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LAWYERS AS BUSINESS ASSOCIATES UNDER HIPAA: ARE YOU READY?

By Gordon J. Apple, Esquire

Law firms with access to protected health information likely will find themselves classified as "business associates" under new HIPAA rules and therefore subject to new privacy, security, and breach-notification requirements governing their handling of such information.

On January 25, 2013, final rules implementing changes to HIPAA Privacy, Security and Breach Notification Rules were published in the Federal Register. The final rules are a wake-up call for lawyers and law firms that qualify as business associates of covered entities to determine whether they are able to comply with both existing and pending regulatory requirements that now apply directly to them; the violation of which can end in fines, penalties and chains.

HIPAA is an acronym for the Administrative Simplification provisions of the Health Insurance Portability & Accountability Act of 1996. HIPAA provides a framework under its Privacy and Security Rules for the protection of patient confidentiality, security of electronic systems, and standards and requirements for the use, disclosure and electronic transmission of what is defined as "Protected Health Information" or PHI. The Breach Notification Rule outlines notice and mitigation requirements when unsecured PHI is acquired, accessed, used, or disclosed in violation of the Privacy and/or Security Rules.

Organizations and individuals originally required to comply with the HIPAA rules were and are called "covered entities." Many lawyers and law firms have entered into "business associate" contracts with covered entities to provide legal advice knowing there was a contractual commitment to assure the privacy and security of the protected health information provided and to notify the covered entity in the event of a data breach.

Major revisions to HIPAA were made under the HITECH provisions of the American Recovery and Reinvestment Act of 2009 ("ARRA") making the Privacy and Security Rules explicitly applicable to the "business associates" of covered entities, including law firms. Among the sections changed were:

- Section 13401 – Application of Security Provisions and Penalties to Business Associates
- Section 13402 – Notification in the Case of Breach
- Section 13404 – Application of Privacy Provisions and Penalties to Business Associates
- Section 13410 – Improved Enforcement

Under the statutory and regulatory changes, business associates are now directly liable:

1. for impermissible uses and disclosures of protected health information;
2. for a failure to provide breach notification to the covered entity when unsecured protected health information is lost or inappropriately accessed;
3. for a failure to provide access to a copy of electronic protected health information to either the covered entity, the individual, or the individual's designee (whichever is specified in the business associate agreement);
4. for a failure to disclose protected health information where required by the Secretary of the Centers for Medicare & Medicaid Services ("CMS") to investigate or determine the business associate's compliance with the HIPAA Rules;
5. for a failure to provide an accounting of disclosures of protected health information, and last, but far from least, for a failure to comply with the requirements of the Security Rule.

With respect to this last part, it is not without irony that the final rule commentary notes: "[w]e acknowledge that some business associates, particularly the smaller or less sophisticated business associates that

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may have access to electronic protected health information for limited purposes, may not have engaged in the formal administrative safeguards such as having performed a risk analysis, established a risk management program, or designated a security official, and may not have written policies and procedures, conducted employee training, or documented compliance as the statute and these regulations would now require." In fact, it is likely that this is a gross understatement about the true state of HIPAA readiness of law firms throughout the country.

Given the above, every lawyer and law firm needs to determine first, are they business associates under HIPAA, and if the answer is yes, what do they need to do (or should have been doing) to assure their compliance with the new HIPAA regulatory regime.

The Business Associate

For lawyers, the critical question is whether they fall within the definition of business associate. The answer is yes if the lawyer "[p]rovides, other than in the capacity of a member of the workforce of such covered entity, legal … services to or for such covered entity, or to or for an organized health care arrangement in which the covered entity participates, where the provision of the service involves the disclosure of protected individually identifiable health information from such covered entity or arrangement, or from another business associate of such covered entity or arrangement, to the person." In plain English, if your firm represents a covered entity or a business associate of one and it needs to have access to PHI to do its job, such as defending a malpractice claim, business associate status attaches regardless of whether the firm signed a business associate agreement. As noted in commentary to the final rule, "a person becomes a business associate by definition, not by the act of contracting with a covered entity or otherwise. Therefore, liability for impermissible uses and disclosures attaches immediately when a person creates, receives, maintains, or transmits protected health information on behalf of a covered entity or business associate and otherwise meets the definition of a business associate."

Accordingly to the extent you work with independent contractor consultants or others who will have access to PHI as part of the representation, then you need to make sure they adhere to the HIPAA privacy and security requirements as well.

Security Rule Requirements

As stated in the Security Rule preamble, [t]he purpose of this final rule is to adopt national standards for safeguards to protect the confidentiality, integrity, and availability (CIA) of electronic protected health information (electronic PHI)."

The Security Rule requires business associates to ask and answer the following basic questions about their required security risk management program:

1. What administrative safeguards (policies, procedures and related training) are in place to protect the confidentiality, integrity, and availability of electronic protected health information?
2. What physical safeguards are in place to protect the confidentiality, integrity and availability of electronic protected health information?
3. What technical safeguards are in place to protect the confidentiality, integrity and availability of electronic protected health information?
4. Who is responsible for assuring the safeguards are adequate?

The beauty of the HIPAA Security Rule is the fact that it recognizes that business associates come in all forms and sizes and that the CIA of electronic PHI will be maintained in a wide variety of ways. The Security Rule introduced the concept of required and addressable implementation specifications under each of the regulatory standards to address this reality. However, allowing for security safeguards to account for the scale of organizations does not mean that small business associates get a free pass in terms of implementing appropriate safeguards.

A core required implementation specification of the Security Rule, that the business associate must document, is to conduct a risk analysis determining the types of safeguards that are needed, given the scale and scope of the business associate's operations. This means that a business associate must "[c]onduct an accurate and thorough assessment of the potential risks and vulnerabilities to the confidentiality, integrity, and availability of electronic protected health information held by the … business associate."

A business associate's risk management program has to implement security measures sufficient to reduce risks and vulnerabilities to a reasonable and appropriate level to comply with §164.306(a).

Another Security Rule standard is the identification of a "security official who is responsible for the development and implementation of the policies and procedures required by this subpart for the … covered business associate." This is the lucky person at your firm who gets to actually read, understand, and oversee the implementation of various Security Rule requirements and safeguards and makes sure the i's are dotted and t's crossed with respect to the required documentation. This will also be the person the government will interview in the event it ever conducts an audit of your practice since HITECH requires the government to randomly audit business associates to determine if they are complying with the HIPAA Privacy, Security and Breach Notification Rules.

Privacy Rule Requirements

If a law firm has previously entered into business associate agreements with its health care clients, it is already aware of the limitations placed on it relative to the use or disclosure of protected health information. What is different, however, is that

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by being explicitly included in the HIPAA regulatory regime under the final rules, law firms will need to have in place the appropriate policies and procedures to demonstrate compliance with the applicable provisions of the Privacy Rule.

Law firm business associates will also need to demonstrate that workforce members with access to protected health information have been appropriately trained. For example, a new requirement imposed on business associates is the extension of the "minimum necessary" standard. Under this standard, when using, disclosing or requesting protected health information from a covered entity or another business associate a business associate must make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure or request unless an exception applies.

Breach Notification Requirements

As a business associate, a law firm will have to notify a covered entity if unsecured protected health information is acquired, accessed, used, or disclosed in violation of the Privacy and/or Security Rules. In real life, this means an unencrypted laptop computer with protected health information that is stolen out of a trunk would require a disclosure and in the current environment may lead to a hefty fine.

The consequences of a breach can be significant in terms of costs, both in terms of money and reputation. If the breach were large enough, affecting 500 or more individuals, the odds are good it would be publicized in the local press since section 13402(e)(4) of the HITECH Act requires public posting. At a minimum, a law firm will need to have a breach notification policy that outlines how breaches are handled. As noted in the commentary to the final rule, "an impermissible use or disclosure of protected health information is presumed to be a breach unless the covered entity or business associate, as applicable, demonstrates that there is a low probability that the protected health information has been compromised."

A Phased Approach

Lawyers and law firms that are business associates under HIPAA need to get started now to develop an internal plan for assuring compliance with the new HIPAA requirements. Although the actual deadline for compliance may be a moving target depending on whether there are existing business associate contracts in place, it makes more sense to be fully compliant by September 23, 2013.

The first step on the path to compliance is to recruit the right people within or outside of your firm to develop, implement, and eventually monitor the firm's HIPAA compliance efforts. It will be essential to gain an understanding of the applicable HIPAA privacy, security and breach-notification requirements that is more thorough than the overview provided in this article. Ideally, this knowledge can be developed in house, if not, it may be time to seek outside assistance. A lead should be designated who will drill down into the details, map the requirements, and oversee the process. This should include the lawyer or lawyers who are familiar with the nature of the firm's business associate relationships, IT professionals who understand the firm's IT infrastructure, and staff who understand the flow of PHI or electronic PHI within the firm. It will be this group that will have to address the details of compliance. Of course, if you are a solo practitioner like the author, most of these people will be looking you in the mirror each morning.

The second step is conducting a gap analysis to determine what your firm does now in handling PHI and what it will need to do in the future.

The gap analysis may possibly expose some glaring inadequacies and for that reason, there is something to be said for hiring an outside law firm and consultants to oversee the gap analysis process and bring it under the attorney-client privilege.

The third step will be to address the "gaps" identified in the gap analysis, whether technical or administrative. At the end of the day, legal business associates will need to be in a position to demonstrate to internal and external stakeholders that the firm meets HIPAA business associate requirements.

A final step should be a review of the firm's engagement letter for health care clients to set out the boundaries relative to becoming a business associate. For example, a small firm may decide that the only access to electronic PHI that it is willing to have is on site at the client's facility or through limited secure remote access to the client's IT system that is arranged by the client. In other words, the firm would refuse to put itself in the position of maintaining, disclosing, or transmitting electronic PHI and thus limit the potential liability created by the business associate relationship.

Conclusion

Getting up to speed on current HIPAA requirements and going down the path to full implementation will prove to be a challenge for many lawyers and firms that either are or agree to become business associates of health care clients. Lawyers would do well to remember Murphy's Law as a reminder of why this is so important. "If there are two or more ways to do something, and one of those ways can result in a catastrophe, then someone will do it." Nobody wants to be that someone. ▪

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Malpractice & Ethics Claim Avoidance in Practice Areas

WHAT COULD GO WRONG IN A BANKRUPTCY?

By Angie Hoppe – Claim Attorney

While there are many attorneys who specialize in bankruptcy, there are also a large number of attorneys who are not experienced in the area that are taking on bankruptcy clients to supplement their practice in a struggling economy. Bankruptcy is a heavily regulated area and carries unique risks. To avoid a potentially costly malpractice claim, here are some tips for those who engage in this area:

1. Ask the debtor to list the assets and debts in his or her handwriting or to include the information in an email that can be saved in the file. Later, if there is a claim related to a missed asset or debt in the bankruptcy matter, the documents in the file will serve to substantiate the information provided to the attorney.

2. Use brochures and handouts which describe the different types of bankruptcies and the fact that various debts (e.g., student loans) cannot be discharged and any other caveats which are common to all bankruptcies. Give a Frequently Asked Questions section to help educate clients so they do not misunderstand what bankruptcy can do for them and also can serve to show that the attorney did inform the client.

3. Use check lists when working on bankruptcy matters. The checklists will show that a routine procedure has been established within the office, and also that the client was provided with the correct information.

4. Draft retainers so they are clear. If you are only willing to file a certain type of bankruptcy for the client, a clear retainer agreement outlining the scope of the representation may avoid any client misunderstandings. For example, if you are willing to handle a chapter 13 and not a chapter 7, this is something to discuss ahead of time with client and have the plan documented in your retainer.

5. Maintain files for at least 10 years. If you are later sued, the documents in the file will be necessary to your defense. This is especially important with respect to the debtor's handwritten or emailed communications regarding asset/debt lists, retainer agreements, checklists and materials provided to the client.

6. If you are engaged as a bankruptcy trustee be sure to be timely in the handling of your assigned files. The duty to close the estate without unnecessary delay is the trustee's overriding responsibility, and expeditiousness should be balanced against the best interest of parties to the matter.

7. To the extent possible and practicable, independently verify information provided by the client. For example, if a client states they have a homestead on a property it is important and easy to verify whether the statement is accurate.

8. Investigate whether there are any issues that would make bankruptcy improper for the client, or whether the client may have limited bankruptcy options. Consult with the client about the qualifications for bankruptcy, and explain to the client the income barriers for certain bankruptcy options.

As with any practice area, clear communication with the client is critical. Make sure the client has an understanding of likely outcomes and realistic expectations (let them know what you can and cannot do on their behalf!) Creating standard practices within the office is one of the best ways to prevent problematic situations from arising. If concerning issues arise, the MLM Risk Management HotLine at (855) 692-5146 is available to service our policyholders and assist where we can. ▪

THE EMOTIONAL ASPECTS OF DISPUTE RESOLUTION

By Alice M. Sherren – Claim Attorney

It used to be that lawyers were advised to take the emotion out of their work. After all, lawyering is about facts and being right, not about trying to see where the other side is coming from….. right? In reality, attempting to remove emotion from dispute resolution is not only impossible, but it is ill advised. Lawyers who ignore the role of emotion in their cases do themselves and their clients a major disservice.

ABA Model Rule of Professional Conduct 2.1 Advisor specifically directs attorneys to exercise independent professional judgment and render candid advice, referring to moral, economic, social and political factors that may be relevant to the client's situation. In doing so, it is important to be aware of how emotion affects legal representation, and especially dispute resolution.

An increasing number of disputes are resolved short of trial, often using some form of alternative dispute resolution such as mediation. The ability to negotiate well is a vital skill for attor-

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neys. Negotiators – both lawyers and mediators – can improve the mediation experience and outcome by understanding the information communicated by emotions, as opposed to by facts. Rather than ignore the power emotions have over people trying to resolve a dispute, the trick is to empathize with all people involved in a negotiation and enlist positive emotions to come to a mutually agreeable resolution.

Party v. Party

Before beginning to negotiate a dispute, it is important to understand what is truly disputed. Sometimes, a contract dispute truly is simply about party A breaching the contract and party B wanting compensation. But often, other factors have far greater influence over the parties' ability to reach a resolution. For example, a dispute over property might not really be about the land at all but rather about wounded pride going back generations. Family law disputes are notoriously fraught with understandable emotional issues that cannot be compensated in the law. Disputes over distribution of an estate can involve deep-seated emotions that have brewed and intensified over a lifetime. Some parties cannot even be in the same room together without visible animosity if not actual violence erupting.

As lawyers, we are not miracle workers. We cannot heal the wounds of former business partners, spouses, or family members in the course of resolving a legal dispute. But we can be cognizant of the "human" or emotional aspect of conflict resolution, and make an effort to understand what really drives each party. Sometimes, an apology along with a check would allow a resolution that otherwise seemed impossible (because deep down it wasn't about the money). Sometimes, an offer to return Grandma's urn allows an heir to stop challenging certain distributions under the will.

A determination of what is really at issue in a dispute can involve asking deeper questions of your client, and seeking deeper answers from the other side. When doing so, it is important to keep in mind the parameters of **ABA Model Rule 1.6 Confidentiality of Information** and **Rule 3.4 Fairness to Opposing Party and Counsel**. In some circumstances, it may make sense to obtain your client's consent to disclose certain information or motivation to bring to light a potential resolution, and it may make sense to ask opposing counsel to do the same.

Client v. Lawyer

As lawyers, we tend to have better control managing the expectations of our clients if we understand what motivates them. As contemplated by **ABA Model Rule 2.1 Advisor**, we should find out what is really important to our clients in a dispute, which issues they are absolutely unwilling to compromise on, and which issues are true bargaining chips. As soon as possible, we should endeavor to determine the same for opposing parties. Talking candidly with opposing counsel and asking her to find out what truly drives her client can reduce friction among parties and streamline the negotiation process. Getting to the true root of the dispute as soon as possible allows "petty" issues to all but disappear so effort can be focused on the issues that will make or break the negotiation.

Managing your relationship with your client is vital to successful negotiation. The comments to **ABA Model Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer** provide excellent guidance in allocating authority between yourself as lawyer and your client. While the client has the ultimate say in how the representation should be accomplished, the lawyer should provide significant legal guidance, while contemplating the additional parameters addressed in **Rule 2.1**.

Once you understand the heart of the dispute, it's important to be honest with your client if he has unreasonable expectations or is allowing his emotions to impede resolution. The comments to **ABA Model Rule 1.4 Communication** direct attorneys to be in constant communication with clients and to be certain to explain the ramifications of various actions or inactions. Talk with your client about how his demeanor can affect the opposition's reaction to proposed resolutions. Be clear about which issues are deal breakers, which are somewhat negotiable, and which can be easily conceded by your client. While a lawyer is not a therapist, sometimes being straight with a client about how his emotions might hinder his ultimate goals could allow resolution that otherwise seemed impossible. For example, a businessman intent on punishing his former partner may have lost sight of the fact that undermining his former partner may cost the business to be undervalued, for example. Once the businessman realizes that he is also "punishing" himself, he may be able to gain better control of his emotions and truly work toward amicable resolution of the dispute.

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Lawyer v. Insurance Company

If an insurance company is involved, the claims adjuster's emotions should be considered as well. Be sure to address any interpersonal issues between the adjuster and your client, and be sure to keep everyone apprised of your strategy of resolution. It is important to present a united front during a negotiation as any "in-fighting" derails positive momentum toward resolution and gives the other side an upper hand. Common sources of discord include differences of opinion on whether to concede liability, whether to make a settlement offer when liability is disputed, and whether to put resources into defending the case or settling the case. Be certain you are able to appropriately advocate for your client's position while not ignoring the desires of the adjuster who ultimately holds the checkbook.

Lawyer v. Lawyer

Especially as we mature in our practice, lawyers get to know other lawyers on a professional and sometimes personal level – for better and for worse. Be careful to not let friendships or animosities impede resolution of the case at hand. The comments to **ABA Model Rule 3.4 Fairness to Opposing Party and Counsel** provide some guidance on what conduct is specifically prohibited. You will likely find going above and beyond what the rules require in terms of interaction with opposing parties and counsel will serve your client well (not to mention make your work life more pleasant). A confrontational demeanor may prevent an otherwise acceptable proposal from being truly heard. It may lead the other side to believe you are trying to manipulate or trick them somehow, and therefore not trust you or your client. Professional courtesy goes a long way in dispute resolution. Even when you might want to use a condescending tone, recognize that this tactic may "work" in the short term but over time will lose you respect in the legal community and can affect your ability to advocate for your clients.

Lawyer v. Mediator

A skilled mediator can resolve disputes that seemed impossible. But not all mediators are the right fit for all cases, parties, or lawyers. When choosing a mediator, keep in mind the emotional state of your client and of yourself. For example, if your client is prone to tears and likely to disengage if pushed, steer clear of hard hitting mediators, if possible. Likewise, if your client drives a hard bargain, seek out a mediator who will be able to work with him and get him to see where his position may have weaknesses.

At the end of the day, we are all human beings with complex reasons for our actions and desires. Pretending that emotion plays no role in dispute resolution is likely to backfire. Using emotion to your advantage is a skill that will help make your practice more fulfilling and hopefully result in better results for your clients. ▪

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