

SC90610

IN THE SUPREME COURT OF MISSOURI

**STATE OF MISSOURI ex rel. BOBBIE JEAN PROCTOR
AND VINCENT PROCTOR,**

Relators,

vs.

HON. EDITH MESSINA,

Respondent.

Original Proceeding on Transfer

From the Missouri Court of Appeals, Western District

No. WD71326

**BRIEF AMICUS CURIAE
OF MISSOURI HOSPITAL ASSOCIATION**

**R. Kent Sellers MO # 29005
Lathrop & Gage LLP
2345 Grand Boulevard, Suite 2200
Kansas City, MO 64108-2618
(816) 292-2000
(816) 292-2001 - Facsimile**

**ATTORNEYS FOR AMICUS CURIAE
MISSOURI HOSPITAL ASSOCIATION**

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STATEMENT OF INTEREST

Amicus curiae Missouri Hospital Association (“MHA”) is a private, not-for-profit organization whose mission is to create an environment that enables member hospitals and health care systems to improve the health of their patients and community. Since its creation in 1922, MHA has grown from 50 to more than 150 member hospitals. MHA represents virtually every acute care hospital in the state, as well as most of the federal and state hospitals and rehabilitation and psychiatric care facilities. MHA regularly appears as *amicus curiae* in Missouri courts in support of its member hospitals and health care systems when fundamental issues affecting the delivery of health care are at stake.

MHA’s interest in this appeal is to inform this Court about the needs and concerns of hospitals in regard to the flow of health information within hospitals and among their employees, medical staff members, and affiliated health care providers, regardless of whether any one or more of them is a party to litigation. Regulations issued pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) recognize and permit the sharing of health information within hospitals and other organized health care arrangements, and any decision by the Court in this case should be narrowly tailored so as not to interfere with the health care operations of hospitals and others as permitted by HIPAA. Accordingly, MHA offers this brief to aid the Court in its consideration of the issue.

CONSENT OF PARTIES

The parties have consented to the filing of this brief by *amicus curiae* Missouri Hospital Association.

ARGUMENT

Introduction

Relators portray HIPAA as erecting a monolithic barrier to what relators characterize as *ex parte* contacts with a treating physician, or what the court of appeals described as communications with “non-party medical providers.” Slip op. at 1. But HIPAA does not speak in terms of *ex parte* contacts, nor does it differentiate between treating and non-treating physicians or between litigants and non-litigants. Instead, 45 C.F.R. § 164.502 (2009) catalogs a number of permitted uses and disclosures for protected health information, which are in turn further defined in several other regulations. 45 C.F.R. § 164.502(a)(1). One of those is 45 C.F.R. § 164.512 (2009), the HIPAA regulation upon which both relators and the court of appeals have focused, but it is not the only provision to address permitted disclosures that may occur in connection with legal services or proceedings.

In the context of a statutory and regulatory framework as wide-ranging and nuanced as HIPAA, the potential for inaccurate generalization is ever present. For example, relators make the following assertion:

Bobbie Jean Proctor’s health care providers may disclose PHI under HIPAA’s regulations *only* if (1) Plaintiff executes a proper,

written authorization, 45 C.F.R. § 164.508(c); (2) in response to a court order, 45 C.F.R. § 164.512(e)(1); or (3) through formal discovery.

Substitute Brief of Relators at 25 (emphasis added). This statement is inaccurate, and it remains inaccurate even though relators apparently contend this assertion applies “[i]n the context of litigation.” *Id.* at 24. To the contrary, HIPAA permits—without patient consent—the use and disclosure of protected health information to carry out treatment, payment, or health care operations within the limits specified by regulation. As explained further below, those regulations are broadly framed to automatically permit health care providers that are part of an organized health care arrangement, such as a hospital, to use and disclose protected health information among themselves and their counsel in various contexts, including litigation.

Use and Disclosure For Health Care Operations, Including Legal Services

Under HIPAA regulations, “[a] covered entity is permitted to use or disclose protected health information . . . (ii) For treatment, payment or health care operations, as permitted by and in compliance with § 164.506.” 45 C.F.R. § 164.502(a)(1)(ii). Patient consent is not required for use and disclosure to carry out treatment, payment or health care operations under 45 C.F.R. § 164.506 (2009). Although a consent requirement was part of the regulation when originally promulgated in 2000, the Secretary of Health and Human Services (the “Secretary”) dropped that requirement when the rule was revised in 2002.

Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53182, 53208-11 (August 14, 2002). “A health care provider that has a direct treatment relationship with an individual is not required by the Privacy Rule to obtain an individual’s consent prior to using and disclosing information about him or her for treatment, payment, and health care operations. They, like other covered entities, have regulatory permission for such uses and disclosures.” *Id.* at 53211.

The broad scope of use and disclosure permitted under § 164.506 begins to emerge upon examination of the regulatory terminology. *See* 45 C.F.R. § 164.501 (2009) (defining the terms “treatment,” “payment,” and “health care operations”). In particular, the definition of “health care operations” is extensive and encompasses activities described in six subsections. The fourth subsection of that definition states that health care operations include “Conducting or arranging for medical review, *legal services*, and auditing functions” 45 C.F.R. § 164.501 (emphasis added). As originally proposed, this concept was limited to “compiling and analyzing information in anticipation of or for use in a civil or criminal legal proceeding.” Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82490 (December 28, 2000). However, in issuing the final regulations, the Secretary explained that “a broader reference to conducting or arranging for ‘legal services’” had replaced the narrower phrasing in the proposed rule. *Id.* at 82490-91. This means that consultation and

communication in connection with litigation are subsumed within HIPAA's broad concept of "legal services."

Use and Disclosure Within An Organized Health Care Arrangement

As part of the 2002 regulatory modifications, the Secretary also expanded the scope of entities permitted to use or disclose protected health information for purposes of health care operations. 45 C.F.R. § 164.506(c)(1) begins with the basic proposition that "[a] covered entity may use or disclose protected health information for its own treatment, payment, or health care operations." In successive subsections, the regulation provides for more expansive disclosure to others up to and including the following provision in subsection 5:

A covered entity that participates in an organized health care arrangement may disclose protected health information about an individual to another covered entity that participates in the organized health care arrangement for any health care operations activities of the organized health care arrangement.

45 C.F.R. § 164.506(c)(5).

Thus, HIPAA does not restrict the permitted sharing of protected health information based on a provider's legal structure; instead, HIPAA recognizes an "organized health care arrangement," which is primarily defined as "[a] clinically integrated care setting in which individuals typically receive health care from more than one health care provider." 45 C.F.R. § 160.103 (2009) (first of five

defined categories of organized health care arrangements). Commentary from the Secretary places this definition in its real-world context:

[Organized health care arrangements] may range in legal structure, but a key component of these arrangements is that individuals who obtain services from them have an expectation that these arrangements are integrated and that they jointly manage their operations. We include within the definition a clinically integrated care setting in which individuals typically receive health care from more than one health care provider. *Perhaps the most common example of this type of organized health care arrangement is the hospital setting, where a hospital and physician with staff privileges at the hospital together provide treatment to the individual. Participants in such clinically integrated settings need to be able to share health information freely not only for treatment purposes, but also to improve their joint operations.* For example, any physician with staff privileges at a hospital must be able to participate in the hospital's morbidity and mortality reviews, even when the particular physician's patients are not being discussed. Nurses and other hospital personnel must also be able to participate. These activities benefit the common enterprise, even when the benefits to a particular participant are not evident. . . . Thus, special rules are needed to

ensure that this rule does not interfere with legitimate information sharing among the participants in these arrangements.

65 Fed. Reg. at 82494 (emphasis added).

HIPAA Philosophy on Use and Disclosure

Contrary to the impression left by relators, the reality is that HIPAA and its implementing regulations seek to strike a real-world and workable balance between the desire to protect patient privacy and the need to promote and permit the sharing of information that is essential to treatment and payment, as well as the many activities encompassed within “health care operations.” The Secretary addressed this balancing in explaining the 2002 regulatory revisions that eliminated any requirement of patient consent for the disclosure of protected health information in connection with treatment, payment or health care operations pursuant to 45 C.F.R. § 164.506:

Treatment and payment for health care are core functions of the health care industry, and uses and disclosures of individually identifiable health information for such purposes are critical to the effective operation of the health care system. Health care providers and health plans must also use individually identifiable health information for certain health care operations, such as administrative, financial, and legal activities, to run their businesses and to support the essential health care functions of treatment and payment. Equally important are health care operations designed to

maintain and improve the quality of health care. In developing the Privacy Rule, the Department balanced the privacy implications of uses and disclosures for treatment, payment, and health care operations and the need for these core activities to continue. The Department considered the fact that many individuals expect that their health information will be used and disclosed as necessary to treat them, bill for treatment, and, to some extent, operate the covered entities' health care business. Given public expectations with respect to the use or disclosure of information for such activities and so as not to interfere with an individual's access to quality health care or the efficient payment for such health care, the Department's goal is, and has always been, *to permit these activities to occur with little or no restriction.*

67 Fed. Reg. at 53208-09 (emphasis added).

Ex Parte Interviews Permissible Under HIPAA

Although relators advocate a bright-line prohibition on ex parte interviews of health care providers, HIPAA cannot be the source of any such mandate. Instead, HIPAA regulations articulate variable and nuanced disclosure standards that turn on numerous factors, including the wide array of organizational structures through which health care may be delivered and the broad scope of business activities associated with health care operations. At the most basic level, HIPAA recognizes the necessity that “[a] covered entity may use or disclosure protected

health information for its own treatment, payment, or health care operations.” 45 C.F.R. § 164.506(c)(1). This means an individual provider or a provider organized as a corporation is free to share and exchange protected health information for these purposes with and among the provider’s own employees or agents without regard to patient consent. But, as HIPAA recognizes, the legal and organizational arrangements through which health care may be delivered are varied and constantly changing, and the information must be able to flow freely within these arrangements for them to function effectively as health care providers, businesses, and users of legal and other professional services.

For this reason HIPAA permits large and complex organized health care arrangements, such as hospitals, the same level of internal communication and legal consultation available in the smallest of medical offices. HIPAA regulations contemplate and expressly permit the free flow of protected health information among a hospital’s employees, staff physicians, contractors, and others engaged in joint or integrated health care activities. Those permitted communications extend to any aspect of health care operations as defined in 45 C.F.R. § 164.501, such as quality assessment and improvement, review of professional performance and qualifications, or legal services ranging from advice and consultation to all aspects of claim investigation and litigation defense. HIPAA therefore permits an attorney for a participant in an organized health care arrangement to communicate with any other participant in the arrangement, be it an employee of a participant, a

physician with hospital staff privileges, or a contract provider of medical, administrative or payment services.

Based on the regulatory standards and concepts described above, it is apparent that in various circumstances 45 C.F.R. § 164.506 permits what some might regard as ex parte communications in connection with litigation. Assume, for example, that a lawsuit arises out of a hospital surgical procedure and follow-up care. An independent surgeon with staff privileges performs the procedure, assisted by members of an anesthesiology group under contract with the hospital and by nurses employed by the hospital. Laboratory, imaging, and pathology services are provided by a combination of hospital employees and contractors. Post-surgery care is provided on campus, first on an inpatient basis and then through a free-standing outpatient clinic, by employed physicians and nurses as well as an affiliated medical practice group. After the patient files suit against the hospital, the surgeon and an imaging contractor, each defendant retains separate counsel.

Insofar as HIPAA is concerned (and setting aside any other potentially applicable standard, such as rules of professional conduct), 45 C.F.R. § 164.506 grants regulatory permission to counsel for each defendant-participant in this organized health care arrangement to communicate with all other participating entities, not merely those named in the suit. In developing and modifying HIPAA regulations, the Secretary recognized that all participants in an organized health care arrangement have an interest in full access to all facts and information, not

merely to defend those named in the action and the reputations of the organized health care arrangement and all of its participants, but also for purposes of internal review and assessment as needed to maintain and improve the overall quality of care.

CONCLUSION

As HIPAA well demonstrates, questions regarding the use and disclosure of protected health information arise in various contexts and involve competing considerations. The Secretary recognized that arbitrary and inflexible restrictions on the use and disclosure of protected health information for treatment, payment and health care operations would ultimately be detrimental to the quality and availability of health care.

Similarly, this Court should resist any call for a rigid or simplistic resolution to the issues raised by this case, such as an outright ban on ex parte contacts. HIPAA mandates no such result and provides no excuse to short-circuit careful and individualized analysis of such communications under other applicable law or professional standards. Moreover, such a ban on communication among health care providers and their counsel could impair or frustrate the essential uses and disclosures of information contemplated and permitted under HIPAA regulations such as 45 C.F.R. § 164.506.

Respectfully submitted,

R. Kent Sellers #29005
ksellers@lathropgage.com
LATHROP & GAGE LLP
2345 Grand Boulevard, Suite 2200
Kansas City, Missouri 64106-2618
(816) 292-2000
(816) 292-2001 Facsimile

**ATTORNEYS FOR AMICUS CURIAE
MISSOURI HOSPITAL ASSOCIATION**

CERTIFICATE OF COMPLIANCE

I certify that:

1. The brief includes the information required by Rule 55.03;
2. The brief complies with the limitations contained in Rule 84.06(b);
3. According to the word count function of counsel's word processing software (Microsoft® Word 2002), the brief contains 2,594 words; and
4. The disk submitted herewith containing a copy of this brief has been scanned for viruses and is virus-free.

R. Kent Sellers

CERTIFICATE OF SERVICE

On this 30th day of April, 2010, I hereby certify that two copies of the above and foregoing together with a copy of this brief on CD-ROM were served by mail, first-class postage prepaid, addressed to:

Honorable Edith L. Messina
Circuit Court of Jackson County, Division 12
415 East 12th Street
Kansas City, MO 64106
(816) 881-3612
FAX: (816) 881-3233
RESPONDENT

Jana V. Richards
Maureen M. Brady
SANDERS WARREN & RUSSELL LLP
9401 Indian Creek Parkway, Suite 1250
Overland Park, KS 66210
(913) 234-6100
FAX: (913) 234-6199
**ATTORNEYS FOR TIMOTHY L. BLACKBURN, M.D.
AND KANSAS CITY HEART GROUP, P.C.**

Sean T. McGrevey
Scott M. Adam
McCORMICK, ADAM & McDONALD, PA
9300 West 110th Street, Suite 470
Overland Park, KS 66210
(913) 647-0670
FAX: (913) 647-0671
ATTORNEYS FOR ST. JOSEPH MEDICAL CENTER

Robert W. Cotter
Matthew M. Geary
DYSART TAYLOR LAY COTTER & McMONIGLE, PC
4420 Madison Avenue
Kansas City, MO 64111
(816) 931-2700
FAX: (816) 931-7377
ATTORNEYS FOR AMICUS CURIAE
MISSOURI ORGANIZATION OF DEFENSE LAWYERS

Michael T. Yonke
Hans H. vanZanten
YONKE & POTTENGER, L.L.C.
1100 Main Street, Suite 2450
Kansas City, MO 64105
(816) 221-6000
FAX: (816) 221-6400
ATTORNEYS FOR RELATORS

Leland F. Dempsey
Ashley L. Baird
DEMPSEY & KINGSLAND, P.C.
1100 Main Street, Suite 1860
Kansas City, MO 64106
(816) 421-6868
FAX: (816) 421-2610
ATTORNEYS FOR AMICUS CURIAE
MISSOURI ASSOCIATION OF TRIAL ATTORNEYS

ATTORNEYS FOR AMICUS CURIAE
MISSOURI HOSPITAL ASSOCIATION

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