PRESENTED AT

The Car Crash Seminar

August 9-10, 2018
Norris Conference Center – City Centre, Houston TX

Ethics of Redacting Medical Records
(Plaintiff's Perspective)

Paul Gold, Presenter
Judy Kostura, Author

Paul N. Gold
Aversano & Gold
933 Studewood St., 2nd Floor
Houston, TX 77008
pgold@agtriallaw.com
713.426.5600

Judy Kostura
Judge, Kostura & Putman, P.C.
2901 Bee Cave Road, Suite L
Austin, TX 78746
jkostura@jkplaw.com
512.328.9099

JUDY KOSTURA

JUDGE, KOSTURA & PUTMAN, P.C.
THE COMMISSIONER'S HOUSE AT HERITAGE SQUARE
2901 Bee Cave Road, Box L, Austin, Texas 78746
Telephone (512) 328-9099
Facsimile (512) 328-4132

jkostura@jkplaw.com

Licenses: Licensed by Texas Supreme Court: 1980; Licensed by Western District, Federal Court: 1988

Legal Practice: Judge, Kostura & Putman, P.C., www.jkplaw.com; 2004 to current
Sole Practitioner, plaintiff's personal injury practice 1990-2003
Binder & Kostura, plaintiff's personal injury practice 1985-1990
Sole practitioner, general civil practice 1980-1985

AV Rating by Martindale-Hubbell (highest ranking for competence and ethics)

Experience: Trucking, Auto, Cycling and Pedestrian Collisions, DWI Injuries, Wrongful Death, Premises Liability, Burn Injuries, Dog Bites, Subrogation and Liens, Insurance Bad Faith

West Publishing Company: Author of Personal Injury Form Book on Disk
Insurance Subrogation texts for American Association of Justice, Texas Trial Lawyers Assn; CLE speaker on Ethics, Client Communications, Insurance Subrogation, for: American Assn of Justice, Texas Trial Lawyers Assn, UT School of Law, State Bar of Texas, University of Houston Law School, South Texas College of Law, Texas Advanced Paralegal Seminar, Capital Area Trial Lawyers Assn, Austin Bar Assn, South Plains Trial Lawyer Assn.
Course Director: State Bar of Texas Advanced Evidence & Discovery, 2016
Course Director: State Bar of Texas Advanced Personal Injury Seminar, 2013
Course Director: State Bar of Texas Damages Seminar, February 2011

Professional Affiliations: Life Fellow, Texas Bar Foundation
Texas Trial Lawyers Assn: Vice President of TTLA for CLE (2018); Executive Committee (2006, 2018); Nominating Committee (2017); Communications Committee; ListServ Committee (multiple years)
Texas Watch Champion of Justice 2005-2017
Capital Area Trial Lawyers Association (President 1999-2000, President Elect 1998-1999, Secretary Treasurer 1997-1998, Executive Committee through 2015)
Travis County Bar Association, Board of Directors (1995-1998)
Lawyer Referral Service Board of Trustees through 2018 (Chair 1995-1998)
Pro Bono College of Law, over 100 hours of Pro Bono Public Service; 1992 and 1993
College of State Bar (various years)

Professional Honors: *Texas Monthly Super Lawyer* 2015 -2018, *Top 50 Texas Women* 2016, *Top 50 Central/West Texas* 2016
National Association of Distinguished Counsel Nation's Top One Percent 2015
Texas Trial Lawyers Assn Resolution of Appreciation for Legislative Contributions 2013
Scott Ozmun Trial Lawyer of the Year Capital Area Trial Lawyers Assn 2011
John Howie Spirit of Mentorship Award Texas Trial Lawyers Association 2006

Education: Doctor of Jurisprudence, University of Texas at Austin : 1980
Bachelor of Arts, With Honors, University of Texas : 1977

Personal: married to Tom Polk, Realtor, since 1982; mother of daughters Rachel and Kisa
Active member, First United Methodist Church, Austin

THE ETHICS OF REDACTING MEDICAL RECORDS: TABLE OF CONTENTS

THE ETHICS OF REDACTING MEDICAL RECORDS

"If disclosure were required, the privilege would be meaningless to the patient who holds a legitimate interest in it."
In re Anderson, 973 S.W.2d 410 (Tex. App. – Eastland, 1998)

I. Scope of this Article:

This article reviews Federal and Texas statutes, rules of procedure and rules of evidence related to protection/redaction and disclosure of personal medical and health information. While not a treatise on privileges in general, concepts of privilege and privacy are foundational to a discussion on redacting and dealing with protected information. Rule 1.05 Texas Rules of Disciplinary Conduct forbids an attorney from knowingly revealing confidential information of a client or former client. On May 11, 2017, the American Bar Association issued Formal Opinion 477 updating its 1999 opinion on the confidentiality of unencrypted email. This ethics opinion does not relate directly to the issue of redacting medical records but notes a lawyer's duty to minimize the inadvertent disclosure of confidential information.

II. Federal Law:

A. Federal statute: Health Insurance Portability and Accountability Act of 1996 (HIPAA), in pertinent parts codified as 32 USCA Sec. 1320d through 1320d-8, and supporting regulation: Title 45 CFR Parts 160 and in Part 164 Subparts A and E, known as the "Privacy Rules." The 115 page ***simplified*** version of the Privacy Rules can be found at http://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/administrative/combined/hipaa-simplification-201303.pdf

HIPAA requires that health information which is personally or individually identifiable [45 CFR 160.003] must be protected by covered entities. Disclosure is allowed if required by law [45CFR 164.512]; whenever a court orders the disclosure [45CFR 164.512(e)(1)(i)]; or in response to a "subpoena, discovery request, or other lawful process" if appropriate notice is given or if reasonable efforts to obtain a protective order are available [45CFR 164.512(e)(1)(ii)(A) and (B)]. The court order should limit the disclosure to "only the protected health information expressly authorized by such order." [45CFR 164.512(e)(1)(i)] The rules discussing notice and protective orders provide explicit requirements for the protective order, including a prohibition on re-disclosure and a return or destruction of all records, including copies, at the end of the litigation [45CFR 164.512(e)(1)(v)(A) and (B)].

The Health Information Technology for Economic and Clinical Act (HITECH), effective February 2009, increased the privacy requirements and applied HIPAA to business associates of the health care providers even if there is no business associate contract between them. Those business associates include law firms which provide the services such as: handling and security privacy compliance; fraud, abuse or false claims defense; professional license defense; risk management and due diligence for providers; representing medical professionals or covered entities in claims regarding diagnosis, treatment, or health benefits. Excluded transactions include representing someone who is not a covered entity; handling the prosecution or defense of worker's compensation claims, social security benefits claims or employment law claims.

While HITECH and HIPAA do not require redaction of medical records to protect those medical conditions which are not at issue in litigation, federal law has clearly expanded the protection of medical records and recognized the legitimate privacy interests of patients in safeguarding their personally identifiable health information.

Congress allows states to otherwise regulate medical privacy, privilege and redaction. HIPAA pre-empts state laws which are less stringent than HIPAA, but allows state laws to be more stringent than the Privacy Rules found within 45 CFR 160 and 164 [45CFR 160.203].

Protecting *privacy* as to medical records does not equate to creating a federal doctor-patient *privilege*, however. Although the states are allowed to create rules offering greater privacy protections than HIPAA, those more stringent state rules, and state common laws creating a state-law doctor-patient privilege, do not impose that state-law medical privilege in cases dealing with federal legislation. There is no doctor-patient privilege under the federal rules of evidence, except as to the psychotherapist and patient, but in civil cases in which state law "supplies the rule of decision" the federal courts will look to the state law privilege. This distinction is explained in *Northwestern Memorial Hospital v. Ashcroft*:

> [T]he HIPAA regulations do not impose state evidentiary privileges on suits to enforce federal law. Illinois is free to enforce its more stringent medical-records privilege (there is no comparable federal privilege) in suits in state court to enforce state law… The enforcement of federal law might be hamstrung if state-law privileges more stringent than any federal privilege regarding medical records were applicable to all federal cases. … [W]e think it improbable that HHS intended to open such a can of worms when it set forth a procedure for disclosure of medical records in litigation--intended, that is, to be regulating, actually or potentially (depending on other statutory provisions regulating subpoenas), 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 cases in which medical records, whether or the parties or of nonparties, would not be privileged under federal evidence law. … 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. Rule 501 in terms makes federal common law the source of any privileges in federal-question suits unless an Act of Congress provides otherwise. We do not think HIPAA is rightly understood as an Act of Congress that creates a privilege. *Northwestern Memorial Hospital v. Ashcroft*, 362 F.3d 923; 2004 U.S. App. LEXIS 5724 (7th Cir. 2004).

B. <u>Federal medical privileges and FRE 501</u>:

FRE 501 provides:

> Rule 501. Privilege in General
> The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:

Title search: Ethics of Redacting Medical Records (Plaintiff's Perspective)

First appeared as part of the conference materials for the
2018 The Car Crash Seminar session
"The Ethics of Redacting Medical Records from Plaintiff's and Defendant's Perspective"