		reproducing a medical record. The Department must assume that none of the involved parties knew of better data on the "actual costs" of medical record reproduction because such data was not presented to the Department. Hospital representatives have consistently told the Department that record outsourcing firms are often the most efficient and effective means of complying with record requests. The Department has no reason to doubt that assertion. However, the Department cannot either divine the true costs of such businesses to reproduce records nor force such businesses to disclose such pertinent data, which the Department presumes record reproducing businesses have. Those businesses have had ample opportunity to present pertinent analyses to the Department during 2002 and 2003. The Department has not received any information (other than unsubstantiated claims and the fee limits established by some other states) upon which it can specify a "per page" copying fee in the vicinity of $1.00 or more. The data the Department accumulated suggests that the variable costs of reproducing a medical record is substantially lower than $1.00 per page.
17 HFS 117.05	The average record request is 31 pages, but DHFS used an average record request size of 25 pages when constructing the schedule. **19** According to the extensive review completed to implement HIPAA, the average medical request results in 31 pages of documents. DHFS bases its proposed fee on 25 pages of documents. The additional six pages should be included in the Department's calculations, and the fee should be increased accordingly. **5** Medical record maintenance has become significantly more complex since 1997, requiring additional training and resulting in higher salaries. Records are located in multiple storage mediums, including electronic systems that require staff to be computer literate. Also, due to the state and federal privacy regulations, staff needs to understand the laws pertaining to release of information. **19**	The Department received information from a variety of published and first person sources that the average record request is variously 17 to 31 pages. While a 1997 published report indicated 17 pages, record maintainers have unanimously indicated that individuals' records have grown in number over the past 7 years. However, record maintainers vary in their estimates of what the average record request is. Estimates ranged from 23 to 31. In view of the published figure of 17, the Department believes that 25 pages is a reasonable estimate. The Department notes that increasing the average number of records per request may increase some estimated costs, but decrease other estimated costs resulting from an apportionment of costs over an assumed total number

		of records. The Department speculates that growing use of electronic records may be expected to substantially reduce the costs of record reproduction. In addition, one might reasonably expect that any worker, even if only performing clerical functions, would be computer literate; particularly a worker earning a salary in the mid-teens.
18 HFS 117.05	The emphasis on the "five most-time-consuming" tasks means that at least 10 minutes for an average request has not been included in the calculations. The proposed fee should be revised to include these 10 minutes of staff time. **5**	Through published articles and documentation submitted by medical record maintainers, the Department identified 12 steps/tasks associated with reproducing a medical record. In March, 2003, the Department asked both the commenter (Lobbyist for the Association of Health Information Outsourcing Services [AHIOS]) and Chrisann Lemery (President of the Wisconsin Health Information Management Association) for their estimates of the five most time-consuming tasks in reproducing a medical record. The Department's rationale in doing this was to focus on and especially reflect their estimates of the most significant time-consuming contributors to reproducing a medical record. Their responses were largely consistent insofar as they agreed on four of the five most significant steps and the sum of their estimates of associated required time varied by only 10 percent (50 minutes versus 56.5 minutes.) Since other information sources provided much lower estimated times for those five steps (i.e., 34 and 31 minutes), the Department estimated 43 minutes. The commenter states that "*the emphasis on the five 'most time-consuming' tasks means that at least 10 minutes for an average request has not been included in the calculations. The proposed fee should be revised to include these 10 minutes of staff time.*" The Department does not accept the commenter's suggestion because the Department added 27 minutes to its estimate of 43 minutes (to account for the remaining relatively less time-consuming activities) to arrive at its estimate of 70 minutes as the average total time required to reproduce a record. The additional 27 minutes is significantly

		more than the additional 10 minutes the commenter suggested.
19 HFS 117.05	The hourly rate used to calculate the uniform fee is unrealistically low. Department staff based the hourly salary on Dunn's $12.40/hour and adjusted for inflation. Unfortunately, the salaries of staff in this very specialized field have increased at a rate higher than inflation. All medical record maintainers responded to the Department with hourly salary figures higher than $15.00/hour. The cost per hour in staff time is at least 37% too low. The per page costs should be increased to reflect the actual salary rate. **5** The average hourly salary used to calculate the uniform fee was $12.40/hour. This salary is based on a 1997 study and is not reflective of the actual salary rate. In fact, record maintainers reported salaries in excess of $15.00/hour to the department. **19**	The Department based its estimates on an average labor cost component of $16 per hour, which was supplied by a member of the Advisory Committee from a large, Milwaukee hospital, i.e., a geographic area that might be expected to have relatively higher compensation. While the $16/hour labor rate was criticized by some representatives of medical record requesters as being too high, the $16 rate was criticized by some medical record maintainer representatives as too low. Since no persons submitting comments on the Department's initial proposed rule supplied substantiation of a higher labor rate (e.g., based on surveys of persons responsible for the requisite work to comply with record requests), the Department has not modified its original estimate of $16/hour.
20 HFS 117.05	Too many of the calculations were based on Rose Dunn's 1997 article. Many of the steps required to fulfill a request for copies of a medical record have become much more complicated since 1997. In the last six years, in addition to inflation, the introduction of new technologies has resulted in equipment and software costs well beyond what Ms. Dunn imagined. The costs to the records maintainers are not just the cost of photocopiers, toner, and drum replacement, but are for computers, customized software, internet access, and the staff training that goes along with each upgrade in technology. It is important to note that substantially all of the upgrades in technology have been implemented to better protect the confidentiality of patient medical records. Compliance with HIPAA has added significant staff time to fulfilling each request. None of this was reflected in the DHFS calculations. **5** The estimates of the costs of personal computers, printers, and software are based on poor assumptions. The Department staff used personal experience with the cost of computers, printers, and software to reduce the cost of this overhead from what had been estimated by Rose Dunn in 1997. While it is true that the average consumer has seen the cost of this equipment go down in the past six years, that is not true for the	The Department received no significant objections to the record reproduction cost model it originally proposed. Neither did the Department receive documentation that the costs that formed the basis of its initial proposed rule were significantly aberrant. While the Department is sympathetic with the assertion that the steps to fulfill a request for copies of a medical record have become much more complicated since 1997, the Department, as it has throughout this process, gives greater weight to assertions that are either: a. supported by documentation; or b. relatively consistent reports among record maintainers. In lieu of either or both of these, the Department has been and remains more reluctant with respect to reported data. The commenter may be correct that the cost of *specialized* software may have increased in recent years, and that an article based on data from before 1997 may be outdated in the relatively fast-changing and evolving area of computer hardware and software. However, the Department has not accepted the

	specialized equipment used in this industry. The cost of customized software has increased significantly and these items have to be updated regularly. Far more money is spent on computers, software, scanners, digital printers, and related equipment today than was spent in 1997. **5**	argument because it has not received any substantiation of those assertions. The Department notes that were it to ***double*** its previous cost estimate associated with software and hardware, doing so would only increase the average cost per request by $0.06.
	The estimates of the cost of insurance are unrealistic. The Department staff used Dunn's article as the basis for the cost of insurance. This number supposedly was adjusted for inflation to determine the cost of insurance in 2003. Unfortunately, the cost of liability insurance, errors and omissions insurance, and workers compensation insurance has increased at a far more rapid pace than inflation, especially since September 11, 2001. The cost of insurance coverage for those who are engaged in the release of patient information has tripled in recent years and is a much more significant part of the cost of providing the service. Inclusion of the true cost of insurance should be addressed in the per page portion of the fee. **5**	The commenter has not presented reasons why the cost of insurance varies based on the number of pages of records reproduced. Therefore, the Department believes that the cost of insurance should continue to be reflected as a component of "cost per request." The Department also points out that it has not obtained from record maintainers actual data on their insurance costs that substantiate claims of a higher insurance costs. Therefore, the Department has not increased its original estimate of insurance costs. The Department notes that were it to assume a 10% annual increase of insurance costs based on the estimate provided in the 1997 Rose article, doing so would raise the estimated cost of insurance from $2,500 to $3,000 and increase the "liability/insurance" cost component by only $0.05 per request.
	The "hard to define costs" were significantly underestimated. The Department estimated the cost of these overhead items at 12% while the Midwest Medical Record Association estimated it at 36%. The "per page" cost of the fee should be increased accordingly. **5**	The Department acknowledges that it relied on Dunn's published estimate of 12% attributable "hard-to-define" nonlabor costs, and that Dunn's estimate is at great variance with the 36% reported by the Midwest Medical Record Association. However, the Department also points out, as it did in footnote "h" to Appendix 2 of its 2003 "HFS 117 Report," that it has probably broken out and reflected some of those "hard-to-define" costs in one or more of the other cost components. In addition, the Department finds it difficult to accept that any successful business has 36% of its costs that are "hard to define." Before making such a substantial change to its cost estimates for a nebulous component such as "hard-to-define" costs, the Department believes such increases should be supported by substantive supporting documentation.
	The cost of records retrieved from off-site storage must be included.	As it stated in footnote "k" to Appendix 2 of its 2003

	AHIOS estimates that off-site storage is involved in 20% of all requests. The average charge for each chart retrieved from an off-site storage facility is $17.00. The per page charge should be adjusted to include the cost of retrieval from off-site storage facilities. **5**	"*Department HFS 117 Report*," the Department was open to, but did not, reflect the cost of off-site storage and retrieval of records in its original cost estimates because it did not have sufficient data upon which it could derive such an estimate. In a separate document, "*Comments on Department HFS 117 Preliminary and Interim Reports and Department Responses*," the Department stated that it would consider incorporating a separate charge for off-site storage of records if it received a persuasive rationale for why the $0.84 per request it was incorporating as an approximation of "physical space" costs (see Appendix 2 of the "*Department HFS 117 Report*") was not a sufficient reflection of medical record storage. To date, the Department has not received such a rationale. Nor has commenter #5 supported her assertion with documentation of experienced charges. In lieu of supporting or verifiable data, the Department is reluctant to accept and incorporate asserted off-site storage and retrieval costs amounting to $3.40 per request (20% x $17), an increase of about 20%.
	The sum of all of the additional staff time and overhead costs of each of these items equates to a per page charge of at least $1.37. This compares to the 31 cents/page proposed in the propose rule. **5**	The Department disagrees. Incorporating those increases in the "per page" component of the cost model would be contrary to the fact that the vast majority of those costs are attributable to complying with a request for record reproduction regardless of the size of the request. In other words, those costs (computer hardware and software and insurance) are relatively fixed and should not increase significantly in correspondence with an increase in number of copies made.
	Not only has the Department ignored these data, but it appears that the Department has responded to emotion, rather than facts, in creating this draft. **5**	The Department has not ignored these data. Indeed, as the Department has said elsewhere in this document, the actual cost of complying with a request to reproduce medical records may indeed be higher than the fee limits the Department has proposed. While the Department has attempted, throughout this process, to reflect new information into its cost model, at this stage of the rule's promulgation, the Department

		is reluctant to reflect cost levels that are asserted, but unsubstantiated.
21 HFS 117.05	Urges DHFS to statutorily mandate an annual cost of living increase for medical record copy fee costs. As written, the rule does not address this issue. **29** An annual "cost of living" adjustment must be included. The Department has interpreted the directive in the law to mean that the uniform fee must be revised every three years, and not more often. In the negotiations that resulted in this law, there was agreement by all parties (AHIOS, Wisconsin Health Information Management Association, the Insurance Alliance, and the State Bar of Wisconsin) that the language would not preclude the inclusion of annual cost of living adjustments. All parties agreed that the Department would make the determination about the inclusion of an annual adjustment. On the other hand, the State Bar and Insurance Alliance were very interested in specific language directing the Department to completely review the uniform fee and its relationship to actual costs of providing the service because they were convinced that, as more and more records are maintained electronically, there would be a significant reduction in the costs associated with the service. However, they fail to recognize the enormous capital outlays required to invest in the equipment and software development necessary to implement electronic medical records and make electronic delivery of those records a reality. AHIOS was not opposed to a full review in three years because we recognized that the implementation of new technologies within hospitals and clinics was not happening as quickly as believed and because the implementation of new technologies does not immediately, and may never, result in a reduction in the cost of a service, mostly due to tremendous capital investments in equipment. Throughout its Report, the Department has used adjustments based on inflation to justify its proposed fees. Similarly, the uniform fee which is set should be adjusted using a standard cost of living mechanism. Many other states implement an annual adjustment. **5** The proposed rule fails to include cost of living increases for medical record fees. The rule requires revision no more often than every 3 years. Coupled with the absence of a required cost of living increase, this will result is a growing gap between the cost of providing records and the fees paid for the records. **19**	Section 146.83(3m)(b) of the statutes directs the Department to revise the HFS 117 rules every three years to account for increases or decreases in actual costs. In fact, unless the legislature changes paragraph (b), the Department must initially revise the rules by January 1, 2006. Consequently, the Department must begin its first periodic reassessment in 2005. Given the current relatively low rate of price and wage inflation, and the likely odd-numbered fee limits resulting from such annual adjustments, and the Department's desire for the fee limits in the rule not to be confusing and subject to misapplication, the Department believes it is both unnecessary and unwise to specify automatic adjustments in the rule. While fee limits in other states may be adjusted annually to reflect inflation, such adjustments are normally statutorily required. If the Wisconsin legislature desires such annual adjustments, they may so specify in section 146.83 (3m) or request the Department to do so in the course of their review of the Department's final proposed rule.

22 HFS 117.05	Urges DHFS to include language in HFS 117 clarifying that providers may charge medical record requestors for sales tax and the cost of postage. While this is already currently mandated in Wisconsin law, clarification in HFS 117 would further document this requirement. **29**	The Department's proposed rule in HFS 117.05(2) and (3) contains a note stating that "sales taxes, if applicable, also may be added to the fees charged..." As the commenter may know, notes in rules have no legal effect, but only clarify and provide information to the reader. The Department has elected to not refer to the issue of sales tax in the body of the rule because the Department's rule has no bearing on whether or not sales tax is applicable and nothing the Department says in the rule about the applicability of sales tax affects the current or future reality of such requirements anyway. The applicability of sales tax to a particular transaction is the purview of the legislature and the Department of Revenue. Therefore, it would be inappropriate for the Department to allude to sales tax in the substantive provisions of the rule.
23 HFS 117.05	The per page fees that have been established do not realistically reflect the costs that Dean incurs when it prepares a copy of a medical record or when it contracts with a third-party to carry out these duties for us. Not all patients request copies of their medical record. The costs for duplicating records should be borne by those who require this service. a. **Labor costs:** The fees that are established for the costs of reproducing the records are not consistent with our experience as a health care provider who responds to these requests. Dean is concerned that the Department does not fully understand all of the elements that are involved when responding to a request for information. The process of responding to a request for medical records is not a simple one. A person cannot just pull a record off of a shelf, toss it into a copy machine, and stand there watching the copies come out. Many labor-intensive steps are required which may include analyzing what information is being requested; if the authorization presented is valid, what the release signed by the patient will allow to be released; what information the medical record contains; what portions of the record should be copied in response to the request. The Advisory Committee for the Revision of Chapter HFS 117 was presented with information regarding the labor involved in processing a request for medical records. Dean is concerned that the Department disregarded this information when it established the proposed fees. If the person preparing the copies is not properly trained, information may be released inappropriately. This exposes the health care provider to claims by the patient of a breach of	Whether the costs of duplicating records should be entirely borne by those who require such duplication is a debatable issue. However, the Department's charge from the legislature to "prescribe fees that are based on an approximation of actual costs" implicitly is consistent with the commenter's contention that the costs for reproducing a medical record should be borne by the requester. The Department's approach, which the Advisory Committee endorsed, has been to calculate the cost of record reproduction based on a combination of published studies and experiences reported to the Department by medical record maintainers. If the results of those calculations vary significantly from the actual costs experienced by record maintainers, then it has been incumbent on record maintainers to document and substantiate those variations where applicable. The Department has been told (not always gently) that it doesn't fully understand all of the elements that are involved when responding to requests for medical records. The Department points out that the process it used to derive its proposed fee limits has been both ***methodical*** and ***open***. From the beginning of its effort, the Department stated that its intent was to develop a

	confidentiality under state law, and/or violations of the HIPAA regulations which could result in fines and penalties imposed on the health care provider. Health care providers must either thoroughly train their staff to process these requests or hire a reliable third party to handle this work. This is not a job that can be handled by any person off the street. **Recommendation:** The Department should consider actual labor costs when establishing the fees for copies of medical records. b. **Equipment costs:** In addition to the labor costs, the other significant expense in duplicating medical records is the cost of equipment that must be maintained. The equipment includes high capacity copy machines as well as personal computers, printers and scanners. Dean is in the process of migrating to an electronic medical record. This equipment is necessary in order to maintain and reproduce medical records maintained in an electronic format. **Recommendation:** The Department should consider actual costs for equipment when establishing the fees for copies of medical records. **20** The fee structure prescribed by HFS 117 does not begin to cover the actual costs our vendor incurs in fulfilling record requests. **23** The proposed fees do not represent an approximation of the actual costs to furnish copies of health care records, as required by law. AHIOS's December 15, 2003 testimony provides further analysis of the actual costs of furnishing the services compared to the fees prescribed in the proposed rule. WHA asks that the proposed fees be increased to represent the actual costs of furnishing copy services. **31**	rule that complies and consistent with what it believes to be applicable state and federal law, and is based on an approximation of actual medical record reproduction costs. Toward that end, in late February 2003, the Department identified and shared with its advisory committee (half of whom represented medical record maintainers) its proposed approach of, among other things, approximating record reproduction costs by attempting to identify the component tasks and estimated costs associated with medical record reproduction. The Department did not receive ***any*** objections to its proposed approach. Further, the Department invited all advisory committee members and others (who were following the process via the Department's website) to submit pertinent information that would aid the Department in its effort. Based on the information the Department subsequently received (almost entirely from medical record maintainers), the Department proposed fee limits based on the melding of the often discrepant data and its best estimation of actual record reproduction costs. However, the Department has elected not to revise its estimates based on unsubstantiated claims that significantly vary from the results achieved by its cost model methodology. As the Department noted in its background documents of April 2003, not all of the information the Department received regarding the cost and required time to complete the individual steps in the record reproduction process was consistent. Consequently, the Department had to sift, winnow and judge what represented the best cost input in the face of conflicting information. The Department did not disregard any of the information it has been presented with. However, the Department has attempted to give greater standing to data that is reputable, credible and substantiated, i.e., supported by verifiable data.
24 HFS 117.05	The proposed fees do not cover actual costs and the commenters' facilities will be forced to recoup those incurred losses by raising its rates for other services the facility provides. Charging customers for services	The Department has attempted to specify a fee limit that approximates actual costs of reproducing a medical record. It has attempted to do so fairly and

	they did not receive is not in the broad public interest. **24, 17, 18, 6, 23, 21, 31, 35** The fees charged to patients who request copies of their records, or to third parties requesting the record of a specific patient, should accurately reflect the cost of reproducing the records. If the mandated fees are set at a rate that does not cover the overhead costs, the health care provider will be required to subsidize the process. Health care providers may be forced to pass on this additional expense to their patients in the form of increased medical costs. The effect would be that all patients would bear the cost of this service, rather than patients who benefit from the service. **Recommendation:** It is important that the Department considers all of the elements involved in copying a medical record, so that the fee is set at a fair rate to reimburse the health care provider or any vendors it retains for generating the copies. **20** If the rates established by the Department do not consider the costs of production a copy of the records, including the cost of labor and equipment, health care providers such as Dean Health Systems, Inc. may be forced to subsidize the process of duplicating medical records. If this happens, the costs may be passed on to all patients, not just those who require copies of their records. This may further drive up the costs of health care. Establish fees that are reasonable so the costs for duplicating records will be borne by the patients who require this service and the entities that require this information. **20** Underpayment for copies of medical records will likely result in cost-shifting, meaning that all patients will subsidize the requests of patients receiving records at a cost substantially below the cost of compiling them. The rule should be revised so that the costs of record requests are born by individuals making the request. **19** AHIOS members and the medical facilities are being asked to subsidize (insurance company and attorney requester) businesses. A medical record requestor who is requesting records in the course of performing their profit-making enterprise should pay the full cost of locating, retrieving, handling, copying, and forwarding the medical records. If health care providers are required to provide copies to attorneys and insurance companies at less than the actual cost of retrieving and copying the documents, then passing the proposed rule would economically force outsourcing companies to drastically cut service levels	prudently, based on all available information. By extension, the Department's attempt to do so implies that the Department does not believe that cost shifting is either appropriate or necessary. In lieu of more rigorous and verifiable data however, the Department cannot say for certain that its resultant final proposed fee limits actually do approximate the actual (average) cost of reproducing a medical record.

or pass the costs on to the healthcare providers, who in turn, will pass the costs on to their patients. **5**

Ultimately, of course, the effect of this effort to adopt a lower base fee and per page fee is to shift the cost of providing duplicate copies of medical records to those patients who never have a reason to request copies of records for litigation or an insurance claim. The cost of providing the service of duplicating records will have to be covered by the health care provider and if the third party requestors do not have to cover the actual costs of the service, the fees charged to all patients of the hospital or clinic will have to be increased so that the costs of copying medical records are covered. **5**

Attorneys, authorized by the patient, may review records at a health care facility at NO COST. However, when an attorney asks for a service for their convenience, that service being the processing and delivering of confidential medical information, it should be expected that they pay a competitive rate for that service. Instead, based on the proposed HFS 117 ruling, SOURCECORP and our clients are being asked to subsidize these attorneys that are seeking to profit from an action filed by a plaintiff. Attorneys have their own economic interests in obtaining these documents, and there is no reason that they should not pay for the service of locating, retrieving, handling, copying and delivering the medical records. **3**

The unintended consequence will be to shift millions of dollars of the cost of producing these records from the requester to the healthcare provider – unnecessarily fueling the rising cost of care. **23**

The proposed rule changes will increase costs to hospitals and clinics that provide copies of medical records to attorneys and insurance companies. It may also force companies such as ours to either pass additional costs on to hospitals and clinics, or force us out of business altogether. We currently provide copies of medical records to over fifty percent of requestors **free of charge.** The only way we can maintain this level of service is to charge reasonable fees to the remaining fifty percent. The proposed rates would mean a reduction in billed dollars in excess of 30 percent, something that would make it impossible to remain in business. **2, 34**

Increase the proposed mandated rate for the benefit of patients,

	healthcare providers, and organizations like ours that provide a needed service for the community. **2, 34** If the adoption of the proposed fee structure would be imposed, it would severely affect our company's ability to stay in business. Jobs would be lost, and our company and our health care clients would be required to pass additional costs on to patients in order to help defray the cost of providing processing services and copies to attorneys and insurance companies at less than actual costs. The fee structure proposed in HFS 117 is substantially less than the actual costs of providing a service. **3**	While the Department sympathizes with the commenter's assertions, the Department must adhere to its cost component model as the only reasonable approach to empirically approximating the cost of reproducing medical records. The Department would encourage the commenter (and others unhappy with the resultant fee limits) to perform a rigorous analysis of the costs of reproducing records and present that documentation to the Department at the next opportunity to revise these rules.
25 HFS 117.05	Although the mandated rates in IL and MN have forced a compromised approach to ROI services performed in those states, their mandated fee structure is reasonable and allows for our company to remain in business and for the health care provider not to penalize their patients due to providing attorneys and insurance companies ROI services at below cost levels. Based on an average request resulting in 31 pages, the Wisconsin proposed fee structure is 53% less than our neighboring states of IL and MN. As the processes involved are identical in those states, it is difficult to understand what rationale was used to develop a fee structure that is one-half of Illinois and Minnesota designated rates. The current mandated fee structure in MN supports a $13.79 processing and retrieval fee and a $1.05 per page charge. The IL fee structure supports a $20.48 processing and retrieval fee and a $.77 per page charge. Both have annual inflation adjustments based on standard cost of living increases. Therefore, based on an average request of 31 pages, the MN fee structure would support a charge of $46.34 and in IL a charge of $44.35. This is only a 4% variation, far from the 53% that is proposed in HFS 117. The proposed HFS 117 fees should be re-visited, and a new fee structure should be proposed that models a consistency with our neighboring states. **3** Other states have mandated copy fee limits that are in excess of $20.00 base fee per request. **2, 34**	As directed by the legislature, the Department has attempted to approximate the actual cost of reproducing medical records and base its fee limits on those estimated costs. The legislature did not direct the Department to base its fee limit on an average of those specified in surrounding states. Moreover, the Department does not know if either Illinois or Minnesota bases its fee limit on a similar approximation of costs. Admittedly, it would have been much, much easier for the Department to simply propose a fee limit that is an amalgam or average of those in surrounding states. The Department notes that the fee limit in Illinois is specified in statute, not administrative rule.

26 HFS 117.05	Asserts that regulation and a uniform fee structure are absolutely necessary because medical record maintainers are using their monopoly position to overcharge medical record requesters. Advocates adopting the fee structure currently in place for worker's compensation and personal injury claims. **28**	The Department's legislative directive was to prescribe fees that are based on an approximation of actual costs. Adopting the fee structures established by other programs would be contrary to the legislative directive.
27 HFS 117.05(2)	HFS 117.05 needs to reference Wis. Stat. 146.83(3m)(a) and 45 CFR 164.524(c)4 to explain what is included in the fee. **6**	The Department believes that sections 146.83(3m)(a) and 45 CFR 164.524(c)(4) do not need to be referenced in HFS 117.05(2). HFS 117.05(2), as proposed by the Department, reflects and is consistent with the requirements of the federal law. The cost model the Department constructed to estimated the fee limits conformed with the requirements of sub. (3m)(a), and the fee limits expressed in HFS 117.05(2) reflect the circumscribed cost components expressed permitted under 164.524(c)(4).
28 HFS 117.05(2)	DHFS does not have the statutory authority to promulgate proposed HFS 117.05(2). DHFS appears to rely on federal law, namely HIPAA, as the rationale for the promulgation of proposed HFS 117.05(2), overlooking the explicit language in sections 146.83(3m) and 908.03(6m)(d). DHFS's authority is in state law, not federal law, and thus WHA requests that HFS 117.05(2) not be promulgated. **31**	As it states in HFS 117.01, the Department recognizes that its authority to promulgate HFS 117 emanates from the state statutes the commenter specified. The fee limits specified in HFS 117.05(2) are applicable solely to individuals and their personal representatives. The Department recognized these lower fee limits because federal HIPAA regulations mandate that the fee limit for individuals and their personal representatives reflect only the cost of copying and postage. HIPAA controls the record activities of most health care providers and health plans. Were the Department to create requirements in HFS 117 that were not compatible with those expressed in federal HIPAA regulations and commentary, HIPAA would supercede anyway, and the lack of HIPAA recognition in the HFS 117 rules would create great confusion for the public on what charges are allowable. Given that "copying" is a variable expense, dependent largely on the number of pages copied and a small share of associated/attributable costs, the Department has proposed that only the "per page" portion of its derived fee limit (without the "per request" portion) be stated as the limit applicable to individuals' requests for copies of their own records. The Department believes that doing

		otherwise would not, broadly, be in the public's best interests.
29 HFS 117.05(3)	The Department should propose a $20.00 late fee for records not received within ten days. Section 908.03(6m)(c)3., Stats., states that record maintainers must provide certified copies of all records within two (2) business days. This rarely happens. (It is almost impossible to receive medical records within two (2) business days; therefore, the ten day limit.) The Department should consider including an additional late fee of $25.00 for all medical records that need to be "second or third requested" and received after 30 days. This fee would be similar to the requested retrieval fee by the health care providers and /or copy services. **30**	The Department believes it lacks statutory authority to impose late fees and penalties, and that, consequently, such sanctions are outside the scope of HFS 117. The Department believes that if the legislature sees the merit of such fees, the fees should be specified in statute. Finally, the Department reminds readers that it has no authority to enforce any of the provisions of HFS 117.
30 HFS 117.05(3)	Advocates that record copying fees be recoverable under sections 814.03 and 814.04 of the statutes. Acknowledges that a revision of 814.04 (2) would be necessary. **30**	As the commenter acknowledges, it is up to the legislature to do so if they wish.
31 HFS 117.05(3)	States that the Department originally proposed a retrieval fee limit range of $14 to $21, which AHIOS supported. Objects to the Department subsequently lowering the base fee to $12.50 and $15.00 without the benefit of additional data to support the change. **5**	The Department originally proposed a retrieval fee limit range of $14 to $21 because it was the ***range*** arrived at by reflecting (or not) the cost components of "profit" and "bad debt." The Department attributed a 10% amount to reflect "profit" and a 40% amount to reflect what the Department was told represented "bad debt," i.e., the amount of work medical record maintainers perform for which they are not ultimately paid. The Department originally stated that range because it was undecided as to whether or not to reflect these two factors in its calculation of a fee limit. Not reflecting either would have resulted in a retrieval fee limit component of $14, while reflecting both would have resulted in a retrieval fee limit of $21. The Department asked its Advisory Committee whether or not to include either of both factors in the calculation of the fee limit, but members were evenly split on whether to do so. Not surprisingly, medical record maintainers wanted to reflect both factors in the fee limit while medical record requesters did not. The Department subsequently elected to reflect the factor of "profit" in its calculations of actual cost, but not "bad debt" because it believes that bad debts can or should be controllable by a

		service organization. The Department subsequently proposed a two-tiered retrieval fee of $12.50 and $15.00 under the premise that a medical record maintainer's cost to retrieve a few pages of records was, on average, less than that required to retrieve substantially more pages.
32 HFS 17.05(3)(c)	The proposed fee limits for certifying records would be acceptable if all of the following were true: 1. When a legal request for medical records is made, after the filing of a court action and pursuant to a signed HIPPA authorization, the copy service must comply with that legal request. The authorization must be read by that copy service employee and fulfilled as noted. Health care provider "policy" regarding release of the patients' medical file does not override a signed HIPPA compliant authorization. 2. The certification forms for medical records, used by the health care providers and/or copy services must be complaint with WI Stats 908.03 (6m) (c) 3. which: "... require the records custodian to indicate the specific dates of treatment." This means a specific beginning and ending date. Treatment dates ending with "to the present" is not compliant with statutes. Often in review of the certified medical records received, "to the present" results in a last treatment date, years before "the present" date. 3. The records are in compliance with WI Statutes: §908.03(6m)(c)3. If the medical records are not an **accurate, complete duplicate copy of the entire medical file**, which is my standard request noted in the signed HIPPA authorization, a fine will be imposed for falsifying the certification. I am recommending a fine of $50.00 per occurrence which should be imposed and collected by the requesting law firm, from the health care provider and/or copy service who falsifies the certification of the medical records. In the first draft of the rule, DHFS staff used the data to create a certification fee that recognized the extra effort involved in certifying a record for use in court. The fee was proposed to be $7.50 per record, which was based on the review of an average record. It should be noted that this is the same fee for certification that is codified in at least one state's statute (Georgia – O.C.G.A 31-33-3, which is subject to a CPI increase each July and is currently at $8.54). Without any logical rationale, the second draft creates two tiers and the language is completely illogical. To administer two sets of base fees and two sets of	Instance #1 has no bearing whatsoever upon the Department's setting of fee limits in HFS 117. It is an enforcement issue over which the Department has no power. With respect to #2, this again is an enforcement issue that has nothing to do with the setting of fee limits. The Department can't control the manner in which certifications are worded. All the Department has the authority to do is to designate maximum fees. With respect to #3, only the legislature can declare a situation to be a crime, and only the legislature can designate a fine as a penalty for that crime. Criminal penalties can only be imposed if the criminal defendant has been prosecuted, convicted, and sentenced in court. There is no possible way that an attorney could personally impose a fine. The Department has no authority whatsoever over enforcement. In fact, the existing statute language in s. 908.03(6m) already contains an enforcement mechanism, which is subpoenaing the record custodian to appear in court if the record custodian has failed to properly supply records. The Department originally proposed a certification fee of $7.50 to reflect the costs a medical record maintainer was estimated to incur in certifying a set of records. Subsequently, based on the premise that it is less costly for a medical record maintainer to certify a few (less than five) pages of records, the Department proposed two tiers of certification fees ($5.00 and $7.50.) The commenter does not indicate why two tiers of fees is illogical and does not offer reasons for

	certification fees is an unnecessary added burden to the health care provider. The rule, in this latest version, will mean more work and increased costs for health care providers. **5**	refuting the premise that certifying a small number of records may entail less time and effort than a large volume of records. If it is correct that the amount of time expended in certifying records is at least somewhat a function of the number of records, the Department may be justified in proposing several additional fee limit levels beyond the two it has proposed. In addition, if such were the case, the lowest fee level might be lower than the $5.00 the Department has proposed. For these reasons, the Department has not modified its originally proposed two-tiered fee limit structure.
	The fee for certification of records seems excessive when you consider what little time is required to do the work of certification. Especially the $5.00 fee for just a couple pages. It takes only a few seconds to generate the page and verify the records. **33**	The Department believes that certifying medical records is not as simple as the commenter suggests. Certifications are performed by more highly paid management personnel, and the review of the records takes an average of 10 to 20 minutes.

- Modifications to Initial Proposed Rule

Based on comments received from the Legislative Council Rules Clearinghouse, the Department made minor wording changes to its initial proposed rulemaking order. In addition, the Department modified s. HFS 117.03 (3) to clarify that the term "health care records" has the meaning given in s. 146.81 (4), Stats., and modified the "plain language analysis" section of the rulemaking order to comply with the requirements of 2003 Wisconsin Act 118.

Sections 146.83 (3m) and 908.03 (6m) (d), Stats., directs the Department to "develop realistic estimates of actual patient record reproduction costs based on an approximation of pertinent costs associated with accomplishing such reproduction." The Department believes its approach to specifying fee limits that approximate actual record copying costs has been methodical, rational, open, and responsive to legislative directive. However, the Department cannot offer the legislature assurance that these proposed fee limits indeed are the costs experienced by the "average" entity that maintains medical records. Short of performing or overseeing a rigorous time-study-based analysis of medical record maintainer practices, or examining verifiable record maintainer operational cost data, the Department is limited to compiling estimates that are based almost solely on published data, and, in the face of conflicting or unsubstantiated data supplied by medical record maintainers, the Department's own estimates. The Department recognizes the inherent conflict that record maintainers have between the Department partial reliance on them for the cost information on which the fee limits are based and medical record maintainers' legitimate desire to maximize their revenue by working to secure the highest possible HFS 117 fee limits. Furthermore, the Department also recognizes that medical record maintainers operate in a monopolistic environment insofar as they are the sole source of medical records for the care individuals receive at a given healthcare provider. Consequently, individuals cannot "shop around" for the best record copying price.

PROPOSED ORDER
OF THE DEPARTMENT OF HEALTH AND FAMILY SERVICES
REPEALING AND RECREATING RULES

To amend sections HFS 117.01 to 117.04 and repeal and recreate section HFS 117.05, relating to fees for copies of health care records.

Analysis Prepared by the Department of Health and Family Services

- Rule Summary

Section 146.83 (3m), Stats., as created by 2001 Wisconsin Act 109 and s. 908.03 (6m) (d), Stats., as amended by 2001 Wisconsin Act 109, requires that the Department prescribe by rule fees for reproducing patient health care records that are the maximum amount a health care provider may charge. The fee limits are to be based on an approximation of actual costs. The statutes allow health care providers to also charge for postage or other delivery costs.

Unless superseded by fees established by other applicable law, the fee limits proposed by the Department in HFS 117 will apply to all persons who, upon request, provide copies of health care records to either individuals who are the subject of the records, their personal representatives, or other parties who are authorized to receive copies of records. The Department has proposed separate fee limits dependent on who is requesting the copy of the record. One set of fee limits, in HFS 117.05 (2), applies only to individuals and their personal representatives as defined in this rule who make the request for record copies. In such cases, a record supplier may charge no more than $0.31 per page for copies of the records. Postage is extra. A second fee limit, in HFS 117.05 (3), applies to all others making a request for another person's records they are authorized to receive. In such cases, the record supplier may charge no more than $15.00 per request (or no more than $12.50 per request for requests totaling under five pages) plus $0.31 per page. The "per request" amount may be deemed a retrieval fee that individuals need not pay for copies of their own records. The fee limit for copies of x-rays is proposed to be $5.25 per page, regardless of the number of x-ray images on the page or who requests the copy. Finally, the Department is also proposing a fee limit of $7.50 (or $5.00 for requests totaling less than five pages) if the requester wishes the provider to certify the records supplied.

The Department's authority to amend and repeal and recreate these rules is found in ss. 146.83 (3m) and 908.03 (6m) (d), Stats. The rules interpret ss. 146.83 (3m) and 908.03 (6m) (d), Stats.

- Summary of Factual Data and Analytical Methodologies Used to Develop or Support the Proposed Rule, and How Any Related Findings Support the Chosen Regulatory Approach

To develop these rules, the Department formed a 14-member advisory committee in early February, 2003. The committee consisted of equal representation of those who maintain health care records (medical record professionals, medical care provider representatives, and persons associated with firms that reproduce medical records for medical care providers) and those who request records (attorneys and insurers.) Over the following three months, the Department also created a website on which it posted pertinent documents for review by interested parties and encouraged persons to register to receive email notifications of new Department postings on the website.
(http://dhfs.wisconsin.gov/news/rules/HFS_117/HFS_117_Medical_Record_Fee_Limits.htm)

The Department began its effort by distributing a four-page project plan to advisory committee members on February 18th. The plan stated the Department's intent "to develop a rule that complies and is consistent with what it believes to be applicable state and federal law, and is based on an approximation of actual medical record reproduction costs." Basically, the Department stated its intent to construct a cost-based model of the components of reproducing a health care record. The Department also identified and shared what it considered to be the major factors and considerations bearing on the specification of a fee limit. These factors and considerations were the following:

1. The recent federal Health Insurance Portability and Accountability Act (HIPAA) regulations and federal commentary related thereto, particularly the issues of:

a. Who, and the circumstances under which, a person will be considered someone's "personal representative" for the purposes of requesting a copy of that person's health care record; and
b. Whether the costs associated with record retrieval should be included in fee limits for subject persons or their personal representatives.

2. The Department's desire to approximate total health care record reproduction costs by attempting to identify the component tasks and estimated costs associated with health care record reproduction. Issues bearing on doing so included the following:

a. Whether and how the health care record medium affects the length of time to reproduce a record;
b. Whether the health care provider setting (i.e., hospital, clinic, etc.) or subject patient group (e.g., children, elderly, etc.) affects the time and effort needed to reproduce records; and
c. The steps involved in reproducing health care records and whether those steps are different for different record mediums and record maintainer settings.

The Department invited all committee members, and those who were "virtual" participants via the Department's website postings, to submit documents to the Department on these major factors and considerations, asking that the documents be submitted, if possible, by March 7th. Specifically, the Department requested the following input:

1. Committee members' thoughts regarding the appropriateness and acceptability of the Department's intended approach and, if it is not, how it is not, and how and why the commenter would propose it to be different.

2. Information on the following subjects:

- How HIPAA bears on the revision of ch. HFS 117.
- Whether the categories of paper, electronic, microfilm, microfiche and traditional x-ray comprise the universe of health care record mediums for the purposes of this project, and if not, what other mediums should be addressed.
- Whether the steps involved in the reproduction of health care records within a particular health care record maintainer setting or for a particular patient group are sufficiently different to suggest a significantly different reproduction cost.
- The sequence of steps and time associated with each step typically required for health care record reproduction, by health care record medium, setting or patient group, as appropriate.
- Existing health care record fee limit policies.

After reviewing, analyzing and compiling information from about 20 documents, the Department circulated a preliminary report to committee members on March 31, 2003. The preliminary report included an initial draft of ch. HFS 117, as did the Department's subsequent iterations of the report. The Department's initial draft of the rules acknowledged the HIPAA federal regulatory requirement that individuals and their personal representatives should only be charge for the actual cost to copy (not retrieve) the individual's medical record by establishing two different fee limits; one for individuals (and their personal representatives) and another for everyone else. The Department's initial rule specified a fee limit for individuals of $3.20 per request and $0.04 per page. The draft rule specified a fee limit for all others of $21.00 per request and $0.42 per page. The Department asked that committee members and others submit comments on the Department's preliminary report by April 14th.

In response to comments it received on its preliminary report, the Department revised its preliminary report (known in its second iteration as the "interim" report) and created a table of comments and Department responses. The Department revised its original proposed rules by increasing by 50% the limit that may be assessed for certifying records, increasing the imputed average size of a medical record request from 20 to 25 pages, increasing the fee limit for x-ray copies from $5.00 to $5.25, eliminating the "per request" component of the fee limit applicable to individuals and increasing the "per page" fee limit applicable to individuals from $0.04 to $0.20, clarifying that the Department's proposed fee limit for all others was meant to be somewhere in the range of $14.00 to $21.00 per request and ($0.28 to $0.40 per page, depending on whether and how the factors of "profit" and "bad debt subsidization" were accounted for. The Department subsequently modified the comment and response table to reflect comments the Department received through April 30th. The Department circulated these documents to committee members prior to convening the first and only meeting of the advisory committee on April 25th.

In the course of the advisory committee meeting, a variety of outstanding issues were discussed. However, with one exception, there was virtually no consensus on any of the issues between members representing health care record maintainers and members representing health care record requesters. The one exception was that members encouraged the Department to develop a single fee structure to the extent possible.

Following the April 25th advisory committee meeting, the Department chose its positions on the remaining outstanding issues, electing to reflect a 10% profit factor in its propose fee limits, but not reflect costs related to bad debts. It revised its interim report to become its "final" report, titled "*Department HFS 117 Report*," and created a "final" iteration of its comment and response table, titled "*Comments on Department HFS 117 Preliminary and Interim Reports and Department Responses.*" The Department's initial proposed rulemaking order resulted from these efforts.

On December 15, 2003, the Department held a public hearing on its initial proposed rules in Madison. Fifteen persons attended. The Department received 35 written comments on initial proposed rules. In response to these comments, and those provided by the Legislative Council Rules Clearinghouse, the Department made minor revisions to its proposed rulemaking order.

- *Small Business Effect Analysis and Supporting Documentation*

The revision of ch. HFS 117 will affect many small businesses, principally law firms that request health care records on behalf of clients, and small health provider offices that maintain and supply their patients' health care records to those authorized to request those records. The fee limits specified in ch. HFS 117 also will effect a small number of businesses that reproduce medical records on behalf of health care providers and transmit those records to authorized record requesters.

Chapter HFS 117 does not require compliance with any reporting, bookkeeping or other procedures. Nor does the proposed rule impose new requirements for professional skills that are not currently required to comply with requests for copies of health care records. HFS 117 imposes no new requirement on the private sector that has an associated compliance cost. Given this, the question of exempting particular small businesses from some or all of HFS 117's provisions is moot.

The Department believes that exempting certain law firms and health care providers from the rule's applicability would be contrary to the legislature's intent that the rule, to the extent possible, specify a single fee limit for all parties. Similarly, the Department believes that specifying a lower fee limit for particular law firms (or a higher fee limit for particular health care providers) would also be contrary to legislative intent.

- *Private Sector Fiscal Effect*

Once it becomes effective, HFS 117 will have far broader applicability than it currently has, in that the fee limits it contains will apply to most requests for copies of health care records. The Department cannot reliably estimate the fiscal effect of the proposed rule on the private sector. While the Department has developed what it believes to be a reasonable approximation of the average actual cost to reproduce an average health care record, the true cost of doing so may be less or more. Without actual operating data (such as those resulting from one or more time studies of actual medical record maintainers) upon which to base an estimate, verifiable private sector fiscal effects are likely to be most reasonably known only to medical record maintainers and professionals. To all others, the true fiscal effects may only be roughly deduced.

The Department points out that 14 medical record provider representatives who commented on the Department initial proposed rule asserted that the Department's proposed fee limits are lower than their cost of providing copies of records. (Commenters did not provide the assumptions upon which their assertions were based; nor did commenters state that their assertions applied only to the fee limit for individuals.) Consequently, many of those commenters asserted that, due to HFS 117 as proposed by the Department, the commenters' cost of supplying medical record copies would need to be subsidized by other services. Based on assertions made by several commenters (each communicating to the Department through what appeared to be "form" letters, and none of which offered supporting documentation upon which their estimate was based), one is led to conclude that the cumulative cost of HFS 117 to hospitals statewide would be millions, perhaps tens of millions, of dollars. On the other hand, ***if*** much profit (in addition to health care provider convenience) exists in the (largely monopolistic) system under which some record reproduction is not subject to any fee constraint, and ***if*** the fee limits specified in HFS 117 do not result in attorneys suggesting to their clients that the client make the request for the client's record (thereby subject to the low fee limit applicable to "individuals"), then there it is possible that HFS 117 may reduce overall private sector costs because attorneys may need to pay less than they currently do for client medical records.

- *Relation to Federal Regulations*

The Department believes that there is only one federal regulation that has a direct bearing on HFS 117. In the Department's opinion, those regulations, 45 CFR Parts 160 and 164, issued on August 14, 2002, and commonly known as the "Health Insurance Portability and Accountability Act (or '*HIPAA*') Regulations," bear on the following issues:

1. Whether "billing statements" should be included under HFS 117 as a "health care record."

2. Whether an attorney retained by an individual qualifies as a "personal representative" of that individual for the purposes of requesting and receiving that individual's health care records is subject to the same HFS 117 fee limit that applies if the record had been requested by the individual.

3. The most a medical record maintainer may charge to an individual (or that individual's personal representative) for a copy of his or her own medical records.

Were the Department to create requirements in HFS 117 that were not compatible with those expressed in 45 CFR 164 and commentary, the Department would be doing the public a disservice insofar as medical record maintainers would have more difficulty administering disjoint laws, and the confusion and dissention that has been prevalent between medical record requesters and medical record maintainers over the past 10 years would continue.

With respect to **what qualifies as health care records**, as defined under HFS 117.03 (3), 45 CFR 164.524(c)(1) declares that a health care provider must provide the access (to medical records) requested by individuals, including inspection or obtaining a copy, or both, of the protected health information about them in designated record sets. "Designated record set" is a special term defined by 45 CFR 164.501(1) to include the "medical records and billing records" about individuals. To be consistent with 45 CFR 164.501(1)(i) and to promote the clear, consistent and easy administration of HFS 117, the Department is proposing to include billing statements as a type of "health care provider record" and subject to the fee limits under HFS 117.

With respect to **what persons qualify as a "personal representative" of an individual** for the purposes of requesting a copy of the individual's health care record (and for the purposes of paying a much lower fee for record copies), 45 CFR 164.502(g) and 164.524(c)(4) are relevant to HFS 117. 45 CFR 164.502(g) defies who, under HIPAA, maybe considered a "personal representative" of an individual. The federal HIPAA definition of "personal representative" in 45 CFR 164.502(g) is not identical to the Wisconsin definition of "person authorized by the patient" in s. 146.81 (5), Stats., and the definition in that Wisconsin statute is not the only Wisconsin standard that could apply to a medical record situation. For example, s. 146.835, Stats., notes that parents who have been denied physical placement do not have the traditional parental authority relating to record access. The federal focus is on a person who can make health care decisions on behalf of the patient; in contrast, the Wisconsin definition in s. 146.81 (5), Stats., includes someone who has received the patient's consent for access to records. The intent of the proposed HFS 117 definition is to compel the reduced fee only when the requester is someone other than the actual patient who both qualifies to obtain record access under Wisconsin law **and** meets the "personal representative" definition under HIPAA. To maintain consistency with the federal HIPAA regulations and policy interpretations, the Department believes that HFS 117 needs to clearly specify that the lower "individual" fee limit does not apply to an attorney requesting a client's medical records. The Department's position is strongly influenced by federal commentary responding to a comment on page 53254 of the August 14, 2002 Federal Register. In the response, the federal government clarifies that the limited cost components specified under 45 CFR 164.524(c)(4) apply ***only*** to individuals' and individuals' personal representatives' requests for copies of individuals' medical records. The federal regulations are very specific about who qualifies as a personal representative of a patient under what circumstances. They are defined to be ***only*** parents or guardians of minors, or administrators of estates of deceased persons. It also states that "The fee limitations in 164.524(c)(4) do not apply to any other permissible disclosures by the covered entity, including disclosures that are permitted for treatment, payment or health care operations, disclosures that are based on an individual's authorization that is valid under 164.508, or other disclosures permitted without the individual's authorization as specified in

164.512." Consequently, the Department believes that the medical record requester is the person or entity that transmits the request to the health care provider. If the patient signs a form authorizing an attorney to obtain records, gives the signed form to the attorney, and the attorney then sends the authorization to the health care provider along with a request that the health care provider give the attorney the records, the requester is the attorney. If the patient makes the request directly to the health care provider, the requester is the patient. Consequently, personal representatives ***are not*** attorneys requesting the records of clients on behalf of those clients. While this may be problematic, and may alter current medical record request practices, the Department believes it is the inevitable result of the HIPAA language. The Department believes that Wisconsin law cannot constrain and should not conflict with the parameters specified in federal law, and consequently, the Department it must attempt to comply with the federal regulation.

With respect to **making the fee limits expressed in HFS 117 consistent with federal regulations**, the Department has been criticized for insisting that HFS 117 must specify fee limits for ***two*** groups of persons making the request for the records, instead of specifying a ***single*** fee limit that applies to everyone. These two groups are: 1) individuals and their personal representatives for the individual's records; and 2) all other persons. 45 CFR 164.524(c)(4) requires that medical record maintainers charge individuals or their personal representatives no more than their cost to copying the individual's records, including copying supplies and postage. Given that "copying" is a variable expense, dependent primarily on the number of pages copied (in addition to a small share of associated/attributable costs), the Department has proposed that only the "per page" portion of its derived fee limit (without the "per request" portion) be stated as the limit applicable to individuals' requests for copies of their own records. The Department believes that such costs are only a fraction of the costs required to reproduce the records. For various reasons (discussed in detail in the Department's April, 2003 "HFS 117 Report"), the costs associated with ***retrieving*** records is normally the major cost associated with reproducing medical records. Given the clarity and specificity of the cost component fee limit specified in 45 CFR 164.524(c)(4), the Department does not know how it can avoid specifying fee limits for two groups. To do otherwise would not only be illegal insofar as it conflicts with federal law, but it would cause needless confusion among affected parties trying to operate under disjoint laws. The Department's two-group fee approach is designed to compel the reduced fees only in categories of situations where HIPAA would require reduced fees. Health care providers have the discretion to voluntarily offer reduced copying fees; however, in order for a requester to be **entitled** to a reduced copying fee under HIPAA, the requester must either be the individual patient or be a person who falls within the HIPAA definition of "personal representative." Furthermore, the cost model the Department constructed to estimate the fee limits conformed with the requirements of s. 146.83 (3m) (a), and the fee limits expressed in s. HFS 117.05 (2) reflect the circumscribed cost components expressed permitted under 45 CFR 164.524(c)(4).

Assuming that any previous legislative intent for HFS 117 was prior to (and therefore, without knowledge of) final federal HIPAA regulations, the Department believes it should incorporate recognition of the two-group fee intent implied by the HIPAA regulations. One group fee limit would be applicable to individuals and individuals' personal representatives and would reflect the Department's estimate of actual costs for the cost components specified in 45 CFR 524(c)(4). The other group's (everyone else) fee limit would be based on all of the ***applicable*** cost components the department has specified in its medical record cost model.

The Department understands that a two-group system will result in the situation that an attorney making a request for a client's medical records may be charged by a medical record maintainer significantly more than if the client of that attorney made the request of the medical record maintainer. However, the Department sees no viable alternative. Whether this discrepancy will significantly alter current record request practices remains to be seen.

- *Relation to Similar Rules in Minnesota, Iowa, Michigan and Illinois*

Minnesota – A medical care provider or the provider's representative may charge a patient or a patient's representative (defined similarly to HFS 117 "personal representative") no more than $13.79 plus $1.05 per page for time spent retrieving and copying the patient's medical records. These limits are adjusted annually based on changes in the Minneapolis-St. Paul Consumer Price Index. The 2003 fee limit for a copy of a 25-page medical record would be $40.04. The statutes prohibit a provider from charging a fee for copies of records requested by a patient if the request for copies of records is for purposes of appealing a denial of social security disability income or benefits. The provider may charge a patient no more than the actual cost of copying x-rays plus no more than $10 for the time spent retrieving and copying the x-rays. These fee limits are specified Issue Brief 2003-1 of the Minnesota Department of Health, and has the following weblink:
http://www.health.state.mn.us/divs/hpsc/dap/maxcharge.pdf
These limits are based on Minnesota statutes section 144.335, subdivision 5.

Iowa – Iowa limits only the fees for copies of medical records under workers' compensation. In such cases, the limits are the following:

1 – 20 pages	$20
21 – 30 pages	$20 plus $1 per page
31 – 100 pages	$30 plus $0.50 per page
101 – 200 pages	$65 plus $0.25 per page
200+ pages	$90 plus $0.10 per page

Under this schedule, the fee limit on a 25-page record would be $25.

Michigan – The following fee limits apply only to medical records relating to a specific work-related condition, treatment or request for payment of treatment. It does not pertain to records requested by a subpoena that are part of litigation.
Patients may receive the first 30 pages of medical record copies free of charge, and are charged $0.48 per page for a complete copy of medical records over 30 pages. Attorneys are charged a $23.50 clerical fee and $0.90 for each page ($1.35 per page for microfilm copies.) Insurance companies are charged $35.00 for for a 1-5 page request; $50.00 for a 6-30 page request; and $65.00 for a 31-50 page request. For 51 pages or more, insurance companies are charged a flat $65.00 plus $0.75 for each page, and $1.30 per page for microfiche.
Under this schedule, a patient would pay nothing for a 25-page record (but up to $14.88 for a 31-page record.)

Illinois – In 2003, medical providers or their representatives are limited to charging $20.48 plus $0.77 per page to individuals or their attorneys for the first 25 pages; $0.51 per page for pages 26- 50; and $0.26 per page for each page in excess of 50. Charges for copies made from microfiche or microfilm cannot exceed $1.28 per page. Providers may also charge for the reasonable cost of duplication of x-rays.
Under this schedule, a patient would pay no more than $39.73 for a 25-page record.

For an average 25-page request, the fee limits in the adjacent states and as proposed in these rules for Wisconsin are the following:

Minnesota:	$40.04
Iowa:	$25.00
Michigan:	$46.00 (attorneys); $50.00 (insurers)
Illinois:	$39.73
Wisconsin:	$7.75 (individuals); $22.75 (all others)

The Department does not know which, if any, of the preceding states, in setting its fee limit, deemed the fee limit to approximate the actual costs of those who reproduce the records.

SECTION 1. HFS 117.01 to 117.04 are amended to read:

HFS 117.01 Authority and purpose. This chapter is promulgated under the authority of ~~s.~~ ss. 146.83 (3m) and 908.03 (6m) (d), Stats., to establish uniform fees that are the maximum fees that may be charged for ~~providing certified duplicate health care provider~~ a copy of health care records ~~requested by attorneys pursuant to s.~~ under s. 146.83 (1) (b) or (c) or 908.03 (6m) ~~(c) 3.~~, Stats.

HFS 117.02 Applicability. ~~This~~ Unless superseded by fees established by other applicable law, this chapter applies to all ~~attorneys~~ persons and entities who request ~~certified~~ duplicate health care records under ~~s.~~ ss. 146.83 or 908.03 (6m) ~~(c) 3.~~, Stats., and to all health care providers who supply those records, either directly or indirectly through the provider's agent.

Note: An example of other applicable law is the fee limits imposed under s. 102.13 (2) (b), Stats., for worker's compensation cases.

Note: The fee limits in this chapter apply to requests for health care records whether or not a court action or administrative action has been commenced.

HFS 117.03 Definitions. In this chapter:

(1) "Department" means the Wisconsin department of health and family services.

(2) "Health care provider" ~~means a chiropractor licensed under ch. 446, Stats., a dentist licensed under ch. 447, Stats., or a health care provider as defined in s. 655.001 (8)~~ includes any persons or entities specified in ss. 146.81 (1), 655.001 (8) or 908.03 (6m) (a), Stats.

(3) "Health care ~~provider~~ records" ~~means all records related to the health of a patient prepared by or under the supervision of a health care provider~~ has the meaning specified in s. 146.81 (4), including any billing statements.

(4) "Personal representative" means a person who both has authority under state law to act on behalf of the patient and qualifies as a "personal representative" under 45 CFR 164.502(g).

HFS 117.04 Request for duplicate records. ~~An attorney~~ A person requesting duplicate health care ~~provider~~ records ~~concerning a patient~~ shall provide sufficient identifying information about the patient and the pertinent records to permit identification and location of the specific records. The request shall include all of the following:

(1) The correct name of the patient whose records are the subject of the ~~attorney's~~ request~~;~~.

(2) The patient's ~~social security~~ identifying number, if known~~;~~.

(3) The patient's date of birth, if known~~;~~.

(4) A description of the records requested~~; and~~.

(5) The written informed consent of the patient or person authorized by the patient to give consent to release of the records, if required by law.

SECTION 2. HFS 117.05 is repealed and recreated to read:

HFS 117.05 Fees for duplicate records. (1) DEFINITION. In this section, "x-ray copy" means a page containing one or more radiographic images.

(2) REQUESTS FOR RECORDS FROM THE PATIENT OR REQUESTS FROM THE PERSONAL REPRESENTATIVE OF THE PATIENT. If a patient or if the personal representative of the patient requests copies of the patient's health care records, the health care provider may charge no more than the following fees:

(a) For other than X-rays, all of the following:

1. Thirty-one cents per record page.

2. The actual costs of postage or other means of delivering the requested duplicate records to the person requesting the records.

(b) For X-rays, all of the following:

1. $5.25 per X-ray copy.

2. The actual costs of postage or other means of delivering the requested duplicate records to the person requesting the records.

Note: Sales taxes, if applicable, also may be added to the fees charged under this subsection.

Note: When records are needed by or on behalf of indigents, the Department encourages health care providers to provide those records at as low a cost as possible.

(3) REQUESTS FOR RECORDS FROM INDIVIDUALS OTHER THAN THE PATIENT OR THE PATIENT'S PERSONAL REPRESENTATIVE. If a person is requesting copies of another person's health care records and the person making the request is not the personal representative of the patient, a health care provider may charge the requester no more than the following fees:

(a) For other than X-rays, all of the following:

1. a. For a request generating a total of up to 5 pages, $12.50 per request.

b. For a request generating a total of 5 or more pages, $15.00 per request.

2. Thirty-one cents per record page.

Note: The "per page" fee limit under subdivision 2. above applies to the total number of pages, and is in addition to the "per request" fee limit.

3. The actual costs of postage or other means of delivering the requested duplicate records to the person requesting the records.

(b) For X–rays, all of the following:

1. $5.25 per X–ray copy.

2. The actual costs of postage or other means of delivering the requested duplicate records to the person requesting the records.

(c) 1 For certifying up to 5 pages of records, an additional $5.00 per request.

2. For certifying 5 or more pages of records, an additional $7.50 per request.

Note: Sales taxes, if applicable, may also be added to the fees charged.

This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register, as provided in s. 227.22 (2) (intro.), Stats.

Wisconsin Department of Health and Family Services

Dated:

By:_____
Helene Nelson
Secretary

SEAL:

Medical Group Management Association
MGMA
Wisconsin
A State Affiliate

TO: Members of the Senate and Assembly Health Committees

FROM: Dan Laux
Chair – Legislative Committee
Wisconsin Medical Group Management Association

DATE: March 30, 2004

RE: Oppose CR 03-111
(HFS 117 – Fee for Copying Medical Records as proposed by DHFS)

The Wisconsin Medical Group Management Association (WMGMA) appreciates the opportunity to express its opposition to CR03-111, Department of Health and Family Services Rule 117. We respectfully request that members of this committee return this rule to DHFS with recommendations to review and collect additional information on the actual cost of copying records, and accord it sufficient weight in order to make significant changes that more accurately reflect the costs of making copies.

On the surface, the process of duplicating a medical record may seem like a relatively simple task. However, the reality of the situation is that reproducing a medical record is a complex and time consuming process that requires much more than a trip to the photocopier. Those involved in medical record duplication are highly trained professionals who must protect the patient's privacy while complying with requests for health care information. In addition, these individuals must be experts on the extensive state and federal laws and regulations regarding the release of confidential patient information.

CR 03-111 proposes that the Department of Health and Family Services approximate actual costs of reproducing medical records in the administrative rule and specifies that health care providers charge that amount for any health care record duplication. WMGMA has the following concerns about the proposed legislation:

- The Legislature directed DHFS to develop a rule that reflects actual costs. The proposed rule as written does not allow health care providers to recover the actual costs of reproducing a medical record. These go beyond paper and toner. There are labor and other costs associated with the various steps taken to process a request for a medical record copy as outlined below.

HEADQUARTERS
330 E. Lakeside Street
P.O. Box 1109
Madison, WI 53701
phone: 608.283.5410
800.762.8968
fax: 608.283.5424

www.wmgma.org

- Medical record duplication is a professional service and the complexities of the law and stress of the job require a higher salary than is paid to a receptionist or data entry person. In addition, the costs associated with continuing education for this position are higher than average due to the ever-changing state and federal laws and HIPAA requirements.

- The steps and procedures involved with reproducing a medical record are time consuming and may take staff time away from direct patient care. Some WMGMA members have estimated the time to complete a request at one hour, ***if the record is readily available***. Some steps included in this process:

    - Reading the request
    - Verifying authorization and patient information
    - Requesting additional information on incomplete requests
    - Compliance with HIPAA regulations (i.e. logging request)
    - Retrieving the record – records may be off-site in secured storage, on microfilm or in another part of the clinic or facility
    - Screening the record to comply with Wisconsin Statutes and Federal Regulations such as checking record for alcohol, drug abuse, mental illness, HIV treatment
    - Identifying desired reports
    - Disassembling record to prepare for copying
    - Copying the records from paper and other media such as microfilm
    - Reassembly of records
    - Checking completeness of request
    - Recording of information being sent
    - Addressing "re-release" issue
    - Determining charges and preparing invoice
    - Preparing records for mailing such as addressing envelope, preparing certified mail documents, etc.
    - Refiling of medical record

- The rule does not take into account the limited resources of the state's smaller clinics. Without someone specifically dedicated to handle medical records, and because the critical privacy issues at stake preclude delegation to untrained clerical staff, the task falls to those few people responsible for managing the clinic. Their time is now spent going through medical records, instead of monitoring the operations of the clinic. The fee that they charge should certainly reflect the time away from the clinic that they dedicate to the request.

- CR 03-111 does not provide for regular review and updating of the rate schedule set by DHFS. The WMGMA requests that the DHFS include a cost of living adjustment in the rule to ensure that copy fees keep

pace with inflation. In addition, there should be penalties for those who refuse or decline payment for the records they have received.

- The rule does not take into account the uncompensated cost of releasing patient records when a patient requests a review of their record. This requires the assignment of a dedicated staff person to sit with the patient and answer questions as they go through their medical charts.

- Additionally, the rule creates confusion with new definitions and requirements contained in the Health Insurance Portability and Accountability Act (HIPAA). This confusion will present significant and unnecessary problems in the implementation of the uniform fee. There is a cost factor to all these requirements.

For these reasons, the Wisconsin Medical Group Management Association urges you to ask DHFS to revise the rule to reflect the actual costs of reproducing medical records.

March 30, 2004

TESTIMONY

To: Members of the Senate and Assembly

From: Michael Wickman
Executive Vice President
SOURCECORP
1030 Ontario Road
Green Bay, WI 54311

RE: OPPOSITION TO DRAFT RULE HFS 117

SOURCECORP is a Business Process Services company that specializes in the outsourcing of Release of Information (ROI) services. The company's Wisconsin operation was founded in 1982, and is headquartered in Green Bay. SOURCECORP currently employee in excess of 400 employees in the State that provide specialized ROI services to over 300 healthcare facilities in Wisconsin. Our WI operations ended year 2003 with annual revenue slightly over $22 million, with 54% of that revenue coming from our ROI services division.

SOURCECORP opposes HFS 117 because the proposed fees will not adequately cover the costs of providing professional and quality ROI Services. This opposition is based on statistical data reflected in our 2003 year-end financial results. In 2003, our company responded to in excess of 738,000 requests from various parties seeking copies of Protected Health Information (PHI). The average number of copies per request was 29 pages. Under proposed HFS 117, the fee that can be charged based on a 29 page request would be as follows:

PROPOSED HFS 117

$15.00 Retrieval Fee
$8.99 ($.31 x 29 pages)
$23.99

This proposed rate compared to current mandated rates in our neighboring states of MN, IL, and MI, based on the same 29 page average reflect the following charges:

MN	IL	MI
$14.02 Retrieval Fee	$20.96 Retrieval Fee	$20.00 Retrieval Fee
$31.03 ($1.07 x 29 pages)	$19.50 ($.78 x 25 pages)	$20.00 ($1.00 x 20pg)
$45.05	$ 2.08 ($.52 x 4 pages)	$ 4.50 (.50 x 9 pgs)
	$42.44	$44.50

In addition to these mandated rates, all three of these states have included **annual** CPI price adjustments.

In reviewing the equality of the rate structures of our neighboring states, I must question the information gathering process that the WI Department of Health and Family Services used to come up with their compromised fee structure. There was nothing in their report that reflected a calculation or formula based on any due diligence process involving the survey of a health care provider or copy service in determining their proposed HFS 117 fee structure.

The Health Care Provider business exemplifies cost shifting practices. We are all aware of the shifting costs from shortfalls in Medicare and Medicaid reimbursement to private payers. Our company's billing rate for a 29 page request last year was $60.18. That rate was off set by current mandated rates within the State of Wisconsin for Workers Compensation and Certified Legal Requests that averaged $13.05 per request; and Social Security Disability requests that averaged a flat fee of $20.00 per request. Based on our 2003 financial statement, our average COST per billable request was $37.55, which is 36% higher than the proposed HFS 117 fee structure would allow, and our financial statement reflected a loss of $255,000 last year. How are we expected to remain in business when the proposed fee is 36% less than the direct cost of providing a service…with no profit considered. In addition, copy services are approximately 39% more efficient in providing ROI services than a health care provider. This means that the health care provider costs would be $61.56.

Who is complaining about the current fee structure? Only the attorneys who are "for profit" organizations. The patient, who is the single largest requester has absolutely no objection to existing fees and/or processes.

It is my belief that the Department of Health and Family Services considers the ROI Business to be a straight forward photocopying process. I ask the Senate and Assembly members to oppose the Draft Rule HFS 117, and urge the DFHS to work with Health Care Providers and their Business Associates to fully understand and acknowledge the complexity involved in providing ROI services, and establish a fee structure that is fair and equitable.

Thank you for your consideration.

Michael P. Wickman