

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Unless superseded by fees established by other applicable law, the fee limits proposed by the Department in HFS 117 will apply to all persons who, upon request, provide copies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 18, 2003. 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." 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 7, 2003. 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 14, 2003.

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 30, 2003. The Department circulated these documents to committee members prior to convening the first and only meeting of the advisory committee on April 25, 2003.

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 25, 2003 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. Although 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.

- 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 health care 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 dissension 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 health care 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. As defined by 45 CFR 160.103, "individual" means the person who is the subject of protected health information. 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) defines who, under HIPAA, may be 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 health care 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 intent of the proposed HFS 117 definition is to compel the reduced fee only when the requester is the actual patient (or individual) or someone other than the actual patient (or individual) who 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 health care 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' health care 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 health care 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 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 believes 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 health care records; and 2) all other persons. 45 CFR 164.524(c)(4) requires that medical record maintainers charge individuals or their personal representatives a reasonable, cost-based fee, provided that the fee only includes the cost of copying, including the cost of supplies for and labor of copying, and postage if the individual requests the copy to be mailed. 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. However, HIPAA prohibits charging retrieval or handling costs for health care record requests made by the individual or individual's personal representative. This position is based on a comment made on page 82557 of the December 28, 2000 Federal Register that prohibits the inclusion of costs of retrieving or handling costs. Given the clarity and specificity of the cost component fee limit specified in 45 CFR 164.524(c)(4), it appears most appropriate to specify 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 164.524(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 health care 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 health care 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 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. 146.83 (1) (b) or (c) or 908.03 (6m)-(e) 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)-(e) 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: February 2, 2007

By: _____
Kevin R. Hayden
Secretary

SEAL: