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Introduction

You are a new trial counsel preparing for your first contested court-martial. Naturally, you have worked diligently to gather the evidence which will secure your first victory. The last thing you need is the accused's medical records. Since the records are in the hands of the local Army hospital, you simply send your trusted paralegal to "collect the accused's entire medical file." You figure, "I will sort out what is relevant later. Right now I have to interview witnesses, respond to a discovery request, and prepare for my meeting with the Chief of Justice tomorrow." Imagine your stress level rise when your paralegal returns empty handed and reports that your request did not comply with Health Insurance Portability and Accountability Act (HIPAA).¹ You need those medical records now and you know the Chief of Justice is going to ask about them tomorrow.

Trial counsel routinely face issues regarding the acquisition, use, and release of medical records. However, the very mention of the acronym HIPAA causes many judge advocates to stick their heads in the sand and hope that the administrative hurdle to obtaining medical records will simply disappear. Access to medical records can be critical when gathering evidence to prosecute a Soldier, especially in cases with charges of assault and sexual assault. Trial counsel often need medical records to help prove an element of the offense, offer evidence in aggravation, or respond to a defense discovery request. New trial counsel may have little, if any, time to research the proper and most efficient method to request medical records of the accused or the alleged victim.

In addition to preparing for courts-martial, trial counsel must be prepared to advise commanders on HIPAA-related issues. Although commanders have limited access to the protected health information (PHI) of their Soldiers, commanders should be careful not to overstep their authority when accessing or releasing PHI. In order to properly advise the command on this complicated area of the law, judge advocates must clearly understand the applicable right and left lanes of HIPAA as it applies within the military community.

This primer will provide military justice practitioners with an overview of the relevant portions of HIPAA, an analysis of its applicability within the Department of Defense (DoD) and the Department of the Army (DA), the available methods for requesting PHI from military and civilian facilities, the proper format for drafting a request for PHI, and practical guidance for advising commanders on HIPAA-related issues.

Background: The Health Insurance Portability and Accountability Act

Legislative History

Prior to 1996, there were no standard rules or regulations to protect a patient's healthcare information.² Requirements varied between states and from hospital to hospital. Despite the implementation of some state regulations and local policies, there were simply too many cases of providers failing to safeguard private healthcare information, such as leaving medical records lying around on fax machines.³

Congress intended for HIPAA to bring uniformity to the healthcare system through the "establishment of standards and requirements for the electronic transmission of certain health information."⁴ The statute was enacted in 1996 under the umbrella of regulating certain economic provisions of healthcare, such as claims, payments, and referrals, which cross state lines. Because Congress never passed specific privacy legislation, the Department of Health and Human Services (HHS) later published the Privacy Rule and its subsequent modifications to implement the standards of HIPAA.⁵

When drafting the Privacy Rule, HHS intended to provide a flexible rule. The goal was to protect the privacy of medical information and still allow healthcare entities to share necessary medical information when administering healthcare.⁶ The Privacy Rule is rooted in the general public policy that doctors have a fiduciary relationship to patients

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¹ Health Insurance Portability and Accountability Act (HIPAA), Pub. L. No. 104-191, 110 Stat. 1938 (1996) [hereinafter HIPAA].

² The Privacy Act of 1974 applied to the Federal Government. See Privacy Act, 5 U.S.C. § 552a (2006).

³ PATRICIA IYER, BARBARA J. LEVIN & MARY ANN SHEA, MEDICAL LEGAL ASPECTS OF MEDICAL RECORDS 165-66 (2006).

⁴ *Id.* at 166; HIPAA, *supra* note 1, § 261.

⁵ U.S. DEP'T OF HEALTH & HUM. SERVS., OFFICE OF CIVIL RTS., SUMMARY OF THE HIPAA PRIVACY RULE (2003) [hereinafter HHS HIPAA SUMMARY], available at <http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf>. See generally 45 C.F.R. §§ 160, 164 (2010).

⁶ HHS HIPAA SUMMARY, *supra* note 5, at 1.

and communications between them should be maintained as confidential.⁷ This primer highlights for judge advocates HIPAA's exceptions to the principles of medical privacy.

HIPAA Enforcement and Preemption

Judge advocates should be aware that there is no private cause of action for a HIPAA violation. However, there are potential civil and criminal penalties for noncompliance. The Secretary of HHS is the designated civil enforcement authority for HIPAA violations. The Secretary is directed to impose a penalty of at least \$100 for each violation that is not punishable under the criminal enforcement provision.⁸ Criminal sanctions are also available when a covered entity knowingly discloses individually identifiable health information in violation of HIPAA.⁹

Although HIPAA provides a national privacy regulation, judge advocates should review applicable state health information privacy laws, especially when requesting medical records from a civilian provider or in cases involving the medical records of a minor.¹⁰ When the state

law is contrary to the federal regulation, HIPAA preempts the state law.¹¹ However, state law is not preempted by HIPAA if the state law is more stringent or better protects a patient's PHI.¹² For example, the State of New York has more stringent laws regarding the dissemination of HIV records. Specifically, patient authorizations must specify if the release includes HIV information; a generic HIPAA authorization is not sufficient.¹³

HIPAA and the Department of Defense

Applicability

The Privacy Rule and the corresponding DoD regulation are applicable to most DoD medical records.¹⁴ The Privacy Rule applies to any "covered entity," which is defined as "a health care provider who transmits any health information in electronic form in connection with a transaction" covered by the Rule.¹⁵ Covered entities perform most medical treatment within the Military Health System.¹⁶

DoD Health Information Privacy Regulation (DoDR 6025.18-R)

The DoD acknowledges the importance of protecting the health information of its patients. However, given the unique nature of the military, the DoD has the additional burden of balancing privacy goals against the commander's

⁷ The Principles of Medical Ethics, adopted 17 June 2001, states that "a physician shall respect the rights of patients, colleagues, and other health professionals, and shall safeguard patient confidences and privacy within the constraints of the law." AM. MED. ASS'N, COUNSEL ON ETHICAL & JUDICIAL AFFAIRS, CODE OF MEDICAL ETHICS (n.d.), available at www.ama-assn.org/ama/pub/physician-resources/medical-ethics/about-ethics-group/ethics-resource-center/educational-resources/pocket-principles.shtml. "The Hippocratic Oath emphasizes patient privacy. Accordingly, U.S. laws protect medical confidentiality." Specifically, the Hippocratic Oath states, "I will respect the privacy of my patients, for their problems are not disclosed to me that the world may know." Sonia Gupta, *The Hippocratic Oath and HIV: A Conflict of Ethics?*, 7 YALE J. MED. & L. (Oct. 5, 2010), <http://www.yalemedlaw.com/2010/10/the-hippocratic-oath-and-hiv-a-conflict-of-ethics>.

⁸ 42 U.S.C. § 1320d-5(a) (2006).

⁹ A covered entity could face a fine of \$50,000 and one year imprisonment. The potential penalties increase to the level of a felony for use of false pretense or the intent to sell, transfer, or use the information for commercial advantage, personal gain, or malicious harm. 42 U.S.C. § 1320d-6(b). Cf. U.S. DEP'T OF ARMY, REG. 40-66, MEDICAL RECORD AND ADMINISTRATION AND HEALTHCARE DOCUMENTATION para. 2-2d (17 June 2008) (RAR, 4 Jan. 2010) [hereinafter AR 40-66] (requiring Department of the Army (DA) personnel to report all possible violations of AR 40-66 to the HIPAA privacy officer and the commander who will then seek guidance from his or her legal advisor to determine the next step in reporting the potential violation). For an overview of the criminal enforcement provision of HIPAA, see Scope of Criminal Enforcement Under 42 U.S.C. § 1320d-6, Op. O.L.C., 2005 WL 2488049 (2005) (preliminary print) (explaining which "persons" may be directly prosecuted and what level of knowledge is required to meet the "knowingly" element of the offense). See HITECH Act, 42 U.S.C. § 17931 (2006) (extending criminal penalties to individuals whether or not they are employees of the covered entity, extending HIPAA violations to cases involving willful neglect, increasing monetary penalties, and establishing a compensation methodology).

¹⁰ U.S. DEP'T OF DEF., REG. 6025.18-R, DOD HEALTH INFORMATION PRIVACY REGULATION para. C2.4.2 (Jan. 23, 2003) [hereinafter DOD REG. 6025.18-R]. ("As a general rule, state laws pertaining to healthcare are not applicable to healthcare programs and activities of the Department of Defense (DoD). However, there are some matters concerning which DoD rules and procedures call for the DoD Components to follow State law. For

example, in cases involving disclosure of protected health information about a minor to a parent, guardian, or person acting in loco parentis of such minor, the State law of the State where the treatment is provided shall be applied."). See *infra* note 54.

¹¹ 45 C.F.R. § 160.203 (2010); DOD REG. 6025.18-R, *supra* note 10, para. C2.4.1.

¹² DOD REG. 6025.18-R, *supra* note 10, para. C2.4; 45 C.F.R. § 160.202 (outlining the factors to determine if a state law is more stringent: (1) prohibits or restricts a use or disclosure more than HIPAA; (2) provides greater access to or rights to amend information; (3) provides more information; (4) narrows the scope or duration of an authorization or consent, increases privacy protections, or reduces the coercive effect regarding expressing legal permission; (5) requires recordkeeping of disclosure in more detail or for longer duration; or (6) in general provides the individual with an increase in privacy protection for Protected Health Information (PHI)).

¹³ See N.Y. PUB. HEALTH LAW § 2782(5) (McKinney 2010).

¹⁴ DOD REG. 6025.18-R, *supra* note 10, para. C1.1.

¹⁵ 45 C.F.R. § 160.102.

¹⁶ *But see* AR 40-66, *supra* note 9, at 198 (glossary) (defining the term "covered entity": "Not all healthcare providers affiliated with the Armed Forces are covered entities; among those who are not providers associated with the Military Entrance Processing Stations and Reserve Components practicing outside the authority of military treatment facilities (MTFs) who do not engage in electronic transactions covered by DoD 6025.18-R and non-network civilian providers."). See *infra* text accompanying notes 68-74 (providing information about accessing civilian medical records).

need to execute a mission.¹⁷ Shortly after HHS published the final modifications of the Privacy Rule, the DoD published its own health information privacy regulation, DoDR 6025.18-R. The lengthy DoD regulation closely mirrors the federal Privacy Rule as it pertains to the military healthcare system. Given the breadth of the DoD regulation, trial counsel are advised to pay particular attention to the following chapters: Chapter 5.3, The Core Elements of an Authorization; Chapter 7, Uses and Disclosure of PHI without an Authorization; Chapter 8.2, The Minimum Necessity Rule; and Chapter 8.9, Rules for Alcohol and Drug Abuse Program Patient Records. Judge advocates who are analyzing a medical privacy issue are advised to consult both DoDR 6025.18-R and AR 40-66.

Army Regulation 40-66: Medical Record Administration and Healthcare Documentation

The Department of the Army published AR 40-66 to provide “procedures for the preparation, disposition, and use of Army electronic and paper medical records.”¹⁸ The regulation separates the release of PHI into two categories: (1) the release of information when the patient consents to the disclosure, and (2) the release of information without the consent of the patient.¹⁹ Judge advocates should begin their HIPAA analysis by determining whether or not they will be able to obtain the consent of the individual.

When a court-martial witness consents to the release of information, trial counsel should draft a valid authorization on DD Form 2870. However, when the individual does not consent, the trial counsel will need to rely on an exception found in DoDR 6025.18-R to access the PHI.

Army Regulation 40-66 outlines the procedures for the Patient Administration Department (PAD) at an Army Medical Treatment Facility (MTF) to follow when processing requests for PHI.²⁰ The MTF is encouraged to seek legal guidance from its servicing judge advocate before releasing PHI to ensure the request or authorization is legally sufficient.²¹ Typically, each Army Medical Center has at least one field grade judge advocate and several civilian attorneys who provide HIPAA-related guidance to the hospital commander and staff. Trial counsel should be aware that their requests will be reviewed by experienced judge advocates or civilian attorneys for regulatory compliance.²²

¹⁷ DoD REG. 6025.18-R, *supra* note 10, para. C7.11.1.1; AR 40-66, *supra* note 9, para. 2-4(a)1.(k).

¹⁸ AR 40-66, *supra* note 9, para. 1-1.

¹⁹ *Id.* paras. 2-3, 2-4.

²⁰ *Id.* para. 2-5.

²¹ *Id.* para. 2-5e.

²² *See id.* para. 2-5e.

The Nuts and Bolts of a Trial Counsel’s Request for Medical Records

The Department of the Army requires PHI of both living and deceased persons to remain confidential unless otherwise authorized.²³ “Individually Identifiable Healthcare Information” (i.e., PHI) is defined as

information that [i]s created or received by a healthcare provider, health plan, or employer; and relates to the past, present, or future physical or mental health or condition of an individual; the provision of healthcare to an individual; or the past, present, or future payment for the provision of healthcare to an individual; and [t]hat identifies; or [w]ith respect to which there is a reasonable basis to believe the information can be used to identify the individual.²⁴

Accordingly, nearly any medical record that a trial counsel will need to prepare for trial or to comply with a discovery request will qualify as PHI. Trial counsel can use one of three methods to request access to PHI maintained at a MTF: (1) consent and authorization; (2) request for a law enforcement purpose; or (3) a court order during a judicial or administrative proceeding.

Three Ways for a Trial Counsel to Access PHI for Military Justice

Consent and Authorization

Military treatment facilities are authorized to disclose PHI to a third party, such as a judge advocate, if that party has obtained the prior written consent of the patient.²⁵ The patient’s consent may authorize an oral or written release of PHI to a judge advocate. When possible, a trial counsel should utilize DD Form 2870 to document the authorization.²⁶ Because the PAD staff in the MTF regularly process requests in this format, using this form will likely reduce miscommunication and overall processing time.

If the trial counsel is unable to use DD Form 2870, any written authorization will be valid, provided it contains the following information: (1) a description of the specific information to be used or disclosed; (2) the name of the person authorized to make the disclosure; (3) the name of

²³ *Id.* para. 2-2.

²⁴ DoD REG. 6025.18-R, *supra* note 10, para. DL1.1.20 (internal subdivisions omitted).

²⁵ *Id.* para. C5.1; AR 40-66, *supra* note 9, para. 2-3.

²⁶ AR 40-66, *supra* note 9, para. 2-3b(1). A sample DD Form 2870 is enclosed at Appendix A.

the individual or entity who may receive the disclosure; (4) a description of the purpose of the disclosure; (5) an expiration date; and (6) a dated original signature.²⁷ Judge advocates are advised to pay particular attention to the date of the signature on the authorization. Authorizations more than one year old are invalid.²⁸

Consent and authorization is a useful method for cooperative witnesses. For example, victims of sexual assaults may be willing to consent to the release of their PHI to prove the extent of their injuries. The personal representatives of a homicide victim will likely consent to the release of relevant medical records for cause of death evidence.²⁹ Authorizations may not be so practical for the accused or other noncooperative witnesses who may not want to release sensitive medical or psychiatric records to satisfy a discovery request. When an authorization is not available, counsel in need of medical records must draft an administrative request as a law enforcement official or seek a court order.

Law Enforcement Purposes

A military medical treatment facility is authorized to disclose PHI for law enforcement purposes to a law enforcement official.³⁰ A law enforcement official includes an employee of the agency who has the authority to “prosecute or otherwise conduct a criminal, civil, or administrative proceeding arising from an alleged violation of the law.”³¹ Absent an authorization, trial counsel and criminal investigators should use this exception to obtain PHI when needed.³²

When requesting PHI for law enforcement purposes, trial counsel must submit a proper request to the PAD at the MTF which maintains the records.³³ The request may be in the

²⁷ DoD REG. 6025.18-R, *supra* note 10, para. C5.3.1; AR 40-66, *supra* note 9, para. 2-3b(1).

²⁸ AR 40-66, *supra* note 9, para. 2-3b(1)(c).

²⁹ The Federal Privacy Rule and the DoD Privacy Regulation apply to both living and deceased individuals. Generally, a third party who can legally act on behalf of the deceased individual or the estate can consent to the release of protected health information. DoD REG. 6025.18-R, *supra* note 10, paras. C1.2.1, C8.7.4.

³⁰ *Id.* para. C7.6.

³¹ *Id.* para. DL1.1.22.

³² The DoD health information privacy regulation grants patients the right to receive an accounting of most PHI disclosures made by a covered entity in the last six years. Upon request by a law enforcement official, the MTF may temporarily suspend an individual’s right to receive an accounting for HIPAA disclosures made to law enforcement. The request should include a written statement that the information, if provided to the individual, “would be reasonably likely to impede the agency’s activities.” *Id.* paras. C13.1.1.6, C13.1.2.1

³³ See AR 40-66, *supra* note 9, para. 2-4a(4) (requiring use of DA Form 4254 for such requests).

form of (1) a court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer; (2) a grand jury subpoena; or (3) an administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law.³⁴ The administrative request involves fewer administrative hurdles and is generally the simplest method for trial counsel to obtain PHI from an MTF.³⁵

Court Order (Judicial or Administrative Proceeding)

Finally, an MTF will release information without the consent of the patient to comply with a court order for a judicial or administrative proceeding.³⁶ “Any order from a military judge in connection with any process under the Uniform Code of Military Justice” is considered a court order.³⁷ Court orders can be useful when requesting records from a non-cooperative military or civilian facility. If a court order is necessary, only the PHI expressly described in the court order will be released.³⁸ Therefore, a trial counsel’s petition for a court order should list the specific medical records requested.³⁹

Protected Health Information may also be released in response to a subpoena, discovery request, or other lawful process, provided specific assurances are provided by the requestor.⁴⁰ Trial counsel are likely to find this method of accessing PHI more burdensome than drafting an administrative request as a law enforcement officer.⁴¹

³⁴ DoD REG. 6025.18-R, *supra* note 10, para. C7.6.1.2.

³⁵ See *infra* text accompanying notes 43–51 for additional information on drafting an administrative request.

³⁶ DoD REG. 6025.18-R, *supra* note 10, para. C7.5.1.1.

³⁷ *Id.* para. C7.5.4.

³⁸ *Id.* para. C7.5.1.1.

³⁹ The “minimum necessary” rule (requiring the MTF to limit its disclosures to the minimum necessary to accomplish the purpose of the disclosure) does not apply to court orders or other disclosures required by law. *Id.* para. C8.2.2.6. That is to say, the order of the military judge is sufficient to require the disclosure, without fear that the MTF will further restrict the disclosures based on its own independent judgment. However, counsel will still be required to demonstrate to the military judge that the requested protected health information is relevant. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 402 (2008) [hereinafter MCM].

⁴⁰ DoD REG. 6025.18-R, *supra* note 10, para. C7.5.1.2.

⁴¹ The requesting counsel is required to document in writing that reasonable efforts have been made to notify the subject of the information of the request for PHI, that the party made a “good faith attempt to provide written notice to the individual,” that the “notice included sufficient information about the litigation or proceeding . . . to permit the individual to raise an objection,” and that enough time has passed and “no objections were filed, or all objections filed by the individual have been resolved by the court or administrative tribunal.” See *id.* paras. C7.5.1.2, C7.5.1.3. In the alternative, the requesting counsel may provide the treatment facility with satisfactory assurance that reasonable efforts have been made to secure a qualified protective order. *Id.* para. C7.5.1.2.2.

Drafting the Request for PHI

Once a trial counsel has determined that he has the authority under DoDR 6025.18-R to request PHI, he should draft and submit a valid written request to the PAD at the treatment facility where the records are located. The request must be submitted on a DA Form 4254, Request for Private Medical Information.⁴²

When drafting a request for PHI, the trial counsel must comply with several requirements under DoDR 6025.18-R.⁴³ First, the trial counsel must demonstrate why the request is “relevant and material to a legitimate law enforcement inquiry.”⁴⁴ Second, the trial counsel must show in writing that the request is “limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought.”⁴⁵ Third, the trial counsel must attest that “de-identified information [i.e., information that does not identify an individual] could not reasonably be used” instead of the PHI.⁴⁶ Fourth, the trial counsel must document the official purpose of the request, specify which medical records are being requested, and list the dates of treatment that are relevant.⁴⁷ Finally, the trial counsel must present his official credentials to the PAD when submitting the request for PHI.⁴⁸ These administrative requirements help ensure compliance with the principle of disclosing only the minimum amount of PHI necessary to satisfy the authorized request.⁴⁹

When drafting the DA Form 4254, trial counsel should pay particular attention to the specificity and relevance of the request. One of the most frequent errors law enforcement officials make is requesting a patient’s entire medical record either because they did not take the time to draft a narrow request or because they are unsure which

exact records will be relevant to the case.⁵⁰ Fishing expeditions will not only aggravate the hospital staff but lead to a total denial of the request for release. For example, a trial counsel’s request for a ten-year-old medical record of an accused charged with vehicular homicide will likely be denied as overly broad. The medical treatment facility is only authorized to release the minimum amount of PHI necessary to satisfy the purpose of the request.⁵¹

Additional Issues

Requesting PHI of a Minor or Declared Incompetent Individual

Minors and individuals who have been declared mentally incompetent are generally unable to consent to the release of their medical records.⁵² A minor is defined as someone who “has not attained the age of 18 years and who has not been emancipated as determined by the law of the state in which the MTF is located.”⁵³ If the victim or witness is a minor or has been declared mentally incompetent by a court, the DD Form 2870 generally must be signed by a parent or legal guardian.⁵⁴ If a trial counsel encounters an uncooperative parent, for example in a child molestation case where the parent is the accused, the trial counsel will need to draft an administrative request as a law enforcement official on DA Form 4254 or obtain a court order.⁵⁵

Requesting Mental Health Records and Alcohol and Drug Records

Psychotherapy Notes

Trial counsel should be aware that psychotherapy notes are generally subject to more protection and fewer exceptions under HIPAA and DoDR 6025.18-R.⁵⁶ Psychotherapy notes are defined as

⁴² Although the DoD Privacy Regulation permits an administrative request to be drafted in any format provided the content complies with regulatory requirements discussed below, AR 40-66 requires DoD personnel to request PHI on DA Form 4254. DoD REG.6025.18-R, *supra* note 10, para. C7.6.1; AR 40-66, *supra* note 9, para. 2-4a(4). A sample DA 4254 appears in Appendix B.

⁴³ DoD REG. 6025.18-R, *supra* note 10, para. C7.6.1.2.

⁴⁴ *Id.* para. C7.6.1.2.3.1.

⁴⁵ *Id.* para. C7.6.1.2.3.2.

⁴⁶ *Id.* para. C7.6.1.2.3.3.

⁴⁷ AR 40-66, *supra* note 9, para. 2-4a(4). DA Form 4254 requires requesters to submit the dates of the hospitalization or clinic visits and diagnosis, if known.

⁴⁸ AR 40-66, *supra* note 9, para. 2-4a(4). Trial counsel will usually be required to present their military identification cards when requesting medical records in person. There is no specific written guidance on the verification process, so local patient administration division policies may differ. Advance coordination is recommended. Telephone Interview with Charles Orck, Attorney Advisor, U.S. Army Med. Command (Jan. 7, 2010) [hereinafter Orck Telephone Interview].

⁴⁹ DoD REG. 6025.18-R, *supra* note 10, para. C8.2.4.2.1.

⁵⁰ Orck Telephone Interview, *supra* note 48.

⁵¹ DoD REG. 6025.18-R, *supra* note 10, para. C8.2.1; AR 40-66, *supra* note 9, para. 2-4a(4).

⁵² See AR 40-66, *supra* note 9, para. 2-3b.

⁵³ *Id.* para. 2-3b(1)(b)1.

⁵⁴ *Id.* But see DoD REG. 6025.18-R, *supra* note 10, para. C8.7.3.2.; AR 40-66, *supra* note 9, para. 2-6a(1) (referring the reader to state law to determine when a teenager can act on his or her own behalf and when parents may not be notified, especially with respect to records of drug and alcohol abuse, venereal disease control, birth control, and abortion). In Texas for example, a child may consent to the medical, psychological, or surgical treatment related to pregnancy (other than abortion) or the diagnosis and treatment of an infectious, contagious, or communicable disease. TEX. FAM. CODE ANN. § 32.003(a)(3), (4) (West 2003).

⁵⁵ See DoD REG. 6025.18-R, *supra* note 10, paras. C7.5, C7.6; see *supra* text accompanying notes 43–51 and Appendix B for further guidance on using DA Form 4254.

⁵⁶ See DoD REG. 6025.18-R, *supra* note 10, para. C1.2.3.1.

Notes recorded (in any medium) by a healthcare provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record. Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.⁵⁷

Except under limited circumstances, the MTF is required to obtain a valid authorization from the patient or the guardian before releasing psychotherapy notes.⁵⁸ Medical treatment facilities are authorized to release psychotherapy notes as required by law, which includes court orders and authorized investigative demands.⁵⁹ Trial counsel can use an administrative request for law enforcement purposes to obtain a summary of the accused's or witness's "diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date," as well as dates of treatment and prescription information.⁶⁰ However, psychotherapy notes, or medical records which detail the content of the conversations during a counseling session, will generally be redacted absent a court order or authorization. If, for example, defense counsel wants to compel the production of the alleged victim's psychotherapy notes and does not have the consent of the alleged victim, defense counsel should request an in-camera review of the records. The military judge will then make a ruling pursuant to Military Rule of Evidence 513(e)(2).⁶¹

⁵⁷ *Id.* para. DL1.1.29.

⁵⁸ *Id.* para. C5.1.2 (noting the limited exceptions in which a medical treatment facility may release psychotherapy notes: (1) to carry out certain treatment, payment, or healthcare operations, (2) to comply with activities of the Department of Health and Human Services, (3) as required by law, (4) for health oversight activities, (5) to coroners and medical examiners regarding a decedent, or (6) to avert a "serious and imminent threat to health or safety of a person or the public, which may include a serious and imminent threat to military personnel or members of the public or serious or imminent threat to a specific military mission or national security under circumstances which in turn create a serious and imminent threat to a person or the public").

⁵⁹ *See id.* para. DL1.1.31 (defining "required by law").

⁶⁰ *Id.* para. DL1.1.29 (defining "psychotherapy notes").

⁶¹ Major Stacy E. Flippin, *Military Rule of Evidence (MRE) 513: A Shield to Protect Communications of Victims and Witnesses to Psychotherapists*, ARMY LAW., Sept. 2003, at 8.

The release of drug and alcohol records from the Army Substance Abuse Program (ASAP) is strictly protected by statute and regulation.⁶² The release of "the identity, diagnosis, prognosis, or treatment of a patient maintained in connection with a Federal substance abuse program" is prohibited unless the patient consents in writing,⁶³ the disclosure is directed pursuant to a court order, or the disclosure is made to medical personnel in limited treatment circumstances.⁶⁴

In preparation for a court-martial, a trial counsel may seek a court order directing the release of ASAP records. However, the disclosure will be restricted to factual information such as dates of enrollment, discharge, attendance, and medication. The court order will not permit the disclosure of the accused's communications to the ASAP staff.⁶⁵ Alternatively, the ASAP patient may consent in writing to have his or her records released to defense counsel.⁶⁶ If the defense intends to enter relevant portions of the ASAP record into evidence during the merits or sentencing case, the records must be disclosed to the trial counsel in compliance with discovery rules.⁶⁷

Requesting Access to Civilian Medical Records

Trial counsel will likely find that accessing medical records from MTFs with a DA Form 4254 is a relatively simple process.⁶⁸ However, the procedure becomes increasingly complex if the witness or accused has received medical treatment at a civilian medical facility. DoDR 6025.18-R, AR 40-66, and DA Form 4254 are not binding on civilian medical facilities.⁶⁹ When requesting PHI from a

⁶² *See* 42 U.S.C. § 290dd-2 (2006); AR 40-66, *supra* note 9, ch. 8; DoD Reg. 6025.18-R, *supra* note 10, para. C8.9; U.S. DEP'T OF ARMY, REG. 600-85, THE ARMY SUBSTANCE ABUSE PROGRAM paras. 6-8, 10-15 (2 Feb. 2009) (RAR, 2 Dec. 2009) [hereinafter AR 600-85].

⁶³ In the Army, this may be accomplished using DA Form 5018-R, Army Drug Abuse and Prevention Control Program (ADAPCP) Client's Consent Statement for Release of Treatment Information.

⁶⁴ AR 40-66, *supra* note 9, para. 8-3b.

⁶⁵ AR 600-85, *supra* note 62, para. 10-26.

⁶⁶ *Id.* para. 10-19.

⁶⁷ *See* MCM, *supra* note 39, R.C.M. 701(b)(1)(B)(ii), 701(b)(3), 1001(c)(1)(B). In practice, if the defense is trying to show that the client has seriously participated in treatment, a letter or testimony from the Army Substance Abuse Program (ASAP) counselor may prove more beneficial than the "raw" ASAP records. Defense counsel should use the opportunity afforded by the client's release of information to talk to the client's actual counselors. Of course, if the defense counsel calls them as witnesses, the government will then be entitled to equal access under Rule for Court-Martial 701(e), and may, if necessary, request a court order on that basis.

⁶⁸ *See supra* text accompanying notes 42-51.

⁶⁹ DOD REG. 6025.18-R, *supra* note 10, para. C1.1.2. Civilian facilities typically have their own forms, which may be obtained from their records departments. Trial counsel are encouraged to use DoD and DA policies and

civilian facility, trial counsel must rely on HIPAA, and hopefully, a cooperative civilian records department.

HIPAA generally permits, but does not require, a covered entity to disclose PHI when authorized by the patient or his guardian. A covered entity is required to disclose PHI in two limited situations: (1) when an individual requests his own records or an accounting of disclosures, and (2) in compliance with a HHS investigation.⁷⁰ Various other provisions of HIPAA authorize a covered entity to disclose PHI at its own discretion.⁷¹

The most practical method for requesting PHI from a civilian medical facility is for trial counsel or CID to submit an administrative request for law enforcement purposes.⁷² The written request must explain how the information sought is “relevant and material to a legitimate law enforcement inquiry,” be precise and “limited in scope to the extent reasonably practicable,” and state that “de-identified information could not reasonably be used” to accomplish the same purpose.⁷³ Because civilian covered entities are permitted, but not required, to honor a law enforcement request, military justice sections are encouraged to establish professional relationships with their local facilities prior to submitting requests for medical records.⁷⁴

Article 32 Investigating Officer Access to PHI

An Article 32 investigating officer (IO) has the authority to request access to PHI under several sections of HIPAA and the DoD Privacy Regulation. The status of the individual whose medical records are being requested and the location of the medical records determine the appropriate provision of HIPAA to authorize a release of PHI to an Article 32 IO.⁷⁵

regulations as persuasive support for their request for PHI from a civilian medical facility.

⁷⁰ 45 C.F.R. § 164.502(a)(2) (2010); HHS HIPAA SUMMARY, *supra* note 5.

⁷¹ 45 C.F.R. § 164.502(a)(1); HHS HIPAA SUMMARY, *supra* note 5.

⁷² 45 C.F.R. § 164.512(f); Orck Telephone Interview, *supra* note 48. A covered entity may also disclose the PHI of armed forces personnel for activities deemed necessary by command authorities to assure the proper execution of the military mission, provided notice has been published in the *Federal Register*. 45 C.F.R. § 164.512(k)(1)(i); DoD Health Information Privacy Program, 68 Fed. Reg. 17,357-02 (Apr. 9, 2003) (listing the purposes for which PHI may be used or disclosed to appropriate military command authorities. Although the execution of courts-martial is not expressly listed, the *Federal Register* does include the broad purpose of carrying out any other activity necessary for the proper execution of the mission of the armed forces).

⁷³ 45 C.F.R. § 164.512(f)(1)(ii)(C). A sample request attached to this article at Appendix C provides guidance on how to request PHI from a civilian medical treatment facility.

⁷⁴ 45 C.F.R. § 164.512(f); HHS HIPAA SUMMARY, *supra* note 5; Orck Telephone Interview, *supra* note 48.

⁷⁵ Memorandum from the Office of Gen. Counsel, Dep’t of Def. to Dir., Tricare Mgmt. Activity Privacy Office, subject: Applicability of HIPAA

If the individual patient is a Soldier, the IO is authorized to request the pertinent records under paragraph C7.11.1. of DoDR 6025.18-R.⁷⁶ This provision recognizes that the IO was appointed by the commander to conduct an Article 32 investigation to execute the mission of the armed forces.⁷⁷ Specifically, Article 32 of the Uniform Code of Military Justice (UCMJ) requires a “thorough and impartial investigation” prior to a charge being referred to a general court-martial.⁷⁸

The reach of the commander under paragraph C7.11.1 does not extend to the medical records of a civilian patient.⁷⁹ If the individual is not a member of the armed forces and the records are within the control of the MTF, as when a civilian dependent is a victim of an assault, the Article 32 IO is not authorized to receive PHI as an arm of the command.⁸⁰ Instead, the IO could request the records as a law enforcement official acting pursuant to a process “required by law” under paragraph C7.6.1.⁸¹ The request must specify that the information sought is relevant, material, and necessary.⁸²

Finally, DoDR 6025.18-R does not apply if the individual is not a member of the armed forces and the medical records are not within control of the DoD, such as a civilian victim of a DUI accident.⁸³ However, HIPAA, like the DoD Regulation, authorizes a covered entity to release PHI to an Article 32 IO pursuant to an administrative request

Regulations to Article 32 Investigations (22 Sept. 2004) [hereinafter Article 32 HIPAA Memo] (on file with OSJA MEDCOM).

⁷⁶ *Id.*

⁷⁷ *Id.* See DOD REG. 6025.18-R, *supra* note 10, para. C7.11.1 (noting that the command has authority to access PHI to execute the mission. This authority, however, is limited to the records of servicemembers and does not apply to civilians, retirees, or family members).

⁷⁸ 10 U.S.C. § 832(a); MCM, *supra* note 39, R.C.M. 405(a).

⁷⁹ See DOD REG. 6025.18-R, *supra* note 10, para. C7.11.1; Policy Memorandum 10-042, Office of the Surgeon Gen./MEDCOM, subject: Release of Protected Health Information (PHI) to Unit Command Officials (30 June 2010) [hereinafter Command Release PHI Memo], available at http://www.armyg1.army.mil/hr/suicide/docs/Protected_Health_information.pdf.

⁸⁰ See DOD REG. 6025.18-R, *supra* note 10, para. C7.11.1.

⁸¹ Article 32 HIPAA Memo, *supra* note 75, para. 4. See DOD REG. 6025.18-R, *supra* note 10, paras. DL1.1.31, C7.6.1 (defining “required by law” to include DoD Regulations); DOD REG. 6025.18-R, *supra* note 10, para. DL1.1.9 (defining “DoD Regulation” to include the *Manual for Courts-Martial*); MCM, *supra* note 39, R.C.M. 405 (documenting that unless privileged “[e]vidence, including documents or physical evidence, which is under the control of the Government and which is relevant to the investigation and not cumulative, shall be produced if reasonably available”).

⁸² DoD Reg. 6025.18-R, *supra* note 10, paras. C7.6.1.2.3.1 to C7.6.1.2.3.3. See *supra* text accompanying notes 44–48.

⁸³ DoD REG. 6025.18-R, *supra* note 10, para. C1.1.2.

which is authorized by law.⁸⁴ The Article 32 IO's request must meet the same three restrictions of C7.6.1.2.3.⁸⁵ Because HIPAA does not require a covered entity to release records, it may be preferable for a more traditional law enforcement official, such as a CID agent, to request records from civilian facilities who are unfamiliar with Article 32 hearings.⁸⁶

Knowing Where to Find Help

Trial counsel struggling with HIPAA and the DoD Privacy Regulation should seek assistance from individuals trained in medical privacy law. Each MTF has a HIPAA Privacy Officer who can provide guidance on how to properly request PHI.⁸⁷ Due to the magnitude and complexity of the DoDR 6025.18-R, trial counsel will likely find that each MTF has its own way of processing requests. Therefore, military justice offices will benefit if they network with PAD to ensure requests are submitted properly.⁸⁸

In addition, a prudent trial counsel will develop a solid working relationship with the medical treatment facility's legal advisor. Requests for PHI without the patient's consent will likely be reviewed by the servicing judge advocate to determine the legitimacy of the request, whether on DD Form 2870 or DA Form 4254.⁸⁹ Advance coordination with the facility's servicing judge advocate will help create a seamless procedure for requesting records through PAD.

Advising Commanders on HIPAA Compliance

Command Access to PHI

HIPAA generally prohibits healthcare entities from releasing protected health information to a third party without consent.⁹⁰ However, HIPAA and DoDR 6025.18-R recognize the unique nature of the military and grant commanders limited access to a Soldier's PHI without their

⁸⁴ Article 32 HIPAA Memo, *supra* note 75, para. 7. See 45 C.F.R. § 164.512(f)(1)(ii)(C) (2010); DoD REG. 6025.18-R, *supra* note 10, para. C7.6.1.2.3.

⁸⁵ Article 32 HIPAA Memo, *supra* note 75, para. 7. See *supra* text accompanying notes 44–48.

⁸⁶ See Memorandum for Record from Captain Dan Maurer, subject: Requesting Access to Medical Records from Military and Civilian Healthcare Providers by Trial Counsel in the Performance of Official Duties (2 Nov. 2010) [hereinafter Trial Counsel Request Memo] (on file with author).

⁸⁷ AR 40-66, *supra* note 9, para. 1-4a.(6).

⁸⁸ Orck Telephone Interview, *supra* note 48.

⁸⁹ AR 40-66, *supra* note 9, para. 2-3b(2).

⁹⁰ See 45 C.F.R. § 164.502(a) (2010).

consent.⁹¹ Accordingly, judge advocates must know the limitations of command authority to help prevent abuse and overreaching by commanders.

The DoD authorizes the release of certain medical information which has been deemed necessary for commanders, or their designees, to properly execute the military mission.⁹² For example, commanders have unrestricted access to results of drug tests, medical readiness information, profiles, Medical Evaluation Board or Physical Evaluation Board data, line of duty investigation determinations, medical situations causing a change in duty status such as appointments or hospitalizations, Army Weight Control Program data, threats to life or health such as suicidal or homicidal behavior, and information necessary to carry out other activities in accordance with applicable military regulations or procedures.⁹³

While the privacy rule recognizes that commanders and their designees need access to PHI in order to make informed decisions regarding the mission, a commander's access to medical information is not unlimited. Commanders may receive only the minimum information necessary to properly execute the mission.⁹⁴ Commanders do not have access to medical information which describes the purpose for a medical appointment, states a Soldier's diagnosis or medication prescribed, or pertains to the Soldier's Family members unless the information relates to readiness, fitness for duty, or the Exceptional Family Member Program.⁹⁵

Commanders and their representatives may request authorized PHI from the MTF through various methods. They may contact a provider directly or communicate through the unit surgeon.⁹⁶ All requests should be documented on DA Form 4254.⁹⁷

The AR 15-6 Investigating Officer's Access as a Command Designee

Army Regulation 15-6 Investigating Officers are empowered as command designees to request access to PHI

⁹¹ 45 C.F.R. § 164.512(k)(1)(i); DoD REG. 6025.18-R, *supra* note 10, para. C7.11.

⁹² DoD REG. 6025.18-R, *supra* note 10, para. C7.11; AR 40-66, *supra* note 9, para. 2-4a.(1)(k).

⁹³ DoD Health Information Privacy Program, 68 Fed. Reg. 17357-02 (Apr. 9, 2003); DoD Reg. 6025.18-R, *supra* note 10, para. C7.11.1.3; Message, 282049Z May 10, U.S. Dep't of the Army, subject: ALARACT VCVA Sends on Protected Health Information (PHI) para. 3 [hereinafter DA PHI Message].

⁹⁴ DA PHI Message, *supra* note 93, para. 2.

⁹⁵ *Id.* para. 4.

⁹⁶ Command Release PHI Memo, *supra* note 79, para. 5b.

⁹⁷ AR 40-66, *supra* note 9, para. 2-3a(4).

in order to execute their mission. The command's authority to investigate is necessary for the proper execution of the mission of the Army, and therefore an AR 15-6 IO does not need the consent of the Soldier to access PHI.⁹⁸ When seeking access to PHI, IOs should use DA Form 4254, request only the minimum records necessary for the investigation, and provide their credentials and a written justification of their official need to know.⁹⁹

Commander's Authority to Release PHI to Third Parties

Once a commander or commander's designee receives PHI from the medical treatment facility, he or she is now responsible for safeguarding that information under the Privacy Act of 1974.¹⁰⁰ In general, PHI is considered personally identifiable information under the Privacy Act if it pertains to a living U.S. citizen or alien admitted for permanent residence. Personally identifiable information may not be released to families or even members of the commander's own staff except as allowed under the Act.¹⁰¹ Commanders should avoid releasing PHI during staff calls, in situation reports, and on lists of non-deployable Soldiers. The commander is prohibited from releasing PHI without a need to know recognized under the Privacy Act or the written consent of that Soldier.¹⁰²

Conclusion

By understanding the basic requirements of DoDR 6025.18-R and using the sample requests in the appendices, judge advocates will be able to properly and efficiently access medical records for the administration of military justice and provide practical guidance to the command regarding their access to PHI. Requesting medical records does not need to be a stressful event for new counsel. If the judge advocate arms his paralegal with a legally sufficient request or authorization, the paralegal will not come back from the hospital empty-handed. However, the counsel must first know which specific records they want, why those records are relevant to the case, and under which authority the government is authorized to request them. Although medical records are often a critical piece of evidence at trial, the government's access to PHI is not without limitations. Judge advocates must understand HIPAA and the applicable DoD requirements to be effective litigators and trusted advisors to the command.

⁹⁸ E-mail from Charles Orck, Attorney Advisor, U.S. Army Med. Command (Jan. 1, 2011, 9:13 EST); DoD REG. 6025.18-R, *supra* note 10, para. C7.11.1 (authorizing disclosure when required by a commander to carry out the military mission); *id.* DL 1.1.31.1 (defining "required by law" to include "authorized investigative demands"). The investigating officer is not bound by most of the Military Rules of Evidence and may consider the records obtained without the need for authenticating witnesses. U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS para. 3-7a (2 Oct. 2006). Although there is currently no written legal authority, parallel analysis could be used to support a position that administrative separation board members could access relevant medical records on behalf of the command. *See* U.S. DEP'T OF ARMY, REG. 600-35, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 2-10g (6 June 2005) (RAR, 27 Apr. 2010) (stating that the provisions of AR 15-6 apply to separation boards unless otherwise modified by the regulation).

⁹⁹ DoD REG. 6025.18-R, *supra* note 10, para. C8.2.1 (providing that only the minimum necessary records to accomplish the official purpose will be provided); AR 40-66, *supra* note 9, para. 2-4a(4).

¹⁰⁰ U.S. DEP'T OF ARMY, REG. 340-21, THE PRIVACY ACT PROGRAM paras. 1-5b, 1-5d, 3-1 (5 July 1985) (forbidding the Army to disclose such records except as provided by that regulation, and requiring that released information be safeguarded against unauthorized disclosure or use). Once released by a covered entity to an individual within the DoD, PHI is protected by the Privacy Act rather than HIPAA, and can only be disclosed pursuant to a need to know. Command Release PHI Memo, *supra* note 79, para. 6d.

¹⁰¹ DoD REG. 6025.18-R, *supra* note 10, para. C1.1.5.

¹⁰² Command Release PHI Memo, *supra* note 79, para. 6d.

Appendix A

Sample DA Form 2870

AUTHORIZATION FOR DISCLOSURE OF MEDICAL OR DENTAL INFORMATION		
PRIVACY ACT STATEMENT		
<p>In accordance with the Privacy Act of 1974 (Public Law 93-579), the notice informs you of the purpose of the form and how it will be used. Please read it carefully.</p> <p>AUTHORITY: Public Law 104-191; E.O. 9397 (SSAN); DoD 6025.18-R.</p> <p>PRINCIPAL PURPOSE(S): This form is to provide the Military Treatment Facility/Dental Treatment Facility/TRICARE Health Plan with a means to request the use and/or disclosure of an individual's protected health information.</p> <p>ROUTINE USE(S): To any third party or the individual upon authorization for the disclosure from the individual for: personal use; insurance; continued medical care; school; legal; retirement/separation; or other reasons.</p> <p>DISCLOSURE: Voluntary. Failure to sign the authorization form will result in the non-release of the protected health information.</p> <p>This form will not be used for the authorization to disclose alcohol or drug abuse patient information from medical records or for authorization to disclose information from records of an alcohol or drug abuse treatment program. In addition, any use as an authorization to use or disclose psychotherapy notes may not be combined with another authorization except one to use or disclose psychotherapy notes.</p>		
SECTION I - PATIENT DATA		
1. NAME (Last, First, Middle Initial) Snuffy, John, P.	2. DATE OF BIRTH (YYYYMMDD) 19830626	3. SOCIAL SECURITY NUMBER 111-11-1111
4. PERIOD OF TREATMENT: FROM - TO (YYYYMMDD) 20100101-20100601	5. TYPE OF TREATMENT (X one) <input type="checkbox"/> OUTPATIENT <input type="checkbox"/> INPATIENT <input checked="" type="checkbox"/> BOTH	
SECTION II - DISCLOSURE		
6. I AUTHORIZE <u>William Beaumont Army Medical Center</u> TO RELEASE MY PATIENT INFORMATION TO:		
<i>(Name of Facility/TRICARE Health Plan)</i>		
a. NAME OF PHYSICIAN, FACILITY, OR TRICARE HEALTH PLAN CPT Joseph Smith, Trial Counsel	b. ADDRESS (Street, City, State and ZIP Code) Office of the Staff Judge Advocate Fort Bliss, Texas	
c. TELEPHONE (Include Area Code) (123) 456-7890	d. FAX (Include Area Code)	
7. REASON FOR REQUEST/USE OF MEDICAL INFORMATION (X as applicable)		
<input type="checkbox"/> PERSONAL USE <input type="checkbox"/> CONTINUED MEDICAL CARE <input type="checkbox"/> SCHOOL <input type="checkbox"/> OTHER (Specify)		
<input type="checkbox"/> INSURANCE <input type="checkbox"/> RETIREMENT/SEPARATION <input checked="" type="checkbox"/> LEGAL		
8. INFORMATION TO BE RELEASED All orthopedic paper or electronic records to include chronology of care, imaging, radiological reports, laboratory reports, surgical reports, and prescription information during the period of treatment described in section 4 above. This authorization also permits medical professionals to verbally disclose and discuss the specified protected health information to the person or entity listed in paragraph 6.a.		
9. AUTHORIZATION START DATE (YYYYMMDD)	10. AUTHORIZATION EXPIRATION <input type="checkbox"/> DATE (YYYYMMDD) <input type="checkbox"/> ACTION COMPLETED	
SECTION III - RELEASE AUTHORIZATION		
<p>I understand that:</p> <p>a. I have the right to revoke this authorization at any time. My revocation must be in writing and provided to the facility where my medical records are kept or to the TMA Privacy Officer if this is an authorization for information possessed by the TRICARE Health Plan rather than an MTF or DTF. I am aware that if I later revoke this authorization, the person(s) I herein name will have used and/or disclosed my protected information on the basis of this authorization.</p> <p>b. If I authorize my protected health information to be disclosed to someone who is not required to comply with federal privacy protection regulations, then such information may be re-disclosed and would no longer be protected.</p> <p>c. I have a right to inspect and receive a copy of my own protected health information to be used or disclosed, in accordance with the requirements of the federal privacy protection regulations found in the Privacy Act and 45 CFR § 164.524.</p> <p>d. The Military Health System (which includes the TRICARE Health Plan) may not condition treatment in MTFs/DTFs, payment by the TRICARE Health Plan, enrollment in the TRICARE Health Plan or eligibility for TRICARE Health Plan benefits on failure to obtain this authorization.</p> <p>I request and authorize the named provider/treatment facility/TRICARE Health Plan to release the information described above to the named individual/organization indicated.</p>		
11. SIGNATURE OF PATIENT/PARENT/LEGAL REPRESENTATIVE	12. RELATIONSHIP TO PATIENT <i>(If applicable)</i>	13. DATE (YYYYMMDD)
SECTION IV - FOR STAFF USE ONLY (To be completed only upon receipt of written revocation)		
14. X IF APPLICABLE: <input type="checkbox"/> AUTHORIZATION REVOKED	15. REVOCATION COMPLETED BY	16. DATE (YYYYMMDD)
17. IMPRINT OF PATIENT IDENTIFICATION PLATE WHEN AVAILABLE	SPONSOR NAME: SPONSOR RANK: FMP/SPONSOR SSN: BRANCH OF SERVICE: PHONE NUMBER:	

DD FORM 2870, DEC 2003

Adobe Professional 8.0

Appendix B

Sample DA Form 4254¹⁰³

REQUEST FOR PRIVATE MEDICAL INFORMATION For use of this form, see AR 40-66; the proponent agency is the OTSG		1. Date (YYYYMMDD)
2. Patient's Name and SSN. Snuffy, John P. 111-11-1111	3. Medical Treatment Facility (Name and Location) William Beaumont Army Medical Center, El Paso, Texas	
<p>4. Reason for Request. IAW AR 40-66, para. 2-4a(1)(a), I have an official need to access Protected Health Information (PHI) of the above named patient. I am requesting the PHI in performance of my duties as Trial Counsel in [the investigation of ____] [US v. ____]. This request is made in preparation or anticipation of a [law enforcement investigation] [judicial proceedings for Court-Martial under the Uniform Code of Military Justice, 10 U.S.C. 801 et seq.]. The PHI requested below is material, relevant, and limited in scope to the extent reasonably practicable. De-identified information can not reasonably be used in place of the requested PHI.</p> <p>I authorize [NAME OF YOUR PARALEGAL] to physically retrieve these records from your office as part of [his/her]</p>		
<p>5. Private Medical Information Sought (Specify dates of hospitalization or clinic visits and diagnosis, if known) All medical records, files, reports for [name of individual] between the dates of [enter date range] maintained at [name of medical facility] and/or associated clinics on Fort [name], to include:</p> <ul style="list-style-type: none"> <input type="checkbox"/> chronological record of medical care <input type="checkbox"/> nurse screening reports and notes <input type="checkbox"/> handwritten, typed, or electronic notes from the treating physician and/or surgical team <input type="checkbox"/> patient lab inquiries and reports <input type="checkbox"/> prescription history <input type="checkbox"/> medical record reports, including ambulatory and surgical procedures and reports <input type="checkbox"/> medical record-supplemental medical data forms <input type="checkbox"/> print-outs of electronic, web-based data entry related to admittal, treatment, diagnosis, discharge, or follow-up care <input type="checkbox"/> liability release forms <input type="checkbox"/> patient registration forms <input type="checkbox"/> Imaging records and radiology reports to include X-ray, CT, MRI, or similar photographic evaluative or diagnostic tools <input type="checkbox"/> social work and behavioral health clinic records, if applicable 		
<p>6. Requestor's Name, Title, Organization and SSN. [NAME], CPT, Judge Advocate, Trial Counsel, [UNIT] [phone number and email address]</p>		
<i>FOR USE OF MEDICAL TREATMENT FACILITY ONLY</i>		
<p>7. Check applicable box. <input type="checkbox"/> Approved <input type="checkbox"/> Disapproved (State reason for disapproval)</p>		
<p>8. Summary of Private Medical Information Released.</p>		
9. Signature of Approving Official.		10. Date (YYYYMMDD)

DA FORM 4254, FEB 2003

DA FORM 4254-R, NOV 91, IS OBSOLETE.

APD PE v1.02ES

¹⁰³ Trial Counsel Request Memo *supra* note 86.

Appendix C

Sample Request for Civilian Covered Entity¹⁰⁴

Name of civilian “covered entity”/addressee
Address
City, State XXXXX-XXXX

Dear [Name of Addressee],

Under the provisions of the Health Insurance Portability and Accountability Act (Pub.L. 104-191) and the Code of Federal Regulations, the undersigned requests access to certain “Protected Health Information” (PHI) related to [Name of individual whose records you seek to obtain], specifically the following records, files, and information maintained by your facility and its employees:

[list the specific dates and documents or files you want on the specified individual].

Pursuant to 45 C.F.R. part 164.512, para. (f)(1)(ii)(C), this request fulfills an official need in the performance of the prosecution and law enforcement investigation duties of the office of the undersigned. The intended use of the PHI is [identify your intended use of the PHI (e.g., “to aid in the discovery of relevant, material, and probative evidence of the medical status of _____, a Government witness in this prosecution under the Uniform Code of Military Justice, 10 U.S.C. 846 and Rule for Court-Martial 701 (Manual for Courts-Martial, 2008 ed.”)].

The undersigned has a good faith and reasonable belief that the information sought will be relevant and material to the PICK ONE: [investigation] [court-martial prosecution]. Furthermore, the scope of requested PHI is the “minimum necessary” under the circumstances to accomplish its intended use. 45 C.F.R. parts 164.502(b) and 164.514(d).

“De-identified” information cannot be reasonably be used to satisfy the request.

If this request is part of the Discovery process, add the following statements:

The undersigned has made reasonable written attempts over a [time] period to request the consensual disclosure of this PHI from [name of individual whose records you’re seeking], to provide sufficient notice of the timing and nature of the pending court-martial, and to provide [name] reasonable time to submit an objection to disclosure. 45 C.F.R. part 164.512, para. (e)(1)(iii). The time in which to object has lapsed [state the court rules or pre-trial decision by the court with respect to a filed objection]. (enclose supporting documentation if available)

This request is for PICK ONE or BOTH: [the purpose of conducting a legitimate military law enforcement investigation under the Uniform Code of Military Justice (10 U.S.C. 801, *et seq.*, and pursuant to 45 C.F.R. part 164.512, para. (f)(1)(ii)(C)] [for the purpose of Discovery proceedings in the case of United States v. _____, prosecuted under the Uniform Code of Military Justice (10 U.S.C. 801, *et seq.*, and pursuant to 45 C.F.R. part 164.512, para. (e)(1)(ii)].

Inquiry for additional information or clarification related to this request can be directed to the undersigned at [phone number, email address].

Sincerely,

NAME
Captain, U.S. Army
Trial Counsel

¹⁰⁴ *Id.*