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MEMORANDUM

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VIA E-MAIL

TO: Roger Keetle

FROM: Kelly Clarke, Baird Holm, Attorneys at Law

DATE: April 23, 2001

RE: Paying for Medical Records – What Can Be Charged?

QUESTION

You referenced a bulletin recently circulated by the South Carolina Trial Lawyers Association advising its members that HIPAA prevents hospitals and other providers from charging customary handling fees when called upon to produce medical records. The SCTLA memo also notes that providers can only charge a cost-based fee for "copying", and therefore the typical "one dollar per page probably will not fly." You asked for clarification on behalf of the NAHHS members.

ANALYSIS

1. HIPAA gives *individuals* the right to access their own medical information and to obtain copies of designated record sets or other information in retrievable form. (§ 164.524(a). This is not an absolute right – there are a number of exceptions, and providers will take the exceptions into account when they write their policies.

2. Hospitals *can* impose fees under HIPAA.

> "The covered entity may impose a cost-based fee, provided that the fee includes only the cost of:
>
> (i) Copying, including the cost of supplies for and labor of copying [Note - this isn't limited to supplies and labor, but it is limited to bona fide copying costs];
>
> (ii) Postage . . .; and
>
> (iii) Preparing an explanation or summary of the protected health information, if agreed to by the individual as required [when requesting a summary or explanation in lieu of raw records]." (164.524(c)(4)).

The preamble clarifies that the fee is to be "reasonable" and that it is *not to include a processing or retrieval or handling charge* distinct from the labor connected with copying. Charges established under state law for copying (but not charges for disallowed functions like "handling") are presumed reasonable. The SCTLA memo is therefore correct in stating that HIPAA prohibits charging individuals a handling or processing fee for their own records, distinct from the cost of copying or postage.

3. Importantly, this HIPAA limitation on fees ONLY APPLIES TO COPIES PRODUCED FOR THE INDIVIDUAL OR HIS/HER REPRESENTATIVE. There is no HIPAA-imposed limitation on the fees which can be charged when copying records for someone else, including another party to litigation. (65 Fed. Reg. 82556-7). Thus, the SCTLA conclusion regarding handling fees does not apply to copies produced for third parties and their lawyers.

4. Finally, HIPAA has no upper limit on fees, including fees which can be charged to the individual for his or her own record. Depending on the length of a record and the provider's ability to document the cost of copying, the fee could be quite high. HIPAA sets no per-page or per-record maximum. The provider establishes the copying fee based on the provider's documented costs.

5. Neb. Rev. Stat. § 71-8404, on the other hand, says the following:

a. It sets a *maximum* $20 per-record handling fee for copies requested by the individual or his/her representative. Since HIPAA prohibits any handling fee for these records, this maximum has no meaning.

b. It sets a *maximum* 50 cents per page copying fee for copies requested by the individual or his/her representative.– which is stricter than HIPAA and therefore has the effect of setting a per page maximum fee, even though permissible cost-based charges under HIPAA might have been higher.

CONCLUSION

1. HIPAA prohibits charging a "handling" or "processing" or "retrieval" fee of any amount when producing copies for the individual or his/her representative. HIPAA has no effect on the cost of copies produced for others.

2. Providers need to create AND DOCUMENT their per-page labor and supply cost-based copying fee. We believe this can include any reasonable costs properly allocable to copying, but because of Section 71-8404, it cannot exceed 50 cents per page.

3. The HIPAA limits only apply to copies for the individual and his/her representatives (including the individual's lawyer), not the requests by others, including other lawyers.

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