

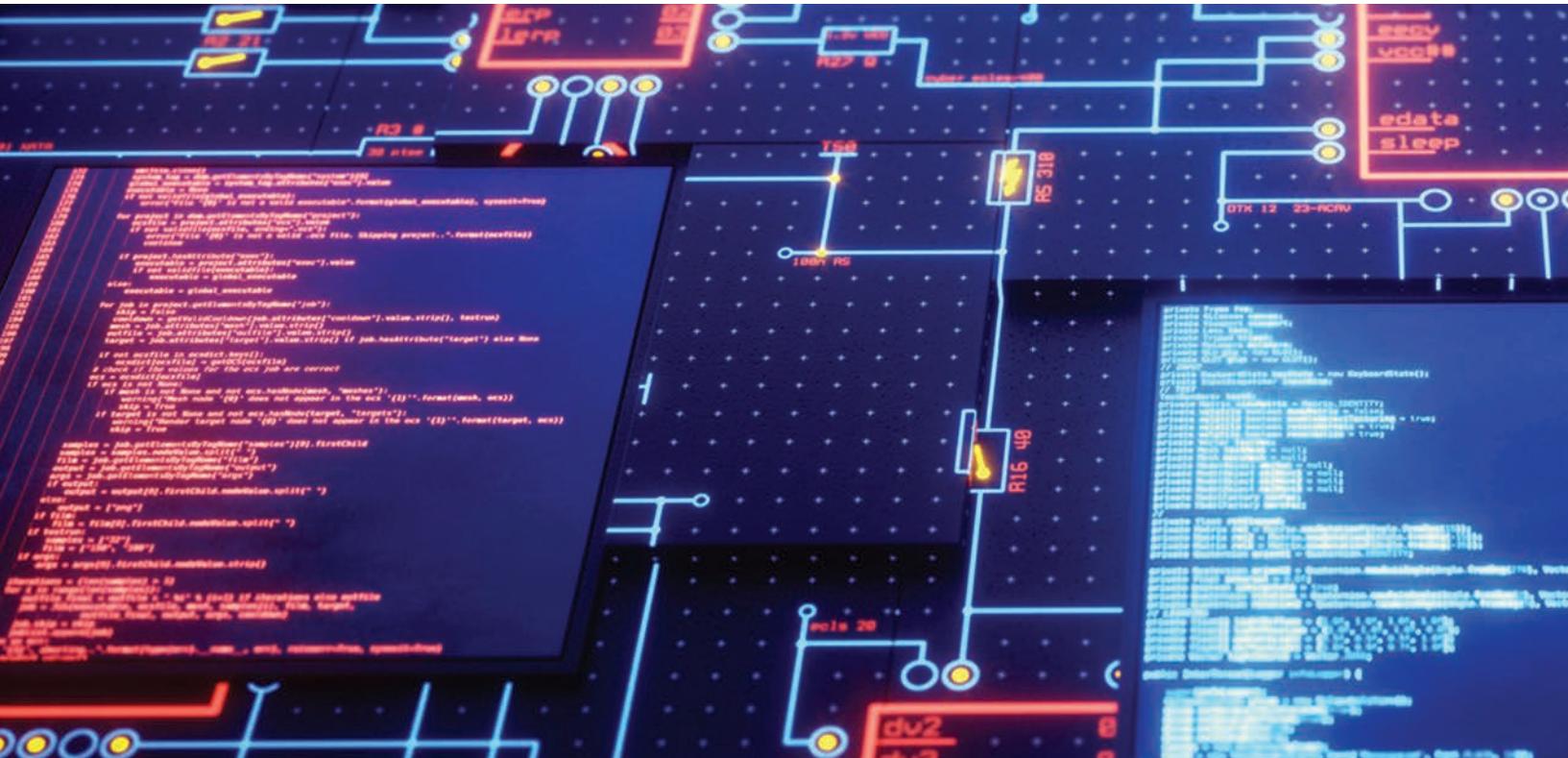


FIFTH EDITION

Legal and Ethical Aspects of

HEALTH INFORMATION MANAGEMENT

Dana C. McWay, JD, RHIA, FAHIMA



Australia • Brazil • Mexico • Singapore • United Kingdom • United States

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*Dedicated to
Patrick, Conor, William, and Ryan for their patience and encouragement
throughout the development and revision of this text.*

PREFACE

INTRODUCTION

The fifth edition of this text addresses numerous changes in the law and in society since the time the fourth edition was developed. Revised chapter content and learning objectives meet CAHIIM curriculum standards and competencies for accreditation and are designed to keep the learner abreast of the latest trends in health care. Throughout the text, provisions relating to protection of data and confidentiality concerns are integrated. The chapter on Information Technology is substantially revised, with additional focus placed on future legal and ethical trends in health IT. Changes in regulations relating to long-term care, home health care, research, patient rights, and substance abuse are included.

The success of the third and fourth editions validated the approach of expanding the text to incorporate both legal and ethical aspects of health information management. Woven throughout the text is a thorough updating of the law plus changes in rules of procedure, evidence, and the HIPAA standards. Newer concepts have been either added or expanded upon, including discussion of social media and its various applications to health information management. This provides the reader and instructor with the opportunity to focus solely on law, solely on ethics, or on both law and ethics. This text incorporates the model curriculum of the American Health Information Management Association (AHIMA) for both the health information administrator and health information technician programs, effective with the 2018 revisions. Although differences exist in the curricula between the programs, it is my belief that the content of this text is applicable to students in both groups because it is written with multiple levels of detail. Instructors may determine the emphasis level of each chapter as it is taught during the semester.

ORGANIZATION OF THE TEXTBOOK

While each chapter is designed to stand alone, it is grouped with related chapters to form a unit of study. Four units of study are found in this text.

Part 1 serves as an introduction to the study of law in general. The unit comprises four chapters, beginning with a discussion of the workings of the American legal system. This chapter is followed by a discussion of court systems and legal procedures, including e-discovery, and a chapter addressing judicial process of health information, including discovery requests. The fourth chapter addresses principles of liability, including intentional and nonintentional torts and defenses to lawsuits.

Part 2 serves as an overview of ethics and includes three chapters. The unit begins with a study of ethical standards, outlining concepts and theories basic to an understanding of ethics. Building on this basic understanding, the next chapter addresses decision making and challenges from an ethical perspective. Specialized bioethical issues are the focus of the third chapter, with each life stage forming the framework in which to examine ethical issues.

Part 3 summarizes both legal and ethical issues central to health information management: control and use of patient-specific health information. Four chapters comprise the unit. The first

chapter addresses patient record requirements, including use, content, retention, and destruction requirements. Confidentiality and informed consent are addressed in the next chapter, with emphasis on both theory and application. Issues related to access to health information, including ownership of health information and management of the various parties requesting access to that information, form the basis of the next chapter. A discussion of specialized patient records completes the unit, with expanded focus given to genetic information.

Part 4 is composed of four chapters and addresses specialized areas of concern in health information management. The first chapter discusses the concepts of risk, quality, and utilization management, addressing general principles, trends, and application. Information systems forms the next chapter, with focus given to the legal health record, HIPAA regulations, and future legal and ethical trends in health IT. A discussion of health care fraud and abuse follows, including an overview of applicable laws and the necessity for compliance programs. The last chapter provides an understanding of the role of law and ethics in the workplace, including employee rights, discrimination, and workplace protections.

Three things set this text apart from others in the field. First, the text is authored by only one person, allowing for a consistent voice and tone across chapters. It also means that one chapter will not contradict the content of another chapter within the same book and that the difficulty level will not vary from one chapter to the next. Second, this text provides a thorough grounding in ethics, both as to theory and its application to the health information management discipline. This grounding in ethics is addressed throughout the text. Third, the text integrates into each chapter, as applicable, four legal areas that are significant to health information management: the Health Insurance Portability and Accountability Act (HIPAA), electronic health records (EHRs), the Genetic Information Nondiscrimination Act (GINA), and the American Recovery and Reinvestment Act (ARRA). This approach is taken so that while the student is learning the substantive matter, he or she can also understand the interplay between these areas and the substantive matter. Special boxes in the text highlight the interplay of ethics and these special areas with the subject matter of the chapter.

FEATURES OF THE TEXTBOOK

Each textbook chapter contains the following elements:

- **Learning Objectives** and **Key Concepts** identify and organize learning expectations for each chapter.
- **Critical Thinking exercises** pose questions designed to stretch the reader's analytical skills.
- **Text Alerts** highlight issues related to important HIPAA, Genetic Information Nondiscrimination Act (GINA), American Recovery and Reinvestment Act (ARRA), electronic health record (EHR) information, and ethics.
- **Case Studies** apply concepts learned to real-world situations.
- **Review Questions** test comprehension of the chapter material.
- **Enrichment Activities** assist critical thinking about chapter content.
- End-of-chapter **Notes** provide source references so you can explore topics further and expand your knowledge of industry standards, guidelines, and practices.

- The **Appendix** includes:
 - A table of cases
 - A list of common acronyms
 - The Patient Care Partnership
 - Selected Laws Affecting HIM

New to the Fifth Edition

- Revised chapter content and learning objectives meet CAHIIM standards and competencies for accreditation and reflect the latest trends in health care.
- Feature boxes calling for the use of critical thinking skills to answer questions that cause the reader to apply the text material in a related, but somewhat different, manner. Suggested answers to each critical thinking exercise are provided in the Instructor Manual for use in stimulating class discussion.
- Substantial revision to Chapter 13, Information Systems, including the section on electronic health records, and inclusion of new materials focusing on future legal and ethical trends in health IT. These materials are designed to prepare students with a solid foundation to address the rapid changes happening in the health IT context.
- New material on confidentiality in the research and HIV contexts. Confidentiality is a cornerstone tenet of health care, and understanding the nuances present in selected contexts prepares the student for later practice.
- New material on the use of Psychiatric Advance Directives. These forms augment Durable Powers of Attorney for Healthcare and are being presented in health care facilities. Students need to understand how these forms affect the health record.
- New materials explaining the European General Data Protection Regulation and the California Consumer Privacy Act. These two developments pose significant impacts for HIM and will influence future statutory and regulatory changes.
- Updated material concerning substance abuse records—this sensitive HIM area carries significant risk for error, and instruction on the proper care of these records is important to ensure compliance with federal and state statutes and regulations.
- Expansion of existing materials on data privacy and protection, substance abuse, HIV, patient rights, confidentiality, licensing and certification, credentialing, use of copy and paste practice, e-discovery and metadata, enterprise risk management, and informed consent.
- Up-to-date information regarding the latest health care legislation, including coverage of the 21st Century Cures Act, and the latest federal health care regulations, including those covering long-term care, home health care, research, and substance abuse.

SUPPLEMENTS

The following supplements have been developed to accompany this textbook to assist with learning content covered in *Legal and Ethical Aspects of Health Information Management*, Fifth Edition.

Student Online Companion

A website has been created for this textbook to provide a space for updates and additional information related to textbook content. To access student resources located at the online companion site, please visit login.cengage.com

Instructor Resources at the Instructor Companion Site

Features of the instructor's companion site include the following:

- The Instructor's Manual in Adobe's PDF format, which contains answers for all chapter activities, case studies, critical thinking exercises, and review questions. It also includes a curriculum crosswalk, identifying the competencies and curriculum guidance applicable for health information management baccalaureate and associate degree programs.
- Cengage Learning Testing Powered by Cognero, a flexible, online system that allows you to
 - author, edit, and manage test bank content from multiple Cengage Learning solutions;
 - create multiple test versions in an instant; and
 - deliver tests from your LMS, your classroom, or wherever you want.
- Customizable instructor support slide presentations in PowerPoint® format, which focus on key points for each chapter.

MindTap

New: *McWay's Legal and Ethical Aspects of Health Information Management*, Fifth Edition, on MindTap is the first of its kind in an entirely new category: the Personal Learning Experience (PLE). This personalized program of digital products and services uses interactivity and customization to engage students, while offering instructors a wide range of choice in content, platforms, devices, and learning tools. MindTap is device agnostic, meaning that it will work with any platform or learning management system and will be accessible anytime, anywhere: on desktops, laptops, tablets, mobile phones, and other Internet-enabled devices.

This MindTap includes the following:

- An interactive eBook with highlighting, note-taking (integrated with Evernote), and more
- Flashcards for practicing chapter terms
- Computer-graded activities and exercises:
 - Self-check and application activities integrated with the ebook
 - Additional computer-graded activities and exercises
- Easy submission tools for instructor-graded exercises

ABOUT THE AUTHOR

Dana C. McWay, JD, RHIA, FAHIMA, is a lawyer as well as a health information management professional. With training and experience in both disciplines, experience as a member of the Institutional Review Board at Washington University Medical School from 1991 to present, and experience in converting a paper-based record management system to an electronic record management system, she brings wide-ranging experience to this textbook.

Ms. McWay serves as the Clerk of Court for the U.S. Bankruptcy Court for the Eastern District of Missouri, an executive position responsible for all operational, administrative, financial, and technological matters of the court. In this capacity, she organized the court's conversion to an electronic case filing system, resulting in widespread acceptance by end users. This success led to her appointment as a member and, later, as the chair of the Case Management/Electronic Case Filing (CM/ECF) Working Group, an entity within the federal judiciary responsible for providing guidance and assistance in all phases of the development of bankruptcy CM/ECF software releases. She previously served as the chair of the Clerk's Office Functional Requirements Group for the Next Generation Bankruptcy CM/ECF Project, a project designed as the successor to the current CM/ECF system. She serves on numerous national committees and working groups within the judiciary, including those involved in identifying the impact of new legislation upon judicial operations and those involved in advising on the education and training needs of court staff. Prior to this position, she worked as the Chief Deputy Clerk of Court for the U.S. Court of Appeals for the Eighth Circuit, responsible for daily operations of the court.

Ms. McWay began her legal career as a judicial law clerk to the Honorable Myron H. Bright of the U.S. Court of Appeals for the Eighth Circuit. She then became an associate with the law firm of Peper, Martin, Jensen, Maichel, & Hetlage, a multispecialty firm located in St. Louis, Missouri. Ms. McWay's legal practice encompassed a variety of health law topics, including contracts, medical records, and physician practice issues. She is admitted to practice in both Illinois and Missouri. She has received national recognition from the National Bar Foundation, a component of the American Bar Association, for creating the "Kids in Court Program," now operated by the Bar Association of Metropolitan St. Louis, which was cited as one of the five most outstanding children's legal education programs for 1995.

Prior to her legal career, Ms. McWay worked in health information management as a director as well as assistant director of medical records in a large teaching hospital and a for-profit psychiatric and substance abuse facility. She continues to participate in the HIM profession, having served as a project manager for the Missouri Health Information Management Association (MOHIMA) and as a member of MOHIMA's Legislative Committee. On the national level, she served as a director on the Board of Directors of the American Health Information Management Association. Her past AHIMA activities include serving as the chair and a member of AHIMA's Professional Ethics Committee, a faculty member for continuing education seminars, a peer reviewer of AHIMA book proposals and texts, a contributing author to AHIMA's HIM Practice Standards, and a member of both the Committee for Professional Development and the Triumph Awards Committee. She serves as a professional practice experience site coordinator for health information management students and has served as a member of the Advisory Board of the Health Information Management program at Saint Louis University. She has served as an adjunct faculty in the Master's of Health Informatics programs at Saint Louis University and Logan University; at the Law School of Saint Louis University; and in the PreLaw Studies program at Saint Louis University.

Ms. McWay is an author as well as an editor. Her textbook *Today's Health Information Management: An Integrated Approach*, second edition, provides a comprehensive discussion of the principles and practices of health information management in a user-friendly manner. With the Peper, Martin law firm, she revised *The Legal Manual to Medical Record Practice in Missouri* in 1991. She has authored numerous other publications and served as coeditor of several online continuing education modules presented by the American Health Information Management Association. She has also presented numerous seminars, serving as faculty and panel presenter. She has served as a guest lecturer at several regional colleges and universities, focusing on the intersection of legal issues and health care practices. She currently serves on the advisory boards of two Health Information Management academic programs.

Ms. McWay is a *magna cum laude* graduate of the Saint Louis University School of Allied Health Professions, with a degree in medical record administration, and a *cum laude* graduate of the Saint Louis University School of Law, awarded the Order of the Woolsack upon graduation. While in law school, Ms. McWay served as the health law editor of the *Saint Louis University Law Journal* and as a faculty research fellow. She is a recipient of the Alumni Merit Award from Saint Louis University and a Triumph Award (the Legacy Award) from the American Health Information Management Association for the first edition of the textbook *Legal Aspects of Health Information Management*. She has received the Missouri Health Information Management Association's Distinguished Member and Outstanding Volunteer Awards. She is the recipient of the Director's Award for Outstanding Leadership to the federal judiciary and the Director's Award for Excellence in Operations—Mission Requirements.

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Dana C. McWay, JD, RHIA, FAHIMA

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ABOUT LEGAL CITATIONS

A legal citation identifies a legal authority or reference work, such as a constitution, statute, court decision, administrative rule, or treatise. Legal citations are used throughout this work to (1) identify the source of a quotation, (2) identify an authority referred to in the text, or (3) support the propositions stated. Legal citations are found in both the body of the text and the endnotes.

The learner may be interested in legal citations for more than one reason: to identify legal authority that is binding on the health care provider or to learn how to obtain full copies of a citation to read as a supplement to the text. For most citations other than statutory provisions and court decisions, the legal citation is self-explanatory. Some explanation is warranted for understanding how to read citations of statutes and court decisions.

Both federal and state statutes are published in either official or unofficial codes. For federal statutes, the official code is the *United States Code* (U.S.C.); unofficial codes include the *United States Code Annotated* (U.S.C.A.) and the *United States Code Service* (U.S.C.S.). Every effort has been made in this book to cite federal statutes published in the official code. A typical federal statutory citation cites first to the title number, next to the abbreviation of the official code, third to the numbered section or paragraph, and finally to the year that appears on the spine of the volume cited. Where statutory material can be found in a supplement to the official code, it is identified as a supplement with the year of the supplement identified. For example, the citation 42 U.S.C. §11101 (1988 & Supp. V 1993) shows that the particular statute may be found in title 42 of the *United States Code* as section number 11101 in both the volume published in 1988 and the fifth supplement to that volume published in 1993.

Similarly, state statutes are published in either official or unofficial codes and generally follow the same practice as federal statutes. For example, the citation FLA. STAT. ANN. §395.0197 (West 1993) shows that the particular statute may be found in the unofficial code *Florida Statutes Annotated* at section 395.0197 published by the West Publishing Company in 1993. Multiple state statutory citations are listed in alphabetical, rather than year, order, using standard abbreviations.

Court decisions are cited according to a similar approach. The name of the case and the numbers, letters, and years following it are referred to as the citation for the decision. For example, the citation *Warwick v. Bliss*, 195 N.W. 502 (S.D. 1923) shows that the case involving those named parties may be found in volume 195 of the *NorthWestern Reporter* on page 502. The initials and year in parentheses refer to the identity of the court that issued the decision, in this case the Supreme Court of the State of South Dakota, and the year the decision was issued.

The same case may show more than one citation, indicating that a decision has been issued in the same case by different courts. If the first citation is followed by the abbreviations *aff'd*, *rev'd*, or *cert. denied*, the citation indicates the subsequent history of the case, namely, that a higher court has reviewed the decision of the lower court. For example, the citation *Johnson v. Misericordia Community Hospital*, 294 N.W.2d 501 (Wis. Ct. App. 1980) *aff'd*, 301 N.W.2d 156 (Wis. 1981) shows that the case involving those named parties appears in two different reporters. First, the case may be found in volume 294 of the *NorthWestern Reporter*, second series, on page 501, and was issued by the Wisconsin Court of Appeals in 1980. Second, the case was affirmed by the Wisconsin Supreme Court in 1981 and can be found in volume 301 of the *NorthWestern Reporter*, second series, on page 156.

The legal citations listed in this book are cited according to the standards of the book *A Uniform System of Citation*, Fifteenth Edition, commonly referred to as *The Blue Book*, a joint publication of the Columbia Law Review Association, the Harvard Law Review Association, the University of Pennsylvania Law Review, and the Yale Law Journal.

ABOUT LEGAL RESEARCH

To the uninitiated, legal research can be bewildering, overwhelming, or intimidating. Entire books have been devoted to the subject, making the topic difficult to summarize easily. Nonetheless, a basic review of legal research methods is provided so that the learner may research an area of law covered in this book or review the exact wording of a constitutional provision, statute, or administrative regulation.

Before beginning any research project, the learner must first obtain an understanding of the sources of law in order to know where to look. The sources of law are explained in detail in Chapter 1, and a brief description is provided here. The sources of law are divided into two categories: primary sources and secondary sources. Primary sources are *the law themselves*, including constitutions, statutes, court decisions, and administrative decisions and regulations. They are located in official and unofficial codes in the case of constitutions, statutes, and administrative regulations and in case digests when looking for court cases or administrative decisions. Case digests are grouped by cases issued by federal courts, state courts, or courts found in a particular region of the United States. Citations to these primary sources are explained in the “About Legal Citations” section. Secondary sources are the writings or commentaries *about the law*, including legal encyclopedias, articles found in professional journals, and legal treatises. This book is an example of a secondary source.

With so many sources to choose from, how does the learner find the answer? There are several techniques to choose from, all of which apply to the traditional method of using books for research or through the newer method of using computer-based legal databases. The learner should choose from the following techniques when beginning legal research:

1. *Generalized approach*. This approach is most applicable when the learner has little or no general knowledge about the problem or area that is the subject of research. It begins with a review of secondary source materials, such as legal encyclopedias or articles in professional journals. These materials often have a table of contents or indexes to guide further research, leading to review of topics of interest. Many of these topics of interest list citations, footnotes, or references to primary source material, which will further aid the learner’s research.
2. *Known authority approach*. This approach is most applicable when the learner knows the citation to the constitutional provision, statute, case, or administrative decision or regulation (the “authority”). It begins with a review of primary source materials to locate the citation of the authority in question and follows with a review of that authority.
3. *Descriptive word or fact word approach*. This approach is most applicable when the learner knows general information about the subject matter but does not have a specific citation to the relevant primary authority. After choosing a descriptive or fact word, the learner should look into the index to a set of official or unofficial codes to find constitutions, statutes, and administrative regulations or to the applicable case digest to find a court case or administrative decision.
4. *Known topic approach*. This approach is most applicable when the learner knows the area of law involved but not the specific legal authority. For constitutions, statutes, and administrative regulations, the learner should look into the subject matter grouping within the official and unofficial codes. For court cases or administrative decisions, look into the topic and subtopic sections of the applicable case digest.

Once the learner has found the authority being researched, the research activity is not over. Rather, the learner must continue the research to check the current status (i.e., validity) of the

authority. The easiest, most thorough, and most complete method to check the status of the authority in question is through the use of a computer-based legal database. A search begins for references to the citation by typing the authority's citation into the database. The learner should review the listed references to evaluate their effect, if any, on the citation in question.

Alternatively, nonelectronic methods of checking the current status of an authority are available. Many hardbound volumes contain so-called pocket parts, which are paperbound pamphlets inserted into a slot in the cover of the hardbound volume. The pocket parts follow the same format as the hardbound volume to which they correspond and report any additions to or decisions for the main text. Supplements to hardbound volumes follow the same principles. The learner should review the references to the citation to evaluate their effect, if any, on the citation in question.

Another method is to trace the subsequent work of a legal authority through a citator publication; the best known is *Shepard's Citations*. The entries contained in *Shepard's* list authorities (e.g., other cases, journal articles, and attorney general opinions) that have cited the legal authority that is the subject of the research. Detailed instruction on the use of a citator publication such as *Shepard's* is beyond the scope of this book.



PART

1

STUDY OF THE LAW IN GENERAL



CHAPTER

1

WORKINGS OF THE AMERICAN LEGAL SYSTEM

LEARNING OBJECTIVES

After reading this chapter, the learner should be able to:

1. Differentiate between public and private law.
2. Compare and contrast contract and tort law.
3. Compose a scenario that illustrates the difference between the substantive and procedural aspects of criminal law.
4. Explain the differences between various sources of law.
5. Compare and contrast licensure and certification.
6. Describe the roles of each branch of government in creating, administering, and enforcing law.
7. Explain the process of how a bill becomes a law.
8. Describe quasi-legal requirements to which health care organizations are subject.

KEY CONCEPTS

Adjudication	Executive branch	Private law
Certification	Felonies	Procedural law
Civil law	Injunction	Public law
Common law	Intellectual property	<i>Res judicata</i>
Conflict of laws	Judicial branch	Separation of powers
Constitution	Law	<i>Stare decisis</i>
Contract law	Legislative branch	Statutes
Criminal law	Licensure	Substantive law
Deeming authority	Misdemeanors	Tort law
Electronic case filing systems	Ordinances	Words of authority
	Pleadings	

INTRODUCTION

As health care becomes more complex, the interplay between the law and health care increases. Government regulation of the health care field continues almost without pause, while lawsuits against health care providers appear to increase. The interplay of these forces significantly affects the ability to manage patient-specific health information. Thus, those who are concerned with

protecting health information must possess a fundamental understanding of the law. This chapter provides that understanding through a discussion of the differences between public law and private law, the sources of law, the branches of government and their respective roles, and quasi-legal requirements to which health care organizations are subject.

PRIVATE AND PUBLIC LAW

In the most general sense, **law** is defined as a system of principles and processes devised by organized society to deal with disputes and problems without resorting to the use of force. Law establishes certain standards for human behavior. When those standards are not met, conflict emerges. Individuals and governments then look to the law to resolve the conflicts and enforce the established standards.

Conflicts between private parties constitute **private law**; by contrast, conflicts between the government and private parties constitute **public law**. It is not always easy to make a distinction between these two types of law because in certain instances behavior that deviates from the established standard violates both public and private law. For example, an assault and battery violates both private and public law. Although no clear distinction is possible, understanding the differences between public and private law will assist in understanding the American legal system. The distinctions between public and private law are illustrated in Figure 1.1.

Private Law

Private law consists of the body of rules and principles that governs the rights and duties between private parties. Private law is sometimes referred to as civil law because it is concerned with private rights and remedies. **Civil law** is more properly defined, however, as that part of the law that does not include criminal law. Table 1.1 provides more details differentiating between civil and criminal law cases.

Generally, lawsuits brought between private parties fall into one of two categories: contract law or tort law. **Contract law** is concerned with an agreement between two or more parties that creates some type of obligation to act (do something) or refrain from acting (not do something) in exchange for some type of consideration. Table 1.2 lists the elements of a contract. Contracts may be oral or written agreements and should abide by applicable federal and state statutes and regulations. When a party fails to fulfill the terms of the contractual agreement, a breach of contract occurs and the aggrieved party may sue to force performance of the terms of the contract or seek compensation.

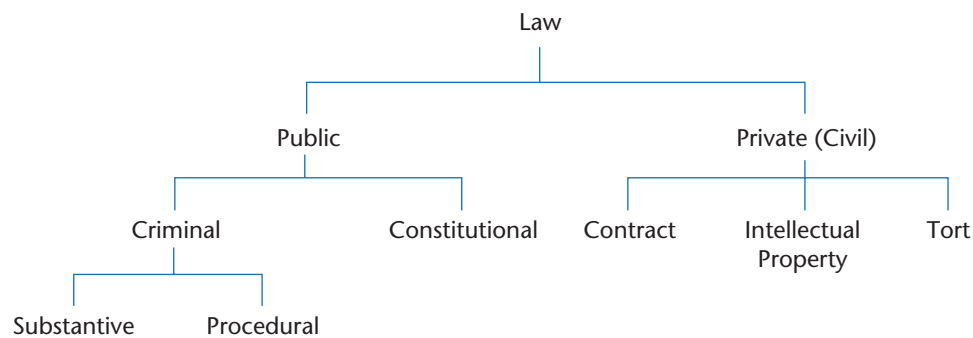


Figure 1.1 Distinctions between Public Law and Private Law

Table 1.1 Differences between Civil and Criminal Law Cases

Civil Law	Criminal Law
1. Both parties may be anybody, including governments, corporations, and individual persons.	1. The plaintiff is always the state or federal government.
2. The loser in a civil case cannot be imprisoned, even if she cannot pay the damages assessed by the court.	2. Punishment may be a fine and/or imprisonment.
3. Civil law is established through both state and federal statutes and court decisions.	3. State or federal statutes always establish criminal law.
4. In some state court systems, a majority vote of the jury is required to win a decision. Some state court systems require a unanimous jury decision. Federal courts require a unanimous jury decision.	4. The jury decision in a criminal trial must be unanimous.
5. The burden of proof is “preponderance of the evidence,” which is defined as “more likely than not.”	5. The burden of proof is “beyond a reasonable doubt.”
6. Either party may appeal in a civil case.	6. Only the defendant may appeal a guilty verdict in a criminal case.
7. The plaintiff and the defendant may both be found partially right and partially at fault.	7. The defendant is either guilty or not guilty; there is no partial fault.

Table 1.2 Elements of a Contract

- Meeting of the minds—at least two persons or entities must reach an agreement.
- Offer—one or more parties promise to do something (obligation) or not do something (refrain) and communicate that offer to the other party.
- Acceptance—the other party agrees to the promise.
- Consideration—what one party to a contract receives from the other party in return for performing the contractual obligations.

An example of a lawsuit involving breach of contract is *Mordecai v. Blue Cross/Blue Shield of Alabama*.¹ In *Mordecai*, the patient sued her insurance company after it denied payment for the majority of her claim for medical expenses. The court held that the patient could proceed against the insurance company for breach of contract on the issue of whether the insurer correctly determined that the patient’s care was not medically necessary.

Claims of breach of contract were also at the heart of *Prevost v. Coffee County Hospital Authority*.² In *Prevost*, the hospital sued a doctor for breach of contract, seeking to recover a loan it made to induce the doctor to open a medical practice at the hospital. The doctor counterclaimed, asserting that the hospital failed to comply with the terms of the contract by not purchasing certain medical equipment to facilitate his practice or reimbursing him for expenses in renovating his office space. A jury found that each side breached the contract and awarded damages to each. Other examples of activities covered by contract law include the sale of goods, the employment

of others, the furnishing of services, the loaning of money, and the contract between hospitals and physicians for clinical privileges.

Tort law encompasses the rights and duties that exist between parties that are independent of a contract. When one party claims that the wrongful conduct of the other party has caused harm, the aggrieved party may seek compensation. An example of a lawsuit involving tort law is *John Roe v. Jane Doe*.³ In *Roe*, the court held a physician liable for negligence and breach of confidentiality after the physician improperly disclosed her patient's HIV status. Other examples of activities covered by tort law include medical malpractice, defamation, and invasion of privacy. Additional discussion of tort law can be found in Chapter 4, Principles of Liability.

While most legal issues in the health care field involve either contract or tort law, one emerging area of law is that of **intellectual property**. Ordinarily associated with patents and trademarks, intellectual property law involves the question of legal rights to processes and products of technology, in particular, the concrete application of a principle or idea. Intellectual property law is used in the health information management field as the basis for the legal rights to the software used to control and store information in the patient's electronic health record.

The legal rights to the software used in electronic health records arise from intellectual property law.

EHR

Public Law

Public law is the body of rules and principles that governs the rights and duties between government and a private party or between two parts or agencies of government. Public law defines appropriate behavior between citizens, organizations, and government.

One very large segment of public law is **criminal law**. The essence of criminal law is to declare certain conduct as injurious to the public order and to provide specified punishment for those found to have engaged in such conduct. Criminal law can be divided into two subcategories: **substantive law** and **procedural law**. Substantive criminal law defines specific offenses, general principles of liability, and specific punishment. Examples of specific offenses are **felonies**, crimes of a grave or serious nature punishable by a term of imprisonment exceeding one year, and **misdemeanors**, crimes of a less serious nature punishable by fine or a term of imprisonment of less than one year. Criminal procedure focuses on the steps through which a criminal case passes, from the initial investigation of a crime through trial and sentence and the eventual release of the criminal offender.

A second large segment of public law consists of constitutional provisions, statutes, and regulations that govern society by requiring governmental entities and private parties to follow certain courses of action. Although some government regulations contain criminal penalties, their purpose is not to punish offenders but to secure compliance with the goals of the law.

To further understand the contrast between private and public law, their sources must be examined. The primary source of private law is decisions of the courts, which may be subsequently modified by statute or regulation. The primary sources of public law are written constitutions, statutes, regulations, and decisions from both judicial and administrative bodies. The interplay of these sources within private and public law provides the starting basis for understanding the legal aspects of health information.

CRITICAL THINKING

Differentiating between private and public law is not always easy. Would you agree that the following statements properly differentiate between the two types of law?

1. Private law applies to issues that affect individuals and groups of people or organizations, whereas public law applies to issues that affect society as a whole.
2. Private law applies to verbal contracts, whereas public law applies to written contracts.
3. Private law applies to criminal matters, whereas public law applies to governmental matters.

SOURCES OF LAW

Because private and public law originate from a variety of sources, there is no one document or place to turn to find the rules governing health information. Even if such a document or place existed, its value would be questionable because law is not constant; rather, it is constantly changing. Accordingly, it is important to understand that all of the following sources of law may affect the management of health information.

Constitution

A **constitution** is the fundamental law of a nation or state and may be written or unwritten.⁴ A constitution establishes the basic principles to which the nation or state must conform, organizes the branches of government, and limits the functions of its different departments.

A constitution familiar to most Americans is the Constitution of the United States, which has as its basic premise the ensuring of each person's rights to life, liberty, and religious freedom. As illustrated in Figure 1.2, the main body of the U.S. Constitution establishes and defines the three branches of government: (1) the **legislative branch**, (2) the **executive branch**, and (3) the **judicial branch**. Following the main body of the Constitution are twenty-seven amendments that have been ratified by at least three-fourths of the states in existence at the time of their ratification. The first ten amendments are referred to as the Bill of Rights and include the rights to freedom of speech and religion, freedom from unreasonable search and seizure, freedom to bear arms, freedom to be protected against self-incrimination, freedom to demand a jury trial, and freedom to be afforded due process of law. A listing of the Bill of Rights is provided in Table 1.3.

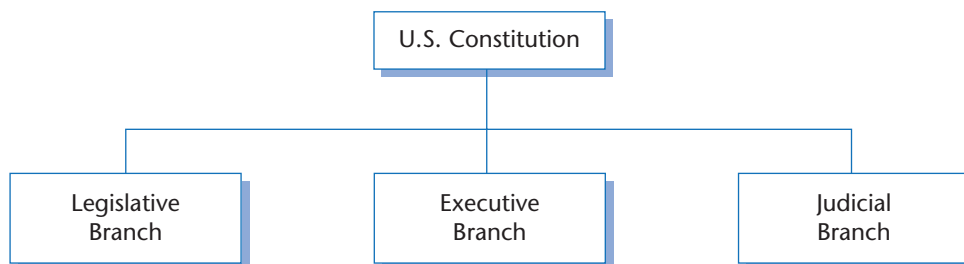


Figure 1.2 Branches of the Federal Government

Table 1.3 The Bill of Rights

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

Amendment III

No Soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

In addition to the U.S. Constitution, each state has its own constitution. These state constitutions provide the fundamental laws for each state but are subordinate to the U.S. Constitution. A state constitution typically contains not only language similar to the U.S. Constitution but also language that is unique to that state. Sometimes, state constitutions provide even broader rights and protections than the U.S. Constitution. For example, one state's courts have interpreted their

state's constitutional provision guaranteeing the right to privacy to include a patient's right to die and right to refuse treatment—matters that the U.S. Constitution does not expressly address.⁵

Statutes

A second source of law flows from federal and state legislatures. The laws written by these legislatures are called **statutes** and become effective after being signed by the president, in the case of federal statutes, or by the governor, in the case of state statutes. As a general rule, statutes passed at the federal level address matters of national concern; statutes passed at the state level address matters of particular interest to the individual state.

HIPAA/ARRA

Both the Health Insurance Portability and Accountability Act (HIPAA) and the American Recovery and Reinvestment Act (ARRA) address the privacy and security of health records.

Multiple statutes written at the same level can address the same subject matter. For example, the Health Insurance Portability and Accountability Act (HIPAA) addresses issues of privacy and security of protected health information of individual patients. Provisions of the American Recovery and Reinvestment Act of 2009 (ARRA) also address the same subject matter. Because Congress passed ARRA after passing HIPAA, any conflicting provisions between the two statutes will be governed by the provisions of ARRA. The two statutes can be reconciled because of a provision in ARRA that states any HIPAA statutory provision or regulation remains in effect to the extent that it is consistent with ARRA.⁶ Any regulations issued after passage of ARRA may contain language and guidance that reconcile the two statutes.

ARRA

Provisions of the American Recovery and Reinvestment Act demonstrate the interplay of federal and state law.

On occasion, federal statutes will address matters of state law. Under ARRA, provisions include financial incentives in the form of grants to states to promote adoption of health information technology and dissemination of best practices information concerning electronic health records. Further provisions establish or expand health informatics education programs and the integration of certified electronic health record technology in the clinical education of health professionals.⁷

Statutes written in one state can differ greatly from statutes written in other states on the same topic. For example, one state's statute may directly address a patient's access to her own health record, whereas the neighboring state's statute governing access to patient records may be silent on the issue of direct patient access. For more information concerning the patient's right of access to health information, see Chapter 10, Access to Health Information.

Where the statutes of different states are inconsistent in deciding how to resolve a particular dispute, a conflict of laws has arisen. A **conflict of laws** refers to an inconsistency between different jurisdictions over the same issue in a legal action. For example, a contract requirement to submit a dispute to arbitration may be effective in the state in which the parties resided at the time of entering the contract but may not be effective in a neighboring state if one of the parties moves to that neighboring state and the contract terms do not specifically comply with the neighboring state's laws governing arbitration requirements. In this instance, a conflict of laws has occurred.

Lawyers frequently avoid the potential for conflicts of law in contracts by including a provision specifying which state's law will govern in the event of a conflict. In a court case, the judge will decide which state's laws will govern in the event of a conflict.

Similarly, one state's response to a perceived problem may result in statutes that are imitated by other states. For example, several states have responded to allegations of high photocopying charges for copies of health records by passing statutes that place caps on the amount the health care provider may charge for these copies. Other states have followed suit and adopted statutes that vary in detail (e.g., the cap amount) but address similar results (e.g., the need for a cap). More information concerning the reasonableness of photocopying fees is provided in Chapter 10, Access to Health Information.

In addition to these legislative bodies, legislatures on the local level, such as city councils or boards of aldermen, may pass laws regulating matters not already covered by federal or state law. City councils or boards of aldermen may also pass laws to supplement federal or state laws. Frequently, laws passed at the local level are called **ordinances**. Areas typically not governed by federal or state law but by ordinances include zoning, building, and public safety. Areas where ordinances supplement federal or state law include content requirements for health records.

To understand statutes and ordinances, one must be familiar with certain verbs that hold legal meaning. Referred to as **words of authority**, these verbs set forth duties, rights, prohibitions, and responsibilities in statutes and ordinances. The most commonly used words of authority for statutes and ordinances are listed in Table 1.4. These words of authority may also be found in rules and regulations and share the same meaning as used in statutes and ordinances.

Rights and duties can vary based on the specific language of a statute, rule, or regulation. Consider the impact of changing the word *must* to *may* in the following sentence:

A covered entity must train all members of its workforce on the policies and procedures with respect to protected health information.

CRITICAL THINKING

Table 1.4 Words of Authority

Word	Meaning
Shall	Has a duty to
Must	Is required to
Must Not	Is required not to; is disallowed from
Is Entitled to	Has a right to
Will	Expresses a future contingency
May	Has discretion to; is permitted to
May Not	Is not permitted to; is disallowed from
Should	Denotes a directory provision

Source: B. Garner, *A Dictionary of Modern Legal Usage*, 2d ed. (1995).