



Update on Massachusetts Law of Health Information: ROI, Privacy and Security



The State of the Law and Its Possible Future Direction

MaHIMA Dot Wagg Legislative Seminar
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2014 Has Been an Interesting Year

- Data breaches
- HIPAA changes: patient rights to un-encrypted information
- EHRs and their records held hostage
- Boston Globe v. Steward – a new basis for providers to release information?
- Ebola and the HIPAA public health exception
- Class actions relating to charges for ROI

Data Breach

- Mass. AG's authority reaches into Rhode Island!
 - Women & Infants Hospital to Pay \$150,000 to Settle Data Breach Allegations Involving Massachusetts Patients
 - Hospital Allegedly Failed to Protect Personal Information and Protected Health Information of More Than 12,000 Massachusetts Patients
- Many, many smaller breaches.

EHRs and Meaningful Use

- The original state “meaningful use” law, enacted in 2012, reads as follows:

“The board [of Registration of Medicine] shall require, as a standard of eligibility for licensure, that applicants demonstrate proficiency in the use of computerized physician order entry, e-prescribing, electronic health records and other forms of health information technology, as determined by the board. As used in this section, proficiency, at a minimum shall mean that applicants demonstrate the skills to comply with the “meaningful use” requirements, as set forth in 45 C.F.R. Part 170.”

- Therefore, physicians who apply for a license, or to renew their licenses on or after January 1, 2015 must be able to attest to their having achieved Meaningful Use.
- The Board of Registration in Medicine has issued regulations. Under the proposed rules, physicians may satisfy the requirement by personally achieving Stage 1 Meaningful Use or having a professional relationship with any Massachusetts hospital that has achieved Stage 1 Meaningful Use. Physician must be employed or credentialed by the hospital, or they must have a “contractual relationship” with the hospital.
- Final regulations should be published very soon.

Patient Requests for Non-Encrypted Messages

- HIPAA now allows for patient requests for non-encrypted messages, per 45 C.F.R. § 164.524(c)(ii):
Notwithstanding paragraph (c)(2)(i) of this section, if the protected health information that is the subject of a request for access is maintained in one or more designated record sets electronically and if the individual requests an electronic copy of such information, the covered entity must provide the individual with access to the protected health information in the electronic form and format requested by the individual, if it is readily producible in such form and format; or, if not, in a readable electronic form and format as agreed to by the covered entity and the individual.
- From personal experience, I do not think this issue has hit providers yet.
- When it does hit—are you ready?

Records Held Hostage

- “Billing dispute leads to blocked patient data in Maine,”
September 22, 2014 [Boston Globe](#):

As part of a billing dispute, the vendor for the clinic’s electronic health records — a German corporation with US headquarters in Boston — took the unusual step of blocking the staff’s ability to look up medical histories on its 4,000 patients.

Nurses and physicians could no longer use the system to review diabetes records, blood pressure logs, medication histories, allergy reports, lab results. Nothing.

- As the move to EHRs continues and deepens, more data will be “held” by vendors.
- The inevitable disputes regarding services (and payments) will lead to more situations where patient data is held hostage.

Boston Globe v. Steward: HIPAA Exception for Media Response

- Steward sued to access patient records to defend itself against an expected Boston Globe story.
- Key facts:
 - Patient “John Doe” did not initiate the reporter's investigation; it was a family or extended family member;
 - At some point John Doe met and spoke with the reporter.
- Massachusetts Superior Court judge ruled in favor of Steward:

[W]here the patient has publicly disseminated aspects of medical care or treatment by a provider, the provider is relieved of the privacy restrictions found in 45 C.F.R. § § 164.502 et seq., to the extent that the provider may confirm or deny the particular allegation made by the patient, and may state its opinion as to the adequacy of the medical care provided....

Boston Globe v. Steward: HIPAA Exception for Media Response (cont.)

- Massachusetts Superior Court judge ruled in favor of Steward:

[I]f the newspaper reporter inquires about a particular event, diagnosis, or situation that they know of as a result of the patient's disclosure, the plaintiff is authorized to confirm or deny the event, diagnosis or situation, and may comment broadly about whether the information obtained is complete or incomplete, accurate or inaccurate, and may comment about the adequacy of care provided.

- Is this consistent with HIPAA or is it new law?
 - HIPAA has no waiver provisions.
 - The decision does not cite any law.

- Several exceptions in HIPAA that might apply:
 - TPO
 - Deceased individuals
 - Patient representatives
 - 164 C.F.R. § 164.512:
 - Public health authorities
 - Health oversight
 - Emergencies
 - Research
- Massachusetts law has a similar exception for reporting of “viral hemorrhagic fevers” to public health authorities.

ROI Charges: Class Dismissed

- Class actions continuing challenging the costs of ROI
- Mostly, those class actions are going nowhere, for example:
 - Moran v. IOD
 - Plaintiff alleged IOD overcharged him for postage
 - A settlement was reached “almost immediately” in the amount of \$11,170.70
 - Attorneys’ fees of \$18,000 awarded (request was \$45,000)
- Upcoming MaHIMA webinar, 12 noon on December 10, “Release of Information: Are you charging the right amount for your record requests?”

- Mass. AG press release re: Women's & Infants settlement:
<http://www.mass.gov/ago/news-and-updates/press-releases/2014/2014-07-23-women-infants-hospital.html>
- Massachusetts EHR regulations: <http://www.massmed.org/News-and-Publications/Vital-Signs/New-EHR-Meaningful-Use-Regulations-Strike---Reasonable---Balance/> and <http://www.mass.gov/eohhs/docs/borim/draft-regulations-20140821.pdf>
- Press reports on billing dispute that blocked patient data access:
<http://www.bostonglobe.com/news/nation/2014/09/21/electronic-health-records-vendor-compugroup-blocks-maine-practice-from-accessing-patient-data/6ILpMv78NARDsrdU5O0T9N/story.html>
- Press reports on Boston Globe case:
http://masslawyersweekly.com/files/2014/10/Steward-v.-Globe_summary-of-decision.pdf



Questions?



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