Attorneys involved in health care matters must understand and carefully address many new and challenging requirements of the Health Information Technology for Economic and Clinical Health (HITECH) Act\textsuperscript{i} enacted as part of the American Recovery and Reinvestment Act (ARRA),\textsuperscript{iii} Public Law 111-005. The HITECH Act creates stringent federal privacy and security requirements for individuals and entities, including attorneys, classified as business associates under rules promulgated under the Health Insurance Portability and Accountability Act of 1996 (HIPAA)\textsuperscript{iv}, Public Law 104-191, as amended.

The original provisions of HIPAA, or "Original HIPAA", did not contain specific privacy and security requirements sufficient for enforcement. Such enforcement became possible only after the Secretary of Health and Human Services promulgated privacy, security, and other HIPAA rules but even those rules were not aggressively enforced by using financial and other sanctions, and instead, an enforcement procedure that could be described as "HIPAA Lite" ensued. But the HITECH Act would appear to reflect Congressional disappointment regarding the absence of monetary sanctions having been imposed under HIPAA Lite. Under the HITECH Act, which can be described as "HIPAA Jolt," enforcement is expanded to include many more potential defendants and possible sanctions substantially are increased, including for attorneys involved in health care matters. Attorneys increasingly are being regulated by federal laws in addition to being regulated by state rules of profession conduct\textsuperscript{v}, and HIPAA and the HITECH Act are a part of this enlarging area of federal professional concern for attorneys.

**HIPAA Business Associate Agreements**

Health care providers and others classified as covered entities under HIPAA rules already are required under HIPAA to enter into written agreements with their business associates including attorneys, and known as "business associate agreements," and thereby to require certain privacy and security protections relating to information classified as protected health information (PHI) under HIPAA rules, including electronic PHI. As of February 17, 2010, the HITECH Act empowered the federal government to impose civil and criminal penalties directly against business associates. Enforcement of such protections by HIPAA covered entities under business associate agreements no longer will be the sole HIPAA-related enforcement remedy for privacy and security breaches suffered or caused by business associates, including those involving computer data breaches.

**HITECH Act Implementation and Enforcement**

No rules have been promulgated to implement such new business associate provisions under the HITECH Act. But nothing in the HITECH Act specifically further defers...
enforcement. Some believe that implementing rules are not even necessary for enforcement of HIPAA against business associates because, *inter alia*, the HITECH Act language includes the words "shall be incorporated..." with respect to the security and privacy provisions applicable to business associates. Some believe that this causes self-executing incorporation of relevant HITECH Act provisions into and to be considered as a part of obligations assumed under existing or new business associate agreements. With or without implementing rules, the HITECH Act, and HIPAA Jolt, implicate many professional responsibility issues for attorneys involved in health care matters.

**Information Technology Competence and Diligent Preparation**

Some believe it is the professional obligation of an attorney, in general, and more specifically when involved in health care matters and even more, when involved in health care and information technology, to be competent in matters of computer technology systems and procedures, including being able to address privacy and security risks arising in legal representation and law office operations generally. The HITECH Act reinforces and expands the universe of technology and professional practice concerns for attorneys and their clients because of security and privacy business associate-related changes made by, and new data breach notice requirements specified in, the HITECH Act. Attorneys who are business associates also are required to impose upon agents and subcontractors certain obligations comparable to those contained in business associate agreements, whether or not such agents or contractors are attorneys or also are business associates. Attorneys for business associates and for such agents and subcontractors, rather than for covered entities, also will have to address the new requirements appropriately and are affected by professional responsibility obligations implicated by HIPAA and the HITECH Act and discussed below.

Attorneys now should be assessing how the HIPAA security and privacy rules affected by, and the data breach provisions of, the HITECH Act will affect professional relationships with their covered entity, business associate, and business associate agent and contractor clients, and with attorneys' agents and subcontractors as well. New business associate agreement and other agreement provisions and new and complex policies and procedures regarding protecting PHI should be considered, and professional responsibilities of attorneys under relevant rules of professional conduct must, as always, be respected, including in all jurisdictions that are determined to be relevant to each attorney and law firm.

**New Agreements and Amending Existing Agreements**

As indicated above but worthy of emphasis here, the HIPAA rules, both before and after enforcement of the HITECH Act, require covered entities (note that special provisions obtain for government entities) to enter into business associate agreements with their HIPAA business associates and in general to include terms and conditions directly required by or thought to be advisable because of the applicable privacy and security rules provisions. Therefore attorneys will be asked (or will have to determine whether to advise their HIPAA covered entity clients) to enter into new business associate
agreements or to amend existing business associate agreements (or, in some instances, to enter into or to amend agreements comparable to business associate agreements with those of their clients who are business associates and who must impose obligations comparable to those contained in business associate agreements upon agents and contractors, including attorneys), if and to the extent a determination is made that the HITECH Act requires new or amended business associate agreements.

As mentioned above, while currently there appears to be some disagreement regarding whether amendments to existing business associate agreements are required by the HITECH Act (some believe that the better side of the argument likely is that such amendments are required and that the HITECH Act does not automatically incorporate the new HITECH Act requirements in existing business associate agreements by using the "shall be incorporated..." language), the Department of Health and Human Services is expected to clarify this and other ambiguities by the end of the rule-making process now underway.

**Professional Responsibility Implications for Attorneys**

Several areas of professional responsibility are implicated by new or amended business associate agreements. Among the many concerns are if, when, and how an attorney who is a HIPAA business associate must advise a potential client, an existing client, or a new client regarding the entitlement of that client to independent legal representation if, as, and when a HIPAA business associate agreement between a client that is a HIPAA covered entity and the client's attorney is contemplated. The need to request client consent to potential conflicts of interest and a waiver of an entitlement to the advice of independent legal counsel are implicated by and relevant to such concerns. More specifically, when an attorney enters into a contract with a client, in most instances (except perhaps in engagement letter contracting, because of long-standing traditions that are not expressly set forth under rules of professional conduct), potential conflicts of interest are implicated that either can or cannot be consented to by a client at the same time as a client may elect to waive an entitlement to the advice of independent legal counsel with respect to giving consent and entering into such an agreement.

What type of consent and waiver may or may not be required or permitted generally in instances of potential conflicts of interest, and more particularly when entering into a business associate agreement or an agreement with agents and contractors, and how consents and waivers are to be documented and explained, must be considered and addressed in a manner consistent with professional obligations when an attorney and such attorney's client, including a HIPAA covered entity client, are involved.

If, as, and when an attorney and a client, having previously entered into a HIPAA business associate agreement or an analogous agent or contractor agreement, contemplate amending that agreement, the attorney must give consideration to what disclosures and advice must be given regarding the client's entitlement to the advice of independent legal counsel, and to whether a waiver is an available option in a situation in which an existing agreement is to be amended, as distinguished from entering into a new agreement. Some
believe that there is a distinct and dispositive difference between entering into a new agreement with a client and amending an existing agreement with a client, and that the professional obligations implicated differ depending upon which of such circumstances ensue, with more stringent requirements applicable to amendments.

Initiating a HIPAA HITECH Act Discussion

There also remains a threshold question that existed before the HITECH Act was enacted and continues to exist: is an attorney, who is not a HIPAA covered entity, required as a matter of professional responsibility to initiate a discussion with a client that is a HIPAA covered entity, regarding the requirement that HIPAA imposes upon the client (but not, under HIPAA or the HITECH Act, upon the attorney) to enter into a HIPAA business associate agreement with the attorney that contractually will burden the attorney? May an attorney, instead, await a request by a client to initiate a business associate agreement arrangement, because, *inter alia*, the agreement would burden the attorney and HIPAA does not require a HIPAA business associate to cause such a contract to be entered into with a covered entity? Would the obligation of the attorney to provide competent representation supersede the attorney's self-interest such that advice to the client that will burden the attorney nevertheless must be given?

If either an attorney or an attorney's client initiates a HIPAA business associate agreement discussion, how should the attorney address the need to provide a form of HIPAA business associate agreement to a client? What negotiating strategy may an attorney use if the attorney knows, because of having negotiated for and in behalf of that client before (and perhaps even more challenging, if that client is a government or charitable entity), the negotiating strategies used by that client and how aggressively or passively that client usually prefers to handle negotiations?

Proper Forms and Procedures

Should the attorney, or do professional responsibility obligations require an attorney to, give the client a form of business associate agreement that is the most favorable form of agreement oriented toward and benefiting a business associate client that ever was used by the attorney so that the attorney zealously is favoring the client’s best interests and not the attorney’s best interests? May the attorney, instead, use a different form that is more favorable to the attorney and thereby (intentionally or without any intention so to do) endeavor to improve the attorney's situation either as a primary motivation or simply as one of several? If given a proposed business associate agreement is given to an attorney by a client, is the attorney obligated to call to the client's attention the absence of provisions that, while likely to burden the attorney, would benefit the client?

Indemnification and Hold Harmless

In this connection and as an example of some of the concerns likely to arise, if another client required the attorney to provide indemnification and hold harmless protection to the client under a business associate agreement that survives the expiration or other
termination of the business associate or other agreement, may the attorney nevertheless omit such a clause from the agreement being presented by the attorney to a different client that is not independently represented by another attorney and that does not have in-house legal counsel providing legal advice with respect to the new agreement? Is the attorney obliged to research whether having an indemnification obligation to a client will cause otherwise available insurance coverage providing protection to the client under the attorney's policies to be unavailable because indemnification obligations are not covered under the policy when expressly assumed by an insured under a contract? May an attorney ask a client to provide indemnification protection to the attorney either by including such a clause in a proposed business associate agreement or as a result of negotiations with a client? If asked by a client whether the attorney ever has provided indemnification and hold harmless protection to another client in connection with HIPAA and the HITECH Act, may the attorney decline to respond and if so, on what basis?

This is a particularly difficult area of concern because indemnification and hold harmless agreements can be complex and confusing. In addition, financially and otherwise, the consequences of having to provide indemnification can be burdensome and the absence of indemnification protection likewise can be burdensome.

Changing Circumstances and Changing Laws

After a business associate agreement is entered into, will the attorney be obliged to seek to amend that agreement if, as and when provisions adverse to the attorney but beneficial to the attorney’s client are implicated because of changes in HIPAA or the HITECH Act either because of changes in the statutes or rules or because of judicial decisions, and what about later realizations by the attorney that perhaps the agreement previously used could have been made more beneficial to the client had the attorney thought of more beneficial clauses earlier?

Disclosures Harmful to a Client

Consideration also has to be given to the so-called "rat fink" provisions of the HITECH Act that purport to require an attorney to advise the federal government of certain non-compliance circumstances involving the attorney's client.xiii Query what can and should be done to avoid being placed in such an awkward position, in addition to amending existing business associate agreements to eliminate, to the maximum extent possible and appropriate, the obligations of the covered entity client to the attorney under the business associate agreement in order to reduce the number of instances under which the attorney would have to evaluate any such possible disclosure obligations.xiv

Conclusion

The foregoing review of several professional conduct concerns for attorneys who are or who will be HIPAA business associates or agents or contractors or who counsel business associates or agents or contractors necessarily is tentative, preliminary, and subject to change, because eventually the Department of Health and Human Services is expected to
publish new rules for implementing provisions of the HITECH Act that relate to HIPAA which can affect those concerns. Thereafter, the HITECH Act rules will have to be evaluated generally and also with respect to each and every jurisdiction in which rules of professional conduct obligations for attorneys are implicated by the HITECH Act. Determining how the professional conduct rules of each such jurisdiction will be construed under applicable state law relative to HITECH Act implications is challenging. Nevertheless, such an effort must be undertaken and should not be underestimated. The advice of competent legal counsel may well be appropriate with careful attention being given to maintaining the attorney-client privilege, although seeking the benefits of privilege claims might not be an available option for a law firm running afoul of professional conduct and HITECH Act requirements.

Even before any such HITECH Act rules are published, attorneys should be reviewing and considering appropriate ways to address the areas discussed above in a manner consistent with their professional obligations under applicable rules of professional conduct and the provisions of their malpractice and other insurance policies and existing HIPAA-related contractual relationships with clients and others also should be reviewed. Always to be remembered is that rules of professional conduct regulating attorneys are promulgated for the ultimate benefit of clients and not their attorneys.

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Author's Note: The foregoing article is based upon and is a further enhanced version of the author's article, Expansion of HIPAA Enforcement Raises Ethical Questions, published in the Virginia State Bar Virginia Lawyer February 2010 issue at http://www.vsb.org/docs/vlawyermagazine/vl0210_tech.pdf. The Virginia State Bar Code of Professional Conduct for attorneys may be viewed at http://www.vsb.org/site/regulation/guidelines/ and soon will be available in html format. The American Bar Association maintains a helpful web page at http://www.abanet.org/cpr/links.html containing links to state rules of professional conduct. Applicable bar ethics opinions and judicial decisions also must be considered when determining evaluating the professional obligations of attorneys with respect to the matters discussed in the foregoing article, and a review of attorneys’ professional malpractice and other insurance policies can inform as well.

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i Attorney & Counsellor-at-Law; Adjunct Professor of Health Law, George Mason University, McLean, Virginia; past member of Rules of Professional Conduct Review Committee of the District of Columbia Bar; Chair, Board of Governors, Health Law Section and Vice Chair, Technology and the Practice of Law Committee, Virginia State Bar Secretary/Treasurer, Virginia Bar Association Health Law Section; Past President and Inaugural Fellow American Health Lawyers Association; http://www.GoldbergLawyer.com

ii Health Information Technology for Economic and Clinical Health Act (HITECH Act), Section 13001, Title XIII, of American Recovery and Reinvestment Act of 2009, Public Law 111-5


iv Health Insurance Portability and Accountability Act of 1996, Public Law 104-191


vi Regarding HITECH Act rule-making and enforcement, the Office for Civil Rights of the Department of Health and Human Services announced that: “…the NPRM and the final rule that follows will provide specific information regarding the expected date of compliance and enforcement of these new requirements [relating, inter alia, to business associate liability].

http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/hitechblurb.html


viii Virginia Code of Professional Conduct, Rule 1.3

ix Virginia Code of Professional Conduct, Rules 1.1 and 1.3.

x Virginia Code of Professional Conduct, Rule 1.8.

xi Id.

xii Virginia Code of Professional Conduct, Rules 1.8., 2.1, and 4.1

xiii Health Information Technology for Economic and Clinical Health Act (HITECH), Section 13404(b), Title XIII, of American Recovery and Reinvestment Act of 2009, Public Law 111-5

xiv Virginia Code of Professional Conduct, Rule 1.6.