



***New Mexico  
Coalition for Healthcare Information Leadership***

**New Mexico HIPAA Conference, September 22, 23, 2001  
Session Results**

**Session Name: Impact of Privacy Regulations on Litigation, Liability and Law  
Enforcement Information Requests**

**Session Number: 224**

TOPIC	DISCUSSION	ACTION
1. Litigation Implications	What is the role of the Courts in Protecting PHI?	Courts to rule on 1 <sup>st</sup> , 4 <sup>th</sup> , 10 <sup>th</sup> Amendments as well as US Constitution, Article 1 Section 1, Power to Legislate vested with Congress.
2. Liability Ramifications	Has Congress adequately protected PHI?	Congress unable to agree on privacy rights.
3. Impact on Law Enforcement Requests	Has HHS adequately protected PHI?	HHS created federal privacy program without guidance. Regulations too vague. Regulations violate Congressional intent to confine to electronic communications.
4. Clinton and Bush Administration and Congress anticipated litigation	Congress authorizes HHS to modify standards within first 12-month period.	No private right of action. No third party beneficiary provision. HIPAA as common law standard of care for privacy. HIPAA requirements likely to be at least persuasive as common law standard.
5. State and Federal courts address release of information.	Plan defended that clerk's actions were outside scope of employment. HIPAA as common law standard of privacy for protection.	Laws found to create duty and define scope of confidentiality obligation, allowing patient suit. Plan is responsible for employee's breaches
6. Hospital at suggestion of lawyers shares Hospital Information with law firm.	Hospital and law firm both liable.	Patient consent form authorized disclosure only to insurance companies and third-party payers.
7. Hospital ordered by court to provide hospital patient records to court.	Patients must be given notice of their right to object to the disclosure.	Per court: HIPAA privacy rules indicate a strong federal policy to protect the privacy of patient medical records.....Invoke need for consent for disclosures for TPO; Need for authorization for non TPO uses; Confidentiality extends to all forms of PHI; No use of PHI obtained by employer through sponsored plan; Right to view and amend health info.

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8. Suits under more stringent state statutes.	Not preemptive if provide greater protection.	NM Genetic Information Privacy Act. Creates private right of action.
9. Mini-HIPAAAs create private cause of action and private right of action.	Injunctive relief, equitable relief, compensatory damages, punitive damages, costs and attorney fees, other relief as warranted.	None
10. Alternative HHS Complaint Process	Available to anyone who believes a covered entity is not compliant. Protected under Whistle Blower.	None
11. Potential for federal right of action.	Desired by HHS under Clinton. Congressional action needed.	Common under federal privacy acts.
12. Liability: Statutory penalties.	Each violation \$100; not to exceed \$25,000 for identical requirement.	Penalties include imprisonment and fines.
13. Civil liability.	No civil penalty where person did not know, reasonable cause, failure is corrected within 30 days of discovery of violation.	Civil penalties modest, criminal penalties potentially substantial.
14. Adequacy of penalties falls on Congress.	Congress sets HIPAA penalties, HHS has no ability to modify.	Office of Civil Rights charged with enforcement. Funding is meager.
15. Liability: Tort	Assumes HIPAA becomes common law standard.	Allows for injunction, consequential damages, punitive damage. May be precluded by other states remedies.

16. Law Enforcement Requests: Disclosures	Required by law, for public health activities, includes victims of abuse, neglect, domestic violence for disclosures, disclosures only. Also includes audits and inspections for health oversight inspections, judicial and administrative proceedings, .....avert serious threat to safety and worker's comp. Good faith evidence that a crime has been committed.	Disclosures required by law, pursuant to judicial order, grand jury subpoena, administrative subpoena. Request is limited to very specific request. Victim may agree to disclosure.
17. National Security, Intelligence Disclosure	Governed by separate section of privacy regulations.	Lawful intelligence, counter-intelligence, national security may authorize disclosure of public health information, to federal officials.
18. Health Oversight	No requirement or notice of consent. Minimum test applicable.	Reuse of most non-health related audit information by law enforcement is prohibited. Case of public hospital held liable for providing police with positive drug tests involving "crack baby".
19. Criticism of Standard	Falls short of other standards where warrant requirement is common. Need for independent review.	May reduce likelihood of successful patient suit by encouraging more cooperation of covered entities.
20. Defense of Standards	Prior to HIPAA no federal law limits police access to medical records, except drug addicts in rehab; Balance between public safety and private interests, states can impose stricter restrictions, does not make lawful any disclosures of PHI that are unlawful under other rules or regulations.	Terrorism of 9/11 has altered the perception of balance between law enforcement and privacy.