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Massachusetts Release of Information: Rate Rules and Pushback

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The Issue

- The rules regarding payment for copying of records date back to the days of photocopying.
- Technology has advanced, but the language in the rules remains the same.
- This results in a misalignment of language and practice, with resulting confusion among providers and ROI professionals, as well as anger and pushback from requesting parties.
- We cannot solve this issue today, but we can understand it better and develop some tools for dealing with requests and requesting parties.

The Massachusetts Rule for Hospitals/Clinics

- Massachusetts law provides that hospitals or clinics may charge a “reasonable fee” for copies of medical records
- Which has been defined to mean:
  - a base charge of not more than $15.00 for each request
  - $0.50 for each of the first 100 pages
  - not more than $0.25 per page for each page in excess of 100 pages
  - with adjustments for the consumer price index for medical care services.

Mass. Gen. L. ch. 111, § 70.

The current rule dates back to the infamous settlement with Lubin & Meyer.

The Battle Commences

"In August 1993, MRA received a demand letter on behalf of the law firm Lubin & Meyer, P.C., and others similarly situated, claiming that MRA had overcharged for copies and also may have included improper charges on its bills, in violation of Mass. Gen. L. ch. 93A and other state statutes. MRA referred the claim to American Empire, with whom it had an errors & omissions (E & O) policy providing defense and indemnification for claims based on the company's professional activities. American Empire declined coverage based on several policy exclusions, and MRA thereafter settled the case for an unspecified sum."

Medical Records Associates, Inc. v. American Empire Surplus Lines Insurance Company, 142 F.3d 512 (1st Cir. 1998)

The Lubin & Meyer Settlement

Hospitals, patients settle suit on photocopy charges Institutions agree to place caps on fees for reproducing their medical records

The Boston Globe (Boston, MA)

March 2, 1996 | Maria Shao, Globe Staff

Forty Massachusetts hospitals have resolved a class-action complaint by agreeing to place caps on charges for photocopies of medical records. The proposed settlement, filed Wednesday in US District Court in Boston, must still be approved by the court. In 1993, Lubin & Meyer, a Boston medical malpractice law firm, had complained and threatened to sue the hospitals and three photocopying firms used by the hospitals over what it said were excessive charges for patient records. The complaint was made under the state's consumer protection act on behalf of patients and lawyers representing patients, said Edward F. Haber, a Boston attorney representing Lubin & Meyer. The hospitals include some of the state's largest: Brigham & Women's, Beth Israel and Deaconess.…

HIPAA Breaks the Uneasy Peace

HIPAA's regulations, adopted in 2001, raise more questions.

45 CFR 164.524(c)(4) - Access of individuals to protected health information.

Fees. If the individual requests a copy of the protected health information or agrees to a summary or explanation of such information, the covered entity may impose a reasonable, cost-based fee, provided that the fee includes only the cost of:

(i) **Labor** for copying the protected health information requested by the individual, whether in paper or electronic form;

(ii) **Supplies** for creating the paper copy or electronic media if the individual requests that the electronic copy be provided on portable media;

(iii) **Postage**, when the individual has requested the copy, or the summary or explanation, be mailed; and

(iv) Preparing an explanation or summary of the protected health information, if agreed to by the individual as required by paragraph (c)(2)(iii) of this section.

HHS OCR Guidance

Federal regulations permit hospitals to impose "a reasonable, cost-based fee" for copies of medical records. 45 C.F.R. § 164.524(c)(4).

Recent HHS OCR guidance affirms that hospitals may charge rates authorized by fee schedules set by state law "where the State authorized costs are the same types of costs permitted under 45 C.F.R. § 164.524(c)(4) of the HIPAA Privacy Rule, and are reasonable." *See* "Individuals' Right under HIPAA to Access Their Health Information 45 C.F.R. § 164.524", Department of Health and Human Services, February 2016. http://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/.

The Problem HIPAA Creates

- The definition of “labor” costs does not include costs for identification, retrieval, collection, or compilation of records.
- The fee charged also may not include costs for “verification; documentation; searching for and retrieving the PHI; maintaining systems; recouping capital for data access, storage or infrastructure; or other costs even if such costs are authorized by State law.”

Are Attorneys Entitled to a “HIPAA Rate”?

- 45 CFR § 164.524 Access of individuals to protected health information is limited to requests from the individual whose records are at issue ("an individual has a right of access to inspect and obtain a copy of protected health information about the individual in a designated record set") but not a third party (like a lawyer).
- In the December 2000 regulatory comments to HIPAA, it talks about who is the "individual":
  - Individual
    - We proposed to define “individual” to mean the person who is the subject of the protected health information. We proposed that the term include, with respect to the signing of authorizations and other rights (such as access, copying, and correction), the following types of legal representatives:
      - (1) With respect to adults and emancipated minors, legal representatives (such as court-appointed guardians or persons with a power of attorney), to the extent to which applicable law permits such legal representatives to exercise the person's rights in such contexts.
      - (2) With respect to unemancipated minors, a parent, guardian, or person acting in loco parentis, provided that when a minor lawfully obtains a health care service without the consent of or notification to a parent, guardian, or other person acting in loco parentis, the minor shall have the exclusive right to exercise the rights of an individual with respect to the protected health information relating to such care.
      - (3) With respect to deceased persons, an executor, administrator, or other person authorized under applicable law to act on behalf of the decedent's estate

What Is a Reasonable Fee Under HIPAA?

A covered entity may calculate a “reasonable” fee in one of three ways.

(1) Actual Cost

(2) Average Cost

(3) Flat Fees for Electronic PHI

What Is “Actual Cost”?

Actual Cost - the entity may calculate the actual cost of each request, multiplying the time spent by the hourly rate of the employees involved. This method may recognize differences in hourly rates between “administrative level labor” that makes and mails copies and more “technical” labor involved in converting and transmitting PHI in electronic format. “Technical” labor, however, should not be understood to include labor for verification, retrieval, or other prohibited costs.

What Is Average Cost?

Average Cost - the entity may develop a schedule of costs based on average labor costs to fulfill standard types of requests, so long as the labor included is that permitted under the guidance. That amount may be added to supply costs for each request.

Calculating and charging the standard rate as a per-page fee is not permitted unless the PHI requested is maintained in paper form and the individual requests a paper copy or asks that the paper PHI be scanned.

Fee for Electronic “Copies”

Flat Fees for Electronic PHI - A covered entity may charge flat fees for requests of electronic copies of PHI that is maintained electronically, provided the fee does not exceed $6.50.

The HHS OCR guidance states that “per page fees are not permitted for paper or electronic copies of PHI maintained electronically.”

Cases: Bactes I

- In Mantia v. Bactes Imaging Solutions, Inc., (Mass. Super. Ct. 2011), the defendant charged the plaintiff postage and handling fee of $4.12, which the parties agreed exceeded the cost of ordinary postage.
- The court determined that this practice violated G.L. c. 111 § 70, which allows additional fees over copying charges only to cover the costs of postage; it allowed summary judgment for plaintiff on its request for declaratory judgment on that count.
- The claim for damages, however, was asserted under a theory of a breach of contract. The agreement to provide copies of medical records to the plaintiff did not reference the statute and the plaintiff willingly paid the extra fee.
- Accordingly, the Court concluded that, as a consequence of this voluntary payment, the plaintiff effectively waived the chance to challenge the fees, and it awarded no damages.

Cases: Bactes II

- In 2013, another group of lawyers (operating as the " Law Offices of PIP Collect") picked up the baton against Bactes.
- In the span of a few months, no less than five complaints including the instant one were filed on behalf of consumers who had requested copies of medical records and who had allegedly been overcharged.
- In almost identical demand letters sent out by PIP Collect, plaintiffs threatened the defendant with three times the amount of actual damages per transaction or $25 (whichever was greater), together with attorney's fees. They also insisted that the defendant pay the cost associated with notifying the class and distributing the proceeds, and added that a refusal to capitulate to these demands would itself be the basis for a 93A violation supporting multiple damages.
- This case settled for an undisclosed amount.

Cases: Moran v. IOD

Moran v. IOD Inc., Superior Court of Massachusetts, Suffolk, August 5, 2014

- A class action brought against IOD Incorporated.
- The plaintiff alleged that IOD has overcharged him and others similarly situated for postage fees, in violation of G.L. c. 111 § 70 and G.L. c. 93A § 9.
- The average overcharge amounted to 57 cents per transaction.
- The parties almost immediately reached a settlement whereby the defendant would be required to disgorge the entire amount of any overcharge over a four year period by way of a cy pres payment to a public interest not-for-profit law firm.
- That amount totals $11,170.70.
- The Court in the exercise of its discretion approved a fee award of $18,000.

The New Frontier: Myriad and the Battle Over Things No One Ordered or Paid For But Which Exist

"Myriad Genetics Denied Patients Access to Data"

- By James Swann, Bloomberg BNA

May 20 — A lab allegedly denied four patients' requests for access to their genetic data, according to a complaint filed May 19 with the HHS by the American Civil Liberties Union….

Myriad Genetics Laboratories Inc., based in Salt Lake City, tested the four patients for their cancer risks, and allegedly refused to provide additional genetic data beyond a copy of their test reports, the complaint said. Myriad eventually provided the additional genetic data on May 18.

The complaint was filed with the Department of Health and Human Services Office for Civil Rights, which in January released guidance clarifying patients' rights to access their medical records under the Health Insurance Portability and Accountability Act's Privacy Rule.

Thank you.

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