

**SHOOTING FROM THE HIP(AA): AVOIDING MISFIRES WHEN
HANDLING MEDICAL INFO IN LITIGATION**

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August 20, 2016
Houston, Texas

CHAPTER _____

I. INTRODUCTION¹

The Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) protects certain health information from disclosure. There are limited exceptions to that protection. One concerns subpoenas demanding production in litigation — HIPAA requires certain conditions be met in addition to receipt of a subpoena before permitting disclosure. There are negative consequences for failing to comply — exposure to prospective criminal and civil liability for both the party responding to a subpoena and the issuing attorney and party on whose behalf it issues. When a party has such health information, other laws limit how it is filed in public courts.

II. HIPAA

A. Purposes

In enacting HIPAA,² Congress listed several purposes: to (1) improve portability and continuity of health insurance coverage, (2) combat waste, fraud, and abuse in health insurance and healthcare delivery; (3) promote use of medical savings accounts; (4) improve access to long-term care services and coverage; and (5) simplify administration of health insurance.³ The Affordable Care Act of 2010⁴ largely supplanted the first of these named purposes — maybe the primary one as even HIPAA’s name suggests — portability.⁵

¹ Unless otherwise noted, the author has supplied all emphases, omitted internal citations from case quotations, and omitted all citing and quoting references from case citations.

² Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified in scattered sections of Titles 18, 26, 29, and 42 of the United States Code).

³ Pub. L. No. 104-191 (“An act to amend the Internal Revenue Code of 1986 to improve portability and continuity of health insurance coverage in the group and individual markets, to combat waste, fraud, and abuse in health insurance and health care delivery, to promote the use of medical savings accounts, to improve access to long-term care services and coverage, to simplify the administration of health insurance, and for other purposes.”).

⁴ Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010).

⁵ See Mark A. Rothstein, *The End of the HIPAA Privacy Rule?*, 44 *Journal of Law, Medicine & Ethics* 352, 357 (2016) (“The need for portability guarantees, the primary purpose of HIPAA, was supplanted by the Affordable Care Act (ACA) of 2010.”).

B. Privacy

To the extent the last of these HIPAA purposes — simplification of administration — concerned privacy of individually identifiable health information, Congress directed the United States Secretary of Health and Human Services (the “Secretary”) to issue regulations if Congress itself did not enact comprehensive privacy legislation within three years of HIPAA’s enactment.⁶ When Congress did not enact within that time frame, the Secretary issued regulations — Standards for Privacy of Individually Identifiable Health Information — commonly referred to as The Privacy Rule.⁷ At least one commentator contends that privacy was a legislative after-thought.⁸

The Privacy Rule prohibits covered entities and business associates from using or disclosing protected health information except as HIPAA requires or permits.⁹ The Privacy Rule *mandates* disclosure in only two circumstances: (1) when the patient requests

⁶ Title II Subtitle F of HIPAA consists of sections 261 through 264. HIPAA § 262 amends Title XI of the Social Security Act, 42 U.S.C. § 1301 *et seq.*, to add a Part C, entitled “Administrative Simplification,” with sections 1171-1179, codified at 42 U.S.C.A. § 1320d through § 1320d-8 (2002). Section 264 is found as a note to 42 U.S.C.A. § 1320d-2. Section 264(c)(1) states: “If legislation governing standards with respect to the privacy of individually identifiable health information . . . is not enacted by the date that is 36 months after the date of the enactment of this Act, the Secretary of Health and Human Services shall promulgate final regulations containing such standards”.

⁷ See Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Parts 160 to 164; see also Stacey A. Tovino, *Gone Too Far: Federal Regulation of Health Care Attorneys*, 91 *Oregon L. Rev.* 813, 816-819 (2013) (discussing history of The Privacy Rule).

⁸ See Mark A. Rothstein, *The End of the HIPAA Privacy Rule?*, 44 *Journal of Law, Medicine & Ethics* 352, 357 (2016) (“The HIPAA Privacy Rule was a legislative afterthought, added to the HIPAA bill when Congress recognized it was necessary because of the extensive electronic sharing of health data in the payment chain resulting from enactment of the Administrative Simplification title of HIPAA.”).

⁹ 45 C.F.R. § 164.502(a) (“*Standard.* A covered entity or business associate may not use or disclose protected health information, except as permitted or required by this subpart or by subpart C of part 160 of this subchapter.”).

it; and (2) when the Secretary requests it to enforce HIPAA.¹⁰ The Privacy Rule *permits* use or disclosure under certain conditions in specified circumstances: (1) to the patient [even when she does not request it];¹¹ (2) for treatment, payment or healthcare operations;¹² (3) inadvertently occurring during permitted or required use or disclosure;¹³ (4) written patient authorization;¹⁴ (5) agreed disclosures;¹⁵ and (6) public interest¹⁶ — divided into twelve categories.¹⁷

¹⁰ 45 C.F.R. § 164.502(a)(2) (“*Covered entities: Required disclosures.* A covered entity is required to disclose protected health information: (i) To an individual, when requested under, and required by § 164.524 or § 164.528; and (ii) When required by the Secretary under subpart C of part 160 of this subchapter to investigate or determine the covered entity’s compliance with this subchapter.”).

¹¹ 45 C.F.R. § 164.502(a)(1) (“A covered entity is permitted to use or disclose protected health information as follows: (i) To the individual;”).

¹² 45 C.F.R. § 164.502(a)(1) (“A covered entity is permitted to use or disclose protected health information as follows: . . . (ii) For treatment, payment, or health care operations, as permitted by and in compliance with § 164.506;”).

¹³ 45 C.F.R. § 164.502(a)(1) (“A covered entity is permitted to use or disclose protected health information as follows: . . . (iii) Incident to a use or disclosure otherwise permitted or required by this subpart, provided that the covered entity has complied with the applicable requirements of §§ 164.502(b), 164.514(d), and 164.530(c) with respect to such otherwise permitted or required use or disclosure;”).

¹⁴ 45 C.F.R. § 164.502(a)(1) (“A covered entity is permitted to use or disclose protected health information as follows: . . . (iv) Except for uses and disclosures prohibited under § 164.502(a)(5)(i), pursuant to and in compliance with a valid authorization under § 164.508;”).

¹⁵ 45 C.F.R. § 164.502(a)(1) (“A covered entity is permitted to use or disclose protected health information as follows: . . . (v) Pursuant to an agreement under, or as otherwise permitted by, § 164.510;”).

¹⁶ 45 C.F.R. § 164.502(a)(1) (“A covered entity is permitted to use or disclose protected health information as follows: . . . (vi) As permitted by and in compliance with this section, § 164.512, § 164.514(e), (f), or (g).”). Note: Sections 164.514(e), (f) and (g) concern additional limited disclosures for data sets, fundraising, and underwriting. See 45 C.F.R. § 164.502(e), (f) and (g).

¹⁷ See Beverly Cohen, *Reconciling the HIPAA Privacy Rule with State Laws Regulating Ex Parte Interviews of Plaintiffs’ Treating Physicians: A Guide to Performing HIPAA Preemption Analysis*, 43 Hous. L. Rev. 1091, 1099 (2006) (“Finally, covered entities are permitted

The twelve public interest categories, which contain their own limitations, concern disclosures that are: “(a) required by law, (b) for public health activities, (c) about victims of abuse, neglect, or domestic violence, (d) for health oversight activities, (e) for judicial and administrative proceedings, (f) for law enforcement purposes, (g) about decedents, (h) for cadaveric organ, eye, or tissue donation purposes, (i) for research purposes, (j) to avert a serious threat to health or safety, (k) for specialized government functions, and (l) for workers’ compensation.”¹⁸

III. SUBPOENAS IN LITIGATION

HIPAA permits, under certain conditions, a covered entity to disclose protected health information if required by law and in judicial and administrative proceedings.¹⁹ For disclosures required by law via subpoena, there are additionally two *alternative* satisfactory assurance requirements — notice and orders of protection.²⁰

to use or disclose protected health information, without first obtaining a written authorization or oral agreement from the individual, for twelve public interest activities, . . .”).

¹⁸ *Id.* at pp. 1099-1100; see 45 C.F.R. § 164.512(a) - (l).

¹⁹ See 45 C.F.R. § 164.512(a) (“*Standard: Uses and disclosures required by law.* (1) A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. (2) A covered entity must meet the requirements described in paragraph (c), (e), or (f) of this section for uses or disclosures required by law.”); 45 C.F.R. § 164.512(e) (“*Standard: Disclosures for judicial and administrative proceedings*”); see also 45 C.F.R. § 164.103 (“*Required by law* means a mandate contained in law that compels an entity to make a use or disclosure protected of protected health information and that is enforceable in a court of law. *Required by law* includes, but is not limited to, . . . , subpoenas or summons issued by a court, grand jury, a governmental or tribal inspector general, or an administrative body authorized to require the production of information; a civil or an authorized investigative demand; . . . ; and statutes or regulations that require the production of information, . . .”).

²⁰ See generally 45 C.F.R. § 164.512(e) (“*Standard: Disclosures for judicial and administrative proceedings*”).

A. Required by Law

Court procedural rules can make compliance with a subpoena *discretionary* until a court decides whether compliance is *required* and if so, to what extent. For example, Texas Rule of Civil Procedure 176.6(e) addresses protection from compliance with subpoenas issued under Texas law.²¹ It provides [in part] that a person affected by a subpoena may seek protection from a subpoena in court for a number of reasons — such as undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights.²²

If an affected person does so in a timely manner, the applicable procedural law does not require compliance *until* the court orders otherwise.²³ Accordingly, HIPAA may *forbid* disclosure in response to a subpoena because the procedural law does not *require* disclosure until the court rules on the protection request.

²¹ See Tex. R. Civ. P. 176.6(e) (“**Protective orders.** A person commanded to appear at a deposition, hearing, or trial, or to produce and permit inspection and copying of designated documents and things, and any other person affected by the subpoena, may move for a protective order under Rule 192.6(b)—before the time specified for compliance—either in the court in which the action is pending or in a district court in the county where the subpoena was served. The person must serve the motion on all parties in accordance with Rule 21a. A person need not comply with the part of a subpoena from which protection is sought under this paragraph unless ordered to do so by the court. The party requesting the subpoena may seek such an order at any time after the motion for protection is filed.”).

²² See *id.*; see also Tex. R. Civ. P. 192.6(b) (“**Order.** To protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the interest of justice and may - among other things - order that: (1) the requested discovery not be sought in whole or in part; (2) the extent or subject matter of discovery be limited; (3) the discovery not be undertaken at the time or place specified; (4) the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court; (5) the results of discovery be sealed or otherwise protected, subject to the provisions of Rule 76a.”).

²³ See Tex. R. Civ. P. 176.6(e) (“. . . . A person need not comply with the part of a subpoena from which protection is sought under this paragraph unless ordered to do so by the court. . . .”).

B. Notice

The notice provision requires from the party seeking the information satisfactory assurance that it made reasonable efforts to notify the person whose health information is requested that her information is being requested.²⁴ To be satisfactory, the assurance must meet several requirements:

The assurance itself must be in writing and accompanied with documentation²⁵ sufficient to demonstrate (1) the requesting party made a good faith attempt to provide written notice to the individual;²⁶ (2) the notice included sufficient information about the litigation or proceeding to permit the person whose information is sought to object to the court or tribunal;²⁷ and (3) the time to raise objections to the court or tribunal has elapsed without objections being raised or with court or tribunal resolution of the objections consistent with the request.²⁸ Without the notice assurance, a covered entity may disclose in response to a subpoena if the

²⁴ See 45 C.F.R. § 164.512(e)(1)(ii)(A) (“The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request;”).

²⁵ See 45 C.F.R. § 164.512(e)(1)(iii) (“For the purposes of paragraph (e)(1)(ii)(A) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information if the covered entity receives from such party a written statement *and accompanying documentation* demonstrating that: . . .”).

²⁶ See 45 C.F.R. § 164.512(e)(1)(iii)(A) (“The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual’s location is unknown, to mail a notice to the individual’s last known address); . . .”).

²⁷ See 45 C.F.R. § 164.512(e)(1)(iii)(B) (“The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; . . .”).

²⁸ See 45 C.F.R. § 164.512(e)(1)(iii)(C) (“The time for the individual to raise objections to the court or administrative tribunal has elapsed, and: (1) No objections were filed; or (2) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.”).

covered entity itself makes reasonable efforts at providing the requisite notice.²⁹

C. Protective Order

The alternative qualifying protective order provision requires from the party seeking the information satisfactory assurance that it made reasonable efforts to secure a protective order meeting certain specified criteria.³⁰

The assurance itself must be in writing and accompanied with documentation³¹ sufficient to demonstrate (1) the parties to the dispute have agreed to a qualifying protective order and presented it to the court or tribunal³² or (2) the party seeking the information has requested one.³³ To be a qualifying protective order, the agreed or requested order must (1) limit use to the subject litigation or proceeding³⁴

²⁹ See 45 C.F.R. § 164.512(e)(1)(vi) (“Notwithstanding paragraph (e)(1)(ii) of this section, a covered entity may disclose protected health information in response to lawful process described in paragraph (e)(1)(ii) of this section without receiving satisfactory assurance under paragraph (e)(1)(ii)(A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e)(1)(iii) of this section or to seek a qualified protective order sufficient to meet the requirements of paragraph (e)(1)(v) of this section.”)

³⁰ See 45 C.F.R. § 164.512(e)(1)(ii)(B) (The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.”)

³¹ See 45 C.F.R. § 164.512(e)(1)(iv) (“For the purposes of paragraph (e)(1)(ii)(B) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that: . . .”).

³² See 45 C.F.R. § 164.512(e)(1)(iv)(A) (“The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or . . .”).

³³ See 45 C.F.R. § 164.512(e)(1)(iv)(B) (“The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.”).

³⁴ See 45 C.F.R. § 164.512(e)(1)(v)(A) (“Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or

and (2) require return or destruction at the end.³⁵ Like with the notice assurance, without the qualified protective order assurance, a covered entity may disclose in response to a subpoena if the covered entity itself makes reasonable efforts to seek a qualified protective order.³⁶

D. Consequences of Violation

1. For the Responding Party

HIPAA contains no express *private* right action for violations and courts have refused to imply one.³⁷ There are, however, *public* rights of action: The government may investigate and impose civil penalties and criminal sanctions.³⁸ In state law tort causes of action, the HIPAA Privacy Rule [or its violation] might be used to set or evidence the applicable standard of care.³⁹

proceeding for which such information was requested; and . . .”).

³⁵ See 45 C.F.R. § 164.512(e)(1)(v)(B) (“Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.”).

³⁶ See 45 C.F.R. § 164.512(e)(1)(vi) (“Notwithstanding paragraph (e)(1)(ii) of this section, a covered entity may disclose protected health information in response to lawful process described in paragraph (e)(1)(ii) of this section without receiving satisfactory assurance under paragraph (e)(1)(ii)(A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e)(1)(iii) of this section or to seek a qualified protective order sufficient to meet the requirements of paragraph (e)(1)(v) of this section.”).

³⁷ See *Saldana-Fountain v. United States*, No. EP-15-cv-39 (W.D. Tex. Feb. 16, 2016) (collecting cases including precedent from the 5th, 7th, 8th, 10th, and 11th Circuits).

³⁸ See generally Daniel J. Solove, *The Brave New World of HIPAA Enforcement*, PRIVACY + SECURITY BLOG (Oct. 28, 2014), <https://www.teachprivacy.com/brave-new-world-hipaa-enforcement/>; see also 42 U.S.C. § 1320d-6 (criminal penalties for “wrongful disclosure of individually identifiable health information”); 45 C.F.R. Part 160, Subparts C (compliance and investigation by Secretary of the Health and Human Services via Office for Civil Rights) and Subpart D (imposition of civil money penalties).

³⁹ See J.S. Christie, Jr., *The HIPAA Privacy Rules from a Litigation Perspective*, 64 ALA. LAWYER 126, 133 (March 2003) (“the HIPAA Privacy Rules create duties of care with respect to Health Information. Therefore, one

Consider the Connecticut Supreme Court's decision in *Byrne v. Avery Center for Obstetrics and Gynecology, P.C.*⁴⁰ In *Byrne*, a man filed a paternity suit against a woman.⁴¹ In that suit, he served a subpoena to the woman's gynecological and obstetrics health care provider.⁴² The provider complied with the subpoena without, the woman contended, first receiving the assurances HIPAA required.⁴³ Thereafter, the woman contended, the man used those records to harass and extort her.⁴⁴

might expect to see the HIPAA Privacy Rules used as part of state law tort actions."); *see also Byrne v. Avery Center for Obstetrics and Gynecology, P.C.*, 102 A.2d 32, 49 (Conn. 2014) ("We further conclude that, to the extent it has become the common practice for Connecticut health care providers to follow the procedures required under HIPAA in rendering services to their patients, HIPAA and its implementing regulations may be utilized to inform the standard of care applicable to such claims arising from allegations of negligence in the disclosure of patients' medical records pursuant to a subpoena."); *Acosta v. Byrum*, 638 S.E.2d 246, 253 (N.C. Ct. App. 2006) ("plaintiff cites to HIPAA as evidence of the appropriate standard of care, a necessary element of negligence. Since plaintiff made no HIPAA claim, HIPAA is inapplicable beyond providing evidence of the duty of care owed by [defendant doctor] with regards to the privacy of plaintiff's medical records."); *see generally Walgreen Co. v. Hinchey*, 21 N.E. 3d 99 (Ct. App. Ind. 2014) (public disclosure of private facts tort jury verdict in excess of \$1m concerning medical records disclosure in which HIPAA was used to reference standard of care); *R.K. v. St. Mary's Med. Ctr., Inc.*, 735 S.E.2d 715 (W. Va. 2012) (ruling that HIPAA does not preempt state claim for wrongful disclosure of medical and health information and referencing courts using HIPAA to inform the standard of care). *But see Sheldon v. Kettering Health Network*, 2015 Ohio 3268 (Ct. App. Ohio Aug. 14, 2015) ("[I]n our view utilization of HIPAA as an ordinary negligence 'standard of care' is tantamount to authorizing a prohibited private right of action for violation of HIPAA itself, . . .").

⁴⁰ 102 A.2d 32 (Conn. 2014).

⁴¹ *Byrne*, 102 A.2d at 36 ("[Man] filed paternity actions against the plaintiff in Connecticut and Vermont.").

⁴² *See id.* ("the defendant provided the plaintiff [with] gynecological and obstetrical care and treatment.").

⁴³ *See id.* at p. 40 ("[Woman's motion] claimed that the defendant's conduct in responding to the subpoena violated the HIPAA regulations, specifically 45 C.F.R. § 164.512(e).").

⁴⁴ *See id.* at p. 36 ("The plaintiff alleges that she suffered harassment and extortion threats from [man] since he viewed her medical records.").

The woman filed suit alleging several violations of state law by her health care provider.⁴⁵ One was for negligence — failing to use reasonable care in protecting her medical records.⁴⁶ The Connecticut Supreme Court ruled that HIPAA did not preempt the state claims and that HIPAA may inform the applicable standard of care for negligence claims premised on the health care provider's response to the subpoena.⁴⁷

So, the *Byrne* opinion shows how a health care provider that responds to a subpoena — but does so without the assurances HIPAA requires — might expose itself to civil liability even if HIPAA provides no private right of action.

2. For the Requesting Party

There may be criminal and civil liability for a party or attorney who issues and serves a subpoena inducing a covered entity to produce protected health information without HIPAA's required assurances.

(a) Potential Criminal Liability

There is potential criminal liability. Consider this: The United States Department of Justice, through its Office of Legal Counsel, issued an opinion about the scope of criminal liability under HIPAA.⁴⁸ It did so at the request of the General Counsel of the Department

⁴⁵ *See id.* at pp. 36-37 ("The plaintiff subsequently brought this action against the defendant. Specifically, the operative complaint in the present case alleges that the defendant: (1) breached its contract with her when it violated its privacy policy by disclosing her protected health information without authorization; (2) acted negligently by failing to use proper and reasonable care in protecting her medical file, including disclosing it without authorization in violation of General Statutes § 52-146o and the department's regulations implementing HIPAA; (3) made a negligent misrepresentation, upon which the plaintiff relied to her detriment, that her "medical file and the privacy of her health information would be protected in accordance with the law"; and (4) engaged in conduct constituting negligent infliction of emotional distress.").

⁴⁶ *See id.*

⁴⁷ *See generally id.*

⁴⁸ *See generally Scope of Criminal Enforcement Under 42 U.S.C. § 1320d-6*, 29 Op. O.L.C. 76 (June 1, 2005).

of Health and Human Services and the Senior Counsel to the Deputy Attorney General.⁴⁹

It addresses whether the HIPAA crime for wrongful disclosure of individually identifiable health information

renders liable *only covered entities* or whether the provision applies to any person who does an act described in that provision, including, in particular, a *person who obtains* protected health information *in a manner that causes a covered entity to violate* the statute or regulations.⁵⁰

In short, the opinion addresses direct criminal liability for obtaining information in a manner that causes a covered entity to violate its HIPAA obligations.

On its face, the crime provision addresses disclosing and, separately, *obtaining* information:

A person who knowingly and in violation of this part —

(1) uses or causes to be used a unique health identifier;

(2) *obtains* individually identifiable health information relating to an individual; or

(3) discloses individually identifiable health information to another person,

shall be punished as provided in⁵¹

In sum, the text has a distinct prohibition on obtaining.

The opinion recognizes inclusion of a distinct prohibition on obtaining health information *arguably* makes it a crime to obtain such information in a manner that causes a covered entity to unlawfully disclose.⁵² But the opinion analyzes context and

⁴⁹ See *id.* at p. 76 (“MEMORANDUM OPINION FOR THE GENERAL COUNSEL OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES AND THE SENIOR COUNSEL TO THE DEPUTY ATTORNEY GENERAL”).

⁵⁰ *Id.* at p. 80.

⁵¹ 42 U.S.C. § 1320d-6(a).

⁵² See generally *Scope of Criminal Enforcement Under 42 U.S.C. § 1320d-6*, 29 Op. O.L.C. 76, 81-82 (June 1, 2005) (“It could be argued that, by including a distinct prohibition on obtaining health information, the law was

concludes that the distinct prohibition on obtaining health information does not *itself* make it a crime for a person who is not a covered entity to obtain protected health information in a manner that causes a covered entity to violate HIPAA.⁵³

The opinion warns, however, that such criminal liability may exist *indirectly*. The opinion states that the term “person” at the beginning of the criminal provision is not limited to covered entities.⁵⁴ The opinion further warns conduct that may not be prosecuted *directly* under the criminal provision, may be prosecuted under aiding and abetting principles.⁵⁵ The opinion quotes from the aiding and abetting statute, which renders ‘punishable as a principle’ anyone who ‘aids, abets, counsels, commands, induces or procures’ a commission of a federal crime.⁵⁶ The opinion also concludes that the reference to the term “knowingly” in the HIPAA crime provision does not require proof that the accused

intended to reach the acquisition of health information by a person who is not a covered entity but who ‘obtains’ it from such an entity in a manner that causes the entity to violate Part C.”).

⁵³ See *id.* at p. 82 (“Further examining the statute and the regulations, however, reveals that the inclusion of section 1320d-6(a)(2) merely reflects the fact that the statute and the regulations limit the acquisition, as well as the disclosure and use, of information by covered entities.”).

⁵⁴ See *id.* at p. 83 (“[W]e do not read the term ‘person’ at the beginning of section 1320d-6 to mean ‘covered entity.’”).

⁵⁵ See *id.* at p. 80 (“[C]ertain conduct of these individuals and that of other persons outside the covered entity, including of recipients of protected information, may be prosecuted in accordance with principles of aiding and abetting liability and of conspiracy liability.”); *id.* at p. 80 (“Other conduct that may not be prosecuted under section 1320d-6 directly may be prosecuted according to principles either of aiding and abetting liability or of conspiracy liability.”).

⁵⁶ See *id.* at pp. 85 (“Other conduct that may not be prosecuted under section 1320d-6 directly may be prosecuted according to principles either of aiding and abetting liability or of conspiracy liability. The aiding and abetting statute renders ‘punishable as a principal’ anyone who ‘commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission’ and anyone who ‘willfully causes an act to be done which if directly performed by him or another would be an offense against the United States.’ 18 U.S.C. § 2 (2000).”).

knew their conduct violated law – only that the person knew the facts that constitute the offense.⁵⁷

In the end, there is *potential* criminal liability for a person who obtains protected health information in a manner that causes a covered entity to violate the statute or regulations. Not necessarily because the statute itself specifically references *obtaining* individually identifiable health information relating to an individual. But because aiding, abetting, counseling, commanding, inducing or procuring a covered entity to unlawfully *disclose* can create such liability. The issuance and service of a subpoena to a covered entity for protected health information — without the required HIPAA assurances — might be considered commanding or inducing a covered entity to make an unlawful HIPAA disclosure. Even when the person issuing and serving the subpoena does not know her conduct in issuing and serving the subpoena violates HIPAA.

(b) Potential Civil Liability

The Federal Rules of Civil Procedure generally apply to civil litigation in federal court — and often serve as a model for state rules. Federal Rule of Civil Procedure 45(d)(1) expressly authorizes courts to sanction a party [or attorney] who fails to avoid imposing undue burden on a party subject to a subpoena.⁵⁸ The act of issuing and serving a subpoena without the requisite assurances — an act that might expose a covered entity to some form of criminal or civil liability — could be considered an undue burden within the meaning of Rule 45(d)(1).

Substantive employment laws prohibiting retaliation might provide potential for civil liability. Numerous employment laws prohibit retaliation for

engaging in protected activities. To be actionable, an act of retaliation may not be limited to acts in the workplace or related to employment at all — it might only be one that could “dissuade a reasonable worker” from engaging in the protected activity.⁵⁹

Retaliatory litigation — the act of threatening or filing a lawsuit in retaliation for some act — can qualify.⁶⁰ The right to file retaliatory litigation generally may implicate the United States Constitution’s First Amendment right to petition government for a redress of grievances — under what is commonly called the *Noerr-Pennington* doctrine.⁶¹ Courts split on whether that doctrine applies in *employment* retaliation cases.⁶² But even if it does, it might not protect the act of serving subpoenas.⁶³ So,

⁵⁹ See *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006) (“We conclude that the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer’s actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.”).

⁶⁰ See generally Adam J. Bernstein, *Retaliatory Litigation Conduct after Burlington Northern & Santa Fe Railway Company v. White*, 42 Colum. J.L. Soc. Probs. 91 (2008) (surveying cases); Paul More, *Protection against Retaliatory Employer Lawsuits after BE&K Construction v. NLRB*, 25 Berkley J. of Emp. & Lab. Law 205 (2004) (same).

⁶¹ Compare, e.g., *Brown v. TD Bank, NA*, No. 15-5474 (E.D. Pa. April 4, 2016) (ruling that threatening and filing a lawsuit can be retaliation actionable under *White* but still be barred under the *Noerr-Pennington* doctrine which protects the right to petition unless the petition is baseless) with *Blount v. Stroud*, 915 N.E.2d 925 (Ill. App-1st Dist, 2d Div. 2009) (“We decline to extend the applicability of the *Noerr-Pennington* doctrine to provide immunity from retaliation claims.”), *cert. denied*, 924 N.E.2d 454 (Ill. 2010), *cert. denied*, 131 S.Ct. 503 (2010).

⁶² See *id.*

⁶³ See *Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. 2003) (“We are skeptical that *Noerr-Pennington* applies at all to the type of conduct at issue. Subpoenaing private parties in connection with private commercial litigation bears little resemblance to the sort of governmental petitioning the doctrine is designed to protect. Nevertheless, assuming *arguendo* the defense is available, it fails. *Noerr-Pennington* does not protect “objectively baseless” sham litigation. . . . The magistrate judge found

⁵⁷ See *id.* at pp. 86 (“We address next whether the ‘knowingly’ element of the offense set forth in 42 U.S.C. § 1320d-6 requires the government to prove only knowledge of the facts that constitute the offense or whether this element also requires proof that the defendant knew that the act violated the law. We conclude that the ‘knowingly’ element is best read, consistent with its ordinary meaning, to require only proof of knowledge of the facts that constitute the offense.”).

⁵⁸ See Fed. R. Civ. P. 45(d)(1) (“*Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney’s fees—on a party or attorney who fails to comply.”).

in an employment case, issuing and serving a subpoena that commands or induces a covered entity to make an unlawful HIPAA disclosure — via lack of requisite assurances — could be an independent act of unlawful retaliation exposing the subpoenaing party to the prospect of civil liability.

(c) Lawyer Liability for Subpoenas

(1) The Lawyer Immunity Doctrine

Almost all states recognize immunity for lawyers involved in litigation.⁶⁴ The concept — as originally conceived — immunizes lawyers from defamation claims based on statements lawyers make preliminary to, during or as part of a judicial proceeding in which the lawyer participates as counsel.⁶⁵ Courts have applied it to matters other than defamation claims.⁶⁶

that the subpoena was ‘transparently and egregiously’ overbroad and that defendants acted with gross negligence and in bad faith. This is tantamount to a finding that the subpoena was objectively baseless. Defendants urge us to look only at the merits of the underlying litigation, not at the subpoena. They apparently think a litigant should have immunity for any and all discovery abuses so long as his lawsuit has some merit. Not surprisingly, they offer no authority for that implausible proposition. Assuming *Noerr-Pennington* applies at all, we hold that it is no bar where the challenged discovery conduct itself is objectively baseless.”).

⁶⁴ See T. Leigh Anenson, *Absolute Immunity from Civil Liability*, 31 Pepp. L. Rev. 915, 917 (2004) (“All but two states recognize absolute immunity for lawyers involved in litigation with ‘very little variation’ from state to state.”); Thomas Borton, *The Extent of the Lawyer’s Litigation Privilege*, 25 J. Legal Prof. 119, 125 (2001) (“attorneys must acknowledge the fact that the privilege will not protect them from any form of professional or criminal discipline”).

⁶⁵ See T. Leigh Anenson, *Absolute Immunity from Civil Liability*, 31 Pepp. L. Rev. 915, 927 (2004) (“While the absolute immunity from civil liability originated to protect attorneys from lawsuits for defamation, recent cases logically extend immunity to other claims as well.”); see also Restatement (Second) of Torts § 586 (1977) (“An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.”).

⁶⁶ See *id.*; see generally *LJH, Ltd. v. Jaffe*, No. 4:15-CV-639 (E.D. Tex. July 11, 2016) (discussing attorney immunity doctrine under Texas law).

(2) Criminal Liability Immunity

Immunity might not apply to allegations of *criminal* conduct.⁶⁷ So, if issuing and serving a subpoena that commands or induces a covered entity to make an unlawful HIPAA disclosure is a crime — discussed above — attorney immunity might not protect the issuing and serving attorney.

(3) Civil Liability Immunity

Immunity might *not* protect a lawyer from civil liability for issuing and serving a subpoena. Consider *Rodrigues v. City of New York*.⁶⁸ In *Rodrigues*, the president of a drywall company who had been indicted sued public prosecutors — alleging civil rights violations.⁶⁹ The prosecutors had issued grand jury subpoenas to the company’s customers, suppliers and business contacts.⁷⁰ But at the time, no grand jury had been convened — when witnesses appeared they were directed to the prosecutors’ offices where they gave statements.⁷¹ Prosecutors were not authorized to issue subpoenas to conduct discovery — only to appear before a grand jury or court.⁷²

⁶⁷ See Louise Lark Hill, *The Litigation Privilege: Its Place in Contemporary Jurisprudence*, 44 Hofstra L. Rev. 401, 405 (2015) (“For instance, a lawyer who physically assaults an opponent cannot use the litigation privilege as a shield from civil or criminal liability.”); T. Leigh Anenson, *Absolute Immunity from Civil Liability*, 31 Pepp. L. Rev. 915, 930 n.83 (2004) (“Certainly criminal conduct is not afforded immunity”); *Gaia Envtl., Inc. v. Galbraith*, 451 S.W.3d 398, 404 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (“Criminal conduct can negate attorney immunity.”); *Rawhide Mesa-Partners, Ltd. v. Brown McCarroll, L.L.P.*, 344 S.W.3d 56, 60 (Tex. App.—Eastland 2011, no pet.).

⁶⁸ No. 193 A.D.2d 79 (N.Y. App. Div. 1993).

⁶⁹ See *Rodrigues v. City of New York*. No. 193 A.D.2d at 82 (discussing case background).

⁷⁰ See *id.* at p. 82 (“... the District Attorney’s office issued numerous Grand Jury subpoenas to [company]’s customers, suppliers and business contacts.”).

⁷¹ See *id.* (“Although the subpoenas were made returnable before the Grand Jury at [address], at the time of their issuance and until the commencement of this action no Grand Jury had been convened to hear evidence against plaintiffs, and when the witnesses responded to the subpoenas they were directed to the District Attorney’s office where they allegedly gave deposition-type statements.”).

⁷² See *id.* at p. 86 (“The law does not confer upon a prosecutor the power to employ a subpoena solely to conduct an investigation or to subpoena witnesses to attend

The prosecutors asserted immunity but the appellate court ruled they were not so entitled.⁷³ In doing so, the court distinguished between activities “intimately associated with the judicial phase” of a case and those “characterized as administrative or investigative” such as issuance of subpoenas, which “merit less protection.”⁷⁴ The court ruled that because the prosecutors acted without authority to issue the subpoenas and so, they were not entitled to immunity.⁷⁵ So, *Rodrigues* demonstrates that — depending on a state’s interpretation of the scope of its immunity — lawyers may not be immune from civil liability for issuing unauthorized subpoenas.

More specifically, immunity might not protect a lawyer from civil liability for issuing and serving a subpoena that commands or induces a covered entity to make an unlawful HIPAA disclosure. Consider *Fuhler v. Gateway Regional Medical Center*.⁷⁶ In *Fuhler*, minor children sued a law firm and lawyer over disclosure of their mother’s medical records.⁷⁷ The lawyer / law firm had represented the mother’s former employer in a retaliatory discharge case the mother pursued.⁷⁸

his office or any other place where a Grand Jury or court is not convened.”).

⁷³ *See id.* at p. 85 (“The prosecutor defendants argue that they are entitled to absolute immunity with respect to the claim for abuse of process as a section 1983 violation. We disagree.”).

⁷⁴ *See id.* (“Where the prosecutorial activities are ‘intimately associated with the judicial phase of the criminal process’, e.g., the ‘initiat[ion of] a prosecution’, the prosecutor is entitled to absolute immunity from liability under section 1983. . . . However, prosecutorial activities that are characterized as administrative or investigative, such as the issuance of Grand Jury subpoenas, merit less protection.”).

⁷⁵ *See id.* at p. 86 (“Thus, insofar as the issuance of the subpoenas is concerned, these defendants acted in the absence of authority and are therefore not entitled to absolute immunity.”).

⁷⁶ No. 5-10-0337 (Ill. App. 5th June 22, 2012).

⁷⁷ *See Fuhler*, No. 5-10-0337 at p. 2 (“Plaintiffs, . . . , are daughters of [mother]. Their complaint concerns the subpoenaing and communication of [mother]’s mental health records in two previous suits.”).

⁷⁸ *See id.* at pp. 2-3 (“Plaintiffs were not parties to either of the two previous suits. In the first of these suits, defendants represented the client defendants in a suit brought by [mother] for retaliatory discharge.”).

In the retaliatory discharge case, the mother alleged her employer fired her after reporting that a doctor for whom she was working was abusing cocaine.⁷⁹ In the retaliatory discharge case, the employer’s lawyer sent a subpoena to the mother’s psychiatrist.⁸⁰ The retaliatory discharge case was dismissed — though the court does not explain if it was a voluntary or involuntary dismissal or settlement.⁸¹

In a separate medical malpractice case, the doctor’s alleged cocaine use and the employer’s knowledge of it may have had relevance.⁸² The employer’s lawyer from the retaliatory discharge case defended the employer in the medical malpractice case.⁸³ In doing so, the lawyer retained an expert in hospital administration and provided that expert with the mother’s psychiatric records subpoenaed in the retaliatory discharge case.⁸⁴ The medical malpractice case was dismissed — though the court does not explain if it was a voluntary or involuntary dismissal or settlement.⁸⁵

⁷⁹ *See id.* at p. 3 (“In the 1990s [mother] started working for [doctor]. . . . [Mother] filed her retaliatory discharge suit . . . and alleged that she met with . . . the chief executive officer for her employers . . . and told him that [doctor] was abusing cocaine. . . . [Mother]’s employment was terminated. [Mother] claimed in her retaliatory discharge suit that she was unjustly terminated for whistle-blowing activity.”).

⁸⁰ *See id.* (“In the course of defending the retaliatory discharge suit, defendants sent a notice for records deposition with a subpoena to [mother]’s psychiatrist, . . .”).

⁸¹ *See id.* (“ . . . [Mother]’s retaliatory discharge suit was dismissed.”).

⁸² *See id.* (“ . . . [Parties] filed a medical malpractice action against The [parties] alleged that [doctor]’s employers allowed him to practice medicine while impaired. . . . [Mother] was not a party to the [parties]’s suit, but was a potential witness to [doctor]’s substance abuse and his employers’ knowledge of the abuse.”).

⁸³ *See id.* (“Defendants were again retained as defense counsel.”).

⁸⁴ *See id.* at pp. 3-4 (“On behalf of their clients, defendants retained an expert in hospital administration, [expert]. Defendants provided [expert] with numerous documents, including the records of [psychiatrist] regarding [mother]’s psychiatric treatment.”).

⁸⁵ *See id.* at p. 4 (“the [medical malpractice] case was dismissed.”).

The mother's children sued the lawyer and law firm over the subpoena, and subsequent disclosure, of the medical records – alleging the records contained personal and sensitive information about them.⁸⁶ The children asserted various rights of action, such as violation of a state medical records confidentiality statute and the tort of publication of private facts — and made reference to HIPAA.⁸⁷

The lawyer / law firm moved to dismiss, arguing HIPAA had no private right of action and the absolute litigation privilege protected them from civil liability.⁸⁸ The trial court granted the motion.⁸⁹ The appellate court reversed.⁹⁰

The appellate court addressed the lawyer / law firm's absolute litigation privilege.⁹¹ The appellate court concluded that – under the applicable state iteration of the privilege — it did not apply.⁹² The appellate court reasoned that the privilege derived

⁸⁶ See *id.* at p. 4 (“ . . . [children] filed the complaint in the present action. [Children] alleged that the records of [mother's psychiatrist]'s treatment of their mother contained information of a highly personal and sensitive nature about them.”).

⁸⁷ See *id.* at p. 4 (“The complaint contained numerous counts, including counts for publication of private facts and counts referring to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (42 C.F.R. § 164.508 (2008)) Plaintiffs also filed counts referring to the Confidentiality Act.”).

⁸⁸ See *id.* at p. 4 (“Defendants in the present action (defendants and the client defendants) filed a combined motion to dismiss. In their motion to dismiss, defendants argued that plaintiffs could not base a private right of action on HIPAA, that defendants owed no common law duty to plaintiffs, that the publication of private facts was not to the public at large, and that plaintiffs had no standing under the Confidentiality Act. Defendants also claimed that they were protected by the absolute litigation privilege as the records of [mother]'s mental health treatment were relevant to both the retaliatory discharge suit and the . . . suit for medical malpractice.”).

⁸⁹ See *id.* at p. 4 (“ . . . [T]he circuit court granted the motion to dismiss.”).

⁹⁰ See *id.* at p. 4 (“the order of the circuit court dismissing defendants is hereby reversed and the matter is remanded.”).

⁹¹ See *id.* at pp. 7-9 (analyzing absolute litigation privilege under Illinois law).

⁹² See *id.*

from section 586 of the Restatement (Second) of Torts – which protected lawyers from claims of defamation made during the course of litigation.⁹³ The appellate court ruled that communication of mental health treatment fell outside the scope of the privilege under applicable state law.⁹⁴

So, *Fuhler* demonstrates that — again depending on a state's interpretation of the scope of its immunity for lawyers — lawyers may not be immune from civil liability for issuing a subpoena that commands or induce a covered entity to make an unlawful HIPAA disclosure.

(4) *Client Exposure for Lawyer Conduct*

The scope of immunity is not settled and uniform.⁹⁵ If immunity does protect a lawyer from any civil liability premised on her issuance of a subpoena that commands or induces a covered entity to make an unlawful HIPAA disclosure, that *immunity* might not extend to protect the client for the lawyer's conduct.⁹⁶ But *liability* for the conduct might pass

⁹³ See *id.* at p. 7 (“Attorneys are protected from claims of defamation for statements made during the course of litigation. . . . Illinois courts have recognized the privilege as defined by section 586 of the Restatement (Second) of Torts: By definition, the privilege addresses defamation.”).

⁹⁴ See *id.* at pp. 8-9 (“Communication of mental health treatment falls outside the scope of the privilege. . . . Nonetheless, even the most liberal interpretation of the privilege would not warrant extending its application to the case of mental health records. The policy considerations underlying the absolute litigation privilege do not call for the protection of communication of mental health treatment.”).

⁹⁵ See T. Leigh Anenson, *Absolute Immunity from Civil Liability*, 31 Pepp. L. Rev. 915, 927 n.62 (2004) (“The ‘proper scope of the lawyer's immunity remains unsettled.”); *id.* at p. 948 (“the doctrine of absolute immunity has not been a model of clarity, . . .”).

⁹⁶ See *Montecito Estates, LLC v. Himsl*, No. 30140-1-III (Ct. App. Wash. Oct. 22, 2013) (unpublished) (“[party]'s argument that he is entitled to the immunity enjoyed by his attorney is without foundation. He cites no authority suggesting that the attorney's immunity is shared with the client. . . . We do not believe that a client can claim immunity for his agent's actions except in carefully delineated circumstances that are not present here. A tortious action is not necessarily immune merely because it is taken by an attorney on behalf of a client.”).

through — via agency or similar principles.⁹⁷ This could put an attorney in the position of having exposed her client to civil liability via her own conduct in issuing a subpoena, while being immune from liability herself.

IV. USE IN LITIGATION

Once a party or attorney has protected health information — via proper subpoena or otherwise — there may be exposure to liability over its use. For example, filing pleadings publicly that disclose such protected health information may violate other laws.⁹⁸

V. CONCLUSION

Be both thoughtful and careful handling and subpoenaing medical records. An attorney who is not may risk exposing herself and her client to satellite litigation and liability.

⁹⁷ See generally Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 Neb. L. Rev. 346, 359 (2007) (surveying client responsibility for tortious conduct of attorneys); see also Douglas R. Richmond, *Sanctioning Clients for Lawyers' Misconduct—Problems of Agency and Equity*, 2012 Mich. St. L. Rev. 835, 841 (2012) (discussing agency law as a basis used for sanctioning clients for lawyers' misconduct); cf. *Link v. Wabash R. Co.*, 370 U.S. 626, 633-34 & n.10 (1962) (“Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have ‘notice of all facts, notice of which can be charged upon the attorney.’ . . . And if an attorney’s conduct falls substantially below what is reasonable under the circumstances, the client’s remedy is against the attorney in a suit for malpractice.”).

⁹⁸ See *Bennett v. John E. Potter*, Postmaster General, USPS, EEOC Decision No. 0120073097, 2011 WL 244217 (January 11, 2011) (discussing liability); EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA), No. 915.002, at 4 (July 26, 2000) (Guidance I); ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, at 18 (October 10, 1995) (Guidance II); Texas Health and Safety Code § 181.154(b).