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Ethics of Redacting Medical Records A/K/A Protecting the Pig in the Poke

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CLIENT MEDICAL RECORDS: DON'T COMMIT MALPRACTICE
[AND BONUS MATERIAL: PERSONNEL RECORDS]

TABLE OF CONTENTS

CLIENT MEDICAL RECORDS: DON'T COMMIT MALPRACTICE

"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. Purpose and Scope of this Article:

Protecting clients is good. Protecting clients also protects lawyers. It may make your life easier.

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; the ABA's 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.

By exercising care early in the case to redact content that is either privileged or private, the lawyer ensures that opposing counsel focuses only on legitimate substantive issues and does not intrude into the client's life more than necessary. Zealously guarding the client's privacy and privileges to the extent allowed/mandated also promotes the client's trust in your work and earns respect from opposing counsel and the courts.

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)]. See *Haage v. Zavala*, 2021 IL 125918 (Illinois Supreme Court, 09/23/2021) requiring State Farm to comply with the return or destruction mandate.

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 litigation. 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

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