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Evolution and Refinement: Recent Texas Legislative Efforts on Medical Records, Corporate Practice, and Other Issues

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Question 1

- If a physician complies with HIPAA, he or she has also complied with all requirements of Texas' medical privacy laws.
  - True
  - False

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Question 2

- Employee training requirements under Texas law are stricter than under HIPAA.
  - True
  - False

Question 3

- Under Texas law, all hospitals can employ physicians because they are exempt from Texas' corporate practice of medicine prohibition.
  - True
  - False

The Corporate Practice of Medicine and Physician Employment in Texas

The CPOM Doctrine

- Texas, like most states, recognizes a prohibition on general business entities practicing medicine
- Concern is that only natural persons can be licensed to practice medicine and corporate employers will unduly influence physician employees' professional judgment and interfere in the physician-patient relationship

The CPOM Doctrine

- The practical effect of it is the prohibition of the employment of physicians by non-licensed persons or entities
- Many states have modified it or else rarely enforce it
  - Some states allow employment by general corporations as long as physician control maintained (e.g., MS, SC, LA)
  - Others retain the prohibition but lack active enforcement (e.g. NV)
  - At least one state has a stricter standard (CA)

The CPOM Doctrine in Texas

- Most states have exceptions to the CPOM prohibition on physician employment for certain entities (e.g., hospitals, HMOs, non-profit corporations)
- Texas has instituted exceptions for:
  - NPHOs
  - Physician associations
  - Some state entities
  - Medical schools

The CPOM Doctrine in Texas

- Unlike most states, Texas does not exempt hospitals from the CPOM prohibition and does not have an exception allowing all hospitals to employ physicians
- Instead, Texas had made exceptions for
  - Specific hospitals/hospital districts
  - Specific types of hospitals

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Legislative Attention to Physician Employment

- For a last several legislative sessions, bills have been introduced in the Legislature to create an exception for hospitals generally, specific hospital districts, non-profit hospitals, or rural hospitals
- In 2009, bill allowing employment by Parkland Hospital passed and signed into law but bill for rural hospitals vetoed

2011: SB 894

- In 2011, SB 894 passed allowing the employment of physicians by hospitals that:
  - Are designated as critical access hospitals;
  - Are a sole community hospital, as defined in federal statutes; or
  - Are located in a “rural” county with a population of 50,000 or less (approx. 200 of 254 counties)

2011: SB 894

- Requirements for employment:
  - Chief medical officer appointed
  - Policies to ensure physician maintains independent judgment including implementation of complaint procedure and no retaliation for advocating patient care
  - Involvement of medical staff in employmnet policies
  - Chief medical officer must report to TMB

2011: SB 894

- Requirements for employment:
  - Employees must not favored over non-employees for staff membership and privileges
  - Protects employed physicians' right to participate in selection of liability coverage, maintain independent defense, and consent to settlement
  - Any covenants not-to-complete for employees must comply with Section 15.50 of the Texas Business & Commerce Code

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2011: Other Employment Bills

- SB 761 authorizes employment of physicians by non-profit fraternal organization hospitals primarily providing medical care to children (e.g., Scottish Rite hospitals)
- SB 1568 authorizes employment by Harris County Hospital District
- SB 311 authorizes employment by Ochiltree County Hospital District

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Future Legislative Sessions

- Piecemeal attacks on CPOM prohibition likely to continue
- CPOM prohibition may be neutralized by sheer number of exceptions– particularly for hospitals
- Attention CPOM doctrine receives by Legislature may depend on state of budget in 2013 and beyond

Medical Record Privacy

HIPAA

- Federal Health Insurance Portability and Accountability Act of 1996
- Created to:
  - Assure health insurance portability
  - Reduce health care fraud and abuse
  - Guarantee security and privacy of health information
  - Enforce standards for health information

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HIPAA: Who is covered?

- Direct applicability to covered entities ("CEs")
  - Physicians, hospitals, and other healthcare providers
  - Health insurance plans
  - "Healthcare clearinghouses"
- Indirect and direct applicability to business associates ("BAs") of CEs
  - Original HIPAA: indirect applicability
  - HITECH: some privacy, all security

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The HIPAA Privacy Rule

- Protected Health Information (“PHI”)
  - Individually identifiable
  - Past, present, or future health condition
  - Condition, provision, or payment

The HIPAA Privacy Rule

- Absolute prohibition from release with exceptions
  - For treatment, payment, or healthcare operations
  - To the individual
  - With permission of the individual
  - As required by law
  - Other specifically-allowed uses

The HIPAA Privacy Rule

- Right to Notice of Privacy Practices
  - Describes individual's rights to access, inspection, accounting
  - Duties of covered entity
  - Complaints and contacts
  - How covered entity will use and disclose their health information
- Information cannot be used or disclosed for any purpose not included on the notice
- Individual must be notified if information is used in a new fashion not covered by the notice

The HIPAA Security Rule

- Covered entities must maintain administrative, technical, and physical safeguards to protect the confidentiality, integrity, and availability of PHI in electronic format that they maintain or transmit

The HIPAA Privacy Rule Administrative Requirements

- Appoint a privacy officer/security officer
- HIPAA policies and procedures
- Train your employees
- Document compliance and complaints
- Risk assessment (security)

HITECH Act Provisions

- New data breach rules require notification in cases of breach:
  - To the affected patient
  - To the media if the breach is big (more than 500 individuals)
  - To HHS
- Notification not required if:
  - Breach is of encrypted data or de-identified data
  - Subjective no-harm standard
- Business associates are now treated like covered entities
- “Hide” rule
- Increased enforcement, penalties
  - State AGs can prosecute

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HITECH Act Enforcement Concerns

- Increased penalties
- State attorneys general can prosecute HIPAA violations
- Injured individuals may get some of the fine money

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Penalties and Enforcement

Degree of neglect and/or correction of violation	Minimum penalty	Maximum penalty
Did not know (and by exercising reasonable diligence would not have known) and corrected within statutory timeframe	No penalty	No penalty
Did not know (and by exercising reasonable diligence would not have known) but not corrected within statutory timeframe	$100 for each violation (total amount imposed for all such violations of identical requirement/prohibition during a calendar may not exceed $25K)*	$50,000 for each violation (total amount imposed for all such violations of identical requirement/prohibition during a calendar may not exceed $1.5M)
Reasonable cause and not due to willful neglect but corrected within statutory timeframe	No penalty	No penalty
Reasonable cause and not due to willful neglect but not corrected within statutory timeframe	$1,000 for each violation (total amount imposed for all such violations of identical requirement/prohibition during a calendar may not exceed $100K)*	$50,000 for each violation (total amount imposed for all such violations of identical requirement/prohibition during a calendar may not exceed $1.5M)
Willful neglect but corrected within statutory timeframe	$10,000 for each violation (total amount imposed for all such violations of identical requirement/prohibition during a calendar may not exceed $250K)	$50,000 for each violation (total amount imposed for all such violations of identical requirement/prohibition during a calendar may not exceed $1.5M)
Willful neglect but not corrected within statutory timeframe	$50,000 for each violation (total amount imposed for all such violations of identical requirement/prohibition during a calendar may not exceed $1.5M)	$50,000 for each violation (total amount imposed for all such violations of identical requirement/prohibition during a calendar may not exceed $1.5M)

Texas' Efforts to Protect Personal Information

Texas' Privacy Laws

- Complying with HIPAA does not guarantee one has complied with Texas' privacy laws
- For example:
  - Texas' law covers more entities
  - Texas' law protects more information than what is defined as PHI under HIPAA
  - Texas has its own training and notice requirements

Texas Medical Privacy Act

- Health & Safety Code Ch. 181
- 2001: Texas legislature proposes near-identical requirements to HIPAA
- Final legislation stripped down to 3 issues
  - More entities are “covered entities”
  - Tighter marketing restrictions
  - Re-identification not allowed

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Texas Identity Theft Identification Act

- Business & Commerce Code Ch. 521
- Person who conducts business in Texas or owns/licenses computerized data including "sensitive personal information" must notify affected individuals after a "breach of system security"
- Businesses in Texas must reasonably protect sensitive personal information
- NOT limited to health information but does apply to "covered entities" under Health & Safety Code

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Texas Identity Theft Identification Act

- "Sensitive personal information"=
  - First name or initial +
  - Last name +
  - SSN or DL number or account, credit card, or similar number
  - In 2009, "PHI"-type information added to the definition
- Notice requirements are broader than those under HIPAA

Medical Record Privacy: House Bill 300 (2011)

House Bill 300

- Passed in 2011 Legislative Session
- Amends portions of the Health & Safety Code, Business & Commerce Code, and Insurance Code
- Multiple start dates, but generally effective September 1, 2012

HB 300: Components

- Training
- Access
- AG Enforcement/Penalties
- AG Website and Reporting
- PHI Sales
- Notice of Electronic Disclosure
- HHSC Audits
- HHSC Standards for Electronic Sharing
- HIT Task Force

Training

- All covered entities under Health & Safety Code (remember, it's a broader group than HIPAA) must train employees
- Training standards are stricter than those required by HIPAA

Training

- Training must focus on:
  - Specific business of the entity
  - Employee's scope of employment
- Within 60 days of employment
- At least every 2 years
- Employee must sign attendance statement and records maintained

Access

- If healthcare provider uses EHR, must give access to patients
  - Similar to HIPAA HITECH requirements, but access in 15 days instead of 30
- Incorporates HIPAA's exceptions to access
- HHSC can recommend standard electronic format for releasing data

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AG Enforcement and Penalties

- New penalties for wrongful disclosure similar to HIPAA HITECH penalties:
  - $5,000 for negligent
  - $25,000 for knowing or intentional
  - $250,000 if for financial gain
  - Limited fine for encrypted data sent to another covered entity for PTO, there was no further disclosure, or policies were in place
- Court penalties can go up to $1.5 million
- AG can retain part of the penalty

AG Website and Reporting

- Website:
  - Consumer information and advice
  - Consumer rights
  - Agencies affected
- Report to Legislature
  - Number and types of complaints
  - Agencies involved
  - Results

Sales of PHI Prohibited

- No covered entity may receive direct or indirect remuneration for disclosing PHI
- Disclosures for PTO don’t count
- Disclosures “required by law” don’t count
- Insurance or HMO functions don’t count (reimbursement limited to cost)

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Notice of Electronic Disclosure

- A covered entity must provide written notice if an individual's information is subject to electronic disclosure
- Texas data breach notification requirement changed to apply if victim is a Texas resident or a resident of a state without a data breach law

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Notice of Electronic Disclosure

- A covered entity must provide written notice if an individual's information is subject to electronic disclosure
- Except for PTO or disclosures required by law, can't disclose without authorization (can be oral)
- AG required to adopt a form

HHSC Audits

- Texas Health and Human Services Commission may request U.S. Secretary of HHS to audit Texas HIPAA covered entities for HIPAA compliance
- Coordinate with Health Services Authority and Department of Insurance
- Commissioner to report to Legislature

HHSC Standards for Electronic Sharing of Data

- Texas Health Services Authority to develop and HHSC to approve privacy and security standards for electronic sharing of PHI
- HIPAA-based
- Should support interoperability of EHR systems

HIT Task Force

- AG appoints 11-member task force to review HIT issues
- Must have 2 doctors, 2 hospital reps, 1 private citizen, and 1 pharmacist
- Develop recommendations for electronic exchange, improving patient access to ePHI, and reporting to the Legislature

Odds and Ends

- HHSC, DSHS, TMB, and TDI to review status of the law and report to the legislature regularly
- HHSC to have oversight over defunct entities to keep their data safe

Questions

Question 1

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