

IMPAIRED DRIVING FATALITIES, THE HIPAA MYTH, AND WORKING WITH HOSPITALS

By Warren Diepraam
-Montgomery County, Texas: Chief Vehicular Crimes Prosecutor

WHY DO WE NEED HOSPITALS?

- × Medical records
 - + Defendant
 - + Victims
 - + Blood results
 - + Instrument records
 - + DRE Reconstructions
- × Chemical samples
 - + Blood and urine samples
- × Witness statements
 - + Defendant
 - + Victims and witnesses

HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA NOT HIPPA)

- × 42 U.S.C. Section 1320 D *et seq.*
- × Enacted in 1996 by the US government
- × Created due to concerns over privacy, health, and insurance related matters
- × Goals are meritorious in that HIPAA seeks to prevent the unbridled use and publication of private medical information
- × HIPAA is not intended to prevent or obstruct legitimate police or prosecutorial investigations

THE REAL PROBLEM



MAIN ITEMS FOUND IN HIPAA

- × Applicability and definitions
 - + 45 C.F.R. sections 164.500 and 501
- × Uses and disclosures of protected health information
 - + 45 C.F.R. section 164.502
- × Transmission requirements and compliance dates
 - + 45 C.F.R. sections 164.532 and 534
- × Uses and disclosures for which individual permission or release by patient is not required
 - + 45 C.F.R. section 164.512

SECTION 164.512 (A)(1): PREAMBLE

- × As long as the request is in compliance with "the law," disclosure is authorized by any healthcare provider
- × What are they talking about?
 - + State law or federal law?
 - + It is not defined!
- × State laws should be reviewed as well
 - + Some states provide greater protections than HIPAA
 - + Some states provide less protection

THE LAW ENFORCEMENT EXCEPTION

- × 45 C.F.R. section (f)
- × There are basically six exceptions to the non-disclosure rule
- × Two exceptions will apply in the majority of HIPAA requests
 - + Disclosures that are required pursuant to process
 - + Disclosures required by laws in the jurisdiction (rape, DV, dog bite, gunshot victim laws) or for administrative hearings

ORAL RELEASE OF INFORMATION?

- × 45 C.F.R. 164.512 (f)(4)
- × Alert police to a death that occurred as a result of a crime
- × Hospital may provide information to law enforcement agent as long as the provider has a reasonable belief that the disclosure constitutes evidence that the suspect caused a death and the stay is related to the crime
 - + Statements about driving and release of hospital toxicology results

ORAL RELEASE OF INFORMATION?

- × 45 C.F.R. 164.512 (f)(5)
- × Crime on the premises of a hospital
- × Hospital may provide information to law enforcement agent as long as the provider has a reasonable belief that the disclosure constitutes evidence of the commission of a crime on the hospital's premises
 - + In most cases, the suspect is intoxicated and a danger to himself or others
 - + In many cases, the subject is a flight risk

ORAL RELEASE OF INFORMATION?

- × 45 C.F.R. 164.512 (f) (6)
- × To explain the nature and circumstances of the commission of a crime
- × Hospital may provide information to law enforcement agent as long as the provider has a reasonable belief that the disclosure will alert police to the nature and circumstances of a crime related to the hospital visit
 - + Facts of Kirsch v. State
 - + Nurse was basically gossiping to the deputy's supervisors

IDENTIFYING OR LOCATING A SUSPECT

- × 45 C.F.R. section 164.512 (f)(2)
- × Authorizes the disclosure of limited identifying information or location information
 - + Name
 - + Address
 - + Type of injury
 - + Distinguishing characteristics

MISCELLANEOUS INFORMATION

- × 45 C.F.R. section 164.512 (f)(3)
 - + Victim information
 - + If your jurisdiction requires proof of serious bodily injury or death before a sample can be obtained, use this section
- × 45 C.F.R. section 164.512 (f)(4)
 - + Death information
 - + If your jurisdiction requires proof of death before a compelled sample can be obtained, use this section

FEDERAL PRIVACY ACT

- × 5 U.S.C. 552a (b) Veteran's Hospitals
- × Intended to protect the improper transfer of information between government agencies
- × Not intended to interfere with legitimate law enforcement investigations
- × A letter from the "head of the agency" if for a law enforcement purpose
- × A court order should suffice as well
- × Applies only to federal agencies?

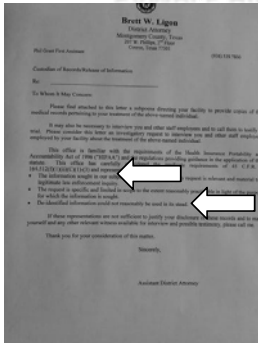
RESOLVING DIFFERENCES

- × Maintain a database of forms for your officers
 - + HIPAA Letters
 - + DA Letters (Privacy Act)
 - + Court Orders
- × Stay in contact with the "important people" in the hospital emergency room
 - + "No Refusal" nurses
 - + Triage nurses
- × Work with their risk management personnel
- × Offer to do training for them
- × Emergency citation:
 - + www.hhs.gov/hipaafaq/permitted/law/505.html
- × Last (but not least) work with the hospital attorneys

HIPAA LETTER

- × Court order
- × Subpoena
- × "HIPAA Letter" covering 45 C.F.R. section 164.512 (f)(1)(ii) (C(1)-(3))
 - + The information sought is relevant and material to a legitimate law enforcement inquiry
 - + The request is limited and specific in scope to the extent reasonable practical in light of the purpose for which the information is sought
 - + De-identified information could not reasonably be used in its stead
 - + This request authorizes the continuing cooperation of staff including oral communications regarding this request

SAMPLE HIPAA LETTER



Identify the section: 45 C.F.R. 164.512 (f)(1)(ii)(C)(1)-(3)

Use the "magic words"

WORKING WITH HOSPITALS

- ✦ Establish contacts with ER staff
 - + No Refusal programs, blood draws, patients, etc.
 - + NUMBER ONE COMPLAINT: RUDENESS
- ✦ Establish contacts with training coordinators
 - + You can offer them CNE benefits for dealing with the criminal justice system
- ✦ Establish contacts with Pathology directors
 - + They are great for getting lab records, samples, etc.
- ✦ Establish contact with hospital administrators
 - + Supervisors are always good to know!
 - + Consider creating restitution forms
- ✦ Establish contacts with hospital attorneys
 - + As a general rule, these individuals will be least conducive to your efforts, but they should still be contacted

ONCE AGAIN....



In the future, please say "I object" rather than "that's total bullshit."

ANY QUESTIONS

- ✘ Warren Diepraam
- ✘ Montgomery County District Attorney's Office
 - + Brett Ligon, District Attorney
 - + 207 West Phillips, Second Floor
 - + Conroe, Texas 77301
- ✘ 281.703.0827 or 936.672.3611
- ✘ warren.diepraam@mctx.org
