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Interplay Investigating: Chapter 133 and Disclosure of Rape Suspect Exams

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Code Section Affected
Penal Code § 11160.1 (new).
AB 998 (Chu); 2005 STAT. Ch. 133

I. INTRODUCTION

A rape victim opened a cold waiting room door. After enduring an exam, she left the hospital and vowed to forget what her assailant did. The physician who treated her called the police to report her identity, injuries, and location. The physician followed the law.[1]

Later that night, police escorted the man suspected of violating the victim through the same waiting room door. The same physician performed an exam, but the police did not receive a call. Afraid he might violate the suspect's right of privacy,[2] the physician refused to release the evidence from the exam. The physician followed the law.[3]

Perhaps it was time for a new law.[4]

II. LEGAL BACKGROUND

A. *Federal Law: HIPAA*

In 1996, the United States Congress enacted the Health Insurance Portability and Accountability Act (HIPAA).[5] HIPAA, the first federal legislation of its kind,

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1. *See* CAL. PENAL CODE § 11160(a)-(c) (West 2004 & Supp. 2005) (mandating a physician who knows or reasonably suspects a patient was the victim of sexual abuse to notify police immediately and submit a written report within two days). The phone call and report must contain the victim's name and known whereabouts, the character and extent of injuries, and the identity of any person the victim alleged was the assailant. *Id.*

2. *See generally* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 998, at 6 (Apr. 19, 2005) ("The enactment of the federal medical privacy act, HIPAA, has caused some California hospitals to express concern about disclosing the results of rape suspect exams to law enforcement.") (quoting Background Information Request Sheet, prepared by Daniel Felizzatto, L.A. Dist. Att'y's Office, for Assembly Member Mark Leno, Chair, Assembly Comm. on Pub. Safety, Cal. State Assembly, at 2) (on file with the *McGeorge Law Review*).

3. *See infra* notes 39-42 and accompanying text. *See generally* Memorandum from the L.A. Dist. Att'y's Office, Appellate Div., to Curt Livesay, Chief Deputy Dist. Att'y, L.A. Dist. Att'y's Office (Dec. 2, 2004) (on file with the *McGeorge Law Review*) (explaining that rape suspect exams do not currently fall within one of HIPAA's exceptions, thus a physician could face liability for releasing such information).

4. *See, e.g.*, Letter from Steve Cooley, Dist. Att'y, by Daniel Felizzatto, Legis. Advocate, L.A. Dist. Att'y's Office, to Cal. Governor Arnold Schwarzenegger, State of Cal. (July 18, 2005) [hereinafter Cooley Letter] (on file with the *McGeorge Law Review*) (emphasizing that Chapter 133 will apply the same requirements to rape suspect exams as already apply to rape victim exams).

5. Pub. L. No. 104-191, 110 Stat. 1936 (1996).

is "a set of basic national privacy standards . . . [designed to] provide all Americans with a basic level of protection and peace of mind that is essential to their full participation in their care."[6] Under HIPAA, the Department of Health and Human Services (DHHS) established regulations regarding the exchange of health information.[7] The regulations became effective in April 2003[8] and apply to DHHS, health plans, and healthcare providers.[9] HIPAA also imposes criminal and civil liability on individuals who improperly handle or disclose protected information.[10] Furthermore, because the Secretary of DHHS enforces HIPAA,[11] a patient whose rights are violated does not have a private right of action under HIPAA.[12] Accordingly, a court lacks subject matter jurisdiction over a HIPAA claim unless the Secretary of DHHS brings the claim.[13]

While HIPAA is comprehensive, it created only a "framework of protection" that subsequent state and federal legislation can strengthen.[14] As a preemptive act,[15] HIPAA established a minimum level of privacy protection and state legislation can provide only greater privacy protection.[16] Conversely, if any federally imposed regulations are less stringent than a state law, the state law applies.[17]

Concisely stated, HIPAA prohibits the release of medical records unless a physician (1) obtains a patient's written consent,[18] (2) gives a patient prior notification with an opportunity to agree or object,[19] or (3) comes within one of HIPAA's exceptions codified in section 164.512 of volume 45 of the Code of Federal Regulations ("section 164.512").[20] In establishing various exceptions,

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6. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82464 (Dec. 28, 2000) (codified at 45 C.F.R. pts.160, 164).

7. Ralph Ruebner & Leslie Ann Reis, *Hippocrates to HIPAA: A Foundation for a Federal Physician-Patient Privilege*, 77 TEMP. L. REV. 505, 510 (2004).

8. Memorandum from Lydia Bodin, Special Assistant, Bureau of Branch & Area Operations, L.A. Dist. Att'y's Office, to Curt Livesay, Chief Deputy Dist. Att'y, L.A. Dist. Att'y's Office (Dec. 15, 2003) [hereinafter Bodin Memorandum] (on file with the *McGeorge Law Review*).

9. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 998, at 11 (June 14, 2005).

10. Bodin Memorandum, *supra* note 8, at 3.

11. 42 U.S.C.A. § 130d-5, d-6 (West 2000).

12. Johnson v. Quander, 370 F. Supp. 2d 79, 100 (D.D.C. 2005).

13. *Id.*

14. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82464 (Dec. 28, 2000) (codified at 45 C.F.R. pt. 164).

15. 45 C.F.R. § 160.203(b) (2004).

16. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 998, at 8 (June 2, 2005); *see also* 45 C.F.R. § 160.202(6) (2004) (defining "more stringent" as a law that "provides greater privacy protection for the individual who is the subject of the individually identifiable health information").

17. *See* 42 U.S.C.A. § 1320d-2 (West 2001) (directing the Secretary of DHHS to promulgate regulations that do "not supersede a contrary provision of State law, if the provision of State law imposes requirements, standards, or implementation specifications that are more stringent than" those by the federal government).

18. 45 C.F.R. § 164.512 (2004).

19. *Id.*

20. *See id.* § 164.512(a)-(l) (detailing specific exceptions within the section's twelve broad categories: (a) uses and disclosures required by law; (b) uses and disclosures for public health activities; (c) disclosures

section 164.512 imposes additional requirements for some of the exceptions[21] and often involves interplay between federal regulations and state laws.[22]

The HIPAA exception most relevant to Chapter 133, section 164.512(a), allows disclosures required by law:

> (1) A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.
>
> (2) A covered entity must meet the requirements described in paragraph (c) [addressing disclosures about victims of abuse], (e) [addressing disclosures for judicial and administrative proceedings], or (f) [disclosures for law enforcement purposes] of this section for uses or disclosures required by law.[23]

When applying this section to state law, there are two plausible interpretations.[24] First, section 164.512(a)(1) could be read independently of section 164.512(a)(2); thus, the additional requirements in paragraphs (c), (e), or (f) would be relevant only when "the disclosure involves the particular topics covered by paragraphs (c), (e), or (f)."[25] Alternatively, the two sections could be read together, permitting state mandated disclosure only if such disclosure is encompassed in paragraphs (c), (e), or (f).[26] The United States District Court for the Southern District of Ohio recently addressed the issue and read the sections independently.[27] In reaching this conclusion, the court relied on the commentary accompanying HIPAA, which explains that "the phrase 'required by law' is intended to be read broadly to include the full array of binding legal authority, such as constitutions, statutes, rules, [and] regulations" and "was generally meant not to interfere with, or add onto, the requirements of those other laws."[28] Thus,

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about victims of abuse, neglect, or domestic violence; (d) uses and disclosures for health oversight activities; (e) disclosures for judicial and administrative proceedings; (f) disclosures for law enforcement purposes; (g) uses and disclosures about decedents; (h) uses and disclosures for cadaveric, organ, eye, or tissue donation purposes; (i) uses and disclosures for research purposes; (j) uses and disclosures to avert a serious threat to health or safety; (k) uses and disclosures for specialized government functions; and (l) disclosures for workers' compensation).

21. *See, e.g., id.* § 164.512(f)(1)(C)(ii)(1)-(3) (explaining that an administrative agency's request for information can seek only information that "is relevant and material to a legitimate law enforcement inquiry"). The request must be "specific and limited in scope to the extent reasonably practicable" and cannot be satisfied with de-identified information. *Id.*

22. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82668 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160, 164) (noting that HIPAA's exceptions are intended to include federal, state, and local laws).

23. 45 C.F.R. § 164.512(a) (2004).

24. Ohio Legal Rights Serv. v. Buckeye Ranch, 365 F. Supp. 2d 877, 889 (S.D. Ohio 2005).

25. *Id.* at 889-90.

26. *Id.* at 889.

27. *Id.* at 889-90.

28. *See id.* (quoting Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82668 (Dec. 28, 2000) (codified at 45 C.F.R. pts 160, 164)).

the court broadly read section 164.512(a) to include state required disclosures that were not explicit in paragraphs (c), (e), or (f).[29]

Section 164.512(f), which elaborates about disclosures for "law enforcement purposes," is also relevant to Chapter 133 and included within the "required by law" exception discussed above.[30] Per this exception, HIPAA allows the release of information for law enforcement purposes if required by law.[31] While each state must determine what disclosures are required,[32] HIPAA explicitly includes certain situations, such as mandatory reporting of particular wounds[33] and law enforcement requests about suspected crime victims.[34] Authorized releases can also be made pursuant to court orders,[35] grand jury subpoenas,[36] and administrative requests.[37] Lastly, the exception does not encompass state-authorized releases unless the release is mandatory.[38]

B. Obtaining Medical Information About Victims

Consistent with HIPAA's victim reporting exception, California Penal Code section 11160 ("section 11160") requires healthcare providers to contact law enforcement if the provider knows or reasonably suspects a patient is the victim of a firearm wound or assaultive or abusive conduct.[39] Section 11160 requires a healthcare provider to report the victim's condition by telephone immediately, or as soon as practically possible, and send a written report to law enforcement within two days.[40] The report must include the victim's name and known whereabouts, the character and extent of the injury, and the identity of any person alleged to be the attacker.[41] Overall, the purpose of mandatory victim reporting is to alert law enforcement of a crime that has been or is being committed.[42]

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29. *Id.*

30. 45 C.F.R. § 164.512(f)(1) (2004).

31. *Id.*

32. Bodin Memorandum, *supra* note 8, at 1.

33. 45 C.F.R. § 164.512(f)(1)(i) (2004).

34. *Id.* § 164.512(f)(3).

35. *Id.* § 164.512(f)(1)(ii)(A).

36. *Id.* § 164.512(f)(1)(ii)(B).

37. *Id.* § 164.512(f)(1)(ii)(C).

38. *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82688 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160, 164) (explaining that releases a state does not believe are necessary to achieve a public policy purpose do not reflect a strong enough interest to "override the Congressional goal of protecting privacy rights").

39. CAL. PENAL CODE § 11160(a) (West 2000 & Supp. 2005); *see also id.* § 11160(d) (defining assaultive or abusive conduct).

40. *Id.* § 11160(b)(1)-(2).

41. *Id.* § 11160(b)(4).

42. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 998, at 10 (June 14, 2005).

C. Obtaining Medical Information About Suspects

1. Extent of Fourth Amendment Protection

Once a suspect is in custody, law enforcement may note or photograph any visible physical evidence without violating a suspect's Fourth Amendment right to be free from unreasonable searches and seizures.[43] Furthermore, if a suspect is under arrest, warrantless intrusions of the suspect's body are constitutional in a limited range of circumstances, particularly if the evidence might be lost in the time it would take to obtain a warrant.[44] For example, the United States Supreme Court held that law enforcement did not violate an arrested drunk driver's Fourth Amendment rights when they directed physicians to extract his blood to determine his blood alcohol level.[45] In reaching this conclusion, the Court emphasized that a delay in obtaining a search warrant threatened to destroy such evidence.[46]

After arresting a rape suspect, police usually perform what is known as a rape suspect exam.[47] Based on the lawful arrest and the need to obtain evidence that could be destroyed, police are constitutionally permitted to perform the search without obtaining a warrant.[48] Generally, a rape suspect exam involves shaking down the suspect's clothing, looking for any scratches, ripped clothing, signs of struggle, or noticeable marks, and swabbing the suspect's genitals.[49] Evidence obtained from the exam can exculpate the suspect, locate the victim's DNA on the suspect, identify the suspect's DNA on the victim,[50] corroborate the victim's testimony, such as identifying places the victim allegedly scratched the suspect, and provide other vital trace and non-trace evidence.[51] As rape suspect exams attempt to find evidence created during an alleged rape, their usefulness diminishes with time because the evidence can often be destroyed.[52] Thus, it is within a police department's discretion to perform a rape suspect exam.[53]

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43. *Id.* at 9.

44. *Id.* at 9-10.

45. Schmerber v. California, 384 U.S. 757, 770-71 (1966).

46. *Id.* at 770.

47. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 998, at 8 (June 14, 2005).

48. *Id.* (noting that rape suspect exams are considered lawful searches as long as there is probable cause for arrest).

49. Telephone Interview with Lydia Bodin, Assistant Head Deputy, L.A. Dist. Att'y's Office, Sex Crimes Div. [hereinafter Bodin Interview] (July 28, 2005) (notes on file with the *McGeorge Law Review*).

50. *See id.* (explaining that the victim's DNA on places such as the suspect's genital region can be used as evidence of sexual contact between the victim and suspect).

51. *Id.*

52. *Id.*

53. *Id.*

For searches that are not permissible incident to arrest, such as tests for permanent diseases, law enforcement must obtain a warrant.[54] When granting warrants for forensic medical exams, the California Supreme Court determined that, after finding probable cause, the issuing authority must also apply a balancing test to determine whether the character of the requested search is appropriate to grant a warrant.[55] On one hand, the issuing authority must consider the medical method that will be used to obtain the evidence, the seriousness of the underlying criminal offense, society's interest in obtaining a conviction, the strength of law enforcement's suspicions that the evidence will be revealed through the procedure, the importance of the evidence sought, and the possibility that the evidence may be obtained by less intrusive means.[56] Balanced against these considerations, the issuing authority must weigh the severity of the proposed intrusion and consider factors such as the procedure's intensity, unusualness, length, uncomfortable results, safety, or undignified nature.[57] The California Supreme Court applied this balancing test in a case when the defendant was charged with incest with his child. The court held that ordering an extremely intrusive exam of the defendant's genital tract violated his Fourth Amendment right because the intrusion was substantial, not routine, and obtained only highly circumstantial and speculative evidence.[58]

2. *Inapplicability of the Fifth Amendment*

Not only was extracting blood from an intoxicated driver consistent with the Fourth Amendment in *Schmerber v. California*, the United States Supreme Court also held that the Fifth Amendment permitted the procedure.[59] In reaching this conclusion, the Court explained that the procedure did not violate the suspect's Fifth Amendment right against self-incrimination because the blood evidence was not testimonial in nature.[60] The Court explained that "[s]ince the blood test evidence, although an incriminating product of compulsion, was neither [the suspect's] testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible based on the Fifth Amendment."[61] Accordingly, Fifth Amendment protections are inapplicable to rape suspect exams.[62]

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54. *Id.*
55. People v. Scott, 21 Cal. 3d 284, 293-94, 578 P.2d 123, 127-28 (1978).
56. *Id.*
57. *Id.*
58. *Id.* at 294-95.
59. Schmerber v. California, 384 U.S. 757, 765 (1966).
60. *Id.* at 764-65.
61. *Id.*
62. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 998, at 8 (June 2, 2005).

3. *Obtaining the Results*

Many counties, including Los Angeles and Kern, contract with local hospitals to perform rape suspect exams.[63] Before HIPAA, hospitals routinely disclosed the results of these exams.[64] Based on concerns about civil or criminal liability, however, some hospitals refused to release the results after Congress enacted HIPAA.[65] On the other hand, some counties, such as Sacramento, do not contract with local hospitals for rape suspect exams.[66] Instead, these counties have police department sexual assault nurse examiners or the county crime lab perform the exam.[67] Thus, post-HIPAA release of suspect records was only a problem for some of the counties that did not perform in-house exams.[68]

III. CHAPTER 133

The California Legislature enacted Chapter 133 to clarify the confusion HIPAA caused.[69] Specifically, because HIPAA made some medical facilities hesitant to release rape suspects' forensic exam records, Chapter 133 clarifies that not only are medical facilities allowed to release the records to law enforcement, but that such release is mandatory.[70] To accomplish its purpose, Chapter 133 added section 11160.1(a)-(f) to the California Penal Code.

Overall, Chapter 133 requires "any practitioner employed in any health facility, clinic, physician's office, local or state public health department, or a clinic or other type of facility operated by a local or state health department" ("hospitals") to prepare and release a written report of any forensic medical exam performed on a person in law enforcement custody[71] for sexual assault charges or a sexual assault investigation.[72]

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63. Bodin Interview, *supra* note 49; Telephone Interview by Gina Nargie, Dist. Att'y Sacramento County Dist. Att'y's Office, with Chris Jackson, Detective, Shafter Police, Kern County (Aug. 17, 2005) [hereinafter Jackson Interview] (notes on file with the *McGeorge Law Review*).

64. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 998, at 6 (Apr. 19, 2005).

65. *Id. But see* Jackson Interview, *supra* note 63 (indicating that hospitals in Kern County routinely release rape suspect exam records). *See also* Interview with Kimberly Horiuchi, Counsel, Assembly Comm. on Pub. Safety, Cal. State Assembly, in Sacramento, Cal. (July 13, 2005) [hereinafter Horiuchi Interview] (notes on file with the *McGeorge Law Review*) (suggesting Los Angeles County might have experienced the majority of resistance from hospitals).

66. Interview with Gina Nargie, Dist. Att'y, Sacramento County Dist. Att'y's Office, in Sacramento, Cal. (Aug. 17, 2005) [hereinafter Nargie Interview] (notes on file with the *McGeorge Law Review*).

67. *Id.*

68. *Id.*

69. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 998, at 6 (Apr. 19, 2005).

70. *Id.* at 7.

71. CAL. PENAL CODE § 11160.1(a) (enacted by Chapter 133).

72. *Id.*

Instead of listing the types of sexual assault charges that bring a suspect within Chapter 133's provisions, the statute references the sexual assault crimes listed in California Penal Code section 11160(d).[73] While section 11160(d) also lists non-sexual crimes, such as murder and mayhem, Chapter 133 applies only to the sexual assault crimes.[74] Thus, as listed in section 11160(d), the sexual assault crimes Chapter 133 covers include (1) assault with intent to commit rape, sodomy, or oral copulation, (2) sexual battery, (3) incest, (4) rape, (5) spousal rape, (6) procuring any female to have sex with another man, (7) sodomy, (8) lewd and lascivious acts with a child, (9) oral copulation, and (10) sexual penetration.[75]

Regarding the report, Chapter 133 requires the Office of Emergency Services, or an agency the Director of Finance designates, to develop a standard form.[76] Most importantly, such reports must include information obtained only during the rape suspect exam because Chapter 133 does not mandate, or protect physicians from liability for, releasing additional medical information about a suspect.[77] Further, the practitioner is required to immediately release the report to "any person or agency involved in any related investigation or prosecution of a criminal case including, but not limited to, a law enforcement officer, district attorney, city attorney, crime laboratory, county licensing agency, or coroner."[78] The report can be released to defense counsel or another third party only through discovery of the prosecutor's documents or a court order.[79]

Chapter 133 also clarifies that a hospital that releases a report, or a person who takes photographs for the report, shall not incur criminal or civil liability for doing so.[80] Chapter 133 underscores, however, that it does not grant immunity from civil or criminal liability for non-authorized use of exam photographs.[81] Furthermore, Chapter 133 emphasizes that the medical exam and report are subject to the requirements of the Confidentiality of Medical Information Act,[82] the physician-patient privilege,[83] and the privilege of official information.[84]

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73. *Id.*

74. Horiuchi Interview, *supra* note 65.

75. *See* CAL. PENAL CODE § 11160.1(a) (enacted by Chapter 133) (referring to CAL. PENAL CODE § 11160 (West 2000 & Supp. 2005)).

76. *See id.* (providing that the Director of Finance may designate an agency pursuant to section 13820).

77. *See* Cooley Letter, *supra* note 4 ("[Chapter 133] does not seek to require rape suspects' general medical records to be released. The records that [Chapter 133] seeks to have released are only those that relate to lawful searches.").

78. CAL. PENAL CODE § 11160.1(c) (enacted by Chapter 133).

79. *Id.*

80. *Id.* § 11160.1(d).

81. *Id.*

82. *See id.* § 11160.1(b) (subjecting Chapter 133 to the Confidentiality of Medical Information Act, which commences at CAL. CIVIL CODE § 56 (West 1982)).

83. *See id.* (subjecting Chapter 133 to Article 6 (commencing with CAL. EVID. CODE § 990 (West 1995)). *But see* CAL. EVID. CODE § 998 (West 1995) (establishing that California does not recognize the physician-patient privilege in criminal proceedings).

Chapter 133 also provides that a hospital cannot be required to perform forensic medical examinations unless that hospital has entered into a contractual agreement with law enforcement.[85] Still, once a non-contracted hospital performs a forensic exam, the records can be subpoenaed. Consequently, Chapter 133 allows a hospital to decline to perform a forensic exam, but not to decline to release records if an exam is performed.[86] Lastly, California Penal Code section 11162, which provides that a violation of mandatory reporting laws is a misdemeanor,[87] does not apply to Chapter 133.

IV. ANALYSIS OF CHAPTER 133

Although Chapter 133's author believed HIPAA did not prohibit the release of rape suspect exams,[88] hospitals were not convinced that HIPAA permitted these releases.[89] While hospitals' refusals to perform and release the results of exams were troubling to law enforcement and prosecutors, the hospitals' fears were understandable.[90] As one reporter explained, "hospitals have much to lose and nothing to gain by providing information without being ordered to do so, even in cases where it is ultimately in the patient's best interests."[91] Specifically, physicians face $50,000 in fines and up to one year in jail for improperly releasing medical information.[92] Thus, even if a physician wanted to release exam records to assist a rape investigation, the physician must balance this desire against the risk of personal liability.[93] Overall, although Chapter 133 cannot compel a non-contracted hospital to perform a rape suspect exam,[94] it should

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84. *See* CAL PENAL CODE § 11160.1(b) (enacted by Chapter 133) (subjecting Chapter 133 to CAL. EVID. CODE § 1040 (West 1995)); *see also* CAL. EVID. CODE § 1040 (West 1995) (stating that official information is information not previously disclosed to the public and "acquired in confidence by a public employee in the course of" his or her duty, and declaring that such information is privileged and disclosure is forbidden by state or federal law or if against the public interest). *But see* CAL. EVID. CODE § 1040(c) (West 1995) (requiring the Employment Development Department to disclose to law enforcement information about any person for whom a felony arrest warrant has been issued).

85. CAL. PENAL CODE § 11160.1(f) (enacted by Chapter 133).

86. Horiuchi Interview, *supra* note 65.

87. *See* CAL. PENAL CODE § 11162 (West 2000) (establishing that a violation of Article 2 of the California Penal Code is a misdemeanor and is punishable by imprisonment not exceeding six months, a fine not exceeding $1,000, or both).

88. *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82688 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160, 164); Horiuchi Interview, *supra* note 65; Bodin Interview, *supra* note 49; *see also infra* text accompanying notes 105-08.

89. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 998, at 6 (Apr. 19, 2005).

90. Farah Stockman, *Patient Privacy Laws Seen as Barrier to Law Enforcement*, BOSTON GLOBE, Dec. 4, 2003, at B12 (quoting Memorandum from Benjamin Klafter to James Provenza, *infra* note 92).

91. *Id.*

92. Memorandum from Benjamin Klafter to James Provenza (Nov. 12, 2004) (on file with the *McGeorge Law Review*) (regarding proposed legislation to expand HIPAA mandated reporting).

93. Stockman, *supra* note 90.

94. *See supra* text accompanying note 65.

ensure that law enforcement has access to exam records and that hospitals will not fear or face liability under federal or state law.

To release a rape suspect's exam records without violating HIPAA, the release must come within one of HIPAA's exceptions.[95] As Chapter 133 requires hospitals to release the results of rape suspect exams, the California Legislature brought such disclosures within the "required by law" exception.[96] Further, as section 164.512(a), the "required by law" exception, extends to "use" of the disclosed information, Chapter 133 allows others in law enforcement, such as prosecutors, to use the records without HIPAA violations.[97] Section 164.512(a)(2), which implicates section 164.512(f), is also relevant because Chapter 133 disclosures are for a "law enforcement purpose" as they are used to collect evidence to investigate and possibly prosecute rape suspects.[98]

Still, the Secretary of DHHS, or a hospital responding to a subpoena for nondisclosure, could argue that a Chapter 133 disclosure does not come within or was not intended to come within this exception.[99] For example, by framing the issue as one of statutory construction, one could argue that rape suspect exams are not disclosed for a "law enforcement purpose;" however, this argument has little merit or supporting authority.[100] Moreover, even if rape suspect exam disclosures are not considered disclosures for a "law enforcement purpose," the recent Ohio District Court opinion would support allowing the disclosure under section 164.512(a)(1) alone.[101] A stronger argument lies with interpreting section 164.512(f)(1)(i), which allows disclosures required by law, "including laws that require reporting of certain types of wounds or other physical injuries . . . ."[102] Based on the explicit reference to physical injuries, an argument could be made that the Legislature intended the mandatory reporting laws to include only injuries to possible victims, so as to alert law enforcement that a crime may have occurred. In this sense, the exception would not apply to a rape suspect exam because law enforcement is already aware that a crime has allegedly occurred. Accordingly, a policy in favor of identifying current victims through mandatory victim reporting is not as strong when law enforcement has identified a victim and is investigating a suspect.

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95. *See* 45 C.F.R. § 164.512(a)-(l) (2004); Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82668 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160, 164); *see also supra* text accompanying notes 20-23.

96. Horiuchi Interview, *supra* note 65.

97. 45 C.F.R. § 164.512(a) (2004).

98. Bodin Interview, *supra* note 49.

99. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 998, at 9-10 (Apr. 19, 2005); Horiuchi Interview, *supra* note 65.

100. *See* Bodin Interview, *supra* note 49 (concluding that rape suspect exams are clearly performed for law enforcement purposes).

101. Ohio Legal Rights Serv. v. Buckeye Ranch, Inc., 365 F. Supp. 2d 877, 889-90 (S.D. Ohio 2005); *see also supra* text accompanying notes 24-29.

102. 45 C.F.R. § 164.512(f)(1)(i) (2004).

On the other hand, this argument is not consistent with the plain language of HIPAA or the commentary about it. First, while DHHS stated that mandatory reporting would include reporting of possible victims, it did not include this example to the exclusion of others.[103] Second, by declining to create an exclusive list of permissible mandatory reporting, the authors of HIPAA presumably left such determinations to a state's discretion, so long as other constitutional limitations are not violated.[104] Lastly, as the Ohio District Court highlighted in its interpretation of section 164.512(a), HIPPA was "intended to be read broadly to include the full array of binding legal authority . . . encompass[ing] federal, state, and/or local actions with legally binding effect."[105] Still, if the federal government disagrees with this interpretation, or a hospital refuses to release rape suspect exam records, a court could be forced to interpret section 164.512(f) and determine whether it encompasses Chapter 133.[106]

Alternatively, a court would not have to address section 164.512(f) if HIPAA does not apply to Chapter 133.[107] Chapter 133's author, Lydia Bodin, Assistant Head Deputy of the Los Angeles District Attorney's Office Sex Crimes Division, explained that HIPAA protection might not apply because, unlike a medical exam of a patient, a rape suspect exam is a constitutional forensic exam of a suspect who is in custody and subject to search.[108] While it is plausible to distinguish a constitutionally permissible forensic exam from a medical exam, it is questionable if such a distinction would preclude HIPAA protection. Specifically, HIPAA protects "individually identifiable health information,"[109] which appears broad enough to protect an individual's health information, even if it was collected as evidence in a forensic exam. Moreover, if HIPAA does not apply to information obtained in a forensic exam, the DHHS probably would not have included exemptions for such information. For example, section 164.512(f) exempts disclosures made pursuant to a court order, such as a warrant.[110] Still, it could be argued that exemptions based on a warrant refer to medical records obtained while the suspect was a patient, thus do not apply to records from a forensic exam.

Despite the possible ambiguity regarding the interplay between Chapter 133 and HIPAA, it is questionable whether the issue will result in litigation. First, because courts lack subject matter jurisdiction over a private HIPAA claim,[111] the

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103. *See id.* § 164.512(f) (stating "[a]s required by law *including* laws that require the reporting of certain types of wounds or other physical injuries" (emphasis added)).

104. *Ohio Legal Rights Serv.*, 365 F. Supp. 2d at 889-90; *see also supra* text accompanying notes 28-29.

105. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82668 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160, 164).

106. Horiuchi Interview, *supra* note 65.

107. Bodin Interview, *supra* note 49.

108. *Id.*

109. 42 U.S.C. § 1320d-6 (2000).

110. 45 C.F.R. § 164.512(f)(1)(ii)(A) (2004).

111. Johnson v. Quander, 370 F. Supp. 2d 79, 100 (D.D.C. 2005); *see also supra* text accompanying notes 12-13.

party who arguably has the greatest motivation to bring a lawsuit lacks the opportunity to do so. Second, while some hospitals might remain hesitant to release rape suspect exams, Chapter 133 allows law enforcement to subpoena the records, thus bringing the release within another HIPAA exception.[112] Further, while the federal government may bring an action, the commentary regarding HIPAA expresses the intent not to supersede state laws.[113] Lastly, even though there are varying arguments as to the interplay between Chapter 133 and HIPAA, each potentially allows the two to coexist;[114] thus, the incentive to invest in a legal battle without a stronger argument for a HIPAA violation is weak.

Furthermore, Chapter 133 affects only a small class of rape suspects and investigations.[115] Specifically, Chapter 133 applies only to exams when an arrest is made soon enough to justify a warrantless search.[116] Thus, law enforcement must believe that evidence, such as the victim's DNA, scratches, or torn clothing, will be destroyed if additional time passes.[117] On the other hand, if a warrantless search is not justified and law enforcement obtains a warrant, Chapter 133 does not apply because HIPAA and state law already exempt hospitals from liability for disclosures made pursuant to a court order.[118] Additionally, because Chapter 133 applies only to hospitals that have already performed the exam or are contracted to perform the exam, non-contracted hospitals may initially refuse to perform exams to avoid having to disclose records.[119]

Possibly the strongest criticism of Chapter 133 is that it is not the only way to solve the obstacles law enforcement face.[120] Specifically, counties that use in-house sexual assault nurse examiners or county crime labs to perform rape suspect exams do not need Chapter 133's protections.[121] Still, without comparative research, it is only possible to speculate as to which method is the most efficient and reliable. Thus, it is uncertain if counties experiencing resistance from hospitals could have pursued alternative methods before pursuing legislation.

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112. CAL. PENAL CODE § 11160.1(f) (enacted by Chapter 133); *see also supra* text accompanying note 85; 45 C.F.R. § 164.512(f)(1)(ii) (2004) (exempting disclosures made pursuant to a "court order or court-ordered warrant").

113. Ohio Legal Rights Serv. v. Buckeye Ranch, Inc., 365 F. Supp. 2d 877, 889-90 (S.D. Ohio 2005); *see also supra* text accompanying notes 28-29.

114. Horiuchi Interview, *supra* note 65; Bodin Interview, *supra* note 49; Ohio Legal Rights. Serv., 365 F. Supp. 2d at 899-90; 45 C.F.R. § 164.512(f)(1)(1) (2004); Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82668 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160, 164); *see also supra* text accompanying notes 99-105.

115. Bodin Interview, *supra* note 49.

116. *Id.*

117. *See* Schmerber v. California, 384 U.S. 757, 770 (1966) (holding a warrantless search is permissible when the evidence would be lost due to delays caused by getting a warrant).

118. 45 C.F.R. § 164.512(f)(1)(ii)(A) (2004).

119. Horiuchi Interview, *supra* note 65.

120. *Id.*; Nargie Interview, *supra* note 66; *see also supra* text accompanying notes 65-67.

121. *See* Horiuchi Interview, *supra* note 65; Nargie Interview, *supra* notes 66; *see also supra* text accompanying notes 65-67.

V. CONCLUSION

As a bill protecting victims, Chapter 133 is a fairly uncontroversial effort to decrease rape suspects' privacy rights. The loss of privacy protections that previously existed is justifiable as an effort to align disclosure of suspects' exam records with those of victims.[122] Possibly for this reason, in its final version, Chapter 133 received no registered opposition or votes against it.

If, however, section 164.512(a) is read to exempt from HIPAA any mandated disclosures, states are essentially empowered to override all protection HIPAA created. Thus, while it seems Chapter 133 successfully, and arguably justifiably, "wrote in" a new exception in California, there is likely a line beyond which the federal government will not allow a state to venture. Where this line is, and if it will be tested, is yet to be disclosed.

122. *See* Background Information Request Sheet, prepared by Daniel Felizzatto, L.A. Dist. Att'y's Office, for Assembly Member Mark Leno, Chair, Assembly Comm. on Pub. Safety, Cal. State Assembly, at 2 (on file with the *McGeorge Law Review*) (advocating that Chapter 133 "align[s] the treatment and disclosure of both rape victims' and rape suspects' exams").