The Ins and Outs of Responding to Subpoenas and Warrants for Protected Health Information in Michigan

A Whitepaper on Federal and State Privacy Laws

By: Jennifer L. Colagiovanni, *Law Offices of Fehn Robichaud & Colagiovanni PLLC*
Amy K. Fehn, *Law Offices of Fehn Robichaud & Colagiovanni PLLC*
Julie M. Markgraf, *North Ottawa Community Health System*
Rebecca Robichaud, *Law Offices of Fehn Robichaud & Colagiovanni PLLC*

Editors: Monica P. Navarro, Cooley Law School; Vezina Law, PLC
Mercedes Varasteh Dordeski, *Foley & Mansfield, PLLP*

I. Introduction

Attorneys must frequently advise clients on the appropriate response to requests for medical records or testimony from health professionals. Requests may come in the form of subpoenas, discovery requests, warrants, law enforcement requests and other similar methods. Prosecuting attorneys and judicial officers who handle cases involving health care information also have a need to understand the relevant law.

Since most health care providers and businesses that support them are either covered entities or business associates subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the HIPAA Privacy Rule as well as Michigan law must be taken into consideration. This paper seeks to address the legal considerations of responding to requests for patient information by way of a subpoena, warrant or other legal process.

This paper addresses the Michigan Court Rules and Michigan law as they relate to the discovery of protected health information or “PHI”, as well as the requirements

and limitations on disclosure imposed by the HIPAA Privacy Rule. The paper will further discuss the interplay between HIPAA and Michigan law by discussing the general concept of HIPAA Preemption, Michigan's physician-patient privilege[1] and recent court cases. It will end with a discussion about the practical implications of responding to a subpoena or warrant for medical information in civil and criminal actions, and the potential consequences for impermissibly disclosing medical information. This paper is intended to serve as a preliminary research tool for attorneys dealing with a subpoena or warrant for patient information in Michigan. The paper should be viewed as a first-tier resource to obtain a perspective on the release of patient information with respect to Michigan law and HIPAA; it is not intended to be a treatise, nor should it be used as the sole basis for making critical business or legal decisions regarding release of patient information. The paper does not constitute, and may not be relied upon, as legal advice.

II. **HIPAA**

a. "Covered Entities" and "Business Associates"

HIPAA's Privacy, Security and Breach Notification Rules apply to all "covered entities" and "business associates." A covered entity includes health care providers who transmit any health information electronically (directly or indirectly through the use of a clearinghouse or billing company).[2] Thus, any provider who bills insurance or other

[1] Other privileges may also apply; they are outside the scope of this whitepaper, but are important to consider.
[2] 45 CFR 160.103.

third party payors will generally be considered "covered entities." Health plans and clearinghouses are also "covered entities."

A business associate generally includes any person or entity who "creates, receives, maintains, or transmits protected health information" on behalf of a covered entity.[3] Certain categories of services are specifically mentioned in the HIPAA Privacy Rule as creating a business associate relationship, such as claims processing or administration, billing, consulting, data aggregation, and management or administrative services.[4] Further, any entity that provides data transmission services and requires access on a "routine basis" to protected health information is considered a business associate, as well as any entity that stores protected health information for a covered entity.[5] Any subcontractor of a business associate is also considered a business associate of the covered entity. This is often referred to as a "downstream business associate."[6]

b. "Protected Health Information (PHI)"

The HIPAA Privacy Rule took effect in 2003 and has specific requirements related to the permissible use and disclosure of protected health information ("PHI").[7] Subject to certain exceptions, the Privacy Rule requires a covered entity to have a valid authorization in order to disclose PHI. PHI is generally any information that can be used

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[3] *Id.*
[4] *Id*. Other services and relationships specifically mentioned include claims processing or administration, data analysis, processing or administration, utilization review, quality assurance, patient safety activities listed at 42 CFR 3.20, billing, benefit management, practice management, and repricing. Other specifically mentioned services include legal, actuarial, accounting, consulting, data aggregation, management, administrative, accreditation, or financial services. Health Information Organizations and e-prescribing Gateways are also specifically mentioned.
[5] *Id.*
[6] Modifications to the HIPAA Privacy, Security, Enforcement, and Breach Notification Rules, 78 Fed Reg 5573 (Jan. 25, 2013).
[7] 45 CFR 164.500 *et seq*.

to identify an individual and relates to the "past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual; or the past, present or future payment for the provision of health care . . . ."[8] The definition of "protected health information" is quite broad, and includes any "individually identifiable health information."[9] The result is that almost all patient information is considered "protected health information."

The following is a list of all of the "identifiers" that are considered "protected health information" pursuant to the HIPAA regulations:

1. Names
2. All geographic subdivisions smaller than a State, including street address, city, county, precinct, zip code, and their equivalent geocodes. In certain densely populated geographic areas, the first three digits of the zip code will not be considered an identifier.
3. All elements of date, except year, including birth date, admission date, discharge date, date of death. For patients over 89, the year of birth is considered an identifier.
4. Telephone numbers
5. Fax numbers
6. Email addresses
7. Social Security Numbers
8. Medical Record Numbers
9. Health plan beneficiary numbers

[8] 45 CFR 160.103.
[9] 45 CFR 160.103

10. Account numbers
11. Certificate/license numbers
12. Vehicle identifiers and serial numbers, including license plates
13. Device identifiers and serial numbers
14. URLs
15. Internet Protocol (IP) address numbers
16. Biometric identifiers, including finger or voice prints
17. Full face photographic images and any comparable images and
18. Any other unique identifying number, characteristic or code.
19. Any information for which the covered entity has actual knowledge that it could be used alone or in combination with other information to identify an individual who is the subject of the information.[10]

Derivatives of identifiers, such as patient initials or the last four digits of social security numbers are also considered identifiers.[11] People often assume that innocuous items in this list such as a patient's first name, initials, or zip code on its own without any other health care information should not be protected, but each item is PHI, even if it is on its own.

c. HIPAA Preemption

[10] 45 CFR 164.514(b)(2)(i).
[11] Guidance Regarding Methods for De-Identification of Protected Health Information in Accordance with the Health Insurance Portability and Accountability Act (HIPAA) available at: http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/De-identification/guidance.html (accessed 4/28/2014).

HIPAA is a unique federal law in that it allows for state law to supersede HIPAA if the state law provides greater privacy protection of PHI.[12] Wherever possible, both HIPAA and state law should be followed. However, if HIPAA standards or requirements are contrary to a provision of state law, meaning that compliance with both is impossible, HIPAA will generally preempt state law.[13] But, a state law that is more stringent than the requirements or standards of HIPAA will not be preempted by HIPAA.[14] "More stringent" is expressly defined to include a state law that offers "greater privacy protections for the individual who is the subject of the individually identifiable health information."[15] Thus, HIPAA preemption must be determined on a case-by-case basis after considering whether it is possible to comply with both HIPAA and state law and if not, whether state law provides greater privacy protection or a greater right of access or amendment to individuals.

d. HIPAA Authorizations for Disclosure of PHI

Uses and disclosures that are not necessary to carry out treatment, payment or healthcare operations or that do not meet one of the exceptions set forth in the HIPAA regulations require a HIPAA-compliant authorization. In order to be HIPAA-compliant, the authorization must contain all of the following elements:[16]

1. A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion;

[12] 45 CFR 160.203.
[13] 45 CFR 160.203.
[14] *Id.*
[15] 45 CFR 160.202.
[16] 45 CFR 164.508.

2. The name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure;
3. The name or other specific identification of the person(s) or class of persons, to whom the covered entity may make the requested use or disclosure;
4. A description of each purpose of the requested use or disclosure, which can be "at the request of the individual" if applicable[17]; and
5. An expiration date or expiration event that relates to the individual or the purpose of the use or disclosure.

The authorization must also be dated and signed by the patient, or the patient's "personal representative".[18] If the authorization is signed by the patient's "personal representative", a description of the personal representative's authority must be included.[19] For example, if a parent signs on behalf of a minor, the authorization must include the word "parent" beside the signature. (For further discussion of personal representatives, see Section VI.d.)

In addition, the authorization must include a statement letting the patient know that he or she has the right to revoke the authorization in writing, including the exceptions to the right to revoke and a description of how to revoke the authorization.

[17] Note that the Michigan Medical Records Access Act, MCL 333.26267, prohibits a health care provider from inquiring into the purpose of the request when the request is made by the patient himself or his authorized representative. Because the HIPAA Privacy Rule at 45 CFR 164.508(c)(1)(iv) allows for the purpose to be stated as "at the request of the individual", compliance with both laws can be met by health care providers ensuring that their standard authorization forms used for requests by or on behalf of the patient do not inquire into the purpose of the request.

[18] *Id.*

[19] *Id.*

To the extent that this information is included in the covered entity's Notice of Privacy Practices, a reference back to the Notice of Privacy Practices is permissible.[20]

The authorization must also include a statement that treatment will not be conditioned on the patient signing the authorization or the consequences of refusing to sign.[21] Additionally, the authorization must include a statement that once the information is disclosed as authorized it is no longer protected by HIPAA and may be re-disclosed by the recipient.[22] The authorization must be written in plain language and a signed copy must be provided to the patient.[23]

e. HIPAA Disclosures Without Patient Authorization

The HIPAA Privacy Rule allows for the use and disclosure of PHI without a written authorization from the individual in certain circumstances.[24] While HIPAA has many exceptions, this paper will focus on those exceptions that relate to discovery requests, warrants, and subpoenas.

(i) Required by Law

The HIPAA Privacy Rule at 45 CFR 164.512(a) permits disclosures that are "required by law." A use or disclosure is "required by law" when there is a mandate contained in the law that compels the entity to make the use or disclosure of protected

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[20] *Id.*
[21] *Id.*
[22] *Id.* The regulations require the statement to clearly put the individual providing the authorization on notice that the information may lose HIPAA privacy protections; for most circumstances involving subpoenas, the information is disclosed to a third party who is not required to follow the HIPAA privacy requirements.
[23] *Id.* Note that if the authorization is being executed at the request of a patient, the patient does not have to be provided with a copy. In addition, the Michigan Medical Records Access Act requires that a request for records be signed and dated not more than 60 days prior to being submitted to the health care provider. MCL 333.26265(2).
[24] *See* Section IV - Physician-Patient Privilege. As discussed in greater detail below, the requirements of the Michigan physician-patient privilege may be deemed more stringent than HIPAA and prevent disclosure.

health information that is enforceable in a court of law.[25] The definition of "required by law" includes, without limitation, court orders and court-ordered warrants, subpoenas or summons issued by a court, grand jury, governmental or tribal inspector general or administrative body authorized to require the production of information.[26] Required by law can also include a civil or authorized investigative demand.[27]

(ii) Disclosures for Judicial or Administrative Proceedings

45 CFR 164.512 (e) sets forth the circumstances under which a covered entity can also disclose protected health information in the context of a judicial or administrative proceeding.[28]

Contrary to the Michigan Court rules, as discussed in more detail below, a subpoena signed by an attorney does not function as a court order for purposes of HIPAA. The Office of Civil Rights, the federal agency responsible for enforcement of HIPAA Privacy and Security Rules, has issued guidance which specifically provides that, "[a] subpoena issued by someone other than a judge, such as a court clerk or an attorney in a case, is different from a court order. A covered provider or plan may disclose information to a party issuing a subpoena only if the notification requirements of the Privacy Rule are met."[29]

If a subpoena is not accompanied by a court order, the HIPAA regulations allow a covered entity to make the disclosure if it receives "satisfactory assurance" from the

[25] 45 CFR 164.103
[26] Id.
[27] Id.
[28] *See* 45 CFR 164.512(e).
[29] Office of Civil Rights, Health Information Privacy, Understanding HIPAA Privacy for Consumers, http://www.hhs.gov/ocr/privacy/hipaa/understanding/consumers/courtorders.html (last accessed April 16, 2014).

requesting individual that reasonable efforts have been made to give the subject of the PHI notice of the request.[30] "Satisfactory assurance" is defined as a written statement and documentation of a good-faith attempt to provide written notice to the individual.[31] The written notice to the subject of the PHI must include sufficient information about the litigation or administrative proceeding to permit the subject of the PHI to raise objections.[32] It is considered to be "satisfactory assurance" if the timeframe for the individual to raise objections has lapsed, and: (1) no objections were filed, or (2) any objections that were filed have been resolved.[33]

Alternatively, the party requesting the PHI may provide satisfactory assurance by providing a written statement and documentation demonstrating that the parties have mutually agreed to a qualified protective order and have presented it to the court, or documentation showing that the party requesting the PHI has requested a qualified protective order from the court.[34] A qualified protective order is expressly defined by the regulations to include a court (or administrative tribunal) order or stipulation of the parties to the dispute that prohibits the parties from disclosing the PHI for any purpose other than that for which it was requested in the litigation or legal proceeding and requires that the information be returned to the covered entity or destroyed at the end of the proceeding.[35]

Despite the detailed requirements for providing sufficient notice or obtaining a qualified protective order, HIPAA permits a covered entity to disclose PHI in response to

[30] 45 CFR 164.512(e)(1)(ii)(A).
[31] 45 CFR 164.512(e)(1)(iii).
[32] 45 CFR 164.512(e)(1)(iii).
[33] 45 CFR 164.512(e)(1)(iii)(C).
[34] 45 CFR 164.512(e)(1)(ii)(B).
[35] 45 CFR 164.512(e)(1)(v).

a subpoena or discovery request without receiving satisfactory assurance from the requesting party if the *covered entity* itself makes reasonable efforts to provide notice to the individual or seeks a qualified protective order.[36] The regulations, therefore, give the covered entity *the option* of directly providing notice to the subject of the PHI or seeking a qualified protective order, but the covered entity is not required to do so.

iii. Disclosures For Law Enforcement Purposes

The HIPAA Privacy Rule also permits disclosures of PHI for law enforcement purposes in compliance with a court order, court-ordered warrant, subpoena or summons issued by a judicial officer (e.g. a judge or magistrate), or a grand jury subpoena.[37] The Privacy Rule provides that such disclosures may be made to a law enforcement official (e.g., police officer or prosecuting attorney)[38] if the information authorized by the judicial officer is relevant and material to a legitimate law enforcement inquiry, the request is specific and limited in scope, and de-identified information cannot reasonably be used. The disclosure must be limited to the relevant requirements of the order or subpoena.[39]

III. Michigan Court Rules and Related Michigan Laws

The Michigan Court Rules provide for relatively broad discovery; generally parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in a pending action.[40] Significantly, the protection of

[36] 45 CFR 164.512(e)(1)(vi). (Emphasis added).
[37] 45 CFR 164.512(f)(1). This section also includes disclosures in compliance with an administrative request, including an administrative subpoena or summons, a civil or authorized investigative demand, or similar process.
[38] 45 CFR 164.103.
[39] 45 CFR 164.512(f)(1).
[40] MCR 2.302(B).

privileged information supersedes even Michigan's liberal discovery principles[41] and, as discussed below, is primarily more stringent than HIPAA.

a. Michigan Court Rules for Civil Procedure

With regard to requests for medical records and other documents containing PHI, the methods and limits on discovery differ for parties and non-parties. When the mental or physical condition of a party is in controversy, the medical condition is subject to discovery under the Michigan Court Rules if it is otherwise discoverable and a *valid privilege* is not asserted.[42] This includes medical records in the possession or control of a physician, hospital, or other custodian.[43]

For example, upon receiving a discovery request for production of medical information from the defendant in a personal injury or medical malpractice action, the plaintiff's attorney typically provides authorizations signed by the plaintiff that will allow the defendant to obtain the requested medical information from physicians, hospitals or other providers in possession of the information.[44] The Court Rules specify that authorizations provided by a party in response to a discovery request should be in "the form approved by the state court administrator."[45] SCAO form MC315 is the authorization form approved by the state court administrator and is also HIPAA-compliant.

The requesting party (or in many cases a copy service employed on its behalf) would then issue a subpoena together with the authorization provided by the plaintiff to

[41] *Meier v Awaad,* 299 Mich App 655, 666; 832 NW2d 251 (2013).
[42] MCR 2.314(A)(1).
[43] MCR 2.314(A)(2).
[44] MCR 2.314(C)(1)(d).
[45] MCR 2.314(c)(1)(d).

request the medical record information directly from the healthcare provider. To the extent that an authorization form other than SCAO form MC315 is provided, health care providers should review the authorization to confirm that it complies with HIPAA and the Michigan Medical Records Access Act.

A subpoena may also direct a party or a witness to appear to testify.[46] The Michigan Court Rules further state that a subpoena that is signed by an attorney of record in an action has the force and effect of an order signed by the judge of that court.[47] This directly contradicts the guidance noted above from OCR that a subpoena signed by an attorney or clerk is not the same as an order signed by a judge, which is a more stringent protection of privacy. Accordingly, federal law controls.

b. Michigan Laws and Rules for Criminal Procedure

Michigan law provides for the issuance of an investigative subpoena in connection with an investigation into the commission of a felony. Pursuant to MCL 767A.2, a prosecuting attorney may petition the court for authorization to use an investigative subpoena. Once authorized by the court, the prosecuting attorney may issue an investigative subpoena directing an individual to produce records or documents.[48] The investigative subpoena is required to describe the records and documents requested with sufficient definiteness so the records can be fairly identified by the recipient.[49] The subpoena is also required to provide notice that the individual

[46] MCR 2.506(A)(1).
[47] MCR 2.506(B)(1).
[48] MCL 767A.3.
[49] MCL 767A.4(1)(e).

may object to the subpoena or file reasons for non-compliance with the prosecuting attorney in advance of the time in which the disclosure was to be made.[50]

MCL 767A.6 allows for the filing of a motion to compel if a person refuses to answer or files objections to an investigative subpoena. Significantly, however, subsection 5 of this section provides that the court "shall not compel" a person to answer or produce documents if doing so would violate a statutory privilege or constitutional right. This includes the Michigan physician-patient privilege, which is discussed at length in Section IV below.[51]

In addition, the Michigan Court Rules for criminal procedure provide that there is no right to discover information or evidence that is protected from disclosure by statute or privilege, including information or evidence protected by a defendant's right against self-incrimination. However, an exception exists if a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense. In this case, the trial court shall conduct an *in camera* inspection of the records. Records disclosed shall remain in the exclusive custody of counsel for the parties, shall be used only for the limited purpose approved by the court, and shall be subject to such other terms and conditions as the court may provide. [52]

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[50] MCL 767A.4(1)(f).
[51] The *Investigative Subpoena Manual* published by the Michigan Attorney General discusses MCL 767A.6(5) and, in citing to *People v White* 256 Mich App 39; 662 NW 2d 69 (2003) advises that, "This provision …extends to statutory privileges such as the attorney-client, physician-client, accountant client, and investigator-client privileges."
[52] MCR 6.201(C).

Again, the law and rules covering investigative subpoenas require a close look at both HIPAA and Michigan physician-patient privilege law, which is discussed below in detail in Section VI.

IV. Michigan's Statutory Physician-Patient Privilege

The HIPAA Privacy Rule's process for disclosures of PHI in response to subpoenas or warrants must be read in light of the limitations imposed by the Michigan Court Rules and Michigan law. In particular, Michigan's statutory physician-patient privilege will significantly impact the analysis. The Michigan physician-patient privilege, MCL 600.2157, prohibits a physician from disclosing medical information acquired in the treatment of a patient.[53] The statute expressly provides in part:

> Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon.[54]

In contrast to HIPAA, the physician-patient privilege does not include an exception for disclosures for law enforcement purposes and judicial proceedings. The privilege is deemed to belong to the patient and the patient must waive the privilege either through action or written authorization in order for the disclosure of information to be made.[55] The privilege does not need to be invoked expressly or implicitly by the patient, but instead arises by operation of law.[56]

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[53] MCL 600.2157.
[54] MCL 600.2157.
[55] *Steiner v Bonanni*, 292 Mich App 265, 271-273; 807 NW2d 902 (2011). The purpose of the privilege is to protect the confidential nature of the physician-patient relationship and encourage patients' complete disclosure of their medical history and present medical concerns. *See also Popp v Crittenton Hospital*, 181

a. Caselaw related to the physician-patient privilege

Michigan courts have strictly applied the physician-patient privilege in an effort to protect patient confidentiality. This is exemplified in the *Meier* case discussed in Section VI.c below and echoed in the criminal case of *People v. Doers*.[57] In *People v Doers*, the Defendant, Doers, was appealing a conviction for criminal sexual conduct against someone 13 years old or younger.[58] The victim was his adopted daughter. At trial the prosecution introduced evidence of the Defendant's vasectomy because it was relevant to the semen found on sheets as well as statements the Defendant allegedly made to the victim regarding his inability to impregnate her. Importantly, the Court held that because of the physician-patient privilege, the testimony of the doctor who performed the Defendant's vasectomy should not have been allowed. The Court reasoned that the physician's testimony was not the only way to provide evidence of the vasectomy, and therefore it was an abuse of the privilege to allow the testimony. This highlights the Michigan courts' protection of the privilege, even when heinous crimes are involved.

b. Waiver of Privilege by Operation of Law

Under the Michigan physician-patient privilege statute, privilege is determined to be waived:

> If the patient brings an action against any defendant to recover for any personal injuries, or for any malpractice, and the patient produces a physician as a witness in the patient's own behalf who has treated the

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Mich App 662; 449 NW2d 678 (1989), and *Dorris v Detroit Osteopathic Hospital Corporation*, 220 Mich App 248, 559 NW2d 76 (1996).

[56] *Meier v Awaad,* 299 Mich App 655, 668; 832 NW2d 251 (2013).

[57] *People v Doers,* unpublished opinion per curiam of the Michigan Court of Appeals, issued June 29, 2010 (Docket No. 288514).

[58] *Id.*

> patient for the injury or for any disease or condition for which the malpractice is alleged, the patient shall be considered to have waived the privilege provided in this section as to another physician who has treated the patient for the injuries, disease, or condition.

The statute provides for waiver of the privilege by the patient when the patient brings an action to recover for personal injuries or medical malpractice, and calls a treating physician on his or her behalf.[59] Once the plaintiff calls a treating physician as a witness, the privilege is considered waived as to other physicians who have treated the patient for the injuries or conditions at issue in the personal injury or malpractice suit.[60] But waiver of the privilege does not apply in other situations, including other types of actions and where the subject of the requested information is not a party to the litigation. Absent a waiver or exception provided by law, the physician-patient privilege functions as an absolute bar to disclosure.

V. Other Michigan Laws

a. Release of Information in Licensure Actions without Authorization

It is significant to note that the Michigan physician-patient privilege provides for other laws to allow for disclosure of information that would otherwise fall within the physician-patient privilege, with its introductory phrase "Except as otherwise provided by law". However, it must be clear in the law that the privilege is being waived. One such example is related to licensure and found at MCL 333.16244 (2). This law explicitly provides that:

> The physician-patient privilege . . . does not apply in an investigation or proceeding by a board or task force, a disciplinary subcommittee, a hearings examiner, the committee, or the

[59] MCL 600.2157.
[60] MCL 600.2157.

> department acting within the scope of its authorization. Unless expressly waived by the individual to whom the information pertains, the information obtained is confidential and shall not be disclosed except to the extent necessary for the proper functioning of a board or task force, a disciplinary subcommittee, the committee, or the department. Except as otherwise provided in this subsection, a person shall not use or disseminate the information except pursuant to a valid court order.

Similarly, HIPAA allows for the release of PHI to a health oversight agency for activities authorized by law, including licensure or other disciplinary actions without authorization or the opportunity to object.[61] Health oversight committee is defined at 45 CFR 164.501 and includes an agency of the state "that is authorized by law to oversee the health care system (whether public or private) or government programs in which health information is necessary to determine eligibility or compliance, or to enforce civil rights laws for which health information is relevant."

Based on both Michigan and HIPAA law, a provider facing a licensure investigation would not be required to obtain an authorization or even notify the patient prior to releasing PHI as part of a licensure investigation.

b. Criminal Law Providing for Release of Information Without Authorization

The Michigan Vehicle Code, MCL 257.625a, which addresses the admission of results of chemical breath analysis tests (such as Breathalyzer) and chemical tests, also allows for the disclosure of information that would otherwise fall within the physician-

[61] 45 C.F.R 164.512(d). Note that this exception does not extend to health oversight activities where the individual is the subject of the investigation unless the investigation is directly related to the receipt of health care, a claim for public health benefits or qualification for public benefits where the individual's health is integral to the claim for public benefits or services. For example, this exception would not allow a physician's health records to be released where the physician was being investigated for impairment.

patient privilege. This section provides that when a peace officer requests such a test, the results of those tests are admissible into evidence. Furthermore, if after an accident, the driver of a vehicle is taken to a medical facility and a sample of the driver's blood is withdrawn at that time for medical treatment, not only are the results admissible but the statute specifically provides that:

> The medical facility or person performing the chemical analysis shall disclose the results of the analysis to a prosecuting attorney who requests the results for use in a criminal prosecution as provided in this subdivision. A medical facility or person disclosing information in compliance with this subsection is not civilly or criminally liable for making the disclosure.[62]

c. Workers' Compensation

i. HIPAA Exception

The HIPAA Privacy Rule allows a covered entity to "disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers' compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault."[63] The HIPAA regulations do not provide a blanket exception for all workers' compensation uses and disclosures, but rather defer to state law for permissible disclosures as necessary to comply with worker's compensation laws.

ii. Michigan Workers Compensation Laws

In Michigan, §418.853 of the Workers' Disability Compensation Act of 1969 provides that:

> a subpoena signed by an attorney of record in the action has the force and effect of an order signed by the worker's compensation

[62] MCL 257.625a(6)(e).
[63] 45 CFR 164.512 (l).

> magistrate or arbitrator associated with the hearing. Any witness who refuses to obey a subpoena, who refuses to be sworn or testify, or who fails to produce any papers, books, or documents touching any matter under investigation or any witness, party, or attorney who is guilty of any contempt while in attendance at any hearing held under this act may be punished as for contempt of court.

The Workers Compensation Board of Magistrates General Rules, Rule 6 requires that the subpoena must be on an agency-approved form and include, among other requirements, a certification by the requesting party that the matter about which the subpoena is requested is pending before the Workers Compensation agency.[64] Rule 6 further provides that "any dispute arising under this rule shall be brought by signed motion before the assigned magistrate and shall have a copy of the subpoena attached.[65] The Board of Magistrates for the Workers' Compensation Agency in Michigan has taken the following position with regard to subpoenas issued pursuant to Rule 6:

> If you encounter a problem with a medical provider regarding the release of records due to HIPAA concerns, you may advise the provider that cases in workers' compensation litigation are not subject to HIPAA. This is specifically indicated on their website as part of the HIPAA Privacy Rule regarding disclosures for workers' compensation purposes. Thus, unless there are other state law considerations, such as privilege issues, HIPAA would allow the disclosure of medical record pursuant to a signed subpoena.[66]

Based on this interpretation, where the physician-patient privilege has been waived, PHI can be disclosed pursuant to a subpoena signed by an attorney of record in a

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[64] Mich. Admin. Code, R 418.56.
[65] Mich. Admin Code, R 418.56.
[66] Michigan LARA Workers' Compensation Agency, Revised Subpoena Rule for Board of Magistrates memo available at: http://www.michigan.gov/wca/0,4682,7-191-26930-165385--,00.html (accessed on April 29, 2014).

workers' compensation action without the "satisfactory assurances" normally required by the HIPAA regulations with regard to a subpoena.

iii. Applicability of Waiver to Workers' Compensation Proceedings

A. Physician Furnished and Paid for by Employer

MCL 418.385 provides that an employer may request an employee who has given notice of injury to submit to an examination to a physician furnished and paid for by the employer. Michigan Attorney General Opinion 6593 states that an employee will be deemed to have waived the physician-patient privilege when he or she is examined and treated at the employer's medical clinic for an injury sustained during employment. However, the Attorney General Opinion also notes that a waiver of the physician-patient privilege for purposes of workers' compensation in this context is only recognized to the extent that the information is obtained by the physician retained by the employer, and is relevant to the workers' compensation claim.[67]

B. Physician Chosen and Paid for by Employee

For medical treatment by a provider chosen by the employee, the workers' compensation law requires the employee to furnish to the employer or its insurance carrier a complete and correct copy of the report of each physical examination relative to the alleged workers' compensation injury, if so requested, within 15 days of the request. If the employee fails to provide a medical report regarding an examination or medical treatment, the employer may elect to take the deposition of that physician.[68] The statute does not give the employer a right to obtain records from a treating physician chosen by the employee without an authorization. However, if the employer's

[67] OAG 1989, No 6593 (July12, 1989).
[68] MCL 418.385

counsel provides evidence of the employee producing a treating physician as a witness (i.e. the privilege is waived), the records may be disclosed.

VI. HIPAA's Relationship with State Law

a. Preemption

The most common intersection of HIPAA and Michigan law is the interplay between HIPAA and the Michigan physician-patient privilege. As discussed above in Section II.c, HIPAA preempts state law unless the state law provides greater privacy protection. Thus, the most stringent of all the applicable laws should be followed.

As explained above in Section IV.b, if the physician-patient privilege is not waived, it is an absolute bar to disclosure of PHI. If the physician-patient privilege is waived by operation of law, HIPAA's provisions must then be applied. Both the Michigan Supreme Court[69] and the District Court for the Eastern District of Michigan[70] have found in judicial proceedings regarding personal injury or medical malpractice that HIPAA's "satisfactory assurances" provisions discussed above, involving specific notice to the patient or agreement or entry of a qualified protective order, provide more stringent privacy protections and must be applied after waiver of the privilege.

Similarly, the HIPAA regulations addressing disclosures for law enforcement purposes would apply in the context of an investigative subpoena issued under MCL 767A.2 requesting PHI where the physician-patient privilege is determined to have been waived. Where 45 CFR 164.512(e) requires satisfactory assurances or a qualified protective order for a judicial or administrative proceeding, 45 CFR 164.512(f) requires that information sought for law enforcement purposes be relevant and material to a

[69] *Holman v Rasak,* 486 Mich 429; 785 NW2d 98 (Mich.S.Ct. 2010).
[70] *Thomas v 1156729 Ontario Inc. et al* --- F.Supp.2d ----, 2013 WL 5785853 (E.D.Mich. 2013)

legitimate law enforcement inquiry, the request be specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought, and that de-identified information could not reasonably be used.[71]

In *Steiner v Bonanni*[72], the Michigan Court of Appeals analyzed the "more stringent" requirement under HIPAA as relating to preemption and found that the question centered on the ability of the patient to withhold permission and stop the sharing of PHI. *Steiner* involved a defendant attempting to procure a non-party's PHI. The Court reasoned that the Michigan physician-patient privilege law at MCL 600.2157 allows a patient to block disclosure simply by not "engaging in acts that waive the privilege."[73] HIPAA, however, allows for disclosure without the patient's consent in response to subpoenas or even if a protective order is procured. Thus, the Court reasoned, Michigan law and its automatic waiver is not less stringent than HIPAA. Note that this case differs from the *Holman* and *Thomas* cases discussed above, because those cases addressed the protections applicable after the privilege had been waived, rather than the situation where the patient privilege was not waived.

iv. PHI of a Party

If PHI of a party to a legal proceeding is requested, Michigan's physician-patient privilege, Vehicle Code, Mental Health Code, and the Michigan court rules all provide for waiver of the privilege in certain circumstances. Where a determination is made that the privilege has been waived in a judicial or administrative proceeding, the information

[71] 45 CFR 164.512(f)(1)(ii)(C).
[72] *Steiner v Bonanni,* at 5
[73] *Steiner v Bonanni,* at 5

cannot be released without also analyzing the more stringent HIPAA provisions related to satisfactory assurances discussed in Section VI.a.

Since HIPAA specifically defers to state workers' compensation laws, and the Michigan physician-patient privilege applies with regard to medical records of an employee's chosen treating physician until the testimony of such treating physician is provided, counsel requesting medical records without an authorization should provide evidence of the provision of the testimony of the treating physician with the request. A party requesting a deposition of an employee's chosen treating physician without an authorization should provide evidence of their request to the employee for the report of the relevant examination, as the request is a prerequisite to the deposition. Requests for records of treating physicians furnished by and paid for by an employer should be analyzed to ensure that the records requested are relevant to the workers compensation claim only.

The Michigan Vehicle Code permits test results related to operating a vehicle while intoxicated to be provided to law enforcement. HIPAA allows for disclosure without an authorization for law enforcement purposes as required by law, so the Michigan Vehicle Code provisions are not contrary to HIPAA; both allow for the disclosure as provided in the Michigan statute.[74]

v. Non-parties' PHI

The Michigan Court of Appeals in *Steiner v Bonanni*[75] addressed the question of HIPAA preemption in the context of the Michigan physician-patient privilege for non-parties and concluded that Michigan law was more protective of patients' privacy rights

[74] 45 CFR 164.512(f)(1)(i).
[75] *Steiner* at 271.

and therefore, HIPAA did not preempt the physician-patient privilege.[76] The case involved a claim for breach of an employment contract between the plaintiff physician employer and a former physician employee.[77] The plaintiff maintained that the defendant violated his employment contract by continuing to treat patients of the practice after his departure.[78] During discovery, the plaintiff requested disclosure of defendant physician's patient list in order to prove his claim that the physician stole patients after leaving the practice.[79] The defendant objected to the disclosure of the information regarding the nonparty patients citing HIPAA and the Michigan physician-patient privilege.[80]

The Court of Appeals concluded that Michigan law was more protective of patients' privacy rights and, therefore, HIPAA did not preempt Michigan's physician-patient privilege.[81] Moreover, the physician-patient privilege prohibited the disclosure requested in this case. In reaching its finding, the court pointed to the fact that Michigan law uses obligatory language, "shall not" disclose, whereas HIPAA uses permissive language, providing that a physician "may" disclose when adequate assurances are given.[82] Further, the court noted that, unlike HIPAA, Michigan law provides no exception for disclosure of random patient information related to a lawsuit and it does not authorize disclosure under a qualified protective order.[83]

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[76] *Id.* at 267.
[77] *Steiner* at 267.
[78] *Id.* at 268.
[79] *Id.*
[80] *Id.*
[81] *Id.* at 267.
[82] *Id.* at 271-272.
[83] *Id.* at 272-274.

Of particular note, the patient information at issue in *Steiner* involved non-parties and the individuals had not waived their privilege by putting their medical condition in controversy. Quite the opposite, there was no indication that the patients were even made aware of the lawsuit. The Court, citing *Schechet v Kesten*, 372 Mich 346, 350-351, 126 NW2d 718 (1964), held that where the patient is not involved in the case and does not consent, even the names of the nonparty patients are within the 'veil of privilege'.[84] Accordingly, disclosure of the requested information would violate the nonparty patients' privacy rights.

Recent case law suggests that the reach of the Michigan physician-patient privilege is expanding in some situations. In *Meier v Awaad*, 299 Mich App 655, 832 NW2d 251 (2013), the Michigan Court of Appeals extended application of the physician-patient privilege to include PHI subpoenaed from the Michigan Department of Community Health (MDCH). In *Meier*, several patients alleged that Dr. Awaad intentionally misdiagnosed them with epilepsy or seizure disorder in an effort to increase his billings.[85] During discovery, the plaintiffs served a subpoena on MDCH seeking the names and addresses of all Medicaid beneficiaries who were treated by Dr. Awaad and were coded as having epilepsy or seizure disorder.[86] MDCH refused to make the disclosure without a court order. The trial court issued an order enforcing the subpoena, as well as a separate protective order restricting access to the patient list and limiting the permissible uses of the information.[87]

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[84] *Id.* at 275.
[85] *Meier* at 658-659.
[86] *Id.* at 659.
[87] *Id.* at 661-662.

On appeal, the Court of Appeals concluded that the trial court's enforcement of the subpoena violated the statutory physician-patient privilege. Similar to *Steiner*, the disclosure by MDCH involved nonparty patients. Applying the holding of *Steiner*, the Court of Appeals found Michigan law applied as it was more protective of patients' rights than HIPAA.[88]

The plaintiffs in *Meier* argued that the requested disclosure would not violate the statutory physician-patient privilege because it was directed at MDCH, an outside third party Medicaid payor and not a "person duly authorized to practice medicine or surgery" as outlined by the statute.[89] The Court of Appeals recognized that MDCH did not fit into the physician category defined by the statute, but concluded that the privilege continued to protect against disclosures by parties other than physicians after the physician conveys privileged communications obtained in the physician-patient relationship to a third party.[90] The court relied on Michigan Supreme Court precedent in *Dorris v Detroit Osteopathic Hosp. Corp.*, 460 Mich 26, 594 NW2d 455 (1999) and *Massachusetts Mut. Life Ins. Co. v. Bd. of Trustees of Mich. Asylum for the Insane*, 178 Mich 193, 144 NW 538 (1913), concluding that the statutory physician-patient privilege operates to bar disclosure even when disclosure is not sought directly from a physician but rather from a third party who obtained the protected information from a physician.[91]

The impact of *Meier* appears to be far-reaching in the context of requests for medical records of nonparty patients. Applying *Steiner*, *Meier* and its progeny, the physician-patient privilege belongs to the patient, arises by operation of law and does

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[88] *Id.* at 665.
[89] *Id.* at 669.
[90] *Id.* at 671.
[91] *Id.* at 672.

not need to be affirmatively invoked by the patient. Furthermore, based on *Meier*, the privilege applies not only to physicians, but entities that receive privileged information that originated from a physician.

The *Meier* case creates a number of questions and challenges for providers. While *Meier* specifically dealt with the physician-patient privilege, in Michigan many other health care professionals have certain legal requirements to maintain a client's confidentiality. This includes, but is not limited to dentists,[92] physician's assistants[93] and psychologists.[94]

The *Meier* case also potentially expands the physician-patient privilege beyond those who are designated by statute. One of the key issues in the case was whether the defendant, Dr. Awaad, could challenge the subpoena directed at MDCH, a nonparty to the litigation, and assert the physician-patient privilege as a bar to the disclosure by MDCH when MDCH was not a physician who provided care. The Court of Appeals concluded that the defendants, as parties to the suit, had the right to raise discovery and evidentiary objections to the information sought, regardless of whether it was sought from the defendants directly or the MDCH.[95] Furthermore, relying on previous Michigan Supreme Court cases, the Court noted that "the privilege continues to protect against disclosure by parties other than a physician after the physician copies privileged communications obtained in the physician-patient relationship to those third parties."[96] Based on this, the Court held :

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[92] MCL 333.16648.
[93] MCL 333.17078.
[94] MCL 333.18237.
[95] *Meier* at 669.
[96] *Id*. at 671.

> the principle that emanates from *Massachusetts Mut Life* and *Dorris* is that the statutory physician-patient privilege operates to bar disclosure even when the disclosure is not sought directly from a physician or surgeon but rather from a third party who obtained protected information from a doctor.[97]

This language, coupled with the fact that the physician-patient privilege law has been held by Michigan courts to be more stringent than HIPAA in many circumstances, should give all recipients of requests for protected health information cause to carefully assess whether the disclosure would be appropriate in the situation. Furthermore, because of *Meier's* broad interpretation of the privilege, an entity that receives a subpoena will want to do an analysis of whether the entity falls under the privilege law. Based on *Meier* it is no longer true that it only applies to physicians.

The practical implication of the Michigan statutory physician-patient privilege and the *Steiner v. Bonanni* line of cases is that several HIPAA provisions allowing for disclosure without an authorization may be inapplicable in Michigan. For example, even though HIPAA permits law enforcement disclosures of nonparty PHI, such as that of material witnesses, missing persons, and victims of a crime, the physician-patient privilege and associated case law may prohibit such disclosure.

Some of the most common situations involving requests for PHI of a non-party are in domestic violence and child abuse or neglect cases. Many practitioners assume that the alleged victim's injury and medical information is highly relevant to a criminal trial or probate proceeding involving abuse or neglect, and public policy may seem to call for the disclosure. However, the Michigan Court of Appeals held in *People v. Doer* that even the defendant's own medical information cannot be accessed without

[97] *Id.* at 672.

authorization. Likewise, a victim's medical information cannot be provided without the victim's authorization. If the victim is the child of the defendant, a guardian may be necessary to obtain authorization for the child's medical information. Both Michigan law and HIPAA allow for disclosures during the child abuse or neglect investigative process, as explained in Section VI.f. below.

d. Personal Representatives

Since litigation or investigations involving subpoenas, discovery requests, warrants, law enforcement requests and other similar processes can include significant consequences even for nonparties, it is important to ensure that even requests received with an authorization meet all the requirements for a valid authorization under Michigan law and HIPAA. HIPAA defers to state law on who can serve as a "personal representative" for purposes of authorizing a disclosure of another individual's PHI. A person who under state law has authority to act on behalf of the patient in making decisions related to health care must be treated as the personal representative of the patient by the covered entity.[98]

i. Unemancipated Minors and Court-Appointed Guardians

Parents of unemancipated minors and court-appointed guardians with health care decision-making authority qualify as personal representatives.

ii. Emancipated Minors and Adults

For adults and emancipated minors, Michigan's patient advocate designation provision in the Estates and Protected Individuals Code ("EPIC") specifies when another individual can make health care-related decisions for a patient, and that only occurs

[98] 45 CFR 164.502(g)(2).

when two physicians or one physician and one psychologist have made a determination that the patient is unable to participate in medical treatment decisions.[99] Until the patient advocate's powers are thus activated, the patient advocate does not have authority to act on behalf of the patient in making decisions related to health care, and does not meet the HIPAA requirement to be a personal representative.

Michigan's Medical Records Access Act allows for a patient to name an "authorized representative" by explicit written authorization to act on the patient's behalf to access, disclose, or consent to the disclosure of the patient's medical record, in accordance with the act.[100] The act does not address the more global issue of a person having authority to make health care decisions for another. The EPIC provision for a patient advocate is the only way for an adult or emancipated minor to designate another person to make health care decisions on behalf of the patient, so HIPAA preempts the authorized representative provision of the Michigan Medical Records Access Act.

Occasionally patients have a clause in a general durable power of attorney indicating that their attorney-in-fact has the power to obtain medical records of the patient, or they insert a clause in a durable power of attorney for health care (that designates a patient advocate) indicating they want their patient advocate to have authority to obtain medical records prior to the patient advocate powers being activated in accordance with the statute. While these clauses often meet the requirements of the Michigan Medical Records Access Act for naming an authorized representative, HIPAA is more stringent in requiring that a personal representative has to have authority under state law to make health care decisions for the patient. Therefore, a HIPAA-compliant

[99] MCL 700.5508.
[100] MCL 333.26263

authorization signed by the patient is required unless the individual named by the patient is a patient advocate with activated powers to obtain records.

e. Subpoenas Issued Pursuant to State Law v. Federal Law

i. Subpoenas Issued Pursuant to State Law

The dilemma faced by providers who receive subpoenas for patient information is best illustrated by the plight of the Cleveland Clinic in Ohio. The Cleveland Clinic was sued by a patient whose medical records were provided by the Clinic pursuant to a grand jury subpoena issued by Cuyahoga County Court of Common Pleas.[101] The subpoena requested the medical records to include, but not be limited to, drug and alcohol counseling and mental health issues regarding the plaintiff James Turk. The Cleveland Clinic provided the records in response to the subpoena. The plaintiff alleged in part that the Cleveland Clinic released his confidential medical information in response to the grand jury subpoena in violation of its duties under Ohio's privilege law[102] and plaintiffs' common law rights of privacy.

The Court in *Turk* rejected the Cleveland Clinic's motion for judgment on the pleadings, finding that contrary to HIPAA provisions, Ohio's privilege law does not contain an exception for the provision of medical records to law enforcement.[103] The Court also rejected public policy arguments made by the Cleveland Clinic to overcome the right of privacy.

ii. Subpoenas Issued Pursuant to Federal law

[101] *Turk v Oiler* et al, 732 F Supp 2d 758 (N.D.Ohio, Aug. 11, 2010).
[102] O.R.C. 2317.02
[103] Note that the Ohio physician patient privilege law is similar to Michigan's physician-patient privilege law.

Notably, however, federal courts and rules of evidence make a distinction between subpoenas issued based on state law versus subpoenas issued pursuant to federal law. FRE 501 states:

The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state

law supplies the rule of decision.

Following *Turk*, the Cleveland Clinic (in a different matter) asked the U.S. District Court for the Northern District of Ohio to set aside Civil Investigative Demands served under the federal False Claims Act based on the *Turk* case and the idea the Cleveland Clinic would be violating the physician-patient privilege law and be exposed to liability similar to that in *Turk*.[104] The Court, however, ordered the Clinic to provide the information, finding that the subpoenas in the present case were issued pursuant to federal law and not state law, and the standards related to federal subpoenas, grand jury investigations and the Federal Rules of Civil Procedure do not provide for application of state privilege law to federal questions. Rather, federal law applies and federal law does not have a physician-patient privilege law. Specifically, the Court noted that "[t]he Petitioners would violate no patients' rights in complying with properly-

[104] *Cleveland Clinic Foundation v. U.S.,* 2011 WL 862027 (N.D. Ohio, March 9, 2011).

issued CIDs, subpoenas or subpoenas duces tecum issued by a court of the United States in aid of a grand jury investigation."[105] If a subpoena is issued in a federal civil matter that involves state law questions, FRE 501 requires state privilege law to apply to the state law questions.

This is echoed in a recent Michigan case regarding medical marijuana.[106] While the argument regarding physician-patient privilege was not raised, the Michigan Department of Community Health did object to responding to federal Drug Enforcement Administration subpoenas seeking the names and information of seven medical marijuana users. The MDCH argued that the Michigan medical marijuana law provided for the confidentiality of certain information and therefore could not release the requested information without violating the Michigan Medical Marihuana Act. The District Court held that, "[a]s a state law authorizing the use of medical marijuana, the MMMA cannot negate, nullify or supersede the federal Controlled Substances Act, which criminalized the possession and distribution of marijuana throughout the entire country long before Michigan passed its law."[107]

f. Reports and Disclosures permitted by both HIPAA and State Law

It is also important to note there are circumstances in which State law and HIPAA allow for the release of PHI without application of the physician-patient privilege or any special notice or right to object. For example, in Michigan "if there is a compelling need for records or information to determine whether child abuse or child neglect has occurred or to take action to protect a child where there may be a substantial risk of

[105] *Id.* at 2.
[106] *U.S. v Mich Dept of Community Health,* 2011 WL 2412602 (W.D. Michigan, June 3, 2011).
[107] *U.S. v Mich Dept of Community Health,* at 12.

harm…" the physician patient privilege does not apply to the release of medical records to a family independence agency caseworker or administrator directly involved in the child abuse or neglect investigation.[108] The statute is specific to the mandatory reporting and initial investigation process after a report of suspected abuse or neglect; it does not apply to legal or administrative proceedings. 45 C.F.R. 164.512 (b)(1)(ii) mirrors this in allowing the disclosure of PHI to the appropriate government authority authorized to receive reports of child abuse or neglect. This is consistent with other mandatory disclosure laws, which are supported by both the physician-patient privilege and HIPAA.

For subpoenas or other discovery requests related to child abuse or neglect for legal or administrative proceedings MCL 722.631 provides for the physician-patient privilege to be abrogated in a civil child protective proceeding resulting from a report of child abuse or neglect made pursuant to the Child Protection Law. The Michigan Supreme Court in *Department of Social Services v Brock*, 442 Mich 101, 499 NW2d 752 (1993), held that MCL 722.631 applies to the PHI of a parent involved in the civil proceeding as well as the PHI of the child. Once the privilege is abrogated by MCL 722.631, HIPAA's satisfactory assurances provisions must be followed as discussed in section VI.a. above.

VII. Special Considerations for Certain Types of Protected Health Information

Certain subsets of PHI, including medical records dealing with mental health, substance abuse and HIV/AIDS receive special treatment pursuant to state and federal

[108] MCL 333.16281(1). *See also* MCL 330.1748a (regarding mental health records).

law. The interplay between these state and federal laws with HIPAA must be evaluated when considering requests for this type of information.

a. Mental Health Records and Psychotherapy Notes

The Michigan Mental Health Code[109] protects "recipients" of mental health services. In order to meet the definition of "recipient" rendering the Michigan Mental Health Code applicable, an individual must be a recipient of mental health care from the Department of Community Health, a community mental health services program, a residential facility or from a provider that is under contract with the Department of Community Health or with a community mental health services program.[110] The Michigan Mental Health Code would not, for example, apply to a provider of mental health services who is paid in cash or by third party payors other than the Department of Community Health or a community mental health services program.

If an individual is a "recipient" of mental health services for purposes of the Mental Health Code, he or she is entitled to certain "recipient rights" including the right to confidentiality which is codified at MCL 330.1748. MCL 330.1748 prohibits the disclosure of information in the record of a "recipient" subject to certain exceptions. Two relevant exceptions include: "pursuant to an order or a subpoena of a court of record or a subpoena of the legislature, **unless the information is privileged by law**" and "if necessary in order to comply with another provision of law."[111] Consistent with the disclosure of other types of PHI, the subpoena exception expressly acknowledges a

[109] MCL 330.1100 et al.
[110] MCL 330.1100c.
[111] MCL 330.1748(5)(a) & (d). Emphasis added.

limitation on disclosure of mental health records where the information is privileged by law.

For purposes of the Mental Health Code, a "privileged communication" is defined as "a communication made to a psychiatrist or psychologist in connection with the examination, diagnosis, or treatment of a patient, or to another person while the other person is participating in the examination, diagnosis, or treatment or a communication made privilege under other applicable state or federal law." MCL 330.1750 addresses the situations in which such privileged communications may be disclosed. Because MCL 330.1750 provides for privileged communications to be disclosed for a proceeding governed by the Mental Health Code, in a proceeding to determine the legal competence of the patient or the patient's need for a guardian (if the patient was informed), or if the communication was made during treatment that the patient was ordered to undergo to render the patient competent to stand trial on a criminal charge, the state law is not more stringent than HIPAA and would be preempted by HIPAA. Therefore, an authorization, court order, or satisfactory assurances pursuant to HIPAA would be required for disclosure in those distinct circumstances.

While the Michigan Mental Health Code applies to all the information in the mental health records of a "recipient", HIPAA provides special protections for a very narrow subset of mental health records that meet the definition of "psychotherapy notes." "Psychotherapy notes" are generally defined as notes that are recorded by a mental health professional to document or analyze the contents of a conversation during a counseling session. They are often handwritten, but can be in any medium. In order to qualify as psychotherapy notes, the documents must be kept separate from

the rest of the medical chart. Importantly, the definition of "psychotherapy notes" specifically excludes "medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis and progress to date."[112] Thus, a general medical record that contains information related to the diagnosis and treatment of a mental health condition will not be treated as a psychotherapy note for HIPAA purposes.

The use or disclosure of psychotherapy notes almost always requires a signed HIPAA-compliant authorization unless they are being used by the originator of the psychotherapy notes for the covered entity's own training programs. If an authorization for the use or disclosure of psychotherapy notes is obtained, it is important to note that the authorization cannot be combined with any other document or authorization, except for another authorization for use or disclosure of psychotherapy notes.[113]

HIPAA would also allow a covered entity to use psychotherapy notes to defend itself in a legal action brought by the subject of the notes,[114] to demonstrate compliance to the Secretary of HHS for HIPAA compliance, for health oversight activities related to the provider who originated the note, to a coroner or medical examiner about a deceased individual for permitted purposes, or to avert a serious threat to health or safety.[115] However, these disclosures would be subject to analysis under Michigan's potentially more stringent physician-patient privilege law as discussed above.

b. Substance Use/Abuse Laws

[112] 45 CFR 164.501.
[113] 45 CFR 164.508(b)(3)(ii).
[114] 45 CFR 164.508(a)(2)(i).
[115] 45 CFR 164.508(a)(2)(ii).

In Chapter 2A, Substance Use Disorder Services, of the Mental Health Code, MCL 330.1263(c) provides:

> Upon application, a court of competent jurisdiction may order disclosure of whether a specific individual is under treatment by a program. In all other respects, the confidentiality shall be the same as the physician-patient relationship provided by law.[116]

Since HIPAA also provides for disclosure pursuant to a court order, both Michigan law and HIPAA provide equivalent protections.

Certain providers who receive federal assistance and hold themselves out as providing alcohol or drug abuse diagnosis, treatment or referral for treatment may be subject to federal substance abuse confidentiality requirements as set forth in 42 CFR Part 2, in addition to HIPAA and state law.[117] Records subject to 42 CFR Part 2 cannot be released pursuant to a subpoena, but may be released pursuant to a compulsory process such as a subpoena and an authorizing court order.[118]

c. HIV/AIDS Information Under the Public Health Code

MCL 333.5131(3) provides:

> The disclosure of information pertaining to HIV infection or acquired immunodeficiency syndrome in response to a court order and subpoena is limited to only the following cases and is subject to all of the following restrictions:
> (a) A court that is petitioned for an order to disclose the information shall determine both of the following:
> (i) That other ways of obtaining the information are not available or would not be effective.
> (ii) That the public interest and need for the disclosure outweigh the potential for injury to the patient.
> (b) If a court issues an order for the disclosure of the information, the order shall do all of the following:
> (i) Limit disclosure to those parts of the patient's record that are determined by the court to be essential to fulfill the objective of the order.

[116] Emphasis added.
[117] 42 CFR 2.11.
[118] 42 CFR 2.61.

(ii) Limit disclosure to those persons whose need for the information is the basis for the order.
(iii) Include such other measures as considered necessary by the court to limit disclosure for the protection of the patient.

Since these provisions are more restrictive than HIPAA, which does not contain any requirements specific to HIV/AIDS, these provisions must apply. A court order that does not specify the elements of MCL 333.5131(3) is insufficient to effectuate disclosure of HIV/AIDS information.

VIII. Practical Implications for Responding to Subpoenas or Warrants for PHI

a. Policies

Having policies in place to deal with subpoenas or warrants for PHI is essential. Health care providers should establish a process for validating and responding to subpoenas and warrants that ensure they have satisfied their responsibilities under both HIPAA and Michigan law, including accounting for disclosures in subsection e below.

b. Steps to Take When Responding to a Subpoena

As a first step, it is essential to ensure that a subpoena for health care information meets all the requirements of the Michigan Court Rules, including identification of a date for presentation of the witness or documents being requested. A subpoena requiring production of documents must be served at least 14 days in advance of the time set for production.[119] In the case of an investigative subpoena, MCL 767A.4 provides that it must be served as least seven days before the date set for examination of the records or documents unless the judge authorizing the investigative subpoena has shortened the timeframe for good cause shown. It is imperative that the court or administrative tribunal has jurisdiction over the entity. It must also be signed by

[119] MCR 2.305(B)(1).

the appropriate authority, be appropriately specific, and properly served. If not, there may exist procedural grounds for challenging the subpoena.[120]

If the subpoena is valid, since HIPAA requires that if both HIPAA and state law cannot be followed, the more stringent of either HIPAA or state law be applied, the recipient must determine which is applicable. It is helpful to determine first whether the physician-patient statutory privilege exists. Then identify whether the privilege has been waived. The third step is to determine if any other laws provide for the disclosure requested. If the privilege has been waived or another law provides for the disclosure, then look to HIPAA to determine if HIPAA's provisions are more stringent. In circumstances where the privilege is not waived and other Michigan laws do not provide for disclosure, the Michigan physician-patient privilege law is deemed to be more stringent in protecting patient privacy and therefore HIPAA does not apply . Unlike HIPAA, the privilege law does not allow for the provision of PHI when notice is provided to the individual or a protective order is obtained. The attached flowchart can assist in this process. [Insert flowchart – Publications Committee can assist with this].

If there is reason to object or assert a privilege for a subpoena in a civil matter, MCR 2.305(A)(4) allows for the filing of a motion for the subpoena to be quashed or modified; or a motion for a protective order, provided that the motion is timely made, "before the time specified in the subpoena for compliance." The recipient of the subpoena may also serve written objections to the inspection or copying of some or all of the documents on the requesting party, but must do so in advance of time set for

[120] Note that there may be other procedural requirements, such as Workers' Compensation subpoenas, requiring specific certification as discussed in Section V above.

compliance.[121] If the recipient of the subpoena does not timely respond or timely object, or if the recipient does object, then the party that issued the subpoena may file a motion with the court ordering that production of the documents be compelled.[122] If granted, the court "shall" require payment of the reasonable expenses incurred in filing the motion unless the court finds the objection was "substantially justified."[123]

If there is reason to object or assert a privilege for a subpoena or order to provide testimony in a civil matter, MCR 2.506(H) provides the recipient with a process to explain to the court why the person should not be compelled to comply. The court may direct that a special hearing be held, and may excuse the witness.

Many people assume they should appear in response to a subpoena to testify, and then assert the privilege or HIPAA to the judge. However, a covered entity should be careful not to provide information in response to such a subpoena, but rather object or assert the privilege **prior** to the time set forth in the subpoena for appearing. MCR 2.506(H) provides a process to notify the court and the parties of the objection or privilege in advance, and advance notice by written request or motion should occur whenever possible.

c. *Responding to a warrant*

How to appropriately respond to a warrant, grand jury subpoena, or summons issued by a judicial officer can be a difficult question. If a warrant is ignored or not complied with, the recipient can face fines and imprisonment.[124] However, with the *Meier* case extending the physician-patient privilege beyond physicians and making

[121] MCR 2.305(B)(1).
[122] MCR 2.305(B)(3).
[123] MCR 2.313(A)(5)(a).
[124] MCL 600.1701(g).

clear that the privilege law can trump HIPAA, providers should not assume that a warrant or grand jury subpoena supersedes the privilege.

If HIPAA applies, the HIPAA regulations clearly allow for the entity to disclose PHI, provided (1) the information sought by the warrant, grand jury subpoena, subpoena issued by a judicial officer, or applicable administrative request is "relevant and material to a legitimate law enforcement inquiry; (2) the request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and (3) de-identified information could not reasonably be used."[125]

When an entity receives a warrant, grand jury subpoena, or administrative investigative demand, the entity will want to analyze whether the physician-patient privilege is applicable. Providers may face penalties for non-compliance with a warrant, but they may also face administrative and civil legal consequences for violating the privilege.

d. Dealing with Follow-Up Requests

If, in any circumstance, a covered entity receives follow-up requests or questions from the requesting party, it is necessary to evaluate if responding to those requests will still meet the HIPAA exceptions for providing PHI without a patient authorization, and will not run afoul of the physician-patient privilege or another privilege or state law. For a warrant, because the request must be specific and a response should be limited to what is requested, it may not be appropriate to provide the information requested in a follow-up. In the case of a warrant or subpoena, questions arise whether the patient has waived any privilege that may exist and if proper notice and opportunity to object to

[125] 45 CFR 164.512(f)(1).

the information requests was provided, or whether the requests are covered by any protective order that has been entered.

e. Accounting for Disclosures of PHI

Subject to certain exceptions, information disclosed without a patient's authorization and not for purposes of treatment, payment or health care operations, must be tracked and included in an accounting of disclosures. This would include disclosures of information subject to a subpoena, warrant, court order or other lawful process where patient authorization is not obtained. Pursuant to 42 C.F.R. 164.528(a)(1), "an individual has a right to receive an accounting of disclosures of protected health information made by a covered entity". Generally, a covered entity is required to respond to a request for an accounting within sixty days, and for each disclosure specify: (1) date of the disclosure; (2) name and, if known, address of person or entity who received the PHI; (3) brief description of the PHI disclosed; and (4) a statement of the purpose of the disclosure that reasonably informs the individual of the basis for the disclosure.[126] However, if the information was provided for reasons specified in 45 CFR 164.502(a)(2)(ii) or 45 CFR 164.512, such as a court order or subpoena, then a copy of the order or subpoena can be provided in lieu of the statement.[127]

Importantly, 42 CFR 164.528 also provides that the covered entity *must* temporarily suspend the individual's right to receive an accounting if a health oversight agency or law enforcement agency provides in writing that, "such an accounting to the

[126] 45 CFR 164.528(b)(2).
[127] 45 CFR 164.528(b)(2).

individual would be reasonably likely to impede the agency's activities and specifying the time for which such a suspension is required."[128]

IX. Consequences of Wrongfully Disclosing PHI

a. Consequences Pursuant to HIPAA

The penalties for violating HIPAA can be severe and can be imposed on covered entities as well as business associates.[129] A covered entity can be found liable for violations by one of its business associates if the business associate is acting as an agent of the covered entity. To determine whether a business associate is an "agent" of the covered entity for the purposes of assessing HIPAA liability, the OCR will look at the federal common law of agency which generally considers the extent to which the covered entity has the right to control the manner in which the business associate provides services.[130]

For violations where the covered entity or business associate did not know or could not reasonably have been expected to know that the conduct would lead to a HIPAA violation, the OCR will impose a penalty between $100 and $50,000 per violation.[131] For violations that are due to "reasonable cause" and not "willful neglect", the OCR will impose penalties of at least $1,000 and not more than $50,000 for each violation.[132] Violations that are due to "willful neglect" but are corrected within thirty days will be penalized in an amount of at least $10,000 but not more than $50,000 per

[128] 45 CFR§ 164.528(a)(2)(i).
[129] 45 CFR 160.402. *See also* discussion at 78 Fed Reg 5581 (January 25, 2013).
[130] *Id.*
[131] 45 CFR 160.404(b)(2)(i).
[132] 45 CFR 160.404(b)(2)(ii).

violation.[133] If violations are due to "willful neglect" and are not remedied within thirty days of the covered entity's or business associate's knowledge of the breach, the penalty will be at least $50,000 per violation.[134] For all categories of violations, the penalties may not exceed $1,500,000 in a calendar year for identical violations.[135]

b. Potential Consequences Pursuant to State Law

Violation of the Michigan physician-patient privilege law can open a health care provider up to a number of consequences. In addition to the HIPAA penalties detailed above, an entity and/or an individual can face both legal action by the patient and action against their license. In Michigan, MCL 333.16221(e)(ii) provides for the investigation and recommendation to disciplinary boards for licensed health professions when a professional confidence is betrayed. Sanctions to be imposed in such a case can include a reprimand, suspension, and/or a fine.[136]

There is also a growing trend of private rights of action based on invasion of privacy and related laws. As far back as 1881, the Michigan Supreme Court found a right of privacy as related to medical matters.[137] In *DeMay*, the treating physician brought a friend to the home of a woman in labor, and never advised the patient that the friend was not a physician's assistant. This person observed the birth. The Court found that, "The plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it, and to abstain from its

[133] 45 CFR 160.404(b)(2)(iii).
[134] 45 CFR 160.404(b)(2)(iv).
[135] 45 CFR 160.404(b).
[136] MCL 333.16226.
[137] *DeMay and Scattergood v Roberts,* 46 Mich 160; 9 NW 146; (1881).

violation."[138] This case lays a foundation for claims by a patient when her privacy is invaded and medical information shared.

Furthermore, as discussed above in Section VI.e.i, the Cleveland Clinic faced a private right of action when it released medical records in response to a grand jury subpoena from the Cuyahoga County Court of Common Pleas because it violated its state physician-patient privilege law.

X. Conclusion

At first glance, the HIPAA Privacy Rule seems straightforward as to when an entity can provide PHI absent a patient authorization in response to subpoenas, court orders, or warrants. The regulations at 45 C.F.R. 164.512 set out specific processes based on the type of request. However, because HIPAA requires that state law be followed rather than HIPAA if the state better protects patient privacy, knowing how to respond to requests for PHI is not as simple as providers would like. In Michigan, the physician-patient privilege law has been found by state courts to preempt HIPAA and therefore an analysis of application of the privilege law must necessarily factor into responses to requests for PHI.

Obtaining patient authorization prior to disclosure is always the ideal. However, since that is not always possible, practitioners need to be wary about whether HIPAA and all applicable Michigan laws have been properly addressed prior to provision of PHI.

[138] *Id.* at 165-166.

Request/Subpoena for PHI