

***THE IMPACT OF HIPPA
ON FAMILY LAW PRACTICE***

By: Kenneth E. Prather, Sr.
KENNETH E. PRATHER, SR., P.C.,
19846 Mack Avenue
Grosse Pointe Woods, MI 48236
Phone: 313-884-5622/313-884-6073 (Fax)
Email: kprather@quixnet.net

Thursday, May 6, 2004
Advanced Level Family Law Seminar
Michigan Chapter of American Academy of Matrimonial Lawyers
The Townsend Hotel
Birmingham, Michigan

The headlines in the Monday, May 29, 2004 edition of *The Detroit News* stated “*Medical law crimps care - Privacy acts add red tape, diverts attention from sick, limits relatives’ access to information*”

Federal legislation known as the Health Insurance Portability and Accountability Act of 1996 (“HIPPA”), 42 USC 201 et seq. presents a significant challenge to a Family Law practitioner to secure an opposing party’s health care records and protected health information.

Effective August 21, 1996, the Congress of the United States passed HIPPA which provides in relevant part:

“SEC. 261. PURPOSE.

It is the purpose of this subtitle to improve the Medicare program under title XVIII of the Social Security Act, the medicaid program under title XIX of such Act, and the efficiency and effectiveness of the health care system, by encouraging the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information.

(2) SAFEGUARDS—Each person described in section 1172(a) who maintains or transmits health information shall maintain reasonable and appropriate administrative, technical, and physical safeguards—

SEC. 1176 (a) GENERAL PENALTY

(1) IN GENERAL— Except as provided in subsection (b), the Secretary shall impose on any person who violates a provision of this part a penalty of not more than \$100 for each such violation, except that the total amount imposed on the person for all violations of an identical requirement or prohibition during a calendar year may not exceed \$25,000.”

(Exhibit 1: HIPPA Statute)

Applicability. Any standard adopted under this part [42 USC § 1320d *et seq.*]

shall apply in whole or in part to the following persons:

- (1) A health plan.
- (2) A health care clearinghouse.
- (3) A health care provider who transmits any health information in electronic form in connection with a transaction referred to in section 1173(a)(1) [42 USCS 1320d- 2(a)(1)].

(Exhibit 2: 42 USCS § 1320d-1(a))

CODE OF FEDERAL REGULATIONS (“CFR”)

45 CFR - SUBTITLE A - PART 164 states in relevant part:

“(e) Standard: Disclosures for judicial and administrative proceedings.

(1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding.

(I) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or

(B) The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.”

(Exhibit 3: 45 CFR - SUBTITLE A - PART 164 - HIPPA)

PRACTICAL TIP

When a Family Law practitioner is faced with a possible HIPPA challenge to securing an opposing party's health care records, these steps should be taken to secure the opposing party's "protected health information:"

- (1) Request opposing counsel to have his or her client execute an "Authorization to Disclose Protected Health Information".

(Exhibit 4)

- (2) Explore vigorously whether the opposing party has waived the physician /patient privilege in correspondence and pleadings such as answers to interrogatories and deposition. For a commentary on the "Physician/Patient Privilege in Custody Disputes", see Section 7.18 in "Divorce Trial Practice," published in ICLE's Michigan Family Law Book.

(Exhibit 5)

- (3) Where a party will not authorize disclosure of protected health information, and there is a possible waiver of the privilege, file a motion with the trial court requesting the Court to sign and issue the *Subpoena Duces Tecum* directed to the health care provider requiring production of the health care records and disclosure of the protected health information.