel on notice,
the court addressed the propriety of such a procedure, and addressed the relevance of the records
sought. The opinion observes that a HIPAA violation is alleged, but does not address the
HIPAA issue. In this author’s view, this is because the main focus of the plaintiff’s objection to
the records was relevance, not privilege. Has HIPAA been a focus, the failure to follow HIPAA
regulations may have been analyzed by the court. As an aside, the court was very critical of
defense counsel for serving subpoenas for medical records without putting plaintiff’s counsel on
notice.

(2d Dep’t 2004), plaintiff was in an accident at the defendant hospital. Plaintiff sought
disclosure of the names of patients being treated in the part of the hospital where the accident
took place. The court granted a protective order against that information on the grounds that
HIPAA prevented such disclosure as it could lead to the disclosure of protected health
information.

IV. ANALYSIS

As of this writing, we are just over a year after the enactment of the HIPAA Privacy
Rules. This article discusses each of the reported decisions which addresses the impact of the

\(^{101}\) Allender v. Raytheon Aircraft Co., 2004 U.S. Dist. LEXIS 6533 (District Court, Kansas 2004).
Privacy Rules on the discovery of health information in litigation. 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 health information that the potential for state tort actions exist. To date, we have seen no reported cases in this regard.102

As demonstrated by the holdings in the United States v. Sutherland and United States 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. The Seventh Circuit in the

---

102 There is a case where it appears that plaintiff started to assert such a claim, and then withdrew attempts to assert it. See Rister v. Northwestern Mutual Life Insurance Company, 2004 U.S. Dist. LEXIS 6697 (EDPA 2004).
National Abortion case did not feel that HIPAA created a federal privilege, but rather was a mechanism for the release of records.

However, an important question left unanswered by the United States 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 place 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 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 continue to be 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.
MEMORANDUM OPINION DENYING PLAINTIFF’S ORAL MOTION TO PRECLUDE DEFENSE COUNSEL FROM CONDUCTING EX PARTES
INTERVIEWS WITH PLAINTIFF’S TREATING PHYSICIAN

The Court is faced with an apparent issue of first impression in the Fourth Circuit in this medical malpractice action. The question presented is whether adverse counsel’s ex parte discussions with a treating physician regarding the scope of the physician’s care violates the Health Insurance and Portability Accountability Act of 1996, 42 U.S.C. 1320d et seq. (“HIPAA”). The Court finds that in the absence of strict compliance with HIPAA such discussions are prohibited.

Plaintiff Rosalynn Law (“Plaintiff”), brought this medical malpractice action against Defendant David J. Zuckerman, M.D., (“Defendant”). Jurisdiction is based on diversity of citizenship, and therefore Maryland substantive law must be applied where it does not conflict with controlling federal law. This Court heard arguments on January 7, 2004 and January 8, 2004 pursuant to Plaintiff’s oral motion to prohibit defense counsel from conducting ex parte interviews with Plaintiff’s treating physician. (“Plaintiff’s Motion”). After review of the relevant statutes and case law, the Court denied Plaintiff’s Motion. The Court now supplements and further articulates its opinion.
There are two questions before the Court raised by Plaintiff’s Motion. The first was whether Defendant’s *ex parte* pre-trial contacts with Plaintiff’s treating physician, Dr. Thomas Pinckert, were a violation of HIPAA. Second, if those contacts were a violation of HIPAA, whether the remedy was to preclude Defendant from having other *ex parte* communications with Dr. Pinckert. This Court finds that a violation of HIPAA did occur but the remedy requested is not appropriate.

A jury trial commenced in this case on January 6, 2004. Plaintiff alleged that the surgical treatment she received from Defendant rendered her cervix incompetent. Defendant performed a laser ablation procedure to remove dysphasia, or abnormal cells, from Plaintiff’s cervix. Plaintiff’s claim of malpractice is that during the procedure Defendant used laser power settings which caused collateral damage to her cervical tissue. Thereafter, Plaintiff became pregnant and increasingly concerned about her ability to carry a child. Plaintiff sought medical advice as to how best to carry the child to term. One treatment alternative available to Plaintiff was the placement of a cervical cerclage. Simply stated, the cerclage is a method of placing sutures on the cervical tissue so as to minimize the dilation of the cervical opening during the course of pregnancy. Among Plaintiff’s alleged damages were the costs and injuries associated with the placement of a permanent cerclage by Dr. Pinckert.

At the end of the second day of trial, Plaintiff raised an objection to *ex parte* communications that may have occurred between Dr. Thomas Pinckert and Defendant’s counsel. Dr. Pinckert had long before been identified as one of Defendant’s fact witnesses in the Pre-trial Statement prepared by the parties and approved by the Court. Dr. Pinckert was called to testify as Defendant’s first fact witness and to explain that Plaintiff’s alleged damages due to the placement of the cerclage were the result of an elective surgical procedure and not a procedure
compelled by the alleged negligent care of Defendant. Defendant’s counsel met with Dr. Pinckert after Plaintiff provided her medical records to Defendant as part of discovery. Plaintiff was never notified in advance that Defendant’s counsel would pursue _ex parte_ communications with her treating physician. Plaintiff asserts that any attempt by the defense to have such communications is a violation of HIPAA.

Plaintiff’s sole request is for the issuance of an order precluding Dr. Pinckert from discussing Plaintiff’s treatment and care with defense counsel or, in the alternative, to order Defendant to disclose all communications held with Dr. Pinckert and the details of Dr. Pinckert’s expected testimony at trial. Transcript of Motions Hearing (“Transcript”) January 7, 2004, at 4-5. Defendant’s counsel stated that ex parte communications outside the four corners of Dr. Pinckert’s medical records regarding Plaintiff had not taken place, and that it was not the intention of the defense to do so at any time. Transcript, January 7, 2004, at 4-5; Transcript, January 8, 2004, at 6-7.

The Court initially disagreed with Plaintiff as to the application of HIPAA. The Court then issued an order permitting both sides to have _ex parte_ communications with Dr. Pinckert regarding his care and treatment for purposes of the present case before he testified as a fact witness. Upon further reflection, the Court believes Plaintiff correctly discerned the applicability of HIPAA, but the remedy remains unchanged.

**Discussion**

A. **The _ex parte_ contacts between Defendant and Dr. Pinckert are governed by HIPAA not Maryland law.**

Maryland law does not prohibit ex parte communications “between a lawyer and the treating physician of an adverse party who has placed her medical condition at issue.” _Butler-Tulio v. Scroggins_, 139 Md. App. 122, 150 (2001). Nor does HIPAA prohibit all _ex parte_
communications with a treating physician for an adverse party. Mere contact between Plaintiff’s physician and Defendant’s counsel is not regulated by HIPAA. Such contact could include discussion of many benign topics, including but not limited to, the best methods for service of a subpoena, detaining convenient dates to provide trial testimony, or the most convenient location for the anticipated deposition of the physician. However, HIPAA clearly regulates the methods by which a physician may release a patient’s health information, including “oral” medical records. “The HIPAA regulations permit discovery of protected health information so long as a court order or agreement of the parties prohibits disclosure of the information outside the litigation and requires the return of the information once the proceedings are concluded.”


HIPAA and the standards promulgated by the Secretary of Health and Human Services (“Secretary”) in the Code of Federal Regulations set forth the baseline for the release of health information. A patient’s health information may be disclosed pursuant to 45 C.F.R. § 164.512(e)(1)(i), which states that disclosure is permitted “in response to an order of a court ... provided that the covered entity discloses only the protected health information expressly authorized by such order.” Health information includes

any information, whether oral or recorded in any form or medium, that: (1) is created or received by a health care provider ... ; and (2) relates to the past, present or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present or future payment for the provision of health care to an individual.

45 C.F.R. § 160.103. A trial or deposition subpoena is appropriately treated differently from an order of the Court. When medical information is to be released in response to a subpoena or discovery request, the health care provider must receive satisfactory assurance that: (1) there have been good faith attempts to notify the subject of the protected health information in writing
of the request and that subject has been given the opportunity to object; or (2) reasonable efforts have been made by the requesting party to obtain a qualified protective order. 45 C.F.R. § 164.512(e)(1)(ii)(A) and (B).

HIPAA and the related provisions established in the Code of Federal Regulations expressly supercede any contrary provisions of state law except as provided in 42 U.S.C. § 1320d-7(a)(2). Under the relevant exception, HIPAA and its standards do not preempt state law if the state law relates to the privacy of individually identifiable health information and is “more stringent” than HIPAA’s requirements. 42 U.S.C. § 1320d-7(a)(2)(B)(referring back to the Historical and Statutory notes to 42 U.S.C § 1320d-2); 45 C.F.R. § 160.203.

Defendant’s counsel has argued that the Maryland Confidentiality of Medical Records Act, MD. CODE ANN. HEALTH-GIN. I § 4-306(b)(3), (“MCMRA”), governs this case and not HIPAA because MCMRA’s rule governing disclosure is mandatory and therefore more restrictive than HIPAA’s permissive rule governing disclosure. Transcript, January 7, 2004, at 2-3. Section 4-306(b)(3) states

(b) Permitted disclosures. - A health care provider shall disclose a medical record without the authorization of a person in interest:

…

(3) To a health care provider or the provider’s insurer or legal counsel, all information in a medical record relating to a patient or recipient’s health, health care, or treatment which forms the basis for the issues of a claim in a civil action initiated by the patient, recipient, or person in interest.

MCMRA is applicable to cases where the patient has sued her health care provider alleging medical malpractice. MCMRA states that in such an instance, a health care provider shall disclose patient records without authorization from the patient. Conversely, HIPAA states that a health care provider may disclose patient records after using certain procedures. For the reasons
set forth below, the Court does not agree that MCMRA is “more stringent “than HIPAA’s requirements. Accordingly, HIPAA preempts MCMRA and is controlling on the issue of ex parte communications. This Court expressly refrains from opining upon the validity of MCMRA as it relates to the initial disclosure of medical records under § 4-306(b)(3).

Under 45 C.F.R. § 160.203, a state law that is contrary to “a standard, requirement, or implementation specification adopted under this subchapter” is preempted unless it meets one of a small list of exceptions. The only exception relevant here is found in 45 C.F.R. § 160.203(b) which states that a state law is not preempted if it is “more stringent” than a standard, requirement or implementation specification adopted under HIPAA. “More stringent,” as defined in 45 C.F.R. § 160.202, means, that the state law meets any one of six criteria. The criteria applicable to this case are the fourth and the sixth listed under the “more stringent” definition.

(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, provides requirements that narrow the scope of 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.

…

(6) With respect to any other matter, provides greater privacy protection for the individual who is the subject of the individually identifiable health information.

Id. In light of the criteria listed above, the Court views “more stringent” to mean laws that afford patients more control over their medical records. This Court’s analysis is confirmed by a review of the case law from other jurisdictions.

Most recently, this issue was addressed in National Abortion Fed’n v. Northwestern Mem’l Hosp., 2004 WL 292079 (N.D. Ill. 2004), in the context of a motion to quash a subpoena
brought by Northwestern Memorial Hospital (the “Hospital”). In granting the Hospital’s motion to quash, the Court addressed the question of whether the Illinois medical information privacy laws are more stringent than HIPAA’s requirements. *Id.* at *2. The Illinois law prohibits the disclosure by a health care provider of “any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient,” without patient consent, even in response to a subpoena. The Illinois courts have held that the protections of this law apply even if the patients’ names and identification numbers are deleted or redacted from their medical records. *Id.* at *3. Conversely, HIPAA would allow such disclosures with the suggested redactions. Juxtaposing the two statutes, the Court found that “Illinois law concerning when nonparty patient medical records may be disclosed by hospitals” without patient consent is “more stringent” than HIPAA and thus, state law was not preempted. *Id.*

In *United States v. Louisiana Clinic*, 2002 WL 31819130 (E.D. La. 2002), defendants argued that Louisiana law concerning unauthorized disclosure of confidential medical information should apply because it was “more stringent” than HIPAA. Louisiana law requires either that a patient give his or her consent to the disclosure, or in the absence of consent, that “a court shall issue an order for the production and disclosure of a patient’s records ... only: after a contradictory hearing with the patient . . . and after a finding by the court that the release of the requested information is proper.” *Id.* at *5 (citing LA. REV. STAT. ANN. § 13:3715.1(B)(5)). However, the Court noted that the Louisiana law did not address “the form, substance or the need for express legal permission from an individual,” which is “required by 45 C.F.R. § 160.202 for the exception to apply.” The Court stated that instead of increasing the restrictions on express legal permission “the Louisiana statute provides a way of negating the need for such
permission.” *Id.* The Court found that the Louisiana law was not “more stringent” than the HIPAA regulations and it was therefore preempted by federal law.


Under New Jersey case law, ex parte interviews are a legitimate means of informal discovery. *Id.* at *13. However, because the New Jersey safeguards for disclosure fall below the HIPAA standards for disclosure, HIPAA preempts New Jersey law in that regard. *Id.* The New Jersey safeguards provide Plaintiff’s counsel with notice of the proposed interview, provide the physician with a description of the anticipated scope of the interview, and communicate that the physician’s participation in the interview is voluntary. *Id.* at *2. Under state law, the patient can not prevent disclosure of the medical information. The New Jersey Superior Court found these safeguards to be insufficient under HIPAA and found that a reasonable notice provision and an opportunity for the patient to object would bring New Jersey into compliance.

Congress enacted HIPAA, in part, to protect the security and privacy of individually identifiable health information. 45 C.F.R. § 164.501 *et seq*; *United States v. Sutherland*, 143 F. Supp. 2d. 609, 612 (W.D. Va. 2001). The rules promulgated by the Secretary define and restrict the ability of health care providers to divulge patient medical records without express consent of the patient or pursuant to a court order. *Id.* It is clear there is strong federal policy in favor of protecting the privacy of patient medical records.

The key component in analyzing HIPAA’s “more stringent” requirement is the ability of the patient to withhold permission and to effectively block disclosure. HIPAA’s permissive disclosure requirements give each patient more control over the dissemination of their medical records than MCMRA, while MCMRA sacrifices the patient’s control of their private health
information in order to expedite malpractice litigation. If state law can force disclosure without a court order, or the patient’s consent, it is not “more stringent” than the HIPAA regulations. MCMRA is designed to give adverse counsel access to a patient’s medical records without consent. Since Maryland law fails to satisfy the “more stringent” standard, federal law is controlling and all *ex parte* communications must be conducted in accordance with the procedures set forth in HIPAA.

**B. Informal discovery of protected health information is now prohibited unless the patent consents.**

The recently enacted HIPAA statute has radically changed the landscape of how litigators can conduct informal discovery in cases involving medical treatment. In times past, given Maryland’s reluctance to embrace the physician-patient privilege, *ex parte* contacts with an adversary’s treating physician may have been a valuable tool in the arsenal of savvy counsel. The element of surprise could lead to case altering, if not case dispositive results. *Ngo v. Standard Tools & Equipment, Co., Inc.*, 197 F.R.D. 263 (D. Md. 2000)(defendant was free to converse with and use Plaintiff’s treating physician as a witness contrary to Plaintiff’s wishes). Counsel should now be far more cautious in their contacts with medical fact witnesses when compared to other fact witnesses to ensure that they do not run afoul of HIPAA’s regulatory scheme. Wise counsel must now treat medical witnesses similar to the high ranking corporate employee of an adverse party. See *Camden v. Maryland*, 910 F. Supp. 1115 (D. Md. 996)(holding that counsel may not have *ex parte* contact with the former employee of an adverse party when the lawyer knows or should know that the former employee has been extensively exposed to confidential client information); *Accord Zachair, Ltd. v. Driggs*, 965 F. Supp. 741 (D. Md. 1997); *But see Davidson Supply Co., Inc. v. P.P.E., Inc.*, 986 F. Supp. 956 (D. Md. 1997).

---

103 Under MCMRA, it can be plausibly argued that patient consent is inferred by the filing of suit by Plaintiffs. This Court does not believe inferred consent satisfied the intended purpose of HIPAA.
HIPAA outlines the steps to follow in order to obtain protected health information during a judicial proceeding in 45 C.F.R. § 164.512(e). There are three ways. First, counsel may obtain a court order which allows the health care provider to disclose "only the protected health information expressly authorized by such order." 45 C.F.R. § 164.512(e)(1)(i). In the absence of a court order, §§ 164.512(e)(1)(ii)(A) and (B) provide two additional methods available when used in conjunction with more traditional means of discovery.

C. **The imposition of sanctions is not appropriate.**

To the extent there was a disclosure of individually identifiable health information, Defendant’s pretrial contacts with Dr. Pinckert were in violation of HIPAA. However, the remedy sought by Plaintiff precluding Defendant’s counsel from speaking further with Dr. Pinckert about Plaintiff’s treatment is not appropriate here.

The civil remedies for failure to comply with the requirements and standards of HIPAA are found under 42 U.S.C. § 1320d-5. The Secretary shall fine any person who violates a provision of HIPAA “not more than $100 for each such violation.” 42 U.S.C. § 1320d-5(a)(1). However, this penalty may not be imposed if either (1) “the person liable for the penalty did not know, and by exercising reasonable diligence would not have known, that such person violated the provision;” or (2) “the failure to comply was due to reasonable cause and not willful neglect” and “the failure to comply is corrected during the 30-day period beginning on the fast date the person is liable for the penalty knew, or by exercising reasonable care would have known, that the failure to comply occurred.” 42 U.S.C. § 1320d-5(b)(~) and (3). Since HIPAA does not include any reference to how a court should treat such a violation during discovery or at trial, the type of remedy to be applied is within the discretion of the Court under FED. R. CIV. P. 37.

In this case, this Court’s discretion is guided by the fact that the penalty that could be levied by the Secretary as described above is mild and that in all likelihood the defense would be
able to afford itself of the aforementioned statutory defenses. All counsel were knowledgeable and extremely skilled in addressing the issues presented in this less than clear area of the law.\footnote{Parenthetically, counsel for both parties repeatedly demonstrated the high ideal of civility in their dealings with the Court and each other throughout these proceedings. All counsel aggressively represented their clients, while being courteous litigants. \textit{See} \text{THE CODE OF CIVILITY OF THE BAR ASS’N OF MONTGOMERY COUNTY, MARYLAND} (2003); \text{MARYLAND STATE BAR ASSN CODE OF CIVILITY} (1997).}

Defendant’s counsel believed in good faith that MCMRA fell into the “required by law”\footnote{“Required by law means a 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. \textit{Required by law} includes, but, is not limited to,... statutes or regulations that require such information[.]” 45 C.F.R. § 164.103.} exception to HIPAA. Transcript January 7, 2004, 2-3. It does not. The exception is found under 45 C.F.R. § 164.512 and sets forth additional requirements that must be satisfied before the Maryland statute can be accepted under the rubric of “required by law.”

Under 45 C.F.R. § 164.512(a)(1), a doctor or other covered entity “may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.” Defendant reasoned that because MCMRA mandates that patient records are discoverable without authorization or notice to the patient, its \textit{ex parte} communications with Dr. Pinckert fell into this exception. However, a closer reading of the statute reveals that a doctor or other covered entity “must meet the requirements described in paragraph (c)(e), or (f)” of § 164.512 when they are “required by law” to disclose protected health information. 45 CER § 164.512(a)(2).

Paragraph (e) of § 164.512, “disclosures for judicial and administrative proceedings,” applies to medical information disclosed during discovery. This section anticipates that a patient’s records can only be disclosed in response to a court order, or, if in the case of a subpoena or discovery request, when accompanied by satisfactory assurance that (1) written notice has been given to the patient allowing an opportunity to object; or (2) a qualified
protective order has been sought by the requesting party. 45 C.F.R. § 164.512(e) et seq. It therefore follows that while a physician may disclose a patient’s records in accordance with MCMRA’s mandate, he or she must do so using the procedures set forth in HIPAA.

Notwithstanding the Court’s disagreement with Defendant’s counsel’s analysis, it is clear that he exercised more than reasonable diligence when determining that his contacts with Dr. Pinckert did not violate HIPAA. On January 8, 2004, the Court did not find at the time that HIPAA applied in the instant case. Transcript, January 8, 2004 at 5-6. However, in the event that Defendant’s contact with Dr. Pinckert triggered a HIPAA violation, the Court ordered that either party could speak with Dr. Pinckert before he testified about the issues set forth in Plaintiff’s medical records. The Court also stated that if Dr. Pinckert strayed in his testimony from the medical records and offered any opinions beyond his experience as Plaintiff’s treating physician such testimony would be prohibited. While the Court finds upon further review that HIPAA was applicable to any pre-trial disclosure of Plaintiff’s medical information, it is also apparent that the Court’s Order effectively remedied any potential violation.

IV. Conclusion

Therefore, for the reasons stated above, Plaintiff’s Motion to preclude Dr. Pinckert from discussing the Plaintiff’s treatment with defense counsel is denied.

/s/
Charles B. Day
United States Magistrate Judge
February 27, 2004