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Buddy Low
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Beaumont, Texas 77704-1751

Dear Mr. Low:

Enclosed please find the Committee Report of the Administration of Rules of Evidence Committee, together with a proposed Rule 514, which addresses the HIPAA rules concerning disclosure of patient medical information and *ex parte* contacts of a party's physician.

On behalf of the Administration of Rules of Evidence Committee, we earnestly recommend to the Supreme Court Advisory Committee that it endorse our proposed Rule 514 and recommend it to the Supreme Court for adoption.

The history, analysis, and concerns which were raised by the Supreme Court Advisory Committee in its review of the HIPAA regulations have been point-by-point analyzed by the AREC in order to address each concern of the Committee. In particular, the Committee wanted to draft a rule that would conform to Federal Law, address peer review and attorney-client privileges, and give guidance to the bench, the bar, and to medical providers.

Thank you very much for your consideration of this report and the proposed rule. Please notify Mark Sales and me of any schedule of the SCAC to review these matters. Mark or I will be available to attend on behalf of the Committee.

Respectfully,

Jack W. London

JWL/cba

cc: Erin Graham
Terry Jacobson
Mark Sales
Steven Goode

FINAL REPORT REGARDING EX PARTE COMMUNICATIONS BETWEEN PHYSICIANS AND ATTORNEYS WHO DON'T REPRESENT THE PHYSICIAN'S PATIENT, HIPAA AND PROPOSED RULE 514

I. **History to this point.** Two years ago AREC was asked to study the question of whether *ex parte* communications between physicians and attorneys other than attorneys who represented the physician's patient were permissible. An AREC subcommittee was formed to study the problem and report back to the committee. While the subcommittee was studying the issue, the HIPAA rules were released for final comment by DHHS. The AREC subcommittee studying the issue, and subsequently the entire committee, concluded that the HIPAA rules addressed whether and how *ex parte* contact was permissible and, therefore, recommended the adoption of a new Rule of Evidence–Rule 514. The proposed rule was modeled after a process used by then State District Court (now Federal District Court) Judge David Godbey to deal with litigants in his court. AREC submitted its proposal and report. The SCAC, and a subcommittee of the SCAC, was also studying the issue and a member of the SCAC subcommittee studying the issue drafted a proposed amendment to existing Rule 509, which was circulated to AREC, along with several other comments and questions (the automatic exclusion sanction language and how the rule might impact peer review) pertaining to AREC's proposed rule. The AREC subcommittee, and subsequently the entire committee, met and studied the language proposed by the member of the SCAC subcommittee that was studying the issue, and the comments and questions generally posed by SCAC. AREC now issues this final report, which contains a modification to our previous drafts of Rule 514. AREC also rejects the amendment proposed by a member of the SCAC subcommittee as being unworkable.

II. **Comment Regarding the Nature of the Problem.** There are 2 separate, but interrelated, matters at issue. The first is whether *ex parte* communications are or should be permissible. As a general rule, we think HIPAA answers that question in the negative. After the AREC meeting in April, we discovered a recently published article (which we have not analyzed in detail), but which seems to agree with the conclusions reached by AREC. The article is titled "An Important Consequence of HIPAA: No More *Ex Parte* Communications Between Defense Attorneys and Plaintiffs' Treating Physicians." It was written by David G. Wirtes, Jr., R. Edwin Lamberth and Joanna Gomez and it appears at 27 AMERICAN JOURNAL OF TRIAL ADVOCACY 1 (Summer 2003). We urge you to review it in connection with the upcoming SCAC meeting. The second issue is whether there ought to be a procedural vehicle that allows for *ex parte* communications and which is HIPAA friendly. We have concluded for a variety of reasons that such a vehicle ought to be available.

In addition, we note that the problems posed by *ex parte* contacts arise in connection with the discovery of evidence and not its admission before the court. HIPAA does not present an obstacle to the admission of evidence. To the contrary, an

exception to HIPAA allows for the disclosure of health care information when ordered by a trial judge. And, before a trial judge will admit evidence, the evidence first has to be relevant to some issue over which the court has jurisdiction. Besides regulating the admission of evidence, the evidentiary privileges also control the scope of discovery. And, that is where the controversy arises. So, we see the problem as being how to regulate the disclosure of health care information when a trial judge is not present to rule on relevance, discoverability and other similar matters at the time the evidence is being discovered. We believe that new Rule 514 is the best method for balancing the right to privacy afforded by Rule 509, and now HIPAA, with the need to obtain information in the most expeditious fashion.

III. Analysis of AREC's Proposed Rule and the Amendment to Rule 509 Proposed by a Member of SCAC . AREC's proposal is perhaps most usefully viewed as an analog to the rule that prohibits a lawyer who represents a client in a matter from communicating with someone represented by another lawyer in that matter. Texas Disciplinary Rule of Professional Conduct 4.02 forbids a lawyer, in representing a client, from communicating about the subject of his representation with "a person, organization or entity of government" that the lawyer knows is represented by counsel regarding that matter without first obtaining counsel's consent. ABA Model Rule of Professional Conduct 4.2 similarly restricts such *ex parte* communications.[1] A primary justification for this rule is the desire to preserve attorney-client confidences. Kurlantzik, The Prohibition on Communication With an Adverse Party, 51 Conn. B.J. 136, 145-46 (1977) ("The central interest is to protect the privilege—to avoid situations in which persons are asked to reveal privileged information."); Lidge, Government Civil Investigations and the Ethical Ban on Communicating With Represented Parties, 67 Indiana L.J. 549, 561-62 (1992); Restatement of the Law (Third), The Law Governing Lawyers § 99 comment b; *Vickery v. Commission for Lawyer Discipline*, 5 S.W.3d 241, 259 (Tex.App.—Houston [14 Dist.] 1999, pet denied) ("The purpose of Rule 4.02(a) is 'to preserve the integrity of the client-lawyer relationship by protecting the represented party from the superior knowledge and skill of the opposing lawyer.' ") (quoting *In re News Am. Publ'g, Inc.*, 974 S.W.2d 97, 100 (Tex.App. —San Antonio 1998, no pet.)). Cf. Restatement of the Law (Third), The Law Governing Lawyers § 102 (providing that even when a lawyer is permitted to communicate with a nonclient, the lawyer "may not seek to obtain information that the lawyer reasonably should know the nonclient may not reveal without violating a duty of confidentiality to another imposed by law").

The same purpose animates AREC's recommendation. A litigant's treating physician often possesses a wealth of confidential and privileged information about the litigant. To be sure, by filing a malpractice claim, the litigant/patient sacrifices to some

[1] Unlike the Texas rule, the text of the ABA rule refers only to communications with a person represented by counsel, and not does include a reference to organizations or government entities. But Comment 4 to the ABA rule makes clear that it also applies to organizations.

extent the protections of the patient-physician privilege. Some of the plaintiff's medical information will undoubtedly fall within one of the exceptions to the Rule 509 privilege. But some of his or her medical information may still be protected. Moreover, the litigant/patient is not always the person who brought the case. For example, in a malpractice or negligent credentialing case, the plaintiff may want to uncover the defendant physician's confidential medical information in an effort to prove the defendant physician was a drug abuser. Some of this information may fall within an exception to the privilege; some may not.

The two most-commonly invoked exceptions are found in Rule 509(e)(1), which creates an exception where a proceeding is brought by a patient against a physician, and Rule 509(e)(4), which creates an exception where any party relies upon the patient's physical, mental or emotional condition as part of the party's claim or defense. But neither of these exceptions provides carte blanche access to the patient's medical information. Both create exceptions only for medical information that is relevant to the case, and the Supreme Court has directed courts to apply this relevance standard stringently. Interpreting what is now the Rule 509(e)(4) exception, the Court stated :

> Thus courts reviewing claims of privilege and inspecting records *in camera* should be sure that the request for records and the records disclosed are closely related in time and scope to the claims made, *see Mutter v. Wood,* 744 S.W.2d 600, 601 (Tex.1988), so as to avoid any unnecessary incursion into private affairs. Even when a document includes some information meeting this standard, any information not meeting this standard remains privileged and must be redacted or otherwise protected.

R.K. v. Ramirez, 887 S.W.2d 836, 843 (Tex. 1994). The Court's expressed concern was to "prevent" the privilege from evaporating as a matter of course simply because a lawsuit has been filed."

We believe it is unreasonable to assume, as the proposed amendment to Rule 509 seems to do, that physicians will ordinarily be in a position to know precisely what confidential information is privileged and what is not. The proposed amendment to Rule 509 merely states the obvious—except as provided by applicable law—it does nothing to provide guidance to lawyers and physicians. Both state law, see Tex. Occ. Code § 159.001 et seq., and the HIPAA regulations enjoin physicians from breaching confidentiality except in enumerated circumstances.[2] Our proposed rule thus seeks to ensure that lawyers will be prevented from knowingly or unknowingly placing physicians in a position where they may breach their legal duty of maintaining confidentiality. But

[2] The uncertainty for doctors is exacerbated by the fact that Texas Rule of Evidence 509 and Texas Occupation Code § 159.003 contain different, and conflicting, sets of exceptions. See 1 Texas Practice, Goode, Wellborn and Sharlot, Guide to the Texas Rules of Evidence § 509.2 (3d ed. 2002) (arguing that Rule 509 should take precedence over Occupation Code provisions).

AREC's proposal would operate in a less draconian fashion than Disciplinary Rule 4.02. That rule's prohibition on *ex parte* communications may be overcome only by receiving consent from the nonclient's lawyer. Absent consent, the lawyer must resort to formal discovery mechanisms to extract information from the nonclient. AREC's proposed rule does not require consent from counsel; the patient's consent suffices. If that is not forthcoming, the proposed rule still allows the lawyer to communicate informally with the physician once the trial judge has delineated what information the physician may disclose to the lawyer and informed the physician that he or she may decline to be interviewed.

The participants in this process who are most at risk are the physicians and other health care providers. When a physician is being *ex parted* by an attorney other than the physician's attorney, it is the physician who, in the absence of legal training and an understanding of the issues in the case, is called upon to make an informed judgment about what and what not to disclose. We believe that approach, which is what is advocated by a member of SCAC subcommittee studying the issue, places the physician at risk of civil and criminal penalties, without justification.

AREC received a copy of an article which was published in the Pharmaceutical and Medical Device Law Bulletin which argues that HIPAA does not preempt the practice of *ex parte* interviews with a personal injury plaintiff's health care providers. Matteo and Uitti, *Conducting Ex Parte Interviews with Plaintiff's Health Care Providers*, 3 **Pharm. & Med. Device L. Bull.** 1 (No. 9 Sept., 2003). This article is deeply flawed.

First, the article asserts—erroneously—that the HIPAA regulations "removed without replacement," id. at 2, the definitions of "covered entity" and "protected health information" that had appeared in earlier drafts of the regulations at 45 C.F.R. § 164.501. That is not true. The HIPAA regulations occupy Subchapter C (Administrative Data Standards and Related Requirements) of Subtitle A (Department of Health and Human Services) of Title 45 of the Code of Federal Regulations. The terms "covered entity" and "protected health information" are both defined for the *subchapter* (i.e., for the entirety of the regulations) at 45 C.F.R. § 160.103. These definitions conform to the definitions of these terms found in the prior regulations and that Matteor and Uitti claim were dropped from the final regulations.

More fundamentally, Matteo and Uitti write that "Congress recognizes that HIPAA's scope should not reach state discovery practices used to obtain patient health information and employed in a matter in which a personal injury plaintiff has waived the patient-physician privilege by putting his or her medical condition in issue." The authors then quote part of the comment to 45 C.F.R. § 164.512(e), which governs disclosure in judicial and administrative proceedings:

> The provisions in this paragraph are not intended to disrupt current practice whereby an individual who is a party to a proceeding and has put his or her

medical condition at issue will not prevail without consenting to the production of his or her protected health information. In such cases, we presume that parties will have ample notice and an opportunity to object in the context of the proceeding in which the individual is a party."

Id. at 8, quoting 65 Fed. Reg. 82462, 82530 (Dec. 28, 2000).

This language is taken out of context and ignores the changes made in the rule during the drafting process. The Proposed Rule covered disclosures for judicial and administrative proceedings at proposed 45 C.F.R. § 164.510(d). This section would have permitted covered entities to disclose protected health care information without the individual's authorization either:

(1) "In response to an order of a court or administrative tribunal;" or
(2) "Where the individual is a party to the proceeding and his or her medical condition or history is at issue and the disclosure is pursuant to lawful process or otherwise authorized by law."

64 Fed. Reg. 59918, 60057 (Nov. 3, 1999).

The comments to this proposed rule explained that, in judicial or administrative proceedings, covered entities could disclose protected health care information without the individual's consent only "through or pursuant to a court order or an order by an administrative law judge specifically authorizing the disclosure of protected health information." The lone exception to this was "where the protected health information being requested relates to a party to the proceeding whose health condition is at issue, and where the disclosure is made pursuant to lawful process (e.g., a discovery order) or is otherwise authorized by law."[3] Id. at 59959. In other words, even when a party to litigation puts his or her medical condition or history at issue, the proposed regulations permitted covered entities to disclose protected health care information only pursuant to court order, lawful process such as a discovery request, or other means "authorized by law."

The regulations as adopted, however, are quite different. 45 C.F.R. § 164.512(e) governs disclosures for judicial and administrative proceedings. It permits non-authorized disclosure for judicial and administrative proceedings:

(1) "In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order;" or

[3] Disclosure would also be permitted where allowed under other provisions of the regulations. 64 Fed. Reg. at 59959.

(2) "In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal" if certain assurances are received by the covered entity.

Note the changes from the proposed rule to the final regulations. First, the final regulation restricts the information that the covered entity may disclose pursuant to a court order. "[O]nly the protected health information expressly authorized by such order" may be disclosed. 45 C.F.R. § 164.512(e)(1)(i).

Second, and more to the point: the final regulations delete the proposed provision that would have permitted disclosure "[w]here the individual is a party to the proceeding and his or her medical condition or history is at issue and the disclosure is pursuant to lawful process or otherwise authorized by law." The final regulations replace this proposed provision with a far more restrictive one. In the absence of an order from a court or administrative tribunal, the final regulations permit disclosure only in response to "a subpoena, discovery request, or other lawful process." 45 C.F.R. § 164.512(e)(1)(ii). Disclosure "otherwise authorized by law" is no longer allowed.

Moreover, disclosure is allowed pursuant to a subpoena, discovery request, or other lawful process only when one of two requirements is met. First, the covered entity must receive satisfactory assurance from the party seeking the information "that reasonable efforts have been made . . . to ensure that the individual who is the subject of the protected health care information that has been requested has been given notice of the request." 45 C.F.R. § 164.512(e)(1)(ii)(A). Alternatively, the covered entity must receive satisfactory assurance from the party seeking the information that it has made "reasonable efforts . . . to secure a qualified protective order." 45 C.F.R. § 164.512(e)(1)(ii)(B).

In summary, a study of the text of the final regulations, even without reference to their history, plainly indicates the intent to preclude covered entities from disclosing protected health care information in the course of *ex parte* communications conducted without the benefit of a court order. The mechanisms authorized for disclosure for judicial or administrative proceedings—court order, subpoena, discovery request or other lawful process—do not include *ex parte* communications conducted without the benefit of a court order. Any doubt that might exist about this is erased by observing what the final regulations deleted (the provision for disclosure "otherwise authorized by law" when a party puts his or her medical condition at issue) and what the final regulations added (limits on the information that can be disclosed pursuant to court order and, in the absence of a court order, the requirement that covered entities must receive certain assurances from the party seeking the information).[4]

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[4] The language quoted by Matteo and Uitti now may be placed in context. It simply states that current practice is that parties who put their medical condition in issue cannot prevail unless they consent to the production of protected health information, and that these regulations are not intended to alter this practice.

In addition to the matters mentioned above, we feel it important to make additional observations regarding the revision to Rule 509 proposed by a member of SCAC (and which we understand is being considered as an alternative to AREC's proposal) and some of the questions raised by SCAC that have been brought to our attention.

First, in accordance with the analysis above, we disagree with the conclusion that HIPAA won't preempt state law regarding the disclosure of protected health information. We believe that HIPAA expressly preempts any state law which is does not provide at least as much protection as HIPAA. 45 C.F.R.§160.202. A state rule that authorizes physicians to disclose protected health information in response to a lawyer's *ex parte* contacts would be contrary to HIPAA requirements.

Second, the language proposed by the member of SCAC does not directly address whether *ex parte* contact should be permissible under any circumstance. So, additional controversy is likely. At present, it appears that *ex parte* contact is not permissible in Texas federal courts and there is no real consensus yet regarding how state courts will rule on the issue. In our opinion, the better solution is the one that resolves the dispute.

Third, the language proposed by the member of SCAC is too vague to provide attorneys or physicians with any real guidance. The attorneys who have assembled to study this issue have a difficult time agreeing on what HIPAA provides. Pity the physician or the attorney who hasn't studied the problem in detail.

Finally, AREC's proposed rule fits neatly with §74.052 of the Civil Practice & Remedies Code, which requires a plaintiff in a health care liability claim to consent to the disclosure of "verbal" as well as written health care information in order to bring a claim. Proposed Rule 514 envisions that very process.

IV. The Automatic Exclusion Language in the initial draft of Rule 514.

AREC's proposed Rule 514 originally provided that "**Evidence obtained in violation ofthis Rule is inadmissible except upon a finding of good cause.**" After receiving comments and feedback concerning this provision, we have decided that a better approach would be to simply allow the trial court to impose the appropriate sanctions if the Rule is violated. There are several reasons for recommending this

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In such situations, the regulations "presume that parties will have ample notice and an opportunity to object," presumably to the scope of the consent, "in the context of the proceeding." In other words, the regulations do not prevent courts from dismissing a party's claims if the party refuses to consent to the disclosure of relevant medical information after the court determines the party has put his or her medical condition in issue. But that is a far cry from saying that the regulations authorize covered entities from disclosing protected health care information during the course of *ex parte* communications simply because a party has put his or her mental health information in issue.

change. First, if evidence obtained in violation of the Rule is admissible in the first instance, it would or should have come out in discovery anyway. On the other hand, if the evidence were inadmissible then the proposed language would be superfluous. Second, cases should be decided based on the evidence and we should not be in the business of creating a procedural trap for the unwary. Third, a trial court can best fashion an appropriate sanction, and make sure the sanction is assessed against the party or attorney who gives offense. This is consistent with other legal precedents regarding assessing sanctions. Several members of AREC thought that the reference to sanctions could be deleted in its entirety because trial courts already have the inherent authority to assess sanctions and because the inclusion of the language might suggest to trial judges that the judge **had** to assess sanctions. However, the majority of AREC felt that the inclusion of the word "**may**" made it clear that the awarding of sanctions was discretionary. In addition, the majority felt that it was important to give trial courts some direction (to Rule 215) to decide how to assess a violation of the rule. We therefore recommend that the sentence referenced above be deleted and replaced with "**Evidence obtained in violation of this Rule may subject the violating party to sanctions as provided in Rule 215.**"

V. Peer Review And Other Activity.

In his letter of March 15, 2004, Buddy Low asked AREC to consider adding another exception to proposed Rule 514 to deal specifically with peer review activity. As we studied the matter, it occurred to us that there are 2 separate issues involved here. The first relates to the initial gathering of information from a health care provider. We noted that an amendment to the rule was probably not necessary for HIPAA purposes because persons engaged in legitimate peer review and health oversight activities are not prohibited from disclosing protected health information without permission. 45 C.F.R. §164.512(d). The second issue is: What can a person (including parties and nonparties who are health care providers) who obtains information pursuant to proposed Rule 514 do with it once he/she/it has it? As we understand the concern expressed by Buddy Low, he wanted to make sure that a peer review committee was able to use the information; that is, disclose the information it obtained to its members, the Board of Medical Examiners, its attorneys, etc. in order to properly perform its peer review function. As we considered the matter, we realized that there are probably a number of other activities that lawyers (joint defense, consulting experts, etc.) and others (nursing, dental and other health care agencies which regulate health care activity) engage in every day that require them to disclose protected health care information to other people. So, rather than addressing only peer review activity, we decided to create an exception that allowed persons to communicate information obtained in connection with new Rule 514 to others so long as the disclosure is also privileged. That way, a physician who is sued can disclose health care information to his lawyer. That way, a lawyer representing a physician can disclose health care information to a consulting expert, and so on. Proposed Rule 514, with the new sanctions and exceptions language (in bold face), would read as follows:

In civil cases, a party or party's representative may not communicate with or obtain health care information from a physician or health care provider outside of formal discovery except by (1) written authorization of the patient or the patient's representative, or (2) pursuant to a court order which specifies the scope and subject matters that may be disclosed and which states that the health care provider is under no obligation to discuss such matters outside of formal discovery. A copy of such order mush be provided to the health care provider prior to any such communication or disclosure. **Evidence obtained in violation of this Rule may subject the violating party to sanctions provided in Rule 215. This rule does not prohibit a party, a physician, or a health care provider from communicating health care information to another person or party where the communication would be privileged.**