ETHICS OF REDACTING MEDICAL RECORDS

Personal Injury Plaintiff's Attorney's Perspective

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Federal Statute re Medical Privacy:

HIPAA has a 115 page
simplified rulebook…

Health info which is personally identifiable **must** be protected by covered entities.

OK to disclose IF:

a. required by law;
b. under court order;
c. under subpoena, discovery request, or lawful process;

And IF:

a. notice is given; or
b. reasonable opportunity to obtain a protective order is available.
    i. prohibiting redisclosure; and
    ii. **requiring return/destruction of records at the end of litigation**.

Who is a covered entity? Fed Law:

HITECH 2009: Business associates of the health care provider, even w/o privity. Includes law firms handling:

a. security and compliance;
b. defense of false claims;
c. professional license defense;
d. risk management and due diligence; and
e. med mal defense.

But NOT law firms handling:

a. workers comp;
b. social security benefits; or
c. employment law claims.

Warning: state law may be MORE stringent (but pre-empted if less strong.)

Who is a covered entity? State Law (HB 300) much broader than federal:

(2) "Covered entity" means any person who:
(A) for commercial, financial, or professional gain, monetary fees … [engages in] … **using … or transmitting** protected health information.
The term includes a business associate, health care payer, governmental unit, information or computer management entity, school, health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site;
(B) comes into **possession** of protected health information;
(C) **obtains** or stores protected health information under this chapter; or
(D) is an employee, agent, or contractor of … (A), (B), or (C) [and] … uses, or transmits protected health information.
(2-a) "**Disclose**" means to release, transfer, provide access to, or otherwise divulge information outside the entity holding the information.
Tex. Health & Safety Code Sec. 181.001(b)(2)-(2-a)

That's us, guys.

PRIVACY is not the same as PRIVILEGE

State law dr-pt privilege (TRE 509) is not carried over into federal law FRE 501 (but TRE 510 therapist-pt) is.

There is a federal psychotherapist-patient privilege; *Jaffree v. Redmond*; it includes social workers.

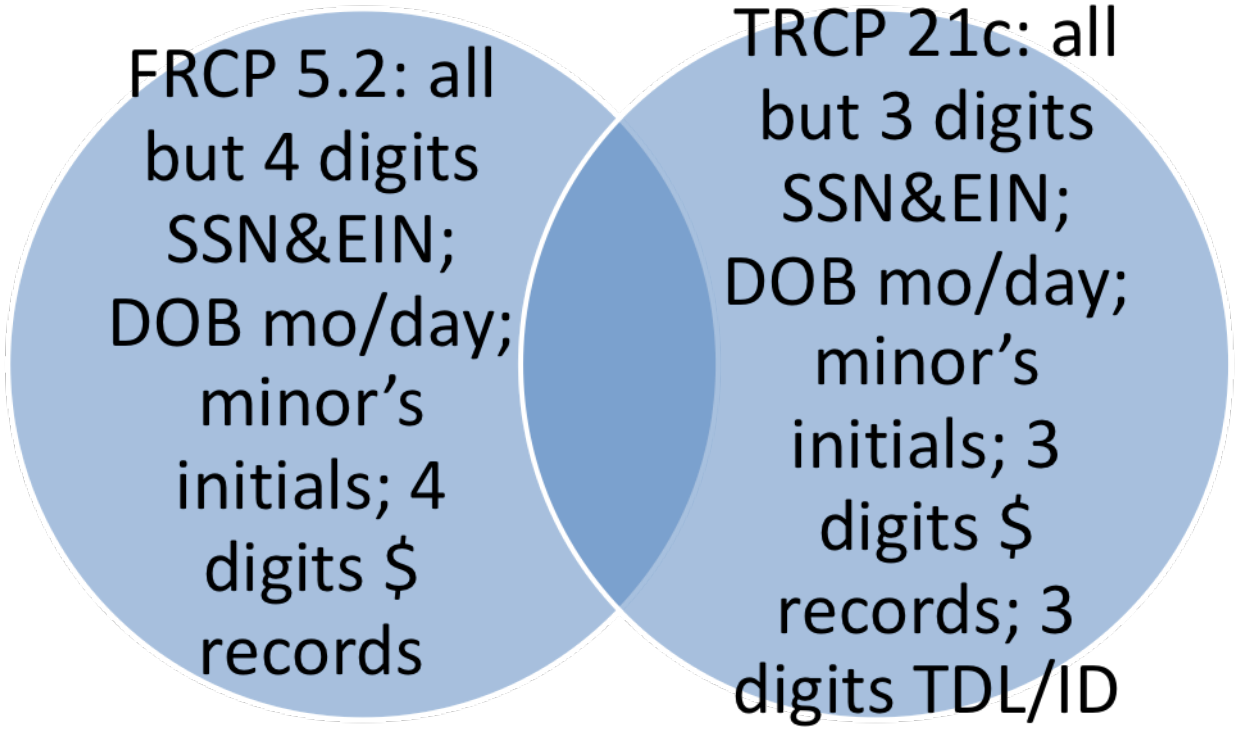
There is no federal "doctor-patient privilege" EXCEPT in civil cases in which state law "supplies the rule of decision."

PROCESS is not the same as PRIVILEGE

"All that **45 C.F.R. § 164.512(e)** should be understood to do, therefore, is to create a **procedure** for obtaining authority to use medical records in litigation. Whether the records are actually **admissible** in evidence will depend among other things on whether they are **privileged**. And the evidentiary privileges **that are applicable to federal question suits are given not by state law but by federal law, Fed. R. Evid. 501, which does not recognize a physician-patient (or hospital-patient) privilege**."

Northwestern Memorial Hospital v. Ashcroft, 362 F.3d 923; 2004 U.S. App. LEXIS 5724 (7th Cir. 2004).

Some privacy redactions are required by federal rules and state rules



States can require greater redactions

X Rated Records

Redactions should be replaced with xxx xx x123 (SSN) or Xxxx Xxxxx for Jane Smith, etc. (TRCP 21c (c))

If you must file unredacted sensitive data, then designate the document as containing sensitive data (TRCP 21c (d)) when you file.

ENFORCEMENT of HIPAA

Private rights of action to enforce federal law must be created by Congress. HIPAA has no express provision creating a private cause of action. HIPAA provides both civil and criminal penalties for improper disclosures [but] limits enforcement to the Secretary of HHS.
That limitation is a strong indication that Congress intended to preclude private enforcement.

We hold there is no private cause of action under HIPAA…

Acara v. Banks, No. 06-30356 (5th Cir. 11/13/2006)

ENFORCEMENT of Ch. 181

OAG may seek

injunctive relief; and
fines up to $5,000;
$25,000;
$250,000, or
$1.5m per year,

depending on whether the violation was negligent, knowing, for financial gain, or part of a pattern or practice; AND may seek

probation or revocation of
professional license of the
offender.
Sec. 181.201 & 181.202

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TRE 509 Physician Patient Privilege

Criminal cases: none except re drug or alcohol treatment; 509(b)

Civil cases: communications + pt ID, Dx, eval & treatment all privileged; 509(c)

Exceptions: if suing provider

if complaint against provider

consent given

collection action

party **relies** on condition as part of claim or defense **and** the record is **relevant** *to that condition*; 509(e)

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TRE 510 Mental Health Info Privilege

Civil cases: Professional is: MD; licensed, certified, or drug abuse treater; **OR anyone pt reasonably believed to be a professional**; 510(a)

Communications + pt ID, Dx, eval & treatment privileged; 510(b)

Exceptions: if suing professional
if complaint against provider
if consent given
if collection action
if Court Ordered Exam
if party **relies** on condition as part of claim or defense **and** the record is **relevant** to that condition; or
if to investigate allegations of abuse or neglect of institutionalized resident; 510(d)

Client Medical Records are "Confidential Information" per Tx Rules Disc. Con. 1.05

(a)Confidential information includes both privileged information and unprivileged client information. Privileged information refers to the information of a client protected by the lawyer-client privilege….[TRE 5.03, FRE 501]. ***Unprivileged client information*** *means* ***all information relating to a client*** *or* ***furnished by the client, other than privileged information,*** *acquired by the* ***lawyer*** *during the course of or by reason of* ***the representation of the client.***

(b) Except as permitted … ***a lawyer shall not knowingly***:

(1) ***Reveal confidential information of a client*** or a former client to:

(ii) anyone … other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

And Am. Bar Assn. Op. 477 Securing Communication of Protected Client Info 05/11/2017

Ethics Rule 1.05: Applicable Exceptions for Revealing Confidential Information

(c) A lawyer may reveal confidential information:

(1) When the lawyer has been expressly authorized to do so ....

(2) When the client consents ...

(3) To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm....

(4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.

[5-8 omitted]

(d) A lawyer also may reveal unprivileged client information.

(1) When impliedly authorized to do so in order to carry out the representation.

(2) When the lawyer has reason to believe it is necessary to do so in order to:

(i) carry out the representation effectively; …

Comments to Tx. R. of Prof. Conduct 1.05 – Confidentiality Generally

1. Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system ***require the preservation by the lawyer of confidential [attorney client] information of one who has employed or sought to employ the lawyer***.

…

4. … Rule 1.05 also furnishes considerable protection to **other information** falling outside the scope of the [attorney client] privilege. ***Rule 1.05 extends ethical protection generally to unprivileged information*** relating to the client or furnished by the client during the course of or by reason of the representation of the client.

Conclusion: Medical records are outside the scope of [attorney-client] privilege but are confidential per Rule 1.05; re-disclosure is unethical unless allowed by Rule 1.05.

Discoverability of Records: Case Law applying Privileges

Privileged medical records are not discoverable.

In re Anderson

Mandamus is the proper remedy if the trial court improperly orders disclosure. *Id*

Discovery must request only relevant matters.

In re CSX

How relevant does a record/condition have to be? Pretty darned relevant.

Information must be **central to claim or defense**, not merely evidentiary or intermediate issue of fact. *RK v Ramirez*

"Relying on" the condition for claim or defense is higher standard than "relevance."

The medical condition contained in the medical records must be of legal consequence to a party's claim in order to be discoverable. *Ramirez, supra* @ 842-3. In applying the litigation exception "**relevance alone cannot be tested** because such a test would ignore the fundamental purpose of evidentiary privileges, which is to preclude discovery and admission of relevant evidence under prescribed circumstances." *In re Christus Health Southeast Texas*

Impeaching credibility is NOT enough to create relevance exception to privilege.

"If we took the position of Patel and Comfort Inn to its logical extreme, mental health records would be discoverable in every case for every witness whose credibility is at issue. Our reading of … *R.K. v. Ramirez* does not support this position. **Permitting discovery of medical records to attack a witness's credibility would have a chilling effect** on an injured party's decision to seek relief, which is not the intended result of the patient-litigant exception. *In re Leatherwood*

Pre-existing condition is NOT enough to create relevance exception to privilege?

"Defensive claims that a plaintiff's damages and injuries were caused by the **pre-existing condition do not involve the resolution of ultimate issues of fact** that have legal significance standing alone. Indeed, these types of defensive assertions are in the nature of **inferential rebuttal claims** and, thus, **are not sufficient to put a plaintiff's mental condition at issue** so as to make medical records about that condition **discoverable**." *In re Pennington*. [NOT just "not admissible."]

Litigation exception:

[T]here is no adequate remedy at law for a decision denying a privilege. …Whether a plaintiff's condition is "part" of a claim is **determined from the pleadings**, without reference to the evidence that is clearly privileged. To be a "part" of a claim or defense, the condition itself must be **a fact that alone carries legal significance** under the substantive law. ("Because relevance is defined so broadly, virtually any litigant could plead some claim or defense to which a patient's condition could arguably be relevant and the privilege would cease to exist. We **reject** this alternative as well.")

In re Nance (Austin 2004)

"[W]hether Ms. Nance was an alcoholic or a heavy drinker is, at most, an intermediate issue of fact regarding the claims for emotional and pecuniary loss by her family, and [for] the defensive theory that a pre-existing condition caused her death." Id at 512. **Pleading a "pre-existing condition as an alternative and affirmative defense" does not make it central**; instead, "that defensive theory is in the nature of an inferential rebuttal, not an ultimate issue of fact that **alone** has legal significance. [*R.K. v. Ramirez*] at 843; see also Tex. R. Civ. P. 277. … [T]he records in question … are not discoverable under the patient-litigant exception to that privilege."

In re Nance

Inferential rebuttal issues made clear. (Yeah, right).

"An inferential rebuttal issue disproves the existence of an essential element submitted in another issue or question. *Select Ins. Co. v. Boucher*, 561 S.W.2d 474, 477 (Tex. 1978). It presents a contrary or inconsistent theory from the claim relied upon for recovery. *Id*. Inferential rebuttal issues attempt to disprove a claim by establishing the truth of a positive factual theory that is inconsistent with some factual element of the ground of recovery. *Id*. 'Inferential rebuttal questions shall not be submitted in the charge.' Tex. R. Civ. P. 277."

Footnote 7 to *In re Nance* and Tex. R. Civ. P. 277

Mental Health Records (FRE 501) (TRE 510)

A plaintiff's mental anguish claim which included testimony of psychiatric treatment, past depression, and stress such as troubled sleep, nightmares, anxiety attacks, emotional breakdowns, difficulty breathing, and heart palpitations were not sufficient to make the plaintiff's mental condition part of a claim or defense. *In re Chambers*

But see *JLG Trucking v Garza* (Tex. 2015):

Two wrecks, three months apart. 1st wreck => lawsuit. Defendant: "2nd wreck caused injuries." Trial court excluded evidence of 2nd wreck. Texas Supreme Court:

"Evidence of the second accident was relevant to the **central issue** of whether the defendant's negligence caused the plaintiff's injuries."

TRE 403: Admissibility and Q of Unfair Prejudice, Confusion etc.

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury…

Family Law and Child Custody: Best interest of the Children

A medical record "relating to [a parent's] personality and bipolar disorders was relevant to the issue of whether appointing her sole managing conservator was in her children's best interests. Both parties' medical and mental conditions were relevant to the jury's determination of which party should be named as the conservator. … [Discussion of TRE 403].

"the trial court concluded that the medical records pertaining to Stephanie's mental state were relevant to the issue of custody and that their probative value was not substantially outweighed by the danger of unfair prejudice. Reviewing the record, we find no abuse of discretion on the part of the trial court." *Garza v. Garza*, 217 S.W.3d 538, 555

JBS Carriers, Inc., and James Lundry v Washington, 17-0151 (Tex. 12/21/2018). [Female Plaintiff Turner, hit and killed by 18 wheeler as she walked across street.] "The trial court excluded all evidence of Turner's mental health, prescription medications, and alcohol and drug use." Court of appeals affirmed exclusion.

Intoxication or drug use "is not, in and of itself, evidence that the party acted negligently in relation to the accident." But it was "probative if it is relevant to a party's actions in conforming or failing to conform to an appropriate standard of care. …. The same analysis applies to evidence of a mental health issue in negligence cases – it is relevant when other evidence supports a finding that the mental impairment contributed to the other party's allegedly negligent actions."

Mechanics of Redacting Records

Redacting medical records the wrong way:

Redacting the new way:

Preserve the original. Duh.

Isn’t redacting medical records… unethical??!!

No. Not if done ethically.

Redact and limit re-disclosure:

"… if the communication 'goes beyond issues dealing with the affirmative relief sought, the trial court should **redact** any part of the privileged communication that does not relate to the affirmative relief sought.' *Davis*, 856 S.W.2d at 163 n. 10. The irrelevant portions of the records, should be **redacted, deleted, or otherwise protected by the trial court**. *R.K.* 887 S.W.2d at 844; *M.A.W. v. Hall*, 921 S.W.2d at 915. Thus, with respect to any records the trial court finds to be discoverable, it should limit disclosure of any privileged matters contained therein, such as through **redaction**. In re Nance

"The trial court **must** ensure that production is no broader than necessary. Even if a condition is part of the party's claim or defense, the records should be disclosed **only** to the extent necessary to provide evidence relevant to the condition alleged. …The records disclosed must be **closely related in time and scope** to the claims made … . When a document contains information meeting this standard, any **other information** in the document not meeting this standard **must** be **redacted** or otherwise protected." MAW v Hall

… the protective order in this case, which limits disclosure to certain people **but does not order redaction or deletion**, does not sufficiently protect the highly sensitive privileged information. **If information is privileged, and no exception exists, it is not discoverable**. Thus, the trial court abused its discretion in disseminating these documents without **redacting or deleting the portions that are irrelevant** to plaintiffs' claims. M.A.W. v Hall

"The court" is supposed to do the redactions.

The lawyer seeking to preserve privacy should do the redactions and keep a pristine set to show the court.

See examples in the Appendix.

In camera inspections, or not:

Paul Gold in Hunting for Acorns:

> "It seems like no matter what injury is alleged, if the plaintiff is a woman of child-bearing age, the defense always asks for the plaintiff's OB/Gyn records, even though such records have no **conceivable** relationship to the claims of injury for which the plaintiff is seeking damages."

In re Drews: No need for an in camera inspection of gynecological records and mammograms If the med mal claim relates only to an ankle surgery.

In camera inspections, continued:

"One can **look at the subject matter of the discovery sought**, even in the absence of any other evidence, and discern that the identity of patients is sought; that information was created and maintained by a physician and remains confidential, privileged, and exempted from discovery." *Anderson*

"[W]e have already determined **from the face of the pleadings** that the [litigation] exception does not apply; thus, an in camera inspection would have been unnecessary. Additionally, there is no indication that Pennington was in possession of these documents."

Pennington

Billing Records are Protected by the Same TRE 509 and 510 Privileges

Bonus Material: Employment Records

Personnel records of **governmental** employees have long been afforded protection under the Texas Open Records Act and the Federal Freedom of Information Act.

Medical Records in Employment and Personnel Files

Federal law protects their confidentiality:
42 U.S.C. § 12112(d) and 29 C.F.R. § 1630.14(b)
regarding pre-employment physical examinations

Records related to FMLA and genetic information:
29 C.F.R. § 825.500(g) and (h)

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Forms in Appendix

Motions

Orders allowing Redaction

Privilege Log for Opposing Counsel

Privilege Log for Court, annotated

Sample letters