

SELLING ASSETS AND TRANSFERRING PATIENT FILES: WHAT HIPAA REQUIRES



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The pharmacy industry is experiencing a large number of mergers and acquisitions. For example, assume that ABC Pharmacy desires to sell its assets to XYZ Pharmacy. At the same time that ABC sells its hard assets (inventory, computers, delivery vans, etc.), ABC will also transfer its patient files. Patient files are "protected health information" (or "PHI") under HIPAA.

In order for ABC to be able to transfer PHI to XYZ, XYZ needs to be a "covered entity" under HIPAA. If XYZ is simply a "straw man company" that does not fall within the HIPAA definition of a "covered entity," then ABC's patient files cannot be transferred to XYZ without the authorization of each of ABC's patients. On the other hand, if XYZ is a covered entity (e.g., XYZ is another pharmacy that will assume responsibility for ABC's patients), then HIPAA will allow the transfer without authorization.

A "covered entity" includes a health care provider that transmits health information in electronic form in connection with a covered transaction. "A covered entity may use or disclose protected health information for its own.....health care operations." 45 C.F.R. 164.506(c)(1). The term "health care operations" includes "the sale, transfer, merger, or consolidation of all or part of the covered entity with another covered entity....." *Id.* at 164.501. The Final Rule that modified the definition of health care operations, to include language about the sale of a covered entity, contains a description of the intent behind the addition of that language. The Final Rule states that the prior version of the Privacy Rule only explicitly stated that uses or disclosures of PHI for due diligence purposes, when a sale is contemplated, were permissible. 67 FR 53182, 53190 (Aug. 14, 2002). Because the intent was "to include in the definition of health care operations the actual transfer of protected health information to a successor in interest upon a sale or transfer of [a covered entity's] assets," the Privacy Rule language was modified so as to eliminate any confusion. *Id.* Therefore, it is clear that a covered entity may disclose PHI in order to facilitate the sale of its assets to another covered entity.

The rule that a covered entity can transfer its patient files to another covered entity, but cannot transfer the files to a non-covered entity without patient authorization, is exemplified in a recent bankruptcy case in Delaware, *In re: Laboratory Partners, Inc. et. al.*, Case No. 13-12769 (PJW). In this case, the United States filed a Protective Objection to Debtors' Motion for Sale of Substantially All of the Debtors' Assets. In its objection, the government pointed out that "[a]s covered entities, the Debtors must comply with the requirements of HIPAA. HIPAA regulations provide that covered entities who seek to sell their customers' protected health information can only do so with their customers' authorization." However, the objection points out: "Counsel for the United States has advised Debtors' counsel that, if the purchaser.....is a "Covered Entity" under HIPAA, the sale of the Acquired Assets would not necessarily require the authorization of the beneficiaries as it would be considered a disclosure for the purposes of health care operations. 45 C.F.R. 164.501. However, Debtors' counsel has been unable to assure the United States that the purchaser will be a Covered Entity."

The "takeaway" for the pharmacy (that desires to sell its assets and transfer its patient files) is that the transferee of the files needs to be a "covered entity" as defined by HIPAA. If the transferee is not a covered entity, then patient authorizations will be required before their files are transferred.

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