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Mark Your Calendars

2008

May 19 – June 1
Click It or Ticket
National Mobilization [NHTSA]

May 28 – 31
NADCP's 14th Annual Drug Court
Training Conference
St. Louis, MO

June 24 – 26
IPTM Symposium on Alcohol and Drug
Impaired Driving Enforcement
Orlando, FL

July 13 – 16
NDAA 2008 Summer Conference
Tucson, AZ

July 14 – 17
Impaired Driver Course [NTLC]
National Advocacy Center (Columbia, SC)

August 3 – 9
National Stop on Red Week
[Federal Highway Administration]

August 15 – September 1
Drunk Driving: Over the Limit, Under
Arrest
National Crackdown [NHTSA]

September 7 – 10
Governors Highway Safety Association
Annual Meeting
Scottsdale, AZ

September 15 – 18
NDAA Fall Conference

September 21 – 27
Child Passenger Safety Week [NHTSA]

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Between the Lines

DWI Fatalities: The HIPAA Hurdle

By Warren Diepraam
Assisted by Eric Kugler¹

Imagine being asleep on a Saturday morning at 2:30 A.M. A call comes to your home regarding a multiple fatality crash that just occurred. The first responders state that a family of three died in a vehicle that was struck by another car going the wrong way on the highway. They further state that the driver of the at-fault vehicle was found moderately injured about 15 feet away, smelled strongly of alcohol, and was transported to the local hospital with injuries requiring prompt examination or treatment. The investigating officer meets you at the hospital and informs you that the suspect is a habitual drunk driver with a history of fleeing from the police. Knowing that the suspect is a flight risk, you need to find evidence fast and turn to the hospital staff for assistance with the toxicological findings and medical records to support your suspicion that the suspect is impaired. From having worked these cases before, you realize that you will find the suspect's blood alcohol results, driving related admissions, and documentation relating to driver injuries. The hospital staff in this hypothetical situation kindly responds by referring you to HIPAA and opining that they are not allowed to release private medical information because the federal statute trumps your state laws. Fortunately, this hurdle should not be an impediment to your investigation or the exigent filing of charges. It is simply a matter of being prepared and of making the request by using the benefits of HIPAA to your advantage.

In response to concerns over privacy, health, and insurance related concerns, the Health Insurance Portability and Accountability Act, more commonly known by the acronym HIPAA, was enacted in 1996.² A cursory reading of the statute reveals that its goals are meritorious and not intended to prohibit legitimate law enforcement inquiries into the commission of crimes. In general terms, HIPAA contains seven sections that cover everything from applicability and definitions,³ uses and disclosures of protected health information,⁴ to transmission requirements and compliance dates.⁵ However, the section that will be applicable, and the section covered by this article that many in the healthcare industry are unfamiliar with, is the section

relating to uses and disclosures for which individual authorization or an opportunity to object are not required.⁶ This disclosure section should be thoroughly analyzed and followed to avoid any trial or appellate entanglements that may result in an unnecessarily granted defense motion to suppress.

In the above case, the police and the prosecutor feel that there is a potential danger to the suspect and the public due to the intoxicated state of the individual and the risk associated with the subject's potential for flight. Additionally, they have a reasonable belief that significant evidence will be found that will establish probable cause for an arrest. Fortunately, a hospital or emergency room worker, or paramedic may provide relevant medical information to law enforcement personnel without the written authorization of the suspect or target facing a criminal investigation. They may disclose medical information as required by law and the disclosure is limited to the relevant requirements of the law.⁷ What is significant in this opening preamble of sorts is that the wording does not specifically define which law. Therefore, as long as the requirements of HIPAA are met, it appears that the word "law" does not preclude state law as authorizing release of information.⁸

The most common exception to non-disclosure is the law enforcement exception.⁹ This section lists six exceptions to non-disclosure. However, two exceptions to non-disclosure will most likely apply in the majority of these cases, namely those disclosures that are required pursuant to process / required by law in the jurisdiction or administrative requests. While there are some limitations in this section, they are not intended to be seen as a hindrance to police officers or prosecutors. A hospital or other covered provider may reveal protected information to a law enforcement investigator pursuant to process or as otherwise required by law. The section does not distinguish between federal or state law; therefore the wording implies that disclosure should be covered under HIPAA even when mandated only by state law.

Additionally, there is not any significant requirement for how the law enforcement request is to be made. Although, an oral

request by a police officer for toxicology results does not, on its face, appear to be prohibited by this section of HIPAA, the better practice is to make the demand in writing with some form of state authorized process, including court orders, warrants, grand jury subpoenas, regular subpoenas, a summons issued by a judicial officer, or an administrative request where authorized by law.¹⁰ This section will cover most of the law enforcement requests for information regarding crashes that occur on our roads.

There are helpful approaches to make disclosure more likely. If making the request for health information in state mandated written form, the hospital will appreciate a HIPAA letter and, if authorized by state law, a general court order. The letter should cover the requirements contained in the relevant section of HIPAA.¹¹ For example, a HIPAA letter should state that the request is relevant and material to a legitimate law enforcement inquiry, is specific and limited in its scope to the extent reasonably practicable in light of the purpose for which the information is sought, and that information could not reasonably be used.¹² Providing a citation to the hospital in the HIPAA letter will also assist their attorneys in reviewing and approving the request. A court order, although not necessary when a subpoena or warrant is issued, will also help to alleviate the hospital's reluctance to comply. Any prosecutor or police officer that regularly responds to the scene of this type of case should keep a standard form court order and subpoena handy.

There are other exceptions in HIPAA that allow for quick and easy access to information to police or prosecutors investigating this sort of a case. One exception authorizes disclosure of limited identifying information (name, address, social security number, type of injury, and a few other distinguishing characteristics) to law enforcement for the purpose of identifying or locating a suspect.¹³ While this specific exception does not allow for release of toxicology results and may not reveal all evidence needed, it will be helpful in locating suspects.

In conclusion, the expedient discovery of narrowly tailored information in a criminal investigation relating to impairment or traffic injuries should not be slowed down by HIPAA. The goals of HIPAA are to facilitate better privacy

protections and management of patient information as it relates to medical staff and the health industry. The federal government recognized that there would be many situations when law enforcement will legitimately require quick and prompt access to medical information and created several exceptions to the HIPAA rules. By being prepared and having the appropriate documents available for quick use, police and prosecutors will be able to perform their duties promptly. In the above scenario, the discovery of a blood alcohol content of 0.18, statements by the suspect to a nurse that he was the driver of the motor vehicle involved in the head-on crash, and seat-belt injuries consistent with having recently driven a motor vehicle will allow for the quick apprehension and prosecution of the suspect.

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² Health Insurance Portability and Accountability Act of 1996: 42 U.S.C. Section 1320D et seq.

³ 45 C.F.R. sections 164.500 and 501

⁴ 45 C.F.R. section 164.502

⁵ 45 C.F.R. sections 164.532 and 534.

⁶ 45 C.F.R. section 164.512

⁷ 45 C.F.R. section 164.512 (a) (1)

⁸ This article does not cover relevant state laws. However, some states provide greater privacy protections in individual medical records than others. Many states have evidentiary rules that eradicate or curtail a suspect's ability to claim a privacy interest in medical records or communications between a patient and a doctor. Therefore, it would be wise to research your state's laws to ensure that they don't become your hurdle to this information.

⁹ *Id* at section (f)

¹⁰ *Id* at section (f) (1) (ii) (A)-(C)

¹¹ *Id* at section (f) (1)-(6)

¹² These are the requirements for a law enforcement request made administratively under section (f) (1) (ii) (C). Therefore, they do not apply to other requests under this section, but it may facilitate obtaining the requested information by using this language.

¹³ 45 C.F.R. Section 164.512 (f) (2)

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