

Expansion of HIPAA Enforcement Raises Ethical Questions

by Alan S. Goldberg

EXPANDING FEDERAL PRIVACY and security requirements to protect health data are presenting new challenges to Virginia attorneys—including on the ethical front.

Attorneys must address the federal Health Information Technology for Economic and Clinical Health (HITECH) Act, enacted as part of the American Recovery and Reinvestment Act (ARRA), Public Law 111-005.

The HITECH Act creates stringent privacy and security requirements for individuals and entities, including Virginia attorneys, who are classified as business associates under rules promulgated for enforcement of the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

Congress created the HITECH Act to provide more authority to enforce HIPAA, which in its original form did not contain requirements sufficient for enforcement. Now, enforcement will include many more potential defendants, and penalties may be increased for attorneys involved in health care matters.

Health care providers and others classified as covered entities under HIPAA rules already are required under HIPAA to enter into written agreements with business associates, including attorneys, to protect health information. These are called “business associate agreements.”

Beginning February 17, 2010, the HITECH Act will empower the federal government to impose civil and criminal penalties against those business associates who breach privacy or security provisions of HIPAA—including those involving computer data.

An attorney involved in health care and information technology might be obliged to be competent in computer technology systems, including privacy

and security risks. The HITECH Act reinforces and expands the universe of technology and professional practice concerns for Virginia attorneys and their clients.

Virginia attorneys who are business associates also are required to impose obligations comparable to those in business associate agreements on agents and subcontractors. Attorneys for business associates also will have to address the new requirements.

Attorneys are assessing how the new rules will affect relationships with their covered entities, business associate clients, agents, and subcontractors. New business associate agreements and related other agreement provisions and new and complex policies and procedures to safeguard protected health information should be considered, and responsibilities of Virginia attorneys under the Virginia Rules of Professional Conduct must be respected.

Before the HITECH Act, HIPAA rules required covered entities to enter into business associate agreements with their HIPAA business associates and include terms and conditions required by privacy and security provisions. The HITECH Act may require new or amended business associate agreements. There is disagreement on this point. The HITECH Act does not automatically incorporate the new requirements in existing business associate agreements by using “shall be incorporated” language. The U.S. Department of Health and Human Services is expected to clarify ambiguity during the rule-making process.

Several areas of professional responsibility are implicated by new or amended business associate agreements involving Virginia attorneys. The rules and clarifying ethics opinions of each

relevant jurisdiction in which such attorneys practice law must be reviewed before determining requirements and obligations.

Among the many concerns are if, when, and how an attorney who is a HIPAA business associate must advise a client of the client’s entitlement to independent legal representation if a business associate agreement is contemplated between the attorney and the client. There may be a distinct and dispositive difference between entering into an agreement with a client and amending an existing agreement with a client. The professional obligations implicated differ.

There also remains a threshold question that existed before the HITECH Act was enacted: Is an attorney who is not a HIPAA-covered entity required to initiate a discussion with a client that is a HIPAA-covered entity about the requirement that HIPAA imposes upon the client (but not, under HIPAA, upon the attorney) to enter into a HIPAA business associate agreement with the attorney that will contractually burden the attorney? May an attorney instead await a request by a client to initiate the discussion? 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 must nevertheless be given?

If either an attorney or the 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 the negotiating strategies used by a client and how aggressively that client handles negotiations? Should the attorney give the client a form of

business associate agreement that is favorably oriented toward a business associate client so that the attorney is aggressively favoring the client's interests and not the attorney's interests, or may the attorney use a different form that is more favorable to the attorney and thereby improve the attorney's situation? If another client required the attorney to provide indemnification protection to the client under a business associate agreement, may the attorney nevertheless omit such a clause from the agreement being presented by the attorney to a new client who is not independently represented by another attorney with respect to the new agreement?

Consider also the so-called "rat fink" provisions of the HITECH Act that purport to require an attorney to advise the federal government of the client's noncompliance. Query what should be

Relevant Virginia Rules of Professional Conduct include:

RULE 1.1 Competence
 RULE 1.2 Scope of Representation
 RULE 1.3 Diligence
 RULE 1.6 Confidentiality of Information
 RULE 1.16 Declining or Terminating Representation
 RULE 2.1 Advisor
 RULE 4.1 Truthfulness in Statements to Others
http://www.vsb.org/docs/2008-09_rules-pc.pdf

done to avoid being placed in such an awkward position to eliminate the obligations of the covered entity client to the attorney under the business associate agreement.

The foregoing summary may change, because the Department of Health and Human Services is expected to publish new rules for implementing

provisions of the HITECH Act that relate to HIPAA. But even before any such rules are published, Virginia attorneys should consider appropriate ways to address those areas in a manner consistent with professional obligations under the Virginia Rules of Professional Conduct and any other applicable professional responsibility rules.