

Avoiding Legal Potholes on the Road to Health IT

Presented By:

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Today's Presentation

- **Lawyers' Role in Health IT**
- **HIPAA Privacy Rule Enforcement**
- **Federal Health IT Initiative**
- **Reliability of Quality Measurements**

Lawyers' Role In Health IT

- **Advise covered entities, including health plans, self-insured employers, providers and clearinghouses how to comply with HIPAA**
- **“Soup to nuts” HIPAA privacy audits**
- **Draft policies and procedures**
- **Draft business associate contracts**
- **Identify most common uses and disclosures and advise on how to disclose only the minimum amount necessary**

Lawyers' Role In Health IT

- **Experience with clients indicate that health plans are the most focused on privacy and providers are the least**
- **Most common concerns are requests for disclosures for litigation-related reasons (divorces) and employee-related information (mostly behavioral health)**
- **Advise clients who undergo government investigations**

Lawyers' Role in Health IT

Best Offense is the Best Defense

- **Appoint privacy officer / security officer / complaint officer**
- **Audit procedures for handling PHI**
- **Draft and implement meaningful policies and procedures**
- **Train, train, train**
- **Mitgate, mitigate, mitigate**

Lawyers' Role In IT

Key privacy policies:

- **Minimum Necessary**
- **Sanctions**
- **Mitigation**
- **Complaints**
- **Business Associates**
- **Documenting what's necessary**
- **Beware of e-mails – they're discoverable**

HIPAA Privacy Rule Enforcement

- **HHS OCR charged with enforcement**
- **Agency seeks voluntary compliance**
- **Between April 14, 2003 and December 31, 2006, approximately 24,000 HIPAA privacy complaints were received**
- **5,987 cases advanced past prelim review**
- **4,015 OCR obtained compliance or issued correction action**

Litigation Risk

- **If agency is gently enforcing, what's the risk?**
- **HIPAA Privacy Rule held as standard for all privacy breaches**
- **Negligence can be demonstrated if covered entity failed to comply**
- **Lack of private right of action is irrelevant**

Federal Health IT Initiative

2004 President Bush appointed first
Coordinator for HIT

National

2005 National Coordinator awarded
contracts

nine

Federal Health IT Initiative

1. Health Information Technology Standards Panel (HITSP)
– **To harmonize industry-wide health IT standards**
2. Certification Commission for Healthcare Information Technology (CCHIT) – **To develop a certification process for health IT products**

Federal Health IT Initiative

3. **Privacy and Security – To enhance safety of health information by addressing variations in policies and State laws affecting privacy and security practices**
4. **Nationwide Health Information Network (NHIN) – To create prototype architectures for widespread health information exchange for consumers and providers**

Federal Health IT Initiative

5. Health Information Exchange – To develop consensus for best-practice guidelines from existing, state-level efforts to exchange health information

Goal: Establish nationwide health information network by 2014

Federal Health IT Initiative

- **American Health Information Community –advisory committee of public and private leaders**
- **AHIC formed a workgroup to address privacy issues for nation-wide use of health IT**
- **Attempted to apply HIPAA to all entities that process health data, not just CEs**

Federal Health IT Initiative

- **Privacy Forum Initiative -- for state leaders to reach consensus on cross-border issues of privacy, security, and the states' roles in health information exchange. Summary of state privacy and security assessments, solutions, and implementation plans will be presented and used to consider national policy issues.**

Federal Health IT Initiative

- **October 5, 2007**
- **HHS Secretary Leavitt awarded contracts to nine health information exchanges to begin trial implementations of the Nationwide Health Information Network (NHIN)**
- **Purpose of contracts: create a secure foundation for basic health information exchange between select HIEs to build on later**

Federal Health IT Initiative

- **Contractors include Indiana University, Long Beach Network for Health in L.A., Lovelace Clinic Foundation in New Mexico, MedVirginia**
- **They will participate in the NHIN Cooperative, to test and demonstrate the exchange of private and secure health information among providers, patients and other stakeholders**

HEALTH IT NEWS

- **Feb 2007 GAO Recommends National Strategy to Ensure Privacy of Medical Records**
- **Dec 2006 Alliance for Health Reform Report:**
 - Medication errors account for 20% of all adverse events in health care
 - But only 21% of hospitals have adopted computerized physician order entry, only 16% of solo practitioners are using EHR

More Health IT News

- **July 2007 Commonwealth Fund survey of 200 health care leaders showed wide support existed for making physician records more public**
- **With all this agreement, why aren't we all-electronic?**
- **Today's news: Massachusetts Hospitals compile and release new data on patient falls and bedsores**

Measuring Quality

- **Provider Tiering – how do we compare physicians?**
- **Health plans analyze claims data to assess network physicians on the basis of efficiency (costs per episode of care, such as treatment of low back pain) and on measures of quality that can be assessed with claims data (blood testing for a diabetic).**

Measuring Quality

- **Quality assessment is based on physicians' adherence to evidence-based medical guidelines and other quality standards.**
- **For example, the Boston-based Group Insurance Commission (GIC), which administers health insurance benefits for public employees in Massachusetts, requires all contracted plans to include tiered networks and to use nearly 60 specified quality measures, including those from the Health Plan Employer Data and Information Set (HEDIS).**
- **In contrast, Blue Cross of California uses approximately 20 HEDIS-type measures to assess quality.**

Tying Quality Measures To Compensation

- **Pay for Performance**
- **P4P programs typically rely on some mix of four types of quality measures:**
 1. Patient Outcomes (is the patient better now?)
 2. Process Measures (how often cholesterol levels are checked for heart patients)
 3. Structural Quality Measures (adequacy of facility)
 4. Patient Satisfaction

P4P Measures Reliability

- **Problem with Patient Outcome Measures**
 - Outcomes depend on patient activities beyond the control of the physician. E.g., cholesterol levels may be influenced by Oreos.
 - Process measures – how many beta-blockers were prescribed? – could be skewed by care provided for outlier patients and providers may be encouraged to game the system through patient selection and data manipulation

P4P Measures Reliability

- **Structural quality measures evaluate the setting in which a provider delivers medical care, like the adequacy of facilities and equipment, e.g., does a hospital use HIT such as e-prescribing and EHRs.**
- **Problem: Can require large investments by providers and it doesn't measure whether capital is used optimally.**

P4P Measures Reliability

- **Patient Satisfaction Measures**
- **What do you think of your doctor? Waiting time? Convenient location?**
- **Problem: Patients may not be in the best position to evaluate the quality of care.**
- **RISK of P4P Measures: Providers suing over quality measurements.**

Legal Risks of HIT

- **Everything that is a risk now, but worse**
- **Greater access to PHI means greater threats to privacy**
- **Authentication of e-medical records**
- **No standards / requirements for quality measurements**
- **New duties for providers / plans**

Questions?

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