

# Health Law and Technology: A Primer and a Warning

by Alan S. Goldberg



Attorneys for providers, payers, vendors, and others in health-care delivery must understand information-technology challenges and opportunities. What follows may not be profound—or obvious. It is often the simple and not the complex that creates trouble in areas of health care and technology.

In health care, privacy and security are paramount. Federal, state, local, and contractual law provisions are not always consistent. Knowledge of health-care privacy and security laws must precede an analysis of which laws complement or preempt others, and which laws are independent of others.

The privacy rule under the Administrative Simplification subtitle of the Health Insurance Portability and Accountability Act (HIPAA) of 1996 says that when state laws contradict and are more stringent than the HIPAA privacy rule, the state laws preempt the HIPAA rule. Now that the use of electronic health information is increasing, clients must review whether protected electronic information reposes in jurisdictions with laws that preempt HIPAA. Clients should include references to state preemptive laws in notices of privacy practices of entities covered under HIPAA.

There are challenges to privacy assertions when clients use an .edu e-mail address or other electronic mail accounts for communication of health information that is not directly related to their professional work for academic or other institutional health-care organi-

zations. Questions arise: Do no-privacy policies that govern the e-mail account create inconsistencies with HIPAA privacy obligations? Can protection of the attorney-client privilege for communications be asserted when using such e-mail accounts?

HIPAA privacy provisions and nondisclosure agreements can be inconsistent. Some nondisclosure agreement documents include a provision that accounts for the HIPAA privacy rule regarding confidential health-care information. The following clause may be considered to address this concern:

**Exclusion.** Notwithstanding anything contained in this agreement to the contrary (except that confidential information which, regardless of becoming publicly or otherwise available, is required by law to be confidential, including under the administrative simplification subtitle of the Health Insurance Portability and Accountability Act of 1996, Public Law 104-109, shall be included as and shall remain confidential information if, as, and to the extent confidentiality is required under applicable law), confidential information shall not include any information which would otherwise be classified as confidential information but: (a) is or becomes publicly available other than through unauthorized disclosure by a receiving party or a receiving party's representative, or (b) is shown by written record to have

been independently developed by a receiving party.

Attempts to protect privacy may be thwarted by computer terms. Words that describe computer technology functions do not always mean what they seem. Microsoft's Windows XP application, for example, requires a feature called "start" to get to another feature that turns off the computer. A more troubling feature is the common delete key. When a file is "deleted" using the delete key, the file does not disappear. The information in the file remains available on the hard drive or elsewhere in the computer. Finding the supposedly deleted file can take time and knowledge of how computer software and hardware work together to create and retain information, but usually it is not difficult.

Other inadvertent disclosures of electronic information can occur when an Internet browser cache is not cleared or when a list of document files previously opened in an application such as Microsoft Word for Windows is not cleared. Failing to clear a cache could mean that an otherwise protected Web page that contains health information can be viewed without password protection. Failure to clear a list of document files could mean that names and health and other information included in a document file title can be disclosed unintentionally.

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There are many areas of concern involving how health information is to be protected. Health lawyers and others cannot solely rely on others to learn about and help address these concerns.



**Alan S. Goldberg** is a solo practitioner in McLean, having completed thirty-nine years with a large Boston and Washington, D.C., law firm. He is a past president of the American Health Lawyers Association, a past member of the council of the American Bar Association Health Law Section, a past cochair of the Virginia State Bar Health Law Section, and a member of the Rules of Professional Conduct Review Committee of the District of Columbia Bar, the VSB Special Committee on Law and Technology, and the council of the Health Law Section of The Virginia Bar Association. He is currently cochair of the Health Technology Committee of the Northern Virginia Technology Council. He is an adjunct professor of health law at George Mason University, and he served in the judge advocate general corps of the U.S. Navy.