

HIPAA and the Law Firm

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Karen McKeithen Schaede is the founder and principal of Karen McKeithen Schaede Attorney at Law, PLLC in Greensboro, North Carolina, a small boutique law firm concentrating in the areas of health law, business/corporate law, and employment law. Ms. Schaede earned a Bachelor of Science degree in Nursing from the University of North Florida. She has over 10 years experience as a Registered Nurse in critical care, home health, and hospice. This nursing background puts Ms. Schaede in a unique position to offer expertise to healthcare provider clients in all areas of their practices. Ms. Schaede's past corporate counsel experience contributes to her expert abilities in the corporate and employment law areas.

Ms. Schaede is a licensed attorney in both North Carolina and South Carolina, earning her degree from Mississippi College School of Law. She is a member of the American Health Lawyers Association, the North Carolina Society of Health Care Attorneys, the American Bar Association, the North Carolina State Bar Association, and both the Health Law, Employment and Labor Law, and Business Law sections of the North Carolina Bar. She serves as a preceptor for Elon University School of Law.

In addition to her professional activities, Ms. Schaede sits on the Board of Youth Focus and The Volunteer Center of Greensboro as well as being a member of First Presbyterian Church of Greensboro and an active member of the parent support organization of Canterbury School.

Ms. Schaede is a frequent speaker on health care and employment law issues.

**HIPAA Compliance for Lawyers:
Protecting Confidentiality**

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**Hhealth
Insurance
Portability
Accountability
Act**



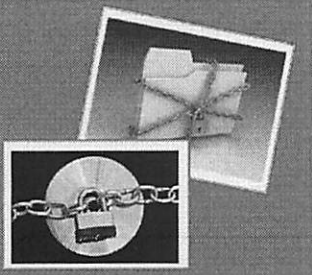
**Hhealth Insurance Portability
Accountability Act**

- o Passed in 1996.
- o Provides federal protections for personal health information.
- o Balances protection of personal health information and disclosure needed for patient care and other important purposes.



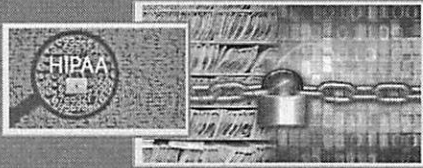
To What Information Does HIPAA Apply?

- Protected
- Health
- Information



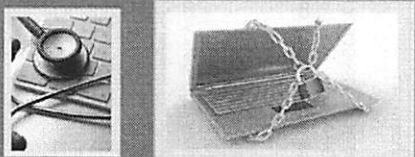
PHI under Privacy Rule

PHI is individually identifiable health information, including demographic data.




PHI under Security Rule

All individually identifiable health information a covered entity creates, receives, maintains or transmits in electronic form.




To Whom Does HIPAA Apply?

- Health Plans
- Health Care Providers
- Health Care Clearinghouse
- Business Associates



Who Falls Into The Business Associate Category?


This is a person or organization, other than a member of covered entity's workforce, that performs certain functions or activities on behalf of, or provides certain services to, a covered entity that involved the use or disclosure of individually identifiable health information



For Example: Lawyers

Business Associate Contract

- HIPAA requirement
- Must be in writing
- At termination of the contract all PHI should be returned or destroyed



Who Is Authorized To Access Medical Records?

Medical records of a patient are confidential and should only be released with proper written consent or authorization of the patient.



Authorization

- Should be in specific terms.
- Should be written in plain language.
- Should provide any facts needed to make an informed decision.



Authorization Procedure

- Authorization should be kept for a period of at least 6 years from the date of its creation or the date when it last was in effect, whichever is later.
- Provide the individual with a copy of the signed authorization.
- No time limit on revocation of authorization.
- Revocation should be done in writing.

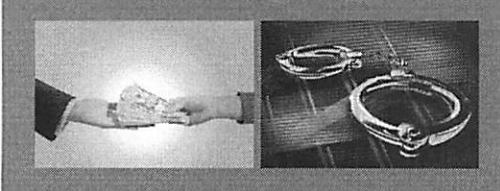
Disclosure

Should only disclose what is reasonably necessary to accomplish the goal of the use, disclosure or request.

All Patient Information

Minimum Necessary Standard

Penalties for Unauthorized Release of PHI



The Health Information Technology for Economic and Clinical Health Act

Tier A	<ul style="list-style-type: none"> Offender did not realize and would have acted differently if he/she knew. \$100 fine for each violation and cannot exceed \$25,000.
Tier B	<ul style="list-style-type: none"> Violations due to reasonable cause, but not willful neglect. \$1,000 fine for each violation and the fines cannot exceed \$100,000 for the calendar year.
Tier C	<ul style="list-style-type: none"> Violations due to willful neglect that the organization ultimately corrected. \$10,000 fine for each violation and the fines cannot exceed \$250,000 for calendar year.
Tier D	<ul style="list-style-type: none"> Violations of willful neglect that the organization did not correct. \$50,000 fine for each violation and the fines cannot exceed \$1,500,000.

Penalties for Unauthorized Release of PHI

Criminal

Permitted Disclosure

How Do Attorneys Obtain Medical Records?

- Authorization by the Individual
- Order of the Court or Administrative Tribunal
- Subpoena

Authorization By the Individual

- Name of the covered entity.
- Name of the requesting party, such as the name of the law firm and the attorney on the case.
- Description of the desired information -- must be specific so the entity can determine the scope of the request.
- Description of the purpose of the disclosure, such as Mr. Doe's personal injury litigation against our client, arising out of a motor vehicle accident on July 27, 2011.
- Expiration date of the authorization or an expiration event.

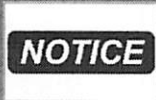
Court Order

- This allows attorneys to get access to medical records without the patient's authorization.
- Attorneys need to make the order for release of information as specific and comprehensive as possible to ensure the receipt of all desired information.



Subpoena

- Satisfactory Assurance of Notice
- OR
- Satisfactory Assurance of Attempt to Secure a Protective Order



Subpoena:
Satisfactory Assurance of Notice

- o Written statement with accompanying documentation that:
 - The party requesting the subpoena made a good faith attempt to provide written notice to the plaintiff or defendant.
 - The notice is sufficient to inform the plaintiff or defendant about the litigation and permit them to raise an objection; and either:
 - The time for objection has passed with no objection, or
 - A court ruled on any objections in favor of the party seeking the subpoena

Subpoena:
Satisfactory Assurance of Attempt to Secure an Order

- o Demonstrate a qualified protective order is sought.
 - A Protective order is an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:
 - 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.
 - Requires the return of the records to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

Protecting Confidentiality

- Requesting and receiving medical records.
- Reviewing, emailing and faxing medical records.
- Printing medical records.
- Storing the medical records.
- Afterward, return medical records or destroy.

How Do Attorneys Obtain Mental Health Records?

- "Psychotherapy notes" are accorded special privacy protections under HIPAA.



How Do Attorneys Obtain Mental Health Records?

- o Attorneys should get two consents for release of mental health records:

- One that requests copies of any type of mental health record other than psychotherapy notes and
- One that requests only psychotherapy notes.



Psychotherapy Notes

- o Psychotherapy notes are:
Notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record.

Psychotherapy Notes

o "Psychotherapy notes" does not include:

- Medication prescription and monitoring
- Counseling session start and stop times
- The modalities and frequencies of treatment furnished
- Results of clinical tests, and
- Any summary of the following items: diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.

How Do Attorneys Obtain Psychotherapy Notes?

o Psychotherapy notes may be disclosed without consent or authorization:

- An attorney can obtain the records by use of a court order accompanied by a subpoena.
- When needed to defend a lawsuit against the therapist by the individual who is the subject of the notes.
- To HHS when required for enforcement of the privacy rule.
- When provider who created them needs them for oversight.
- To a coroner or medical examiner.
- When needed to avert a serious and imminent threat to health or safety.

How Do Attorneys Obtain Substance Abuse Records?

* A treatment program may not even acknowledge that an individual is a patient to anyone not authorized by written consent to receive that information, since such acknowledgment would effectively identify the individual as a substance abuser.



How Do Attorneys Obtain Substance Abuse Records?

- o An attorney may seek a court order.
 - Notice must be given to the patient and program.
 - The program and the individual must have an opportunity to make an oral or written statement.

NOTICE



How Do Attorneys Obtain Substance Abuse Records?

- o Before the order is issued:
 - There must be a finding of "good cause" for the disclosure.
 - It is necessary to protect against a threat to life or of serious bodily injury
 - It is required to investigate or prosecute an extremely serious crime or
 - It is necessary in a proceeding in which the patient has already provided evidence about confidential communications.

How Do Attorneys Obtain Substance Abuse Records?

- o A court order can be issued to release patient information for a criminal investigation or prosecution. Five criteria must be met. These are:
 - Extremely serious crimes
 - Records sought will probably contain significant information to the investigation or prosecution
 - No other feasible way to acquire the information
 - The public interest in disclosure outweighs any harm to the patient, doctor-patient relationship, and the agency's ability to provide services; and
 - The program has an opportunity to be represented by independent counsel when law enforcement personnel seek the order.

PHI Disclosed to Law Enforcement

- Minimum Necessary Requirement
- Patient must consent to the publication of his or her name, location, facility and condition in the hospital directory



PHI Disclosed to Law Enforcement Exceptions

- Required by Law
- Limited Information for Identification and Location Purposes
- Victims of Crime
- Decedents
- Crime on Premises



PHI Disclosed to Law Enforcement Exceptions

- Reporting Crime in Emergencies
- To Prevent or Lessen Serious or Imminent Threat
- To Federal Agents in For National Security
- To Correctional Institutions



HIPAA Preemption and NC Law



North Carolina Privacy Law

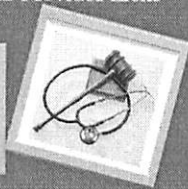
o Physician-Patient Privilege

- Motor Vehicle Accidents
- Driving While Impaired Investigations
- Child Abuse And Disabled Adult Abuse
- Violent Crime
- Handgun Permits
- Prescription Investigations
- Substance Abuse Treatments



North Carolina Privacy Law

- Workers Compensation
- Personal Injury and Medical Provider Liens



2013 Revisions to HIPAA Regulations

- › What are the latest revisions to HIPAA, and how will they effect your law firm?

Questions?

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