

Q&A With Akin Gump's Jo-Ellyn Klein

Law360, New York (September 9, 2011) -- Jo-Ellyn Klein is senior counsel in the Washington, D.C., office of Akin Gump Strauss Hauer & Feld LLP, where she leads the firm's interdisciplinary privacy and data protection initiative. She devotes a substantial portion of her practice to assisting clients with issues arising under state and federal privacy, security and breach notification laws and regulations affecting the health industry. She also advises clients outside the health care sector that are affected by health care or privacy law and regulation.

Q: What is the most challenging case you have worked on and what made it challenging?

A: The application of the Health Insurance Portability and Accountability Act and its implementing regulations to nontraditional covered entities is often rife with challenges, but I have found the application of HIPAA and state privacy laws in the professional sports context to be particularly thorny. Most health information privacy laws were drafted with entities such as hospitals and typical health plans in mind. Applying them in the sports context — where so many forces are in play; special programs exist that involve the provision of, or payment for, health care; and the media is so hungry for information about players' health condition — has really kept me on my toes.

Q: What aspects of your practice area are in need of reform and why?

A: Since the U.S. Department of Health and Human Services published the health care data breach notification regulations required under the Health Information Technology for Economic and Clinical Health Act in 2009, I have been intrigued by how tensions between the self-reporting required under the breach notification rule will be reconciled with heightened enforcement. From a policy standpoint, the two approaches — mandatory self-shaming and drastic penalties for noncompliance — seem at odds. Entities will hesitate to self-report if they are too anxious about facing steep penalties or a high settlement amount, so one policy seems to undercut the other.

Q: What is an important case or issue relevant to your practice area and why?

A: The announcement of the Massachusetts General Hospital settlement earlier this year stopped me in my tracks: A well-respected HIPAA covered entity had agreed to pay the federal government a million dollars to settle potential HIPAA violations for what felt like “everyman’s breach.” In this case, a hospital employee intending to work from home accidentally left a stack of documents containing protected health information behind upon exiting a subway train during her commute, and they were never recovered. There was no ill intent, and it seemed like the type of breach that could happen at many institutions, even those with strong HIPAA training programs, detailed policies and procedures, and diligent employees. After years of minimal HIPAA enforcement, this announcement, more so than any other, signaled to me that times were changing.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: Paul Uhrig, who now serves as executive vice president, chief administrative and legal officer, and chief privacy officer at Surescripts, has certainly impressed me. Paul is both forward-looking and practical — a difficult balance to achieve in the health privacy realm. Surescripts is a large and growing e-prescribing network, and Paul has helped them remain on the forefront in addressing privacy issues.

In my work with him, he has always been on the leading edge in developing and implementing policies that reflect emerging best practices. He does not sit back and wait for the law to catch up to technology; when good business sense and consumer needs indicate action is needed, he takes it, even when it means doing more than may technically be required at the time. He is thoughtful and practical in his approach and continually re-evaluates his efforts as the privacy environment shifts and changes. This is key, as in the current state of play in health information privacy, there is no checking the compliance box for done!

Q: What is a mistake you made early in your career and what did you learn from it?

A: Early in my career I had the misfortune of securing a great legal result, but ending up with an unhappy client. I had determined that the client needed to be on a certain list created years ago — and rarely updated — to join its competitors in being eligible for certain benefits. There was no formal process for gaining a place on this list, and no criteria were firmly established, so I developed an official-looking and detailed submission essentially styled as a "Request to Be Added to the All-Important List" — and my request was granted!

I promptly called the general counsel and left him a message with the good news, and followed up with an email, copying all of the people at his organization who had assisted in the effort. And did I make a mess. He was inundated with questions, and he was not happy. My most important takeaway was to be sure to give due thought to how I share even good news with clients.