

HEALTH RECORDS AND THE LAW

FIFTH EDITION

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Preface

“With respect to excellence, it is not enough to know, but we must learn to have and use it.”

—**Aristotle** (384 BCE–322 BCE), Greek Philosopher, from *Nicomachean Ethics*

The nature and use of health records has changed dramatically since the first edition of this text was published in 1985. Patient data that once traveled by paper at the pace of the U.S. mail now moves instantaneously on top of TCP/IP (also known as the Transmission Control Protocol/Internet Protocol) and blockchain technologies. With the evolution in how we create, store, retrieve, use, transmit, and protect health records has come new and comprehensive regulation in the form of the Health Insurance Portability and Accountability Act (HIPAA) and its voluminous privacy, security, identifier, code set, and transactions regulations. Patients have emerged in this new regulatory scheme with expanded rights to control their health information. Health providers and governments at all levels have an increased focus on accountability for the quality of health care and the reduction of medical errors.

Rapid access to health records has become an essential and fundamental part of successful quality improvement efforts. The ability to create for every patient a community health record maintained in a health data network—and making it easily accessible to patients, their health providers, ancillary support providers, and other authorized individuals—is viewed as providing greater protection for patients, data for important medical and public health research, and enhanced cost savings for all. As the creation of health information becomes the norm, health record administrators must increasingly collaborate with their information technology professionals to provide secure spaces for health records storage and safe methodologies for data transmission. The pace of change will continue to increase as the health care industry endeavors to keep up with technological advances. It should be noted that this text does not distinguish between health information in any form or media, whether electronic, paper, or oral; it simply calls this information *health information*.

This fifth edition of *Health Records and the Law* is written primarily for students in health information management programs as a comprehensive and accessible text and as a reliable reference source for those professionals in the health information field as well as for those in the legal and risk management professions. It addresses the substantial changes brought about by HIPAA and the growth of network information systems while retaining and updating the discussion of state laws affecting the use and disclosure of patient data. The text also discusses the highly complex interplay of federal and state privacy laws. In addition to the considerable new material concerning HIPAA and its regulations, this edition addresses the challenging area of how patient data may be used in connection with medical research involving human subjects. The effect that the Health Information Technology for Economic

and Clinical Health Act (HITECH Act) is having on public health monitoring and surveillance is explained.

Health record administrators, their managers, and their legal counsel will face new challenges. They will be challenged both in interpreting the laws governing health records and in using the law to find creative and practical solutions to problems that will inevitably arise. We hope you find the fifth edition of *Health Records and the Law* a useful tool in building the right solutions.

► Organization of This Text

The dual goals of this text are to engage those readers who will be leading and shaping 21st-century health record departments and to explain health records law issues, such as:

- Innovative new approaches to networked health information systems
- The future privacy of health records
- Balancing the interests of patients in maintaining confidentiality of their health records, the interests of health providers in furthering medical science and treatment, and the interests of governments in making cost-effective health care available to its citizens

This text is divided into 15 chapters:

Chapter 1, *Introduction to the U.S. Legal System*, provides general information about health records law, with a particular emphasis on the roles of the various branches of government in creating, administering, and enforcing HIPAA and the privacy laws and regulatory schemes of the federal and state governments.

Chapter 2, *Health Records and Managed Care*, explains the characteristics of the managed care industry that have changed the nature of health records.

Chapter 3, *Health Record Requirements*, describes how state licensure laws and regulations, accreditation standards, professional association guidelines, and federal reimbursement programs impose requirements on the maintenance of health records.

Chapter 4, *Health Record Entries*, addresses the standards that govern the completeness and accuracy of health record entries.

Chapter 5, *Document Consent to Treatment*, examines the requirements for informed consent documentation.

Chapter 6, *Access to Health Information*, discusses health records confidentiality requirements and the general legal principles governing access to health information.

Chapter 7, *Reporting and Disclosure Requirements*, reviews state and federal laws that require or permit the disclosure of confidential health records without the patient's consent.

Chapter 8, *Documentation and Disclosure: Special Areas of Concern*, looks at the complexities of special problems involving documentation and disclosure of health records that frequently arise in the health care space. These include patients in need of emergency care, celebrity patients, hostile patients, victims of child abuse,

patients who refuse treatment, dying patients, and dead bodies that require authorization for autopsy.

Chapter 9, *Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome: Mandatory Reporting and Confidentiality*, sets forth how HIV/AIDS is a significant problem in health records management. The complexity and variety of the laws governing these records can interfere with the ability of health record administrators to cope with the demands of government agencies, clinical researchers, hospital administrators, and the patients themselves.

Chapter 10, *Discovery and Admissibility of Health Records*, covers the role health records play in legal actions, such as workers' compensation claims, disability insurance claims, personal injury lawsuits, and medical malpractice.

Chapter 11, *Legal Theories in Improper Disclosure Cases*, investigates how providers and health care entities may face civil and criminal liability for a release of health records that has not been authorized by the patient or that has not been made pursuant to statutory, regulatory, or other legal authority.

Chapter 12, *Risk Management and Quality Management*, outlines how these programs depend in large measure on health records and health record administrators for patient data necessary to identify potential risks.

Chapter 13, *Electronic Health Records*, summarizes their dramatic development and expansion over the past 2 decades.

Chapter 14, *Health Information in Medical Research*, deals with how federal, state, and international laws relating to the privacy of medical and other personal information and the protection of human research subjects affect every aspect of the research-related access to, and use of, such information.

Chapter 15, *Looking to the Future*, takes a systematic look at the foundational technologies, including blockchain technology, that are providing the infrastructure for the transformational apps that are enabling progress in the use of health records.

► Fifth Edition Updates

Following the full implementation of HIPAA and the Privacy Rule, there has been tremendous inconsistency in their application and interpretation. This fifth edition of *Health Records and the Law* addresses the many new challenges health record administrators face with the 2013 HIPAA Privacy and Security updates, including:

- The new obligations and liabilities of business associates
- Changes in the covered entity/business associate relationship and business associate agreements
- The new HIPAA obligations of subcontractors
- The definition of a *breach* and a new definition of *harm standard*
- New requirements for breach notifications
- Revisions to the notice of privacy practices
- Restrictions on the sale of protected health information
- Changes in authorizations for medical research

- Revisions to patient rights to access and request restrictions on their health records
- New rules for use and disclosure of protected health information
- Changes to the fund-raising opt-out and disclosure provisions for fund-raising
- Expanded protection for the protected health information of decedents
- Stronger enforcement of HIPAA/HITECH violations and imposition of higher penalties

► How to Use This Text

One of the strengths of the text is the consistent approach to topics in each chapter. Each chapter has been methodically developed so that readers have the opportunity to understand what the law is as well as the principles that act as a foundation for the rules that regulate health records. This text can be used at both the introductory and the advanced levels by changing the amount of guidance provided in each chapter. The same format is used in each chapter:

- **Learning objectives** provide an overview of what is to be learned in each chapter.
- **Principles and applications** explain the basics of administrative decision making for those with little or no training in HIPAA and its regulatory scheme—namely, the importance of health record rules, their basic principles, and how they apply to practical health record applications. Understanding the legal reasoning of HIPAA rules will assist in reaching the best administrative decisions, particularly when such decisions may involve management's transformation of the current order of the health records sector.
- **Chapter summary** summarizes the most important issues and principles covered in each chapter, pulling together practical knowledge and insights into emerging trends in the health records sector.
- **Chapter endnotes** list the extensive body of HIPAA rules and regulations and state privacy laws that provide the foundation of this text.

► Teaching Materials

Dramatic changes in the health care industry marketplace have pushed forward new questions about value creation. Because the health records sector is a uniquely regulated space, and there are genuine high-stakes medical issues with people's lives at risk, privacy and integrity are two values that are very important. This text will help instructors prepare their readers for these challenges.

Study Guide

Readers are provided with an online guide as a resource to help them apply the administrative principles and law concepts and to master the health records terminology. This guide, which will be updated periodically as the law evolves, includes:

- **Learning objectives** to summarize key concepts and intentions
- **Key terms** that are expanded upon in the text and online glossary
- **Review questions** to help readers assess their knowledge
- **Health records and law issues** that ask readers to analyze selected questions by reference to health record principles and the law so that readers can reach reasoned conclusions based on the information in each chapter
- A **comprehensive glossary** explaining the many key terms identified in each chapter in the text

Instructor's Resources

The instructor's resources are computerized tools for instructional needs. These comprehensive and convenient materials are designed to enhance class discussion and to measure reader progress. They provide a wide variety of valuable items to help instructors plan their courses and implement activities by chapter. The availability of these resources in an electronic format increases their value as teaching resources. They include:

- Suggested **discussion points** for the *Health Records and the Law Issues* from the study guide with a focus on the HIPAA rules and regulatory scheme and correctness of health record principles and law choices as well as what different principles might be used in future, similar situations
- **PowerPoint presentations** to visually enhance lectures and to aid readers in note-taking
- A **computerized test bank** containing short-answer, multiple choice, and true/false questions from each chapter. This versatile program enables instructors to create their own tests and to write additional questions
- **Comprehensive syllabus templates** to help instructors customize specific course titles

About the Authors

Donna K. Hammaker, a health law attorney, holds an adjunct faculty appointment in the graduate health administration program at Saint Joseph's University. She earned graduate degrees in law and government administration from Temple University School of Law and the Wharton School of the University of Pennsylvania, and she completed graduate studies at the Hebrew University Faculty of Law and the London School of Economics. Before entering academia, Hammaker was a member of the Pennsylvania Bar, admitted to practice before the U.S. District Court for the Eastern District of Pennsylvania and the U.S. Court of Appeals for the Third Circuit. Hammaker was also president and chief executive officer of Collegiate Health Care, the nation's first interuniversity managed care organization; cofounder of the College Consortium, a preferred provider organization serving the higher education market; counsel to Crozer-Chester Health System, the nation's 12th top grossing hospital system with over \$5 billion in revenue; and counsel to West Pharmaceutical Services, a leading global packaging manufacturer for the medical products industry. Hammaker also served as a director at IMS Health, a leading global information and technology company, and Laventhol and Horwath (now Crowe Horwath), one of the nation's largest public accounting, consulting, and technology firms. A County Board of Assistance administrator in Pennsylvania's Medicaid insurance program, Hammaker started her health care career as a traditional midwife. She has served on the adjunct faculty and taught graduate management and health law at Immaculata University, Pennsylvania State University, Rutgers University, Temple University, and Widener University. Hammaker and Thomas M. Knadig recently authored the text *Health Care Ethics and the Law* (Jones & Bartlett Learning, 2017) with Sarah J. Tomlinson. The second edition of *Health Care Management and the Law* was authored with Knadig and Tomlinson (Jones & Bartlett Learning, 2018). Hammaker is a member of the Health Lawyers Association, Society of Hospital Attorneys, American Association of Nurse Attorneys, and the Pennsylvania and American Bar Associations.

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Hammaker, Kaymak, and Tomlinson are members of the American College of Healthcare Executives and the American Health Information Management Association.

► **Interaction with the Authors**

The standard for this text is excellence. Therefore, every instructor who adopts it must have an excellent experience with both the core text and its ancillary teaching materials. The authors can be contacted with any questions regarding materials hereinto offer suggestions or to share teaching concerns.

*Donna K. Hammaker
with
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