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HEADLINES

Attorney General Settlement Highlights Importance of Proper Record Disposal

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As paper medical records become old and outdated, health care providers are often confronted with the challenge of how to destroy or dispose of such records. This challenge may become even more prevalent as providers shift to electronic health record systems, rendering maintenance of duplicate paper records unnecessary. Providers must take care to ensure that such records are properly disposed of, in accordance with applicable state and federal laws. A recent settlement agreement entered into by the North Carolina Attorney General's Office highlights the importance of proper record disposal, demonstrating that providers must be aware of (and comply with) both federal and state laws governing such disposal or face significant consequences.

I. THE SETTLEMENT AGREEMENT

In a press release issued September 7, 2011, the North Carolina Attorney General's Office announced that it had reached a settlement with a Charlotte doctor for illegally dumping files containing patients' financial and medical information. According to the press release, the provider "illegal[ly] disposed of 1,000 patient files by dumping them at the West Mecklenburg Recycling Center. The files contained names, addresses, dates of birth, Social Security numbers, drivers' license numbers, insurance account numbers, and health information for 1,600 people." The Attorney General's Office alleged that the improper disposal caused potential harm to consumers by exposing patients to the risk of identity theft, and that such conduct constituted a violation of the North Carolina Identity Theft Protection Act.

In order to resolve the Attorney General's investigation without proceeding to litigation, the Attorney General's Office and the provider entered into a settlement agreement on September 7, 2011. Under the settlement agreement, the provider agreed not to dispose of or destroy documents in violation of state or federal law. In addition, the provider agreed to pay \$40,000.00 to the Attorney General's Office upon execution of the settlement agreement.

The Attorney General's press release is available at: [http://www.ncdoj.gov/News-and-Alerts/News-Releases-and-Advisories/Press-Releases/Charlotte-doctor-pays-\\$40,000-for-dumping-patients.aspx](http://www.ncdoj.gov/News-and-Alerts/News-Releases-and-Advisories/Press-Releases/Charlotte-doctor-pays-$40,000-for-dumping-patients.aspx).

II. APPLICABLE LAW

Medical record disposal implicates both state and federal laws, as discussed below, with significant penalties for failure to comply with such laws.

A. The North Carolina Identity Theft Protection Act

Section 75-64 of the North Carolina Identity Theft Protection Act (the "Act") provides that any business that conducts operations in the state of North Carolina and any business that maintains or otherwise possesses personal information about North Carolina residents must take "reasonable measures" to protect against unauthorized access to or use of the information in connection with or after its disposal. Such "reasonable measures" must include:

- Implementing and monitoring compliance with policies and procedures that require the burning, pulverizing, or shredding of papers containing personal information so that information cannot be practicably read or reconstructed;

- Implementing and monitoring compliance with policies and procedures that require the destruction or erasure of electronic media and other non-paper media containing personal information so that the information cannot practicably be read or reconstructed; and
- Describing procedures relating to the adequate destruction or proper disposal of personal records as official policy in the writings of the business entity.

The North Carolina Attorney General's Office is authorized to investigate potential violations of the Act, and may impose civil penalties of up to \$5,000.00 for each violation. As a practical matter, this means that the Attorney General's Office may impose penalties of up to \$5,000.00 *per medical record*, because each record that was improperly disposed of would constitute a separate violation of the Act.

B. **The Health Insurance Portability and Accountability Act of 1996 ("HIPAA")**

The HIPAA Privacy Rule, 45 C.F.R. Parts 160 and 164, Subparts A and E, restricts the use and disclosure of protected health information ("PHI") by HIPAA covered entities, including covered entity health care providers. Generally speaking, a covered entity may only use or disclose PHI as specifically permitted or required under the HIPAA Privacy Rule. When disposing of PHI, covered entities must ensure that the PHI is destroyed such that the information cannot be read or reconstructed. Otherwise, the PHI may be accessed by unauthorized individuals, which would constitute an unpermitted disclosure of PHI under the Privacy Rule.

Violations of the HIPAA Privacy Rule can result in substantial monetary penalties. As a result of the Health Information Technology for Economic and Clinical Health ("HITECH") Act, the United States Department of Health and Human Services Office for Civil Rights is now authorized to impose penalties of up to \$50,000.00 per violation of the Privacy Rule, with an annual maximum penalty of \$1.5 million. In addition, the HITECH Act granted state attorneys general the authority to bring civil actions against covered entities for violations of the HIPAA Privacy Rule. The HITECH Act permits state attorneys general to obtain damages on behalf of state residents or to enjoin further violations of the Privacy Rule.

III. **PRACTICAL TIPS FOR HEALTH CARE PROVIDERS**

As demonstrated by the recent North Carolina Attorney General settlement agreement, the Attorney General's Office takes seriously its obligation to investigate and prosecute health care providers that improperly dispose of medical records. In order to comply with the North Carolina Identity Theft Protection Act and the HIPAA Privacy Rule (and avoid potentially devastating monetary penalties and negative publicity for violating such laws), health care providers must implement, and monitor compliance with, policies and procedures that require the *burning, pulverizing, or shredding* of papers containing medical and other personal information. Implementation of such policies and procedures is key; developing a policy that simply sits on a shelf is not sufficient. Providers must take measures to ensure that all employees who have access to medical records understand and comply with the provider's policies, such as conducting regular employee training. The Attorney General's settlement agreement should send a clear message to health care providers that the disposal of medical records is not a matter to be taken lightly.

It should be noted that this Article has only addressed the *destruction and disposal* of medical records, and the steps providers must take to ensure that records are properly destroyed under state and federal law. Both the Act and HIPAA, however, contain detailed breach notification obligations for health care providers that must be followed in the event of an unauthorized disclosure of medical record information. These notification obligations, which are beyond the scope of this Article, may be triggered when proper record disposal procedures are not followed. In addition, before destroying any medical records, providers must be sure to comply with any record retention requirements or statute of limitation provisions that may apply to such records.

Editor's Note:

Frederick R. Zufelt is a member of Smith Anderson's Health Care and Information Privacy and Security practice groups.

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