

HIPAA Releases

By Yahne Miorini, LL.M.

The Health Insurance Portability and Accountability Act (HIPAA”) was enacted in 1996. The privacy rules became effective on April 14, 2003 regarding individual’s medical records or payment history and the requirement to notify individuals of their Protected Health Information (“PHI”). For waiver, this law is referred as 42 USC 1320d and 45 CFR 160.164. Provisions in the Virginia Code, as amended, can be found under Section 32.1-127.03 which has a sample form for release of information.

A regulation implementing the Patient Safety and Quality Improvement Act of 2005 (“PSQIA”) was published on November 21, 2008, and became effective on January 19, 2009. PSQIA established a voluntary reporting system to enhance the data available to assess and resolve patient safety and health care quality issues. To encourage the reporting and analysis of medical errors, PSQIA provides Federal privilege and confidentiality protection for patient safety

information called *patient safety work product*.

Covered entities must protect the patient’s privacy rights. Covered entities include Health Plans, such as health insurance companies, HMOs, company health plans, and certain government programs that pay for health care, such as Medicare and Medicaid. It also includes most health care providers, including doctors, clinics, hospitals, psychologists, chiropractors, nursing homes, pharmacies, and dentists. In addition, it includes health care clearinghouses, entities that process nonstandard health information that they receive from another entity into a standard (standard electronic format or data content) or vice versa.

Organizations that do not have to follow these laws include life insurers, employers, workers compensation carriers, many school and school districts, and many state agencies.

The information protected is related to information on your

medical records, conversations about your care, information on your health insurer’s computer system, and billing information. Patients have the right to: (1) ask to see and get a copy of their medical records, (2) have corrections added to their health information, (3) receive a notice that tells them how their health information may be used and shared, (4) decide if they want to give their permission before health information can be used or shared for certain purposes, (5) and file complaints if their rights have been denied or unprotected. The patient information can be used and shared for the following: (1) treatment and care coordination, (2) payment of doctors and hospitals, (3) identifying who can be involved as family, relatives, and/or friends for the patient’s health care or payment of bills, (4) protecting the public’s health such as by reporting when a flu outbreak, and (5) making requirement reports to the police, such as reporting gunshot wounds.

Covered entities must put in place safeguards to protect your

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health information and limit who can view and access your health information. Training of their employees is required. For instance, without the patient's consent, the covered entity cannot give patient's information to patient's employer, use or share patient's information for marketing purposes, or share private notes about the patient's health care. Entities must reasonably limit uses and disclosures to the minimum necessary to accomplish their intended purposes.

Complaints should be filed to the United States Department of Health and Human Services ("HHS") Office of Civil Rights ("OCR"). The entity may face civil and criminal penalties. Section 160.404 of Virginia Code, as amended, provides a maximum civil penalty of \$25,000 per violation. The HHS has received 8,526 complaints in 2008. The top 5 issues in 2008 investigated with corrective actions are the following: impermissible uses and disclosure, safeguards, access,

minimum necessary, and amendment.

From 2003 through 2008, complaints in the Commonwealth of Virginia were as follows:

- 69%: Cases resolved after intake and review
- 20%: Corrective action obtained
- 11%: No violation

A resolution agreement is a contract signed by HHS and a covered entity. The Entity agrees to perform certain obligations and make reports to HHS, generally for a period of 3 years. As of today, HHS has signed two resolution agreements, one in 2008 with Seattle-based Providence Health & Services (Providence) where Providence agreed to pay a \$100,000 fine and to implement a detailed corrective action plan to ensure that it will appropriately safeguard identifiable electronic patient information against theft or loss. The second was with CVS Pharmacy in 2009. CVS Pharmacy agreed to pay a \$2.25 million fine and to implement a detailed

corrective action plan to ensure that it will appropriately dispose of protected health information such as labels from prescription bottles and old prescriptions.

What is really important for the Estate Planning attorney is to ensure that the client has executed a HIPAA release for the family members or friends in order for them to access medical information. The language of the HIPAA release should be included in the Power of Attorney and in the Advance Medical Directive.