

How Hip Is HIPAA?

A 'QPO' Will Save You Time and Save Your Client Money

Attorneys often need to procure medical information about their clients and other parties. In personal injury cases, defense counsel must obtain medical and other records, including earnings records, for any plaintiff who claims to have been injured. Counsel needs this information as quickly as possible to prepare for written and oral discovery, as well as for internal evaluations, reports to insurers and clients, and as an early dispute resolution tool. So, counsel issues a cover letter, a subpoena and a check to each of plaintiff's healthcare providers as he or she has done for decades, right? Wrong.

The new sheriff in town is "HIPAA," the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C.A. § 1320(d) *et seq.*, and the Privacy Regulations implemented under HIPAA, which became effective April 14, 2003. HIPAA changes everything. In addition to addressing how to effectively deal with HIPAA, this article also suggests a different procedure to obtain records under the statute.

These Privacy Regulations apply to all "covered entities," a term defined to include most health care providers (e.g., hospitals, doctors, physical therapists) as well as the health plans that pay for health care (although not workers' compensation and disability carriers). Privacy Regulations are lengthy and detailed, prescribing how and when covered entities may use or disclose health information, known in the Regulations as "protected health information." Because the Privacy Regulations govern the flow of health information to and from health care providers, litigators who rely on providers to furnish protected health information need to understand how these regulations affect litigation. In short, your local hospital or doctor will no longer simply hand over medical records. You need to know how the Privacy Regulations impact discovery, whether by subpoena or request for production of documents.

The Privacy Regulations at 45 C.F.R. §164.512(e) identify when a covered entity may disclose protected health information in

response to a subpoena or discovery request. These regulations only permit the covered entity to disclose protected health information when it receives from you either:

- a valid Authorization pursuant to 45 C.F.R. §§ 164.508, 164.502(b)(2);
- a subpoena or request for production of documents accompanied by "satisfactory

assurances" that adequate and timely prior notice of discovery was given to the "subject individual" whose records are being requested in accordance with 45 C.F.R. 164.512(e); or

■ a court-issued qualified protective order (QPO) pursuant to 45 C.F.R. § 164.512(e)(1).

Each of the above privacy documents has advantages and disadvantages under the Privacy Regulations. For example, authorizations are quick and effective, but they can be revoked at any time, potentially cutting off your future use of the document. The subpoena or notice of discovery approach works well when only one or two records are needed on one or two individuals.

The QPO, however, lends itself best to

The form HIPAA Qualified Protective Order motion (BELOW) and the QPO (RIGHT) have received the respect and approval of various state and federal courts in the Philadelphia region. They are provided by the authors as a public service.

POST & SCHELL, P.C. BY: RICHARD B. WICKERSHAM JR. FOUR PENN CENTER 1600 JOHN F. KENNEDY BLVD. PHILADELPHIA, PA 19103-2808 215-587-1000	ATTORNEYS FOR DEFENDANT
JOHN DOE <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> ABC PRODUCT MANUFACTURING, INC. <p style="text-align: center;">Defendant.</p>	COURT OF COMMON PLEAS PHILADELPHIA COUNTY NO: 04-01234 JURY TRIAL DEMANDED
MOTION OF DEFENDANT, ABC PRODUCT MANUFACTURING, INC., <u>FOR QUALIFIED PROTECTIVE ORDER</u>	
Defendant, ABC Product Manufacturing, Inc., by and through its attorneys, Post & Schell, P.C., hereby move this Honorable Court as follows:	
1. This is a products liability case in which the parties, counsel, witnesses and others will need access to protected health information of the plaintiff, John Doe.	
2. Pursuant to the Health Insurance Portability and Accountability Act (HIPAA) and its implementing regulations found at 45 C.F.R. §164.512(e), moving defendant hereby requests that the Court enter the attached Qualified Protective Order.	
3. Pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), and the Privacy Regulations implemented under HIPAA which became effective April 14, 2003, the parties to this litigation are obligated to comply with the Privacy Regulations as we obtain and redisclose protected health information such as medical records, etc., on behalf of our clients.	
4. The Privacy Regulations at 45 C.F.R. §164.512(e) identify when a covered entity, i.e., a doctor, hospital, etc., may disclose protected health information in response to a subpoena or discovery request. For example, the regulations permit the covered entity to disclose protected health information when it receives satisfactory assurances that the parties have presented a qualified protective order ("QPO") to the court.	
5. Under the QPO, the parties will be able to obtain protected health information solely for use in connection with this litigation and then will be able to disseminate those materials to experts and witnesses and to use them at trial, arbitration and/or mediation of this matter. Without the QPO, the litigation will essentially be stalled and discovery may not proceed.	
WHEREFORE, moving defendant respectfully requests that this Honorable Court grant the defendant's motion and enter the attached Qualified Protective Order.	
POST & SCHELL, P.C. BY: _____ RICHARD B. WICKERSHAM JR., ESQUIRE Attorneys for Defendant	
Dated: December 1, 2004	

cases that involve considerable amounts of protected health information or many individuals. Under the Privacy Regulations, mass tort cases with large, amorphous plaintiff classes simply cannot be litigated using authorizations. The logistics of getting authorizations for thousands of medical records is too burdensome and costly. The same hurdles apply to complex products liability cases involving a single severely injured claimant. By using the QPO, the parties will be able to obtain protected health information solely for use in connection with each litigation matter and then will be able to disseminate those materials to experts and witnesses in addition to use at trial, arbitration and/or mediation of a civil action. Without a QPO in today's front-line battle over the privacy of protected health care information, your litigation may essentially be stalled and discovery may not proceed with the speed to which you (and, more importantly, your client) are accustomed.

Thus, take the time to generate a form motion and QPO for your firm's use in every jurisdiction within which you practice. Make it a standard part of your products liability or mass tort practice. It will, in both the short and long term, save your litigation staff time and many headaches in securing the health care information you need to successfully defend your client. It will, as demonstrated by our firm's practice over the past year, save your client actual dollars in your receipt of necessary health care information about plaintiff. While plaintiff's counsel and trial judges may at first shy away from something that appears "new," each will learn over time that a HIPAA QPO is truly hip. ■

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ATTORNEYS FOR DEFENDANT

JOHN DOE

Plaintiff,

v.

ABC PRODUCT MANUFACTURING, INC.

Defendant.

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

NO: 04-01234

JURY TRIAL DEMANDED

QUALIFIED PROTECTIVE ORDER

AND NOW, this ____ day of _____, 2004, pursuant to Defendant's Motion, the Court hereby enters this Qualified Protective Order pursuant to the Privacy Rules implementing the HIPAA at 45 CFR §164.512(e):

1. In response to a discovery request or subpoena which is served under the Rules of Civil Procedure, the parties to this litigation and/or their counsel are permitted to obtain protected health information (hereinafter "PHI")¹ from any health care provider/covered entity (hereinafter "covered entity")² who rendered treatment to plaintiff, John Doe, or made payment for treatment on their behalf;
2. The parties and/or their counsel are prohibited from using any PHI obtained with this Qualified Protective Order for any purpose other than this litigation; except that, nothing herein shall be construed to apply to, or impair the rights of, a party individual who is the subject of PHI that is covered by the Qualified Protective Order to use or disclose PHI that is solely about the party individual.
3. At the end of this litigation (including any and all appeals), the parties and/or their counsel will either return the PHI to the covered entity or destroy the PHI (including all copies made);
4. In conjunction with the prosecution and/or defense of this litigation, the parties and/or their counsel are permitted to redisclose PHI to persons and/or entities including the following: any party to the litigation, counsel for any party to the litigation, non-expert witnesses, expert witnesses, counsel for any non-party to the litigation, the insurance carrier(s) for any party to the litigation, the M-CARE Fund, any other person permitted by other order of this Court and the Court.
5. Any person or entity who receives PHI pursuant to paragraph 4 of this Qualified Protective Order is prohibited from using the PHI for any purpose other than this litigation;
6. Any person or entity who receives PHI pursuant to paragraph 4 of this QPO must return the PHI to the covered entity or destroy the PHI (including all copies made) at the conclusion of the litigation.

BY THE COURT:

J.

¹ As defined at 45 C.F.R. 160.103.

² As defined at 45 C.F.R. 160.103.