Healthcare Records

Healthcare Records, Qui Tam Whistleblowers and HIPAA

by Zachary Kitts

Of all the acronyms found in the healthcare world, few are better-known – or less understood – than HIPAA. That is true for medical professionals, laypersons, and lawyers alike. However, qui tam whistleblowers – and lawyers handling qui tam matters – can ill afford to be ignorant of HIPAA. The process of copying medical records to support a qui tam case always carries a certain amount of risk. Perhaps the best analogy is crossing a minefield – lawyers and their clients can either proceed very carefully, examining the terrain before taking each step, or they can close their eyes and run as fast as possible.

This article looks at the "privacy rule" portion of HIPAA, and explains why that rule – and the medical records protected by that rule – play such a prominent role in qui tam practice under the federal False Claims Act and the Virginia Fraud Against Taxpayers Act. The article then provides an overview of relevant case law interpreting the whistleblower exception to HIPAA, and discusses how Virginia Legal Ethics Opinion 1786 provides further guidance to Virginia lawyers.

HIPAA and its exceptions

When lawyers and others refer to HIPAA, they are mostly referring not to the Health Insurance Portability and Accountability Act of 1996 itself but rather to the privacy regulations required by that statute. When finalized in 2000, the *Standards for Privacy of Individually Identifiable Health Information* created for the first time a nationwide set of privacy rules for health records. As with many remedial statutes, HIPAA establishes only a minimum floor for patient privacy. While states are free to adopt their own standards that are more protective of patient privacy than HIPAA, under no circumstances may they enact standards less protective.

The Privacy Rule protects all "individually identifiable health information" held or transmitted by a covered entity or its business associate, in any form, whether electronic, paper, or oral. The Privacy Rule calls this information "protected health information" (PHI).

Generally, HIPAA prohibits the disclosure of PHI without the patient's consent for any reason. The rule of course contains various exceptions for insurers, law enforcement personnel, court-ordered disclosures, emergency situations, and so forth.

There is also a specific exemption for qui tam whistleblowers found at 45 C.F.R. §164.502(j). That provision provides that actions that would be in violation of HIPAA – for example, copying records, and sharing those records with certain other professionals without the patient's permission – are not violations if certain conditions are met. First, the individual must believe in good faith that his or her employer engaged in unlawful conduct or conduct that violates clinical standards. Second, the individual must disclose the information only to a health oversight agency, to a public health authority authorized to investigate such violations, or to an attorney retained by the individual for the purposes of determining the legal options available to the individual.

Given the otherwise strident protections afforded to PHI, the inclusion of an exemption for qui tam whistleblowers may seem surprising, until one considers the importance of the federal False Claims Act to the United States.

The False Claims Act and HIPAA

Both the federal False Claims Act (31 U.S.C. §3729 et seq.) and the Virginia Fraud Against Taxpayers Act (Virginia Code §8.01-216.1 et seq.) have qui tam provisions that allow any person with non-public information about fraud on the government to bring a case in the government's name as well as in their own name. The words *qui tam* are derived from a Latin expression along the lines of "He who sues for the King, as well as for himself."

It is no secret that individual and corporate legal compliance are governed by the same basic considerations. In no specific order, those general requirements are as follows: (1) the likelihood that transgressions of the law will be detected;

(2) the likelihood that observed transgressions will be prosecuted; (3) the substance of the behavior the law forbids; (4) the nature and quality of the evidence required to prove a violation; and (5) the severity of the potential sanctions.[1] While government has proven capable of addressing factors three through five, it has proven somewhat less capable with factors one and two, hence the qui tam provisions of the FCA.

There is little doubt that the real power of the FCA lies in these qui tam provisions. While the government can and does bring FCA claims without a relator, the difference in qui tam versus non-qui tam recoveries is staggering. A recent study by the *Journal of Accounting Research* showed that the government's monetary recoveries increase by more than 300 percent in whistleblower cases versus non-whistleblower cases. That same study also found that when whistleblower cases result in criminal pleas or convictions, individual criminals get longer sentences in cases initiated by a whistleblower.[2] The reasons for this are easy to understand. In a case brought jointly by the government and by a whistleblower – in particular by a whistleblower in senior management with a great deal of knowledge about company operations – there is normally very little factual dispute, and very little room for maneuver by defendants.

Why is it important for qui tam relators to copy documents in the first place?

This question is worth some analysis. Most lawyers are aware that qui tam cases require non-public knowledge of false claims being submitted to the government, and most are aware that potential qui tam relators often copy documents from their place of employment, but very few of us give any thought at all to the reasons why copies of records play such an important role.

Some practitioners believe that documents and records should be copied to preserve them in the event a defendant decides to destroy evidence, but that is rarely, if ever, a reason to copy documents. It suffices to say that in the history of civil litigation generally a great many people have tried to cover their tracks by destroying evidence and it almost never works. In fact, it normally backfires and defendants find themselves going from the frying pan into the fire. More specifically, in the world of HIPAA and healthcare fraud, the idea that a fraudfeasor would destroy patient charts or other records to cover its tracks is unimaginable because the lack of patient documentation itself is a problem.

Documents are also not copied for the government to use as part of its case; the government is quite capable of obtaining the records itself. The government will, in fact, be able to obtain most of the evidence it needs from its agency clients. Moreover even if the evidence provided by the relator were to be used at trial, it would not be introduced by the relator's testimony if the government can help it. Relators stand to make quite a bit of money if their cases succeed, and that is normally enough to make them undesirable as witnesses.

In the opinion of this writer, there are three interrelated reasons for relators to copy documents if they can. First, copies of the documents assist the relator's lawyers in their efforts to flesh out and master every nuance in the case. Unlike most types of civil litigation – where most of the lawyers' work is done during discovery – most of the real work of a qui tam case is done by the relator's lawyers before the case is ever filed. This is a practice heavy on forensic investigation skills, because most relators have clear-cut knowledge of the facts underlying their case but an imperfect understanding of how those facts apply to the law or fit into the bigger picture.

Even the most sophisticated clients tend to combine emotions together with their facts. Copies of documents and other evidence assist the relator's lawyers in their efforts to separate emotion from fact and assemble that bigger picture and its potential implications. Copies of relevant documents also can help lawyers identify other individuals, companies or subsidiaries who may share liability.

The second reason concerns the unusual procedural hurdles required in qui tam litigation. A disclosure memorandum must be prepared and served on the government, but not on the defendants. When the Complaint is filed, it is filed under seal and is served on the government but not on the defendant. In fact, whistleblowers and their lawyers are prohibited from alerting the defendants to the potential claims in any manner, thus precluding a great deal of informal discovery that sometimes takes place in comparable commercial litigation contexts.

The third reason is related to the first two. The government lawyers evaluating the case are essentially forced to do battlefield triage when they sort through new cases – that is, they must make quick decisions about which cases get attention and which cases do not. Cases which can be presented to the government in a thorough, well-documented and thoughtful manner stand a much greater chance of receiving attention than those that do not, and that requires hard work.

What is – and is not – protected activity under HIPAA

For all the above reasons, HIPAA contains a specific carve-out for whistleblowers and their lawyers. There are few cases interpreting whistleblowers in the context of the privacy rule, and the cases that do bear few surprises. In *Howard ex rel. U.S. v. Arkansas Children's Hosp.*, 2015 WL 4042170 (E.D. Ark., 2015) two whistleblowers survived a summary judgment motion asserting that they were not "whistleblowers" as defined by the FCA

and were therefore not entitled to have the PHI in their possession. In *Monarch Fire Protection Dist. of St. Louis County, Missouri v. Freedom Consulting & Auditing Services, Inc.*, 678 F.Supp.2d 927 (E.D.Mo. 2009) the Court held that the whistleblower exception in HIPAA applies only to an individual showing the information to his or her own attorney for purposes of getting legal advice; parties are not, therefore, protected when they show the records to the attorney for a third-party for potential use in an unrelated case. Nor is a disclosure of PHI to the EEOC in support of an individual's employment-discrimination claim protected, because the EEOC does not enforce laws against fraud on the government. *Vaughn v. Epworth Villa*, 537 F.3d 1147, 1153 (10th Cir. 2008).

Virginia Legal Ethics Opinion 1786

Finally, Virginia LEO 1786 is a must-read for lawyers practicing in this area. The Committee was presented with a hypothetical in which a client brings a collection of documents to his or her lawyers to evaluate a potential case. The client considers the documents to be confidential; the client had access to the documents as part of her work for the target defendant. In formulating its answer, the Committee identified four factors as important ethical considerations: (1) the nature of the documents, (2) the nature of the sources of the information, (3) the method used by the client to gather the information, and (4) whether the attorney directed the client to gather the information. The Committee points out that the attorney can only use the information if Virginia Ethics Rules 3.4(a) (which prohibits a lawyer from obstructing another party's access to evidence and information) and 4.4 (concerning respect for the rights of third-persons) are not violated.

These rules, taken together, make it clear that potential qui tam relators should never remove original documents from their place of employment. Doing so would obstruct the defendants' access to those documents and, in the healthcare context, removing a patient's medical chart certainly shows an utter disregard for the rights of the individual patient and his or her health.

Conclusion

Although lawyers and their whistleblower clients must proceed cautiously and carefully there is nothing magical or mystical about the rules for copying documents. The rules described in this article, together with good legal judgment and a healthy dose of common sense, will provide all of guidance necessary.

Endnotes

1. William E. Kovavic, General Counsel, Fed. Trade Comm'n, *Third Annual Conference on International and Comparative Competition Law: The Transatlantic Antitrust Dialogue: Private Participation in the Enforcement of Public Competition Law* (May 15, 2003), available at http://www.ftc.gov/speeches/other/030514biicl.shtm#N_1_.
2. http://onlinelibrary.wiley.com/doi/10.1111/1475-679X.12177/abstract;jsessionid=59EE62214A051407A49637679914AF14.f03t01

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