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### On The Cover

From among the many notable attorneys whose passing we mourn, we selected a photo of Charles Shaddox, as we did the photo of Pat Maloney, Sr. in the last issue, to focus on the multi-faceted nature of the San Antonio lawyer. This photo originated as a dual portrait of Shaddox with his long-time partner John Compere riding on his ranch near Bandera. Hugh McWilliams transformed the original photo into our stunning cover.



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# DOCTORS AND LAWYERS JOIN TO CULL THE HERD OF HIPAA FORMS

By Jeffrey C. Anderson

Things happen fast in a digital world. In a fraction of a second, an individual's entire identifiable healthcare information can be disseminated to millions of people through the miracle of the worldwide web. Instant access to patient healthcare information has advanced the art of medicine and undoubtedly decreased patient morbidity and mortality. But the potential for abuse of this information by insurance companies, HMO's, employers, governmental entities, and others has raised concern for individual security and privacy, which required some control on access to an individual's protected medical information.

Thus was born the Health Insurance Portability and Accountability Act of 1996, or "HIPAA." Its objective is to improve the access, portability, and continuity of medical insurance coverage, while providing patients with control over their own personal "protected health information," or "PHI." HIPAA, now codified at 45 CFR §§ 164.502(b), *et seq.*, provides control for patients regarding how their personal information is used by their healthcare insurers or healthcare providers. At the same time, it gives those patients greater access to their own medical records. The privacy provisions under HIPAA apply to "covered entities," which are defined as individual or group healthcare plans, prescription drug users, HMO's, Medicare, Medicaid, and long-term healthcare providers. HIPAA also covers "providers of services" that include hospitals, physicians, dentists, and

other healthcare practitioners.

While the privacy provisions of HIPAA did not differ greatly from pre-existing state statutes requiring that a patient's written consent be obtained before disseminating protected health information, the criminal and civil penalties for noncompliance under HIPAA are severe to the point of being draconian. Should a "covered person or entity" fail to comply with this privacy rule under provisions of HIPAA, the Department of Health and Human Services may impose a civil penalty of \$100 per violation, with an aggregate of \$25,000 per annum. Any person found knowingly disclosing individually identifiable health information in violation of the privacy rule may face a criminal penalty of up to ten years in prison, and the offending party could be fined up to \$250,000 if he or she intended to profit from the transfer of the individually identified health information. Criminal sanctions are enforced by the United States Department of Justice.

Passage of HIPAA in 1996 certainly got the attention of healthcare providers, HMO's, and medical insurers. It even got the attention of individuals considered "business associates" of healthcare providers, including lawyers, accountants, consultants, managers, and financial advisors working with or at the direction of healthcare providers. Those individuals or entities are also held accountable under the civil and criminal penalty provisions of the Act. The medical community's initial response to the privacy provisions of HIPAA was

paradoxical: For a time there was a significant reduction in information sharing between healthcare providers and their business associates out of fear of violating the privacy provisions of the Act. Numerous legal opinions were sought and seminars on HIPAA were conducted. Practitioners and business associates were advised that the privacy provisions of HIPAA applied to a patient's protected health information in any form, including written, verbal, or electronic communications. This information includes the patient's name, address, social security number, and other identifying data.

The Act and the privacy rule, for some reason, did not include any standard HIPAA-compliant authorization form. Without a standard authorization form for guidance, healthcare providers or "covered entities" were left to create their own HIPAA-compliant authorization. The failure to create a standard HIPAA-compliant authorization form predictably resulted in hundreds of unique medical authorizations in Bexar County alone. The end result was that healthcare providers and other covered entities routinely rejected all authorizations not using their own uniquely designed document.

Therein lay the problem. Doctors, hospitals, healthcare institutions, or governmental entities created their own HIPAA-compliant authorization and refused to accept authorizations from other healthcare providers, covered persons, or business associates. In virtually every instance, the authoriza-

tions differed in form, but not in substance or content. Nevertheless, the fear generated by criminal penalties, and the horror stories presented at medical and legal seminars, caused healthcare providers to reject signed medical authorizations that had not been approved by their own lawyers or legal departments.

For the most part, fear of civil or criminal penalties for noncompliance with the privacy provisions of the HIPAA statute were exaggerated and unfounded. There appear to be no reported cases in Texas where a healthcare provider was convicted of criminal conduct or found civilly liable for providing medical information after having received a written authorization to do so from a patient or that patient's legal guardian or representative. Simply put, the disclosure of a patient's medical information by a healthcare provider, which is done with a good-faith belief regarding the adequacy of the signed medical authorization, has never resulted in civil or criminal liability in the State of Texas.

Currently, the problems resulting from the numerous uniquely designed medical authorizations still substantially slow the exchange of medical information between and among healthcare providers, insurance companies, lawyers, or other business associates. These one-of-a-kind authorizations delay the exchange of medical and billing information between and among doctors, healthcare institutions, HMO's, insurance companies, and governmental entities. These individualized medical authorizations delay information gathering by lawyers on behalf of their clients and increase the litigation expenses and court costs associated with the prosecution or defense in both civil and criminal litigation.

The problem created by these uniquely designed HIPAA-compliant authorizations was addressed earlier this year by members of the Medical/Legal Liaison Committee,

which is made up of doctors from the Bexar County Medical Society and lawyers from the San Antonio Bar Association who meet several times a year for the purpose of openly exchanging information and resolving problems that may arise between the two professions. The problem presented the committee, by the numerous uniquely designed HIPAA-compliant authorizations, was one such problem.

The solution is obvious. Since the statute failed to include a standard authorization form, the doctors and lawyers of the committee, working together, created a HIPAA-compliant medical authorization which the committee felt would satisfy the requirements of the statute, and which could be approved for use by both the San Antonio Bar Association and the Bexar County Medical Society. A subcommittee was appointed; draft documents were prepared; amendments and changes were made; and two suggested standard form authorizations were approved and voted out of committee. One of the authorizations is intended for the use of physicians or healthcare providers. The second authorization is intended for use by hospitals or healthcare facilities. The committee felt that two different medical authorizations

were needed because of the unique types of records and materials retained by physicians and hospitals. These standard HIPAA-compliant authorizations were submitted to the San Antonio Bar Association and to the Bexar County Medical Society. Both organizations approved the suggested standard form HIPAA-compliant authorizations for use by healthcare providers in this community. Copies of suggested forms are appended to this article and may also be found at the San Antonio Bar Association and Bexar County Medical Society's websites. ✪



*Jeffrey C. Anderson has been a trial lawyer specializing in medical negligence cases for over 25 years. Board certified in personal injury trial law by the Texas Board of Legal Specialization, board certified as a*

*civil trial advocate by the national board of trial advocacy, and an associate member of the American board of trial advocates, he has served on the medical/legal liaison committee for over 20 years, including as co-chairman of the committee on three occasions.*

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**AUTHORIZATION TO USE AND DISCLOSE PROTECTED HEALTH INFORMATION  
IN ACCORDANCE WITH 45 CFR §164.508-HIPAA  
Approved for use by the San Antonio Bar Association and Bexar County Medical Society**

I hereby authorize \_\_\_\_\_ to disclose my Protected Health Information (PHI) as contained in the records maintained by \_\_\_\_\_, including but not limited to highly confidential information concerning communicable diseases, HIV, AIDS, *psychiatric*, chemical or alcohol dependency, laboratory test results, or any other medical treatment. **This authorization does/does not [please circle selection] include psychotherapy notes.**

**PATIENT IDENTIFICATION INFORMATION**

Account or medical record number \_\_\_\_\_

Patient's name \_\_\_\_\_  
Last First Middle

Social Security No. \_\_\_\_\_ Date of Birth \_\_\_\_\_

Name and address of recipient: \_\_\_\_\_

The release of the materials listed is being authorized for use as evidence in a legal proceeding involving this patient. You understand that such information cannot be released without the patient's specific consent. **You are authorized to comply with an original or copy of this document.**

**DESCRIPTION OF INFORMATION TO BE RELEASED**

The matters to be released pursuant to this authorization are as follows: any and all medical or reports, x-rays (if requested), diagnostic studies, laboratory slides (if requested), clinical abstracts, histories, charts, admission sheet, system history or system review, summary sheet, medical service sheet, nurse's notes, discharge notes, chronological survey, consultant reports, any patient records not located in the medical record library (such as emergency room records), any *counseling* records, and any correspondence, including any handwritten or typed notes of or from any nurse, doctor, physician, surgeon, or any other person, and any other information, documents and opinions relevant to past, present and future, physical, mental and/or emotional conditions, treatment, or hospitalization.

This authorization includes the release of documents in your possession whether or not created in your office or by another healthcare provider.

I understand that this authorization will expire on \_\_\_\_\_ or 180 days from the date of this signed authorization, whichever comes first.  
Date

I understand that the information released in response to this authorization is subject to disclosure to other parties, and that any other person, firm or entity that releases materials pursuant to this authorization is released from any liability that might otherwise result from the release of this information.

I understand that I have a right to revoke this authorization at any time. I understand that if I revoke this authorization I must do so in writing and present my written revocation to the physician or appropriate healthcare provider. I understand that the revocation will not apply to information that has already been released in response to this authorization.

I understand authorization for the use or disclosure of the information identified above is voluntary. I need not sign this form to ensure healthcare treatment. I further understand that my healthcare and the payment of my healthcare will not be affected if I do not sign this form.

You are authorized to comply with an original or copy of this authorization dated on this the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Patient or patient's - representative (including their relationship to patient)  
or patient's guardian (if the patient is a minor or incapacitated adult)

\_\_\_\_\_  
Date

HOSPITAL

AUTHORIZATION TO USE AND DISCLOSE PROTECTED HEALTH INFORMATION
IN ACCORDANCE WITH 45 CFR §164.508-HIPAA

Approved for use by the San Antonio Bar Association and Bexar County Medical Society

I hereby authorize \_\_\_\_\_ to disclose my Protected Health Information (PHI) as contained in the records maintained by \_\_\_\_\_, including but not limited to highly confidential information concerning communicable diseases, HIV, AIDS, psychiatric, chemical or alcohol dependency, laboratory test results, or any other medical treatment. This authorization does/does not [circle selection] include psychotherapy notes.

PATIENT IDENTIFICATION INFORMATION

Account or medical record number \_\_\_\_\_

Patient's name \_\_\_\_\_
Last First Middle

Social Security No. \_\_\_\_\_ Date of Birth \_\_\_\_\_

Name and address of recipient: \_\_\_\_\_

The release of the matters listed is being authorized for use as evidence in a legal proceeding involving this patient. You understand that such information cannot be released without the specific consent. You are authorized to comply with an original or copy of this document.

DESCRIPTION OF INFORMATION TO BE RELEASED

Please initial the materials to be released pursuant to this authorization:

- any and all medical records/reports
x-rays (if requested)
diagnostic studies
laboratory slides (if requested)
clinical abstracts
histories
any correspondence, including any hand-written or typed notes of or from any nurse, doctor, physician, surgeon, or any other person
system history or system review
summary sheet
medical service sheet
nurses notes
discharge notes
chronological survey
any other information, documents and opinions relevant to past, present and future, physical, mental and/or emotional conditions, treatment, or hospitalization
any counseling records
admission sheet
charts
consultant reports
any patient records not located in the medical record library (such as emergency room records)

This authorization includes the release of documents in your possession whether or not created in your office or by another healthcare provider.

I understand that this authorization will expire on \_\_\_\_\_ or 180 days from the date of this signed authorization.
Date

I understand that the information released in response to this authorization is subject to disclosure to other parties, and that any other person, firm or entity that releases material pursuant to this authorization is released from any liability that might otherwise result from the release of this information.

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You are authorized to comply with an original or copy of this authorization dated on this the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Patient, the patient's personal representative or patient's guardian (if the patient is a minor or incapacitated adult)

\_\_\_\_\_  
Date