
CLIENT NEWSLETTER

In This Issue:

SJC Revises Protocol for Inspection of Privileged Records. 1

GME Payment Change Finalized. 5

Revised Interpretive Guidelines Issued for Informed Consent. . . 6

CMS Extends Deadline for Phase III Rule of Stark Law. . . 8

CMS Issues Guidance on Emergency Services Requirements for Hospitals . . . 8

HHS Delegates Subpoena Authority to OCR for HIPAA Privacy Investigations.10

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SJC Revises Protocol for Inspection of Privileged Records

The Massachusetts Supreme Judicial Court (“SJC”) recently revised the protocol for inspecting privileged records in criminal cases. The new protocol, which was announced by the SJC in the matter of Commonwealth v. Dwyer, 448 Mass. 122 (2006), addresses circumstances in which a defendant in a criminal case seeks to pierce a statutory privilege (e.g., records of a psychotherapist, social worker, sexual assault counselor or domestic violence victims’ counsel) in order to protect his constitutional right to “put before a jury evidence that might influence the determination of guilt.” The revised protocol will affect the manner in which hospitals and other health care providers produce privileged records in criminal cases.

In Dwyer, the Complainant was sixteen years old when she informed her parents that two of her cousins had raped and sexually assaulted her over a period of several years beginning in 1992 or 1993, when she was eight or nine years old. The trial of the two Defendants was severed. The first Defendant was convicted of rape of a child by force and indecent assault and battery on a child under fourteen years. The second defendant, Sean Dwyer, went to trial in January of 2004. Prior to trial, the Defendant filed motions seeking access to the Complainant’s therapy records from Pembroke Hospital in accordance with the procedures set forth by the SJC in Commonwealth v. Bishop, 416 Mass. 169 (1993) (the “Bishop Protocol”). The Superior Court judge denied the motion concluding that the Defendant had not demonstrated a sufficient basis for ordering an in camera review of the record. The Defendant was subsequently found guilty on several indictments against him. Following the verdicts, the Defendant’s counsel filed a Motion for a New Trial, arguing, among other things, that the denial of access to the records had deprived the Defendant of a “viable defense to the charged offenses” because redacted records introduced at trial reflect that the Complainant “repeatedly and consistently reported” that the alleged abuse occurred several years before the Defendant turned seventeen years old, and “directly contradicted” the Complainant’s testimony at trial. The judge denied the Defendant’s Motion for a new trial and the Defendant’s filed an Application for Direct Appellate Review with the SJC, which was allowed.

The Defendant's appeal caused the SJC in Dwyer to announce a new protocol that shall apply in every criminal case where a Defendant seeks pre-trial inspection of statutorily privileged records of any third party. The new protocol is grounded in Rule 17(a)(2) of the Massachusetts Rules of Criminal Procedure, which governs pre-trial access to "books, papers, documents, or other objects" held by a third party not under the Commonwealth's control.

The Bishop Protocol held that to pierce a statutory privilege, the Defendant must show "at the threshold, that records privileged by statute are likely to contain relevant evidence." Subsequent to the SJC's ruling in Bishop, the SJC expanded upon the Bishop Protocol in the matter of Commonwealth v. Fuller, 423 Mass. 216 (1996). In Fuller, the Court held that the "likely to contain relevant evidence" standard was "too broad and flexible" when applied to sexual assault counseling record (M.G.L., c. 233, § 20J) and determined that such records should be produced for in camera inspection only when a Defendant "has demonstrated a good faith, specific and reasonable basis for believing that the records will contain exculpatory evidence which is relevant and material to the issue of the Defendant's guilt." In Dwyer, the SJC held that the Bishop-Fuller Protocol provided a very stringent standard which was difficult for a Defendant to meet. Further, the Bishop-Fuller Protocol also embroiled the Courts in conflicts concerning whether documents were actually privileged. According to the SJC, the new protocol, the "Dwyer Protocol", is "designed to give the fullest possible effect to legislatively enacted privileges consistent with a Defendant's right to a fair trial that is not irreparably prejudiced by a court-imposed requirement all but impossible to satisfy." The new protocol provides, in relevant part, as follows:

1. **Filing and Service of a Motion Pursuant to Mass. R. Crim. P. 17(a)(2):**

A Defendant who seeks to summons "books, papers, documents, or other objects" from any non-party individual or entity prior to trial, shall file a Motion pursuant to Mass. R. Crim. P. 17(a)(2) stating the name and address of the custodian of the record (recordholder); the name, if any, of the person who is the subject of the records (third-party subject); and describing, as precisely as possible, the records sought. The Defendant shall serve the Motion and Affidavit on all parties. The Commonwealth shall forward copies of the Motion and Affidavit to the recordholder and the third-party subject and notify them of the date and place of the hearing on the Motion. According to the SJC, the custodian of the records and a third-party subject need not avail themselves of this opportunity to attend the hearing, nor shall the third-party subject be required to assert any statutory privilege. Rather, unless and until the privilege holder waives the privilege, all records likely to be covered by a statutory privilege shall remain and shall be treated as presumptively privileged.

2. **The Lampron Hearing and Finding:**

The Court shall conduct a Lampron hearing (Commonwealth v. Lampron, 441 Mass. 265 (2004)) in which the Defendant must establish good cause for the documents to be produced, by showing: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as general "fishing expedition". Assuming the recordholder and third-party subject appear at the Lampron hearing, they shall be heard on whether (1) the records sought are relevant or statutorily privileged. The judge shall then make oral or written findings with respect to the records sought from each recordholder. Specifically, the Court shall determine whether the Defendant seeking the records has or has not satisfied the requirements of

Lampron; and (2) that the records sought are or are not presumptively privileged. According to the SJC, presumptively privileged records are those prepared in circumstances suggesting that some or all of the records sought are likely protected by a statutory privilege, for example, a record prepared by one who holds himself or herself out as a psychotherapist, a social worker, a sexual assault counselor, or a domestic violence victims counselor.

3. **Summons and Notice to Recordholder.**

If the Court determines that the Defendant has met the requirements of Lampron, and there has been no finding that the records sought are presumptively privileged or the third-party subject has waived all applicable statutory privileges, the judge will order a summons to issue directing the recordholder to produce all responsive records to the applicable Clerk of the Court on the return date stated in the summons. The Clerk shall maintain the records in a location separate from the Court file. In those circumstances in which a judge has determined that some or all of the requested records are presumptively privileged, the summons shall so inform the recordholder, and shall order the recordholder to produce such records to the Clerk of the Court in a sealed envelope or box marked “PRIVILEGED”, with the name of the recordholder, the case name and docket number, and the return date specified on the summons. The Clerk shall maintain the records in a location separate from the Court file, clearly designated “presumptively privileged records”.

4. **Inspection of Records.**

The Clerk of the Court shall permit Defense Counsel who obtained the summons to inspect and copy all records that are not presumptively privileged. As to presumptively privileged records, the Clerk of the Court shall permit only Defense Counsel who obtained the summons to inspect the records and only on Counsel’s signing and filing of a Protective Order in a form approved by the Court.

5. **Challenge to Privilege Designation.**

If, on inspection of the records, Defendant’s Counsel believes that any record, or portions thereof, is not privileged, then Counsel may file a Motion to release specified records, or portions thereof, from the terms of the Protective Order. Counsel shall provide notice of the Motion to all parties. Prior to the hearing on the Motion, Counsel for the Commonwealth shall be permitted to review such records in order to respond to the Motion, subject to signing and filing of a Protective Order. If a judge determines that any record, or portion thereof, is not privileged, the records shall be released from the terms of the Protective Order and may be inspected and copied.

6. **Disclosure of Presumptively Privileged Records.**

If Defense Counsel who obtained the Summons believes that the copying and disclosure of some or all of the presumptively privileged records to other persons, “for example, the Defendant, an investigator and an expert”, is necessary to prepare the case for trial, Counsel shall file a Motion to modify the Protective Order to permit copying or disclosure to specifically named individuals of particular records. The Motion shall be accompanied by an Affidavit explaining with specificity the reason why copying or disclosure is necessary. Following the hearing and in camera inspection of the judge where necessary, a judge may allow the Motion only on making oral or written findings that the copying or disclosure is necessary for the Defendant to prepare adequately for trial.

7. **Use of Presumptively Privileged Records at Trial.**

A Defendant seeking to introduce at trial some or all of the presumptively privileged records shall file a Motion in Limine at or before any pre-trial conference. Counsel for the Commonwealth shall be permitted to review enough of the presumptively privileged records to be able to adequately respond to the Motion in Limine subject to signing and filing a Protective Order. The judge may allow the Motion on making oral or written findings that introduction at trial of a presumptively privileged record is necessary for the Defendant to obtain a fair trial.

Impact on Recordholders

The SJC's new Dwyer Protocol does have an impact on recordholders, such as hospitals or individual health care providers. Specifically, if a Defendant in a criminal case files a Motion seeking an individual's medical or treatment records, the Commonwealth will forward a copy of the Motion to the hospital or individual health care provider and provide notice of the date and place of the hearing. It is important to point out that the notice of the hearing is not an order for the hospital or individual health care provider to produce the records. An order from the Court or written release from the patient will be necessary before the hospital or individual health care provider produces the records.

The Dwyer Protocol specifically states that the recordholder does not have to attend the hearing. Rather, unless and until the privilege holder (e.g., patient) waives the privilege, all records likely to be covered by a statutory privilege shall remain and shall be treated as presumptively privileged. Nevertheless, unless the patient waives the privilege, it is the recommendation of The Rogers Law Firm that legal counsel attend the hearing on behalf of the hospital or individual health care provider to affirmatively assert the privileges on behalf of the patient.

After the hearing (Lampron hearing), the Court will make oral or written findings with respect to the records which are being sought. If there has been no finding that the records sought are presumptively privileged or the patient has waived all applicable privileges, the Court will order a summons to issue directing the hospital or individual health care provider to produce all responsive records to the applicable Clerk of the Court on the return date stated in the summons. However, in those circumstances in which a judge has determined that some or all of the requested records are presumptively privileged and the patient has not waived all applicable privileges, the summons shall inform the hospital or individual health care provider of this fact, and shall order the production of the records to the Clerk of the Court in a sealed envelope or box marked "Privileged", along with the name of the hospital or individual health care provider, the case name and docket number, and the return date specified on the summons. The Clerk shall maintain the records in a location separate from the Court file, clearly designated "Presumptively Privileged Records".

Unless a determination is made to appeal a Court's ruling that certain records are not "presumptively privileged", the production of the records pursuant to the summons, shall effectively complete a hospital as individual health care provider's responsibilities under the new Dwyer Protocol. The records shall be retained by the Clerk of the Court until the conclusion of any direct appeal following a trial or dismissal of a case. It should be noted that with respect to the disclosure of the records, the hospital or individual health care provider must still comply with the Accounting requirements under the HIPAA Privacy Rule.

If you have any specific questions or concerns regarding the Dwyer Protocol, please do not hesitate to contact any of the attorneys at The Rogers Law Firm.

GME Payment Change Finalized

On May 1, 2007, the Centers for Medicare and Medicaid Services (“CMS”) announced a revision to Medicare’s policies for Graduate Medical Education (“GME”) payments to teaching hospitals. Specifically, CMS modified the rule with respect to the time residents spend training in non-hospital settings, such that hospitals will incur at least 90 percent of the total cost of the residents’ salaries, fringe benefits, travel and lodging expenses when appropriate, plus the portion of the cost of teaching physicians’ salaries attributable to direct medical education.

Pursuant to Medicare Part A, Medicare makes direct GME payments to teaching hospitals to cover Medicare’s share of a hospital’s direct cost of the residency training taking place at a hospital. The GME is based on a hospital-specific per resident payment amount that is based upon a hospital’s Graduate Medical Education Program cost (including teaching, tuition and residents’ salaries incurred in a base year).

Currently, hospitals are required to pay “all or substantially all” of the costs for a training program in a non-hospital setting in order to count full-time equivalent (“FTE”) residents training in a non-hospital setting for a GME payment. However, effective July 1, 2007, CMS will amend the definition of “all or substantially all” to require that teaching hospitals pay at least 90 percent of the total cost of training residents in the non-hospital setting. The change is included in CMS’ final rule of payment for services by Long-Term Care Hospitals (“LTCHs”).

CMS announced that in order to reduce the administrative burden of documenting the costs of training residents in a non-hospital setting, hospitals can use specified proxies.

Revised Interpretive Guidelines Issued for Informed Consent

The Centers for Medicare and Medicaid Services (“CMS”) has issued revised Interpretive Guidelines for Informed Consent (the “Guidelines”). The Guidelines pertain to the Medicare Conditions of Participation (CoPs) for patients’ rights, medical records and surgical services. The following is an overview of the revised Guidelines:

Patients’ Rights:

- The right to make informed decisions means that the patient or patient’s representative is given the information needed in order to make “informed decisions” regarding his/her care.

- A patient may wish to delegate his/her right to make informed decisions to another person.
- A patient or the patient's representative should receive adequate information, provided in a manner that the patient or the patient's representative can understand, to assure that the patient can effectively exercise the right to make informed decisions.
- Hospitals must establish policies to assure that each patient, or the patient's representative, is given information on the patient's health status, diagnosis and prognosis.
- Informed decisions related to care planning also extend to discharge planning for discussion of pertinent requirements.
- Hospitals must also establish policies and procedures that assure a patient's right to request or refuse treatment. However, hospitals are under no obligation to fulfill a patient's request for a treatment or service that the responsible practitioner has deemed medically unnecessary or even inappropriate.

Surgical Services:

- The primary purpose of the informed consent process for surgical services is to ensure that the patient, or the patient's representative, is provided information necessary to enable him/her to evaluate a proposed surgery before agreeing to the surgery. Typically, this information would include potential short and longer-term risks and benefits to the patient of the proposed intervention, including the likelihood of each, based upon the available clinical evidence, as informed by the responsible practitioner's professional judgment.
- Hospitals must assure that the practitioner(s) responsible for the surgery obtains informed consent from patients in a manner consistent with the hospital's policies governing the informed consent process.
- There is no specific requirement for informed consent for anesthesia services. However, given that surgical procedures generally entail use of anesthesia, hospitals may wish to consider specifically extending their informed consent policies to include obtaining informed consent for the anesthesia component of the surgical procedure.
- For surgeries in which residents will perform important parts of the surgery, discussion is encouraged to include:
 1. That it is anticipated that physicians who are in approved post-graduate resident training programs will perform portions of the surgery based on their availability and level of competence;
 2. That it will be decided at the time of surgery which residents will participate and their manner of participation, and that this will depend on the availability of residents with the necessary competence; the knowledge of the operating practitioner/teaching surgeon has of the resident's skill sets; and the patient's condition.

3. That residents performing surgical tasks will be under the supervision of the operating practitioner/teaching surgeon; and
4. Whether, based on the resident's level of competence, the operating practitioner/teaching surgeon will not be physically present in the same operating room for some or all of the surgical tasks performed by residents.

Medical Records:

- The medical record must contain a document recording the patient's informed consent for those procedures and treatments specified as requiring informed consent. Medical Staff Bylaws should address which procedures and treatments require written informed consent. There may also be applicable federal or state law requiring informed consent.
- The informed consent form contained in the medical record should provide evidence that it was properly executed.

The final Guidelines do not include the proposal which was found in the draft Guidelines to identify in the surgical consent form each assistant performing significant aspects of the planned surgery. Rather, the final Guidelines only encourage hospitals to state in their informed consent forms for surgery that it is "anticipated" that residents will perform portions of the surgery under the supervision of the operating practitioner/teaching surgeon.

A complete copy of the Guidelines can be found at www.cms.hhs.gov.

CMS Extends Deadline for Phase III Rule of Stark Law

The Centers for Medicare and Medicaid Services ("CMS") recently extended its deadline for the issuance of a Phase III Rule of the Stark Law, from March 26, 2007, to March 26, 2008. The Stark Law (42 U.S.C.A. § 1395nn), or Physician Self-Referral Law, precludes a provider from referring Medicare/Medicaid beneficiaries for designated health services to entities with which they, or members of their immediate family, have a direct or indirect financial relationship. On March 26, 2004, CMS published an interim Phase I Rule (Phase II Rule), which set forth the applicable definitions, statutory exceptions, and additional regulatory exceptions for the Stark Law. The Phase II Rule also responded to comments received from the Phase I Rule.

CMS announced that the extension of the deadline for the issuance of the Phase III Rule was necessitated, in part, by extensive public comments received in response to the Phase II Rule. CMS also stated that the extension is due to the substantial inter-agency coordination between itself, the Office of Inspector General and the Department of Justice.

The Rogers Law Firm will continue to monitor any developments with respect to the Phase III Rule of the Stark Law and will provide updates accordingly.

CMS Issues Guidance on Emergency Services Requirements for Hospitals

On April 26, 2007, the Centers for Medicare and Medicaid Services (“CMS”) issued Guidance (the “Guidance”) clarifying the responsibilities of hospitals to provide emergency services if they participate in the Medicare Program. The Guidance, which was sent in the form of survey and certification letters to state surveyors, emphasizes that any hospital participating in Medicare, regardless of the type of hospital and regardless of whether the hospital has an Emergency Department, must have the capability to provide basic emergency care interventions.

The Guidance provides that with the exception of critical access hospitals, all hospitals must comply with the following Medicare Conditions of Participation (CoPs) in order to provide a foundation for safe care for all persons, including those with emergency care needs:

1. Physician on duty or on-call (42 CFR 482.12(c)(3))

A hospital’s governing body shall insure that there is a physician either on duty or on-call at all times.

2. A responsible physician for each patient (42 CFR 482.12(c)(4))

A hospital’s governing body shall insure that an M.D./D.O. is responsible for the care of each Medicare patient with respect to any medical or psychiatric problem that is present on admission or that develops during the hospitalization.

3. R.N. supervision and availability 24/7 (42 CFR 482.23(e))

A hospital shall provide twenty-four hour nursing services furnished by, or supervised by, an R.N.; an R.N. shall supervise and evaluate the care of each patient; an R.N. shall be immediately available, when needed, to provide bedside care to any patient.

4. Right to care in a safe setting (42 CFR 482.13(c) (2))

The patient has a right to receive care in a safe setting.

5. Governing Body ensures accountability (42 CFR 482.13(a)(5))

A hospital’s governing body shall ensure that the Medical Staff is accountable to the governing body for the quality of care provided to patients.

6. **Medical Staff – organized and accountable (42 CFR 482.22(b))**

The Medical Staff must be well-organized and accountable to the governing body for the quality of care provided to patients.

7. **Quality assessment and performance improvement (QAPI) (42 CFR 482.21(e))**

A hospital's governing body, medical staff and administrative officials are responsible and accountable for ensuring that clear expectations for safety are established and that adequate resources are allocated for reducing risk to patients.

8. **Appraisal, initial treatment, referral (42 CFR 482.12(f)(2))**

If emergency services are not provided at a hospital, the governing body must ensure that the medical staff has written policies and procedures for appraisal of emergencies, initial treatment and referral when appropriate.

9. **Off-campus locations (42 CFR 482.12(f)(3))**

A hospital that does have an Emergency Department, but also has an off-campus hospital location(s) that do not have an Emergency Department, must still ensure that the medical staff has written policies and procedures for each off-campus locations, including appraisal of emergencies and referral when appropriate.

The Guidance makes it clear that any hospital which offers an Emergency Department must adhere to the following CoPs: The hospital must meet the emergency needs of patients in accordance with acceptable standards of practice (42 CFR 482.55); the services must be organized under the direction of a qualified member of the medical staff (42 CFR 482.55(a)(1)); the services must be integrated with other departments of the hospital (42 CFR 482.55(a)(2)); the services must be supervised by a qualified member of the medical staff (42 CFR 482.55(b)(1)); and there must be adequate medical and nursing personnel qualified in emergency care to meet the written emergency procedures and needs anticipated by the facility (42 CFR 482.55(b)(2)).

CMS announced that the importance of the Guidance is to ensure that all hospitals have the capability to provide basic emergency care interventions.

HHS Delegates Subpoena Authority to OCR for HIPAA Privacy Investigations

The Secretary of the United States Health and Human Services (“HHS”) recently delegated to the Director of the Office of Civil Rights (“OCR”) the authority to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to the investigation of a potential violation of the HIPAA Privacy Rule.

OCR already has the authority to impose civil monetary penalties for a covered entity's failure to comply with the HIPAA Privacy Rule. However, prior to this delegation of subpoena authority by HHS to OCR, the ability to subpoena witnesses and evidence related to the investigation of a potential violation of the HIPAA Privacy Rule rested solely with the Secretary of HHS. Therefore, OCR previously had to request HHS to issue subpoenas for its HIPAA privacy investigations.

There is speculation amongst the legal community that this delegation of subpoena authority may lead to the increased use of subpoenas as part of investigations of potential violations of the HIPAA Privacy Rule.

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