

# HITECH ACT

~~Complete Medical Records for \$6.50~~

Life after Ciox v. Azar

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# Life used to be great...

- HITECH Act came along in 2009
  - *Patient can direct his electronic medical chart to be delivered to any third party*
- Rules were issued
  - *Patient requests for records were subject to caps on charges*
  - *Patient requests with third-party directives were also subject to caps*
  - *Patient requests could include requests not just for Electronic Health Records, but ALL records in the provider's custody*
    - Direct to a third party
    - Caps on charges
    - We get records for \$6.50
- Matt Lathrop used to have a canned presentation to teach you how to get records for \$6.50 per set

# Guess who didn't like it?

- “Business Associates” of the health care providers didn't like the way the rules evolved
- Companies like CIOX have contracts with providers
  - *Provider grants access to the records (Electronic Health Records, AND pre-EHR records)*
  - *Requests to the provider are sent straight to CIOX*
  - *CIOX accesses the records, makes a “copy”, sends it to the requester*
  - *If a patient requested a record, the patient got the records subject to cost containment requirements*
    - Only charges AFTER gathering the records were passed on to the patient
- CIOX charged law office requests under the state copying statute...

# Sample State Statutes...

Nebraska	§ 71-8404	\$20 handling; \$0.50 per page; cost of labor
Iowa	§ 622.10	"Reasonable, cost based fee" including labor; supplies; postage; cost of preparation of a summary
Ohio	§ 3701.741	\$3.18/pg (first 10 pgs); \$0.66 (11-50); \$0.27 (51+); \$2.18/pg for CT/MRI/X-ray "data"; \$19.58 "search fee"; postage
Florida	§ 395.3025	\$2/pg (non paper records); \$1/pg (paper); \$1 "per year of records requested"; Sales tax.
Virginia	§ 32.1-127.1:03; § 8.01-413	"Reasonable fees" include: \$20 search and handling; \$0.50/page (up to 50 pgs); \$0.25 (51+); all postage and shipping costs
Nevada	§ 629.061	Actual postage; \$0.60 per page; no additional fee or administrative charges
Washington	§ 246-08-400	\$26 search and handling; \$1.17/pg (first 30 pgs); \$0.88 (31+); "basic charge for office visit" if provider edits confidential information "as required"

# OHIO

ER Record	23 pages	\$31.80 + \$8.58; \$19.58 Search fee; \$5 postage = <b>\$64.96</b>
Treating doctor – Related records	36 pages	\$31.80 + \$17.16; \$19.58 Search fee; \$5 postage = <b>\$73.54</b>
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PCP – past 5 years of records	172 pages	\$31.80 + \$33.00 + \$30.24; \$19.58 Search fee; \$5 postage = <b>\$119.62</b>
<b>TOTAL</b>	<b>375 pages</b>	<b>\$510.69</b>

# OHIO – Under the OLD HITECH Rules:

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THIS IS HOW LIFE USED  
TO BE





IF IT SEEMS TOO GOOD  
TO BE TRUE...





# CIOX v. Azar

- United States District Court for the District of Columbia
- 18-cv-00040
- Hon. Amit P. Mehta
- CIOX is a medical records “Clearinghouse”
- Alex Michael Azar II “is an American attorney, politician, pharmaceutical lobbyist, and former drug company executive who serves as the United States Secretary of Health and Human Services”

# CIOX v. Azar

- If you really care about the fight and the court's rationale, I'm happy to answer questions
  - *I've also included an additional power point that explains the case better*
  - *(not all of the procedural stuff)*
- I assume you just want to know if you can get the records cheap, and if so, how
- CAVEAT:
  - *The CIOX decision was entered on January 23, 2020*
  - *12 Days ago*
  - *I'm about to tell you what MY plan is, to deal with it*

- Judge Mehta's holding:
  1. “[T]he court ... declares unlawful and vacates the 2013 Omnibus Rule insofar as it expands the HITECH Act’s third-party directive beyond requests for a copy of ‘an [EHR] with respect to [PHI] of an individual... in electronic format.’”
  2. “[The court] declares unlawful and vacates the 2016 Guidance insofar as it, without going through notice and comment, extends the Patient Rate to reach third-party directives.”

# CIOX v. Azar – Bottom Line

- Patient's can still make requests that records be delivered to third-parties
- Patient third-party requests are only for “Electronic Health Records”
- The “Patient Rate” (caps on charges) is not extended to requests by a patient that records be sent to a third party – like a law office

Are we still able to  
get cheap records?

I think so

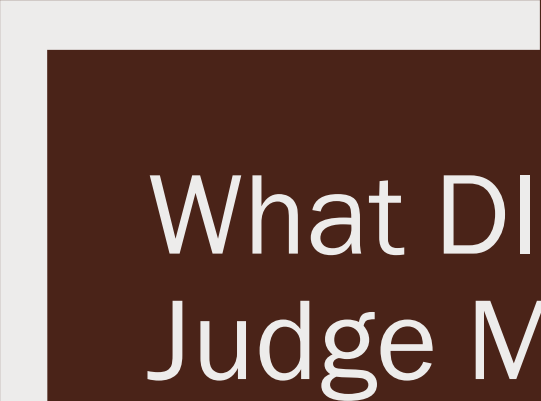
- Here's why
- Here's what we plan to do

# What DIDN'T Judge Mehta throw out?

- HIPAA law still requires providers to make records available to patients
  - “Privacy Rule”
    - Patient has a right to access his/her Personal Health Information [PHI] from a “Covered Entity”
    - When a patient requests the record (“personal use request”) the provider may only “charge a reasonable, cost-based fee.”
      - 45 C.F.R. § 164.524(c)(4)
- This is called, “The Patient Rate”

# “Patient Rate”

1. The cost of “[c]opying, including the costs of supplies for and labor for copying, the Personal Health Information [PHI]”
2. “Postage, when the individual has requested the copy, or the summary or explanation, be mailed”
3. “Preparing an explanation or summary of the Personal Health Information [PHI]”
  - 45 CFR § 164.524(c)(4)(i)-(iii) (2012)



# What DIDN'T Judge Mehta throw out?

- HITECH Act eliminated the need for long-form HIPAA Medical Authorizations for third-party directives
- Specific language of HITECH Act referred only to Electronic Health Record [EHR]
  - *“an electronic record of health-related information on an individual that is created, gathered, managed, and consulted by authorized health care clinicians and staff”*
    - 42 U.S.C. § 17935(e)
- HITECH Act placed a CAP ON FEES that could be charged to the patient for producing an electronic copy of the Electronic Health Record [EHR]



# Some “Rules” were issued by H.H.S.

- We don't care what they were, (with one exception) because the judge threw out most of them out
- Providers STILL have to abide by cost restrictions described by:
  - *HIPAA – which applies to Personal Health Information [PHI] “Patient Rate”*
  - *HITECH – which applies to Electronic Health Record [EHR] “EHR Patient Rate”*
- Remember, these rates only apply to a “Personal Use Request” by a patient, for his or her records

# 2016 Guidance

- Part of the 2016 Guidance discussed what allowable costs could be charged for Protected Health Information [PHI]
  - *Reasonable labor costs:*
    - “Labor for copying includes only labor for creating and delivering the electronic or paper copy in the forma and format requested or agreed upon by the individual, once the PHI that is responsive to the request have been identified, retrieved or collected, compiled and/or collated, and is ready to be copied.” (Emphasis in original)
      - *“Individual’s Right under HIPAA to Access their Health Information 45 CFR § 164.524” at p. 11*

# 2016 Guidance

- Reasonable Labor Costs:
  - *DOES INCLUDE:*
    - Photocopying paper Personal Health Information [PHI]
    - Scanning paper PHI into electronic format
    - Converting from one electronic format to another
    - Transferring electronic PHI to a delivery system or platform
      - *(portals, thumb drive, CD, or email)*

# 2016 Guidance

- Reasonable Labor Costs:
  - *DOES NOT INCLUDE:*
    - Labor for “reviewing” the request from the patient
    - Searching for records
    - Retrieving records
    - Preparing records to be copied
    - Verifying that the documents are related to the patient, and the request

# 2016 Guidance

- Sets out three POSSIBLE means to calculate allowable charges
  1. *Actual costs*
  2. *Average costs*
  3. *\$6.50 (not a maximum number)*
    - *Guidance: “[So] long as the costs are reasonable and only the type permitted by the Privacy Rule”*
      - Individual’s Right under HIPAA to Access their Health Information  
45 CFR § 164.524 at p. 15
    - *Azar Order does NOT throw out this language. ONLY its application to third-party directives.*

# Now what?

- Our job is just harder, not more expensive
- I predict that records will still be produced using the \$6.50 rate (or possibly FREE)
- We just have to figure out how to get these records via patient request WITHOUT a directive to deliver to a third-party (us)



# Our solution...

- We called CIOX
  - *For patient requests:*
    - The “Records Portal” is not used
    - Records are emailed to the patient
    - Email is a text document with a link to access
    - WE EXPECT that the link will take us to a patient login
    - Patient login will require us to verify that we are the patient, or *the patient’s guardian or legally authorized representative*

# Access steps

- Modify our fee agreement to include language
  - *“I understand my lawyer and/or his staff will need to collect medical records on my behalf in order to prosecute my case. This will require access to my Personal Health Information [PHI] and my Electronic Health Records [EHR], as defined and described in Federal Laws, known as HIPAA and HITECH Act. I hereby grant full authority to my attorney and his designated employees to access my health records through any provider portal or through email links sent to me by providers after a request has been issued and requested records have been made available. This authorization covers any PHI regarding me, or if I am acting as a Personal Representative, Guardian or am the parent of a minor, PHI concerning that person or those people.”*





# Access steps

- Set up a specific email account for our client in initial meeting process
  - [Eyer.Aubrey.020420@gmail.com](mailto:Eyer.Aubrey.020420@gmail.com)
  - *In email account, set a specific RULE, “forward all email to:”*
    - [MedicalRecords@LathropLawOmaha.com](mailto:MedicalRecords@LathropLawOmaha.com)



# Access steps

- Send HITECH request letter to PROVIDER by mail
- When an email notification is sent by PROVIDER, we access and download

# The Letter

- Plain paper – not on your letterhead
- Leave room for the provider's name
- Add the date *when you send it out*
- Fill in this information
- Tell them to send email or in electronic format
- Tell them where to send it
- Tell them "I have read the law"
- Have your client sign in your initial meeting
- Use when the need arises
- Send it a plain envelope

DATE

PROVIDER NAME  
PROVIDER ADDRESS

Re: Patient:  
Date of Birth:  
Dates of Treatment:

Dear Patient Records Department:

I request a color copy of my entire office and/or hospital record (my "Protected Health Information" and/or "Electronic Medical Record") **on a CD, thumb drive or email in .pdf format that is OCR searchable and unencrypted.** This is a "Personal Use Request" as that term is defined in 45 CFR § 154.524(c)(4).

Please send the records to my email at CLIENT EMAIL, or if you choose to send the records by mail please send them to me at:

Client name  
Client address

My Designated Record Set is being requested in accordance with the requirements of HITECH Act, and specifically, 42 U.S.C.§17935(e)(1), and its implementing regulations, 45 CFR 164.524(c)(4)(i).

**Pursuant to 42 U.S.C.A.§17935(e)(2), the fee that you may charge for providing the requested documents in electronic form may not be greater than your labor costs in responding to this request. Since the requested records are required by law to be in electronic form, your fee should not exceed \$6.50. If your fee is in violation of this law, a complaint will be made to the United States Department of Health.**

**YOU ARE REQUIRED TO PROVIDE THE RECORDS WITHIN 30 DAYS.**

Sincerely,

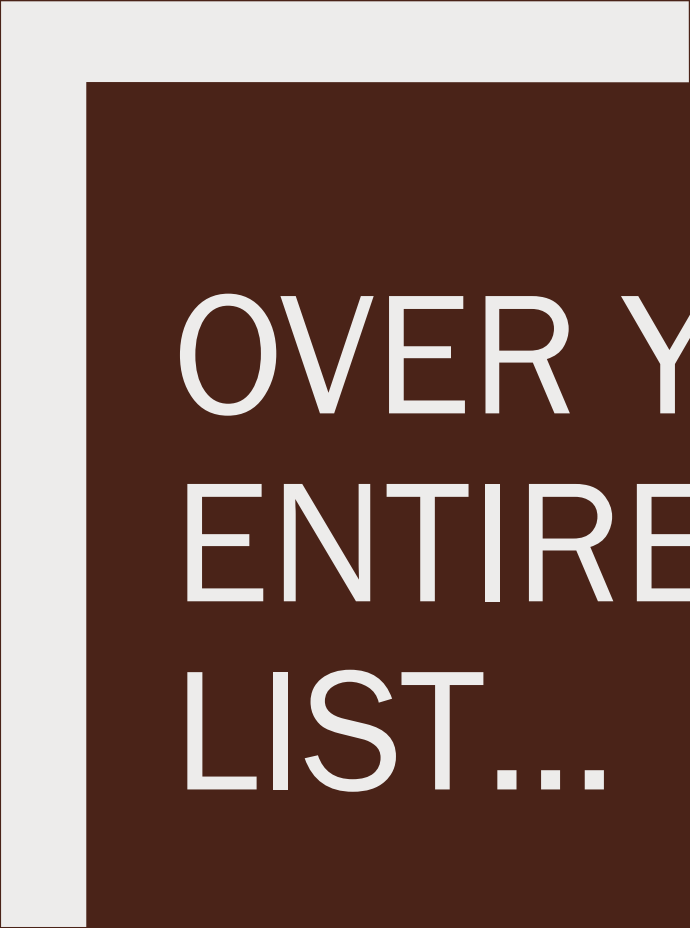
- Will there even BE a bill?
  - *I don't know*
- Can we pay?
  - *Statute says NOTHING about who pays*
- Should client pay?
  - *I'm going to err on the side of caution*
  - *I will issue payment to client for records, client will pay him-/herself*

What about  
the bill?

~~Isn't this harder?~~

Is it worth it?

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# OVER YOUR ENTIRE CASE LIST...

Average of 375 pages  
per case - six  
providers - using  
State fee structure =  
\$510

Average of 375 pages  
per case using  
HITECH Act fee  
structure = \$39

OVER YOUR  
ENTIRE CASE  
LIST...

$$\begin{aligned} & \$470 \times 35 \\ & \text{cases per year} \\ & = \$16,450 \end{aligned}$$

$$\begin{aligned} & \$470 \times 100 \\ & \text{cases per year} \\ & = \$47,000 \end{aligned}$$

# I would really like to know what happens for you.

- If you find a better way, please let me know
- If you have trouble with your requests, please let me know
- [mlathrop@LathropLawOmaha.com](mailto:mlathrop@LathropLawOmaha.com)



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