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# POTENTIAL ABROGATION OF ATTORNEY-CLIENT PRIVILEGE IN OKLAHOMA AS A RESULT OF HIPAA

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## I. Introduction

The Health Insurance Portability and Accountability Act (HIPAA) is the first national law to protect health care information and grant patients control over their medical records.<sup>1</sup> Although the health care industry historically has accepted a physician-patient privilege available and enforceable at the state level,<sup>2</sup> as a result of HIPAA, health care entities nationwide are now grappling with compliance and proper enforcement of HIPAA's Privacy Rule.<sup>3</sup>

The main purpose of HIPAA is to promote efficiency in the health care industry, given recent advancements in the computerized means of sharing health information.<sup>4</sup> Congress intended for the HIPAA privacy law to protect health information and address fears of potential vulnerability resulting from the electronic age.<sup>5</sup> President Clinton signed HIPAA into law in 1996.<sup>6</sup> At that time, HIPAA was dubbed the "most sweeping privacy protection ever

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1. See Pub. L. No. 104-191, 110 Stat. 1936 (1996). Although HIPAA is a sizeable statute, this article focuses on the portions of the statute relating to privacy matters contained within 45 C.F.R. §§ 164.102-164.534 (2004), which seek to protect a comprehensive range of individual health information. See Craig D. Tindall, *HIPAA and Medical Records: A Primer for the Personal Injury Lawyer*, 33 ARIZ. ATT'Y, at 33, 33 (2003); see also OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF HEALTH & HUMAN SERVS., *OCR HIPAA PRIVACY, STANDARDS FOR PRIVACY OF INDIVIDUALLY IDENTIFIABLE HEALTH INFORMATION* 11 (2002) [hereinafter *OCR HIPAA PRIVACY*].

2. The Oklahoma legislature has codified this privilege at 43A OKLA. STAT. ANN. § 1-109(A)(3) (West 2003). See generally Richard J. Kohlman, *Protected Communication Between Physician and Patient*, 45 AM. JUR. PROOF OF FACTS 2D 595 (1986 & Supp. 2004) (stating that the privilege did not exist at common law and is therefore a creature of statute).

3. The compliance date under HIPAA was April 14, 2003 for large entities and April 14, 2004 for plans worth less than \$5 million. See 45 C.F.R. § 160.103.

4. Marsha Cope Huie et al., *The Right to Privacy in Personal Data: The EU Prods the U.S. and Controversy Continues*, 9 TULSA J. COMP. & INT'L L. 391, 404 n.32 (2002).

5. June Mary Zekan Makdisi, *Commercial Use of Protected Health Information Under HIPAA's Privacy Rule: Reasonable Disclosure or Disguised Marketing?*, 82 NEB. L. REV. 741, 743-44 (2004).

6. See Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended at 42 U.S.C. § 1320d (2000)).

written.”<sup>7</sup> The final version of HIPAA’s “privacy rule” was adopted on August 14, 2002.<sup>8</sup>

Under the Privacy Rule, any “business associate” of an entity covered by HIPAA must safeguard health information — including oral communications — pursuant to certain statutory requirements.<sup>9</sup> Business associates handle health care information as necessary to provide certain core functions for a health care entity. In so doing, business associates must grant patients access to health information and provide an accounting of such disclosures upon request, among other HIPAA requirements.<sup>10</sup>

The Office for Civil Rights (OCR), charged with enforcing civil violations of HIPAA, has issued guidance documents explaining that attorneys may be considered business associates.<sup>11</sup> On the other hand, one part of HIPAA states that legal services fall under the definition of “health care operations,”<sup>12</sup> for which the business associate safeguarding requirements do not apply. The effect of the Privacy Rule upon attorneys representing health care entities is therefore unclear.

If a court or federal agency deems an attorney representing a health care client to be a business associate under HIPAA and requires the attorney to turn over health information upon a patient’s request, the attorney’s duty to keep communications confidential may be compromised.<sup>13</sup> Thus, despite the

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7. Huie, *supra* note 4, at 404 n.32.

8. See *Citizens for Health v. Thompson*, No. Civ.A. 03-2267, 2004 WL 765356, at \*2 (E.D. Pa. Apr. 2, 2004) (stating that upon the third anniversary of the passage of the law, the Secretary of Health and Human Services commenced the rulemaking process because Congress had not yet enacted privacy legislation).

9. See, *i.e.*, 65 Fed. Reg. 82,462, 82,503-04 (Dec. 28, 2000). Covered entities under the “Privacy Rule” initially included only health plans, clearinghouses, and health care providers, such as hospitals and physicians. *Id.* Under Part D of the new Medicare Prescription Drug Improvement and Modernization Act of 2003, the Center for Medicare and Medicaid Services (CMS) also designated prescription drug sponsors as covered entities. 42 U.S.C. § 1395w-141(h)(6)(A) (effective Dec. 8, 2003), 42 C.F.R. § 403.806(d)(1) (2004); see also Steve Fox, *And Then There Were Four — HIPAA Covered Entities, That Is*, HIPAA ADVISORY, at <http://www.hipaadvisory.com/action/legalqa/hipaalaw.htm> (last visited Aug. 31, 2004).

10. 45 C.F.R. § 164.504(e)(2)(ii) (2004); see also *id.* § 164.502(e)(1)(I) (requiring satisfactory assurances that health information is protected).

11. OCR HIPAA PRIVACY, *supra* note 1, at 16 (stating that legal services are “business associate services”); OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF HEALTH & HUMAN SERVS., SUMMARY OF THE HIPAA PRIVACY RULE 3 (May 2003) (defining business associate services as including “legal” services); see also Johanna G. Averill, *HIPAA Privacy Rules*, 51 LA. B.J. 280 (2003/2004) (asserting that HIPAA considers attorneys representing either physicians or hospitals to be business associates).

12. 45 C.F.R. § 164.501.

13. 45 C.F.R. § 164.504(e)(2)(ii)(A), (E)-(G) (stating that business associates are to

apparent inconsistency in HIPAA, attorneys must nevertheless become familiar with the statute to satisfy their ethical obligations. This Article explains HIPAA's nuances with respect to attorneys, examines Oklahoma statutes applicable to disclosure of health care records, and ultimately concludes that attorneys should take precautions to ensure compliance with HIPAA and state privacy laws.

## II. The HIPAA Privacy Rule and Business Associates

### A. Business Associate Arrangements Under HIPAA

HIPAA requires business associates to sign written contracts with "covered entities."<sup>14</sup> These contracts must fully and accurately reflect the business associate's intended use and disclosure of health information.<sup>15</sup> Further, the contract or "arrangement" must contain "satisfactory assurances" that health information will be protected.<sup>16</sup> If attorneys are considered business associates under HIPAA, they too must incorporate and abide by all of these statutory requirements.<sup>17</sup>

Despite HIPAA's mandatory nature, the statute provides a possible loophole for attorneys. HIPAA considers "legal services" a subset of a covered entity's "health care operations,"<sup>18</sup> possibly implying that attorneys of health care clients are not bound by business associate obligations. If so, attorneys may avoid certain tenuous obligations to patients, such as accounting of disclosures.<sup>19</sup> Unfortunately, OCR, in its nonbinding public interpretations of HIPAA, has failed to define the scope of the phrase "legal services."<sup>20</sup> Until receiving further guidance, health care attorneys should

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guarantee patients the same protections and rights to access and amend their records and receive an accounting of disclosures of health information); *see also* Alexander S. Gareeb, *Practical Implications of HIPAA: How the Privacy of Personal Health Information Concerns Lawyers and Law Firms*, L.A. LAW., Apr. 2004, at 12 (recommending that law firms document their privacy protection measures to protect themselves from potential liability).

14. 65 Fed. Reg. 82,462, 82,503 (Dec. 28, 2000) (as amended Aug. 14, 2002). OCR has consistently repeated this statutory obligation in its messages to the health care industry. *See, e.g.*, Office for Civil Rights, *HIPAA Privacy*, Dec. 3, 2002, at 46 [hereinafter *HIPAA Privacy*].

15. 45 C.F.R. § 164.504(e)(2)(ii)(A).

16. *Id.* § 164.502(e)(1)(I) (listing a firewall on a company's server for incoming emails and locking cabinets for confidential health information as examples of "satisfactory assurances").

17. *Id.* § 164.504(e).

18. *Id.* § 164.501.

19. *Id.* § 164.528(a)(1)(I).

20. OCR HIPAA PRIVACY, *supra* note 1, at 1.

scrutinize the contents of engagements with health care clients to ensure HIPAA compliance.

### *B. Contractual Obligations to Health Care Clients*

Business associates make a myriad of promises to covered entities. These include the establishment of safeguards to protect health information, the promise to apprise the covered entity of a violation, the agreement to bind its agents to the same contractual terms, and a guarantee to offer patients their rights to access and amend their health care information.<sup>21</sup> The patients' right to receive an accounting of disclosures of their health care information must also be included.<sup>22</sup>

Business associates are restricted to the language of the contract with the covered entity. While HIPAA's safeguarding requirements apply to business associates, its penalties do not.<sup>23</sup> Instead, any liability a business associate may face arises solely from its contract with a covered entity.<sup>24</sup> Thus, as a protective measure, health care attorneys receiving business associate agreements from health care clients should avoid signing strong indemnification language for HIPAA civil and criminal violations.<sup>25</sup>

At the termination of a contract, a business associate must return or destroy protected health information (PHI) belonging to a covered entity "if feasible."<sup>26</sup> Because attorneys must protect communications with clients after representation and indeed even after clients are deceased,<sup>27</sup> perhaps attorneys

21. 45 C.F.R. § 164.504(e)(2)(ii)(B)-(F).

22. *Id.* § 164.504(e)(2)(ii)(G).

23. HIPAA contains both civil and criminal penalties for the improper use and disclosure of protected health information (PHI). *See* 42 U.S.C. § 1320d-5(a)(1) (2000) (prescribing a civil penalty of not more than \$100 per violation and not to exceed \$25,000 in a calendar year); *id.* § 1320d-6(b) (prescribing a maximum fine of \$250,000 and ten years in prison for criminal violations).

24. *HIPAA Compliance: Are You Sure It Does Not Apply To You?*, LET'S TALK, Summer 2003, available at <http://www.smrfirm.com/articles/2003-06-art1.htm> (explaining that HIPAA obligations apply to "covered entities" but are extended to a business associate through the "Business Associate Agreement"); *HIPAA Privacy*, *supra* note 14, at 44 (stating that OCR has the right to require covered entities to draft contracts pertaining to the protection of health information with business associates).

25. The author recommends explaining to health care clients that attorney malpractice carriers would likely not approve indemnification of the type of penalties envisioned by HIPAA. *See* 42 U.S.C. § 1320d-6(b)(1).

26. 45 C.F.R. § 164.504(e)(2)(ii)(I).

27. *Swidler & Berlin v. United States*, 524 U.S. 399, 410-11 (1998); *Glover v. Patten*, 165 U.S. 394, 406-08 (1897).

could claim that returning or destroying such information is not feasible under the attorney-client privilege.

### III. HIPAA and the Attorney-Client Privilege

The attorney-client privilege remains one of the oldest privileges recognized at common law.<sup>28</sup> Its exercise encourages “free and unembarrassed communication between attorneys and their clients, without which the rights of the latter would in many cases be infringed, and justice perverted.”<sup>29</sup>

The ambiguous treatment of business associates under HIPAA may compromise the attorney-client privilege. While the statute specifically states that a business associate need not account for disclosures if performing “health care operations,”<sup>30</sup> including “legal services,”<sup>31</sup> OCR paradoxically places legal services under the business associate heading. If this confusion is not resolved by a necessary amendment to HIPAA in the near future, health care defense attorneys may no longer have the ability to claim a privilege over documents containing health care information.<sup>32</sup>

#### A. Exercising the Attorney-Client Privilege

The Oklahoma legislature has incorporated the attorney-client privilege into the state evidence code.<sup>33</sup> The privilege attaches to “confidential” communications, which are defined as communications “not intended to be disclosed to third parties other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.”<sup>34</sup> To establish that a communication is privileged, an attorney must prove to a court that the status of the parties is that of legal professional and client and that the communication is meant to be confidential.<sup>35</sup> Once the privilege attaches to

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28. In fact, its history dates back hundreds of years to Elizabethan England. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 542 (1961).

29. Pearson v. Yoder, 1913 OK 515, ¶ 2, 134 P. 421, 422.

30. 45 C.F.R. § 164.528(a)(1)(I).

31. *Id.* § 164.501.

32. Gareeb, *supra* note 13, at 12 (asserting that a business associate agreement “imputes the duties of a covered entity regarding the protection of PHI to the law firm” and that “firms that are not compliant with the act may be subject to liability for penalties and fines”).

33. 12 OKLA. STAT. §§ 2101-2513 (2001).

34. State *ex rel.* Cartwright v. Okla. Indus. Auth., 1981 OK 47, ¶ 33, 629 P.2d 1244, 1250-51.

35. Sims v. Travelers Ins. Co., 2000 OK CIV APP 145, ¶ 8, 16 P.3d 468, 470; *see also* Chandler v. Denton, 1987 OK 38, ¶ 20, 741 P.2d 855, 865.

a communication, an attorney — as well as employees and affiliates of the attorney, such as a consulting expert — must protect confidentiality.<sup>36</sup> Indeed, only the client may waive the attorney-client privilege.<sup>37</sup>

Of course, attorneys may have different types of clients. For example, in addition to individuals, corporate clients also have statutory authority to determine how their attorneys use privileged materials.<sup>38</sup> Another example, pertinent to this Article, is the situation where a health care provider, rather than a patient, is the attorney's client. In this instance, the attorney must be able to protect confidential communications with the provider, including PHI within documents.

### *B. Ethical Obligations Associated with the Privilege*

Oklahoma has a strong policy of protecting attorney-client privileged matters.<sup>39</sup> In 1988, the Oklahoma Supreme Court approved the *Oklahoma Rules of Professional Conduct*, modeled after the *ABA Model Rules of Professional Conduct*.<sup>40</sup> Oklahoma Rule 1.6 mandates that an attorney shall not disclose confidential information.<sup>41</sup> Thus, Oklahoma attorneys have a heightened duty to protect confidential communications, including documents.<sup>42</sup> Attorneys must keep confidential "all information relating to the representation, whatever its source."<sup>43</sup>

36. 12 OKLA. STAT. § 2502(B)(3), (5).

37. *Chandler* ¶ 19, 741 P.2d at 865.

38. 12 OKLA. STAT. § 2502(B)(1)-(5).

39. Oklahoma adopted its version of the *ABA Model Code of Professional Responsibility* thirty-six years ago. Order of the Supreme Court of Oklahoma (Dec. 16, 1969), 5 OKLA. STAT. ch. 1, app. 3 (1971). The *Preservation of Confidence and Secrets of a Client* defines what obligations of confidentiality an attorney owes to clients in Oklahoma. OKLA. CODE OF PROF'L RESPONSIBILITY DR 4-101 (1971).

40. Order of the Supreme Court of Oklahoma (Mar. 10, 1988), 5 OKLA. STAT. ch. 1, app. 3 (2001).

41. Specifically, Rule 1.6 provides that "a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation . . ." OKLA. RULES OF PROF'L CONDUCT R. 1.6 (2001).

42. OKLA. CODE OF PROF'L RESPONSIBILITY DR 4-101; *see also* *Chandler v. Denton*, 1987 OK 38, 741 P.2d 855; *Parnacher v. Mount*, 1952 OK 126, 248 P.2d 1021. The Oklahoma Bar Association Legal Ethics Committee has determined that "client confidence" should never be compromised. Okla. Bar Ass'n Legal Ethics Comm., Legal Ethics Opinion No. 301, 1983 WL 207525 (1983) (approved by the Oklahoma Bar Association Board of Governors at its meeting on June 16, 1983).

43. MODEL CODE OF PROF'L CONDUCT R. 1.6, cmt. 5 (1998).

If attorneys are business associates, however, then HIPAA's mandatory obligations, such as granting patients and the Secretary of Health and Human Services (HHS) the right to access any business associates' health records,<sup>44</sup> directly contradict Oklahoma attorneys' ethical responsibilities.<sup>45</sup> In light of these mandatory regulations, attorneys should carefully avoid waiving the attorney-client privilege.

### C. Waiver of the Attorney-Client Privilege

In Oklahoma, a party asserting the attorney-client privilege has the burden of proving that the privilege has attached to specific documents.<sup>46</sup> To avoid waiver of the privilege after HIPAA, attorneys should (1) caution their clients not to publish privileged information to third parties,<sup>47</sup> and (2) take precautions to avoid voluntary dissemination of privileged communications.<sup>48</sup>

Courts have found, however, that the disclosure of privileged information to government agencies may waive the attorney-client privilege in certain situations.<sup>49</sup> Another court has determined that disclosure of information to a government agency results in waiver as to *all* adversaries.<sup>50</sup> Thus, HIPAA's mandatory disclosure of health information by business associates to the

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44. 45 C.F.R. § 164.524(a) (2004); *id.* § 164.504(e)(2)(ii)(H).

45. OKLA. RULES OF PROF'L CONDUCT R. 1.6; MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101; Canon 4, EC 4-4 (1980); Interview with Drew Kershen, Professor of Law, University of Oklahoma College of Law, in Oklahoma City, Okla. (Oct. 1, 2003) (mentioning that agents of a firm may be bound by both Oklahoma and national professional rules of ethics).

46. *Sinclair Oil Corp. v. Texaco, Inc.*, 208 F.R.D. 329, 331-32 (N.D. Okla. 2002) (interpreting 12 OKLA. STAT. ANN. § 2502 (West 2002)).

47. The author recommends marking client health care documents "privileged" and keeping them separate.

48. *See, e.g., Thurmond v. Compaq Computer Corp.*, 198 F.R.D. 475, 481 (E.D. Tex. 2000) (stating that the privilege "protects communications that were made to further the rendition of legal services to the client"). Although the privilege protects communications, it does not protect disclosure of underlying facts related to such communication. *Upjohn v. United States*, 449 U.S. 383, 395 (1981). Therefore, a physician's letter to his attorney detailing a negligently performed surgery, if kept confidential, should remain privileged, but the underlying facts of the surgery, perhaps witnessed by several nurses, remain unprivileged.

49. For example, in *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991), a corporation divulged information to the Securities and Exchange Commission, but subsequently signed a confidentiality agreement with the Department of Justice. *Id.* at 1426. The court reasoned that the company did not have an expectation of privacy, as one agency adversary could obtain the privileged information from another agency. *Id.*

50. *Permian Corp. v. United States*, 665 F.2d 1214, 1220-21 (D.C. Cir. 1981).

Secretary of HHS may result in “mandatory waiver” of any privilege previously attached to the health care documents.

One mitigating factor in situations of waiver in Oklahoma is whether the presence of a third party is required for the transmission of the privileged communication.<sup>51</sup> It is therefore imperative for attorneys to understand relationships between their health care clients and third parties.

#### *IV. Using Protected Health Information in Litigation*

##### *A. Obtaining Health Records*

Several methods of obtaining medical records exist in Oklahoma. Generally, parties may “obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action . . . .”<sup>52</sup> Under HIPAA, attorneys seeking health information may draft subpoenas,<sup>53</sup> seek a court order,<sup>54</sup> or obtain an authorization to release records directly from the patient.<sup>55</sup> HIPAA states that court orders need not accompany subpoenas if: (1) an attorney attempts notice on the individual patient “in good faith”; (2) the notice sufficiently apprises the individual of the request for PHI; and (3) the patient either supports the release of information or fails to timely respond.<sup>56</sup> Attorneys seeking health care records should familiarize themselves with these methods of obtaining PHI, particularly with patient authorizations.

##### *B. Specific Requirements for Authorizations in Oklahoma*

###### *1. Oklahoma Statutes*

In 2003, the legislature passed a law requiring that a plaintiff filing a medical cause of action offer the defendant a specific authorization form for release of medical records.<sup>57</sup> This law, the “Affordable Access to Health Care

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51. *Ratzlaff v. State*, 1926 OK 707, ¶ 17, 249 P. 934, 937; *Jayne v. Bateman*, 1942 OK 298, ¶¶ 24-25, 129 P.2d 188, 191.

52. 12 OKLA. STAT. § 3226(B)(1) (2001) (emphasis added) (stating that information may be discovered if “reasonably calculated to lead to the discovery of admissible evidence”).

53. 45 C.F.R. §§ 164.500, 164.512(f)(1) (2004) (allowing for administrative subpoenas as well).

54. *Id.* § 164.512(e)(1)(I).

55. *See generally id.* § 164.508(c).

56. Alexander S. Gareeb, *How the Privacy of Personal Health Information Concerns Lawyers and Law Firms*, L.A. LAW., Apr. 27, 2004, at 12.

57. 63 OKLA. STAT. § 1-1708.1E(C) (Supp. 2004); *see also* 63 OKLA. STAT. ANN. § 1-1708 (West 2004) (importing HIPAA language into a new authorization form for requesting medical

Act,” attempted to simplify release of records. Specifically, the statute mandates a release of medical records dating back five years.<sup>58</sup> Should a party fail to abide by the statute and not provide an opponent with the proper authorization, the court must dismiss such matter with prejudice.<sup>59</sup>

## 2. Components of a Proper Authorization Form

Because Oklahoma statutes currently provide a blueprint for drafting a medical record authorization form, health care attorneys should familiarize themselves with Oklahoma law, which requires that a patient authorization form:

- (1) be specifically directed to a health care provider;
- (2) identify the recipient of the record, the patient, and the exact information needed;
- (3) contain specific statutory language; and
- (4) be signed and dated by the patient, guardian, or representative.<sup>60</sup>

HIPAA differs slightly in that it requires authorization forms to have an expiration date,<sup>61</sup> as well as other requirements, such as a statement advising that information released may be redisclosed and no longer protected by HIPAA.<sup>62</sup>

## C. Protecting Patient Privacy

When drafting authorization forms, attorneys should include language assuring protection of PHI during litigation.<sup>63</sup> The general rule is to err on the side of patient privacy.

### 1. Preemption Analysis: Choose the “More Stringent” Law

The concept of preemption stems from the Supremacy Clause of the U.S. Constitution, whereby state laws must accede to conflicting federal laws.<sup>64</sup> HIPAA declares in its preemption clause<sup>65</sup> that it will supersede any

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records).

58. 63 OKLA. STAT. § 1-1708.1E(C)(1)(b).

59. *Id.* § 1-1708.1E(C)(2). The authorization form, drafted for Oklahoma practitioners, is available at <http://www.oba-net.org>.

60. 76 OKLA. STAT. § 19 (Supp. 2004); *see also* 63 OKLA. STAT. § 1-502.2(B) (Supp. 2004).

61. 45 C.F.R. § 164.508(c)(v) (2004) (stating that “end of research” or “none” may be sufficient expiration dates).

62. *Id.* § 164.508(c)(2)(B)(iii).

63. Averill, *supra* note 11, at 281.

64. U.S. CONST. art. VI, cl. 2.

65. 42 U.S.C. § 1320d-7(a)(1) (2000).

“contrary” state law.<sup>66</sup> A covered entity must therefore determine if a state law affecting medical records offers more privacy protection to a patient than HIPAA,<sup>67</sup> and then choose the “more stringent” law.<sup>68</sup>

For example, HIPAA has been found to preempt state laws that allowed attorneys to interview the plaintiffs’ physicians without the plaintiffs present. In New Jersey, a court found that HIPAA preempted state law and enjoined the drug manufacturer defendants from performing such interviews.<sup>69</sup> The court reasoned that HIPAA-mandated authorizations had not been sent to the patients to notify them of potential disclosures.<sup>70</sup> The Tennessee Supreme Court interpreted a similar state law and found that physicians violated “an implied covenant of confidentiality” by divulging PHI to a law firm without prior approval from the patient.<sup>71</sup>

Several Oklahoma statutes seek to protect health information and could be subjected to a preemption analysis to determine whether they are “more stringent,” thus providing more protection than HIPAA.<sup>72</sup> Oklahoma

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66. 45 C.F.R. § 160.202 (defining “contrary” as “(1) A covered entity would find it impossible to comply with both the State and federal requirements; or (2) The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of part C of title XI of the Act or section 264 of Pub. L. 104-191, as applicable”).

67. *See* S.C. Med. Ass’n v. Thompson, 327 F.3d 346, 355 (4th Cir. 2003) (holding that HIPAA preemption requirement of choosing more stringent law, derived from a federal administrative agency regulation, was sufficiently clear so as not to violate due process) (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 504 (1982)).

68. 45 C.F.R. § 160.202 (using six criteria to define “more stringent,” with the fifth stating: “[w]ith respect to recordkeeping or requirements relating to accounting of disclosures, [the law] provides for the retention or reporting of more detailed information or for a longer duration”). HIPAA was not designed to conflict directly with state remedies for privacy violations, Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,582 (Dec. 28, 2000), and the statute mentions that it will preempt opposing state statutes, *see, e.g.*, 45 C.F.R. § 160.201 (stating, *inter alia*, that provisions in HIPAA that are contrary to state law preempt state law, unless the state law is “more stringent”). Although the Oklahoma legislature has borrowed language from HIPAA in recent statutes affecting the release of medical records, *see, e.g.*, 63 OKLA. STAT. § 1-1708.1E(C) (Supp. 2004), covered entities should familiarize themselves with preemption analysis to comply with HIPAA. *See* *United States ex rel. Stewart v. La. Clinic*, No. 99-1767, Section N, 2002 WL 31819130 (E.D. La. Dec. 12, 2002) (validating HIPAA’s preemption analysis).

69. *Smith v. Am. Home Prods. Corp.*, 855 A.2d 608, 623-24 (N.J. Super. Ct. Law Div. 2003).

70. *Id.*

71. *Givens v. Mulliken ex rel. Estate of McElwaney*, 75 S.W.3d 383, 408-09 (Tenn. 2002).

72. *See, e.g.*, 12 OKLA. STAT. § 2503 (Supp. 2004) (reciting the Oklahoma version of the physician-patient privilege); *see also* 63 OKLA. STAT. § 1-502.2 (Supp. 2004) (providing communicable disease legend); 43 OKLA. STAT. § 1-109 (Supp. 2004) (providing limited access to psychotherapy notes). Oklahoma attorneys should also be aware that specific classes of

legislators should review current health care laws in light of HIPAA. For example, dental records are statutorily protected,<sup>73</sup> as are records of minors.<sup>74</sup> Also, health care practitioners in Oklahoma are under a statutory duty to claim the physician-patient privilege for their minor patients, absent a waiver.<sup>75</sup> Overall, when choosing between state law and HIPAA, covered entities should follow the law that grants greater privacy protection and notice provisions for the individual.

## 2. Protective Orders

In discovery, attorneys may also consider issuing protective orders with language offering “satisfactory assurances” to patients that their health information will be protected.<sup>76</sup> Courts may require elements of HIPAA’s language during discovery, and attorneys should follow such guidance to avoid sanctions.<sup>77</sup> For example, some federal judges require subpoenas to be HIPAA-compliant, containing “satisfactory assurances” of PHI protection and making patients aware of PHI disclosure.<sup>78</sup> Courts now recognize protective orders for health information and perform balancing tests, often weighing an individual’s privacy interest with the interest of the party seeking production.<sup>79</sup> HIPAA provides that protective orders in litigation must adequately preserve patient privacy rights. Likewise, Oklahoma statutes provide for protective orders, and attorneys who must deal with medical records in litigation should familiarize themselves with drafting protective orders.<sup>80</sup>

## 3. Precedent for Protecting Health Care Information

Under HIPAA, state causes of action for privacy violations are not mutually exclusive with the ability to file a HIPAA complaint.<sup>81</sup> In Oklahoma, a person

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patients are not entitled to their PHI and that those patients’ medical records receive heightened protection from the state legislature. These include records of minors, substance abuse records, and mental health records.

73. 59 OKLA. STAT. § 328.32(A)(26) (2001) (making the willful disclosure of confidential information by a dentist a criminal misdemeanor).

74. 10 OKLA. STAT. § 7005-1.2 (2001).

75. *Id.* § 7005-1.2(C) (acknowledging state and federal medical records laws).

76. 45 C.F.R. §§ 164.512 (e)(1)(ii)(A)-(B) (2004).

77. FED. R. CIV. P. 37.

78. *United States v. Sutherland*, 143 F. Supp. 2d 609, 612 (W.D. Va. 2001).

79. *Id.* at 612-13 (determining that a doctor accused of criminally administering drugs had a privacy interest inferior to the government’s policy of eradicating such crime).

80. *See* 12 OKLA. STAT. ANN. § 3226(c) (West 2002).

81. 65 Fed. Reg. 82,582 (Dec. 28, 2000).

violating HIPAA could therefore face both state and federal penalties.<sup>82</sup>

Some Oklahoma courts have denied privilege for attorney-client communications regarding health care fraud investigations. Further, in the criminal prosecution of health care matters, documents typically lose their privilege. In *State v. Thomason*,<sup>83</sup> a nursing home, defending prosecution for caretaker neglect and Medicaid fraud, could not assert a physician-patient privilege of confidentiality over medical records of non-Medicaid patients.<sup>84</sup> Although the court interpreted the enabling statute for Medicaid fraud investigators as not directly granting them access to non-Medicaid patient records,<sup>85</sup> it reasoned that records of non-Medicaid, private patients were necessarily germane to the comprehensive investigation of elder abuse under both federal and state law.<sup>86</sup> The court balanced patients' interests with the state's right to investigate elder abuse and found that the defendants were required to comply with the state's subpoena for medical records.<sup>87</sup> Thus, physicians criminally investigated for Medicaid billing fraud are unlikely to be successful in withholding medical records as privileged, as the Oklahoma Medicaid Program Integrity Act authorizes the state investigators to access such records.<sup>88</sup>

Other states have similarly found violations of patient privacy. In *Biddle v. Warren General Hospital*,<sup>89</sup> the Supreme Court of Ohio found a law firm liable for patient privacy violations when a hospital disclosed health information to the firm for purposes of screening patients for Medicare eligibility.<sup>90</sup> The court determined that the patients' privacy interests were greater than the matters of attorney-client privilege.<sup>91</sup> In essence, the court

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82. See, e.g., 12 OKLA. STAT. § 2503 (Supp. 2004); 63 OKLA. STAT. § 1-502.2 (Supp. 2004).

83. 2001 OK CR 27, 33 P.3d 930.

84. *Id.* ¶ 21, 33 P.3d at 936; see also *Cole v. State*, 1931 OK CR, 50 Okla. Crim. 404-09, 298 P. 892, 894-95 (stating the general rule that a communication loses its privilege when associated with a crime).

85. *Thomason* ¶ 17, 33 P.3d at 935 (citing 56 OKLA. STAT. § 1004 (Supp. 1995)).

86. See *id.* (citing 42 U.S.C.A. § 1396b(q)(4) (West Supp. 2000); 42 C.F.R. § 1007.11(b)(1) (2004); 56 OKLA. STAT. § 1003(C)(1) (2001)).

87. *Id.* ¶¶ 17-21, 33 P.3d at 935-36 (citing *People v. Doe*, 455 N.Y.S.2d 945, 948 (1982) (concluding that "a patient's statutory right to medical privacy is subordinate to the right of the State in cases of patient abuse or possible crimes committed against them by members of a hospital")).

88. 56 OKLA. STAT. § 1004 (2001) (creating in sections A and C the Attorney General's right to examine Medicaid records of patients and providers as a prerequisite for eligibility).

89. 715 N.E.2d 518 (Ohio 1999).

90. *Id.* at 522-26 (involving seemingly deceitful conduct by law firm that claimed to be the hospital when it contacted patients).

91. *Id.* at 524-25.

found the firm liable for violating patient privacy rights.<sup>92</sup> If an Oklahoma court should adopt the same analysis as the court in *Biddle* and find that a law firm has similarly breached patient confidentiality,<sup>93</sup> a plaintiff could potentially seek redress for privacy claims against the firm and its agents.

Similarly, the high court of Virginia found that a hospital that sent medical records to its outside law firm violated privacy rights.<sup>94</sup> In that case, a child suffered injuries during birth, and the hospital sent the mother's health information to its attorneys and an expert in anticipation of litigation.<sup>95</sup> Although Oklahoma offers a statutory tool for taking depositions before a lawsuit arises,<sup>96</sup> this Virginia holding, if applied in Oklahoma, would present a "catch-22" for hospitals requiring prelitigation legal counseling. Health care entities might debate whether to (1) share information with counsel to gauge its own potential liability and risk a privacy violation, or (2) refrain from potentially beneficial proactive compliance audits and possibly continue to act improperly at the cost of patient safety. Neither choice benefits a health care provider, and the Virginia holding appears incorrect in light of the strength of the attorney-client privilege.

Still other courts have identified violations of HIPAA in the context of health care litigation. In Ohio, a court recently remanded a case to the district court to allow the parties to issue subpoenas and the attorneys to investigate possible "HIPAA violations."<sup>97</sup> A New York court recently reviewed the discovery of hospital patient information in one matter and remanded the case with an order to modify discovery according to HIPAA privacy standards.<sup>98</sup> In a personal injury action, the same court found that, in light of HIPAA's passage, discovery of nonparties' PHI could represent a breach of physician-

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92. In a similar situation in New York where a medical records clerk improperly released health information, the court entertained multiple causes of action based upon the lapse of privacy protection, including negligent disclosure of PHI, intentional revelation of PHI by an employee, state breach of confidentiality, inadequate policies and procedures, negligent supervision and training, and negligent infliction of emotional distress. See *Jane Doe v. Cmty. Health Plan Kaiser Corp.*, No. 8529, 1999 WL 524551 (N.Y. App. Div. May 11, 2000).

93. See *Biddle*, 715 N.E.2d at 518 (determining that a law firm is susceptible to liability for breach of patient privacy).

94. *Fairfax Hosp. v. Curtis*, 492 S.E.2d 642, 644 (Va. 1997) (holding that a patient does not waive rights to medical records simply because litigation is anticipated).

95. *Id.*

96. 12 OKLA. STAT. § 3227 (Supp. 2004).

97. *Buffmyer ex rel. Wise v. Cavalier*, No. 03COA067, 2004 WL 1405126 (Ohio Ct. App. June 23, 2004).

98. *Marte v. Brooklyn Hosp. Ctr.*, 779 N.Y.S.2d 82 (N.Y. App. Div. 2004) (recognizing a need for proper authorization forms, the creation of a privilege log, and possible in camera review of sensitive matters to protect patient privacy interests).

patient privilege.<sup>99</sup> Finally, a New York state appellate court determined that authorizations associated with subpoenas for medical records must comply with HIPAA's requirements to be valid.<sup>100</sup> Documents in litigation of health care matters must therefore be tailored according to state and HIPAA privacy requirements.

### V. Conclusion

Under the final version of HIPAA's Privacy Rule, health care entities may use and disclose PHI for "health care operations," without the need to account for disclosures of PHI.<sup>101</sup> Under the rule, "health care operations" include the "conducting or arranging for . . . legal services . . ."<sup>102</sup> The discrepancy as to whether legal work for a health care client is protected as "health care operations" should be resolved. Unless and until a notice of rulemaking for HIPAA occurs proposing to offer a safe harbor for attorneys, the potential for abrogation of the attorney-client privilege will persist. In the meantime, attorneys should take precautions to ensure compliance with HIPAA and state privacy laws.<sup>103</sup>

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99. *Gunn v. Sound Shore Med. Ctr. of Westchester*, 772 N.Y.S.2d 714, 715-16 (N.Y. App. Div. 2004).

100. *In re Carella*, No. 328210, 2004 WL 727094 (N.Y. Sur. Mar. 25, 2004).

101. 45 C.F.R. § 164.506(a), (c)(1) (2004).

102. *Id.* § 164.501 (including in the definition fraud and abuse detection and compliance programs).

103. The author recommends the following precautions:

1. Attempt to prevent inadvertent disclosure to third parties, which may be deemed an improper HIPAA disclosure and waiver of the attorney-client privilege.

2. Conspicuously identify documents that are privileged and include in privilege log for litigation.

3. Train personnel periodically, including consultants.

4. Designate all agents, especially if investigating a matter involving PHI.

5. Consider whether your work for a health care client would be considered "health care operations" such as compliance work or risk management, and identify your work product as such.

6. Familiarize yourself with authorization forms for medical records in Oklahoma.

7. Scrutinize your contracts with health care clients to avoid potentially strong indemnification clauses regarding HIPAA penalties.

8. Plan on drafting protective orders during discovery.