

ETHICS OF REDACTING MEDICAL RECORDS

Plaintiff's Perspective

THE UNIVERSITY OF TEXAS SCHOOL OF LAW
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Federal Statute re Medical Privacy:

HIPAA has a 115 page
simplified rulebook...

Health info which is personally
identifiable **must** be protected
by covered entities.

OK to disclose **IF**:

- a. required by law;
- b. under court order;
- c. under subpoena, discovery request, or lawful process;

And IF:

- a. notice is given; or
- b. reasonable opportunity to obtain a protective order is available.
 - i. prohibiting redisclosure; and
 - ii. **requiring return/destruction of records at the end of litigation.**



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Who is a covered entity? Fed Law:

HITECH 2009: Business associates of the health care provider, even w/o privity. Includes law firms handling:

- a. security and compliance;
- b. defense of false claims;
- c. professional license defense;
- d. risk management and due diligence; and
- e. med mal defense.

But NOT law firms handling:

- a. workers comp;
- b. social security benefits; or
- c. employment law claims.

Warning: state law may be MORE stringent (but pre-empted if less strong.)

Who is a covered entity? State Law (HB 300) much broader than federal:

(2) "Covered entity" means **any** person who:

(A) for commercial, financial, or professional gain, monetary fees ...

[engages in] ... **using ... or transmitting** protected health information.

The term includes a business associate, health care payer, governmental unit, information or computer management entity, school, health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site;

(B) comes into **possession** of protected health information;

(C) **obtains** or stores protected health information under this chapter; or

(D) is an employee, agent, or contractor of ... (A), (B), or (C) [and] ... uses, or transmits protected health information.

(2-a) "**Disclose**" means to release, transfer, provide access to, or otherwise divulge information outside the entity holding the information.

Tex. Health & Safety Code Sec. 181.001(b)(2)-(2-a)

That's us, guys.

PRIVACY is not the same as PRIVILEGE

State law dr-pt privilege (TRE 509) is not carried over into federal law FRE 501 (but TRE 510 therapist-pt) is.

There is a federal psychotherapist-patient privilege; *Jaffree v. Redmond*; it includes social workers.

There is no federal “doctor-patient privilege” EXCEPT in civil cases in which state law “supplies the rule of decision.”

PROCESS is not the same as PRIVILEGE

“All that 45 C.F.R. § 164.512(e) should be understood to do, therefore, is to create a **procedure** for obtaining authority to use medical records in litigation. Whether the records are actually **admissible** in evidence will depend among other things on whether they are **privileged**. And the evidentiary privileges **that are applicable to federal question suits are given not by state law but by federal law, Fed. R. Evid. 501, which does not recognize a physician-patient (or hospital-patient) privilege.**”

Northwestern Memorial Hospital v. Ashcroft, 362 F.3d 923;
2004 U.S. App. LEXIS 5724 (7th Cir. 2004).

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"The Ethics of Redacting Medical Records from Plaintiff's and Defendant's Perspective"