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## Guest Editorial

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### He Sleeps, They Transmit, She Scores

by **Daniel B. Brown, JD**

#### **Nine legal issues to consider when setting up a freelance scoring service.**



The surge in the number of polysomnographic sleep studies in recent years has fueled a corresponding demand for expert sleep scoring services. Like the internist's indispensable office nurse, the skilled sleep scorer is a key component to the successful operation of any sleep disorders laboratory.

Sleep disorders laboratories have a variety of options for engaging qualified scorers. One route is to employ scoring technicians directly. Employment offers the laboratory a relatively secure workforce and offers the scorer a steady salary and employee benefits.

Another choice is outsourcing the service either locally or abroad. The local contractor may be less expensive but may be more difficult to schedule depending on the contracted scorer's other pursuits.

Yet another choice is the off-site, distant scoring service. These stand-alone companies offer off-site scoring services on a full-time basis. Manual scoring may be available, and most offer Internet connectivity with both the laboratory and the interpreting physician. Some are located offshore to leverage the lower labor cost and communications expense. But the privacy of patient information circulating in an offshore jurisdiction may be a concern. For example, Congress has considered, without passing, legislation restricting offshore transmission of personal health information without the patient's consent. See, eg, The Personal Data Offshoring Protection Act of 2004 (HR 4366) (S 2312).

Experienced technologists have the opportunity to sell their services in any of these settings. Depending on the needs and desires of the technologist, setting up a freelance scoring service out of one's home or small office may be worth a look. Some of the legal issues to consider in setting up a scoring service might include the following:

#### **1. Form of Business Entity**

Because of the relatively high likelihood of personal liability in the health care field, almost every industry participant chooses to do business through a limited liability entity. The corporation and the limited liability company are the most common forms of limited liability entities. Failure to incorporate or organize as one of these entities exposes a scorer's personal assets—such as their house—to the claims of persons injured due to the scorer's negligence or carelessness. Check with your attorney or accountant for which entity makes sense in your personal tax situation or business growth plans.

## **2. Independent Contractor**

Outsourced scorers, acting through their limited liability entity, will likely contract with one or more different sleep laboratories or interpreting physicians on an independent contractor basis. Independent contractors typically invest in their own tools, equipment, and training and control the methods used in performing their services. As such, contracting sleep laboratories or physicians will pay independent contractors as a Form 1099 contractor on a fee for service basis rather than as salaried employees. This means that the independent scorer will be solely responsible for all of their income tax obligations, including self-employment taxes, health and pension benefits, and other worker insurance obligations and plans.

## **3. Insurance**

Unless the scoring entity contracts immunity into its scoring agreements, the entity, as an independent contractor, will likely bear all of the losses falling on the sleep laboratory or physician caused by the scorer's negligent or careless scoring performance. Persons should seek advice from their attorney or insurance agent regarding proper insurance coverage for the scorer and the scoring entity.

## **4. Telemedicine**

Unless the scorer plans to score studies at the sleep laboratory or have a courier deliver manually scored tests, the scorer and the business will be practitioners of telemedicine. Telecommunication, manipulation, and storage of an unknown or unseen patient's digitized sleep study data are the nuts and bolts of off-site sleep scoring. Although many states are beginning to regulate telemedicine, ancillary providers such as sleep scorers are not the direct subject of regulation. It is still a good idea to check your state's rules in this regard to ensure that off-site electronic scoring activities do not interfere with the telemedicine requirements imposed on the scorer's client sleep laboratory or physician.

## **5. State Medical Record Privacy Rules**

Each state has adopted its own statutes and rules safeguarding the privacy of patients' medical records and information. The freelance scorer will need to be familiar with these rules and follow them. If these state laws are more stringent than the federal privacy standards promulgated under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the state rules continue to apply.

## **6. HIPAA Privacy and Security Rules**

All persons who handle patients' health information in electronic form must be familiar with HIPAA's Privacy and Security Rules published at Parts 160, 162, and 164 of Title 45 of the Code of Federal Regulations. These rules create standards for maintaining the privacy and integrity of protected health information (PHI). PHI is individually identifiable health data that is transmitted or maintained in any form and would include sleep test data identifiable to a patient.

Generally, as long as physicians and sleep laboratories submit patient health care invoices electronically, these health care providers are "Covered Entities" under HIPAA. Whether the off-site sleep scorer is a Covered Entity or even a Business Associate of the Covered Entity is not certain under HIPAA's technical definitions. Regardless, any independent contractor providing sleep scoring services is best advised to conform their privacy and security practices consistent with the HIPAA Privacy and Security Rules.

The Privacy Rules require Covered Entities to adopt policies and procedures to safeguard the use, disclosure, and protection of PHI. Covered Entities should ensure that persons handling their PHI disclose only the minimum amount necessary for their specific use of the information. Covered Entities who sell or market PHI without patient consent may be civilly or criminally liable under HIPAA.

Freelance scorers utilizing the Internet should review HIPAA's encryption standards to ensure a minimum level of protection against unauthorized access to PHI. The Security Rules applicable to electronic PHI also call for security management protocols to prevent, detect, contain, and correct security breaches. These range from the simple—such as locking up your computer at night and password-protecting your electronic information—to more elaborate steps such as data back-up plans, disaster recovery plans, and emergency operation mode.

HIPAA does not provide for a private right of action, meaning that a plaintiff's attorney may not sue a Covered Entity for money damages resulting from a HIPAA violation. However, the Department of Health and Human Services' Office of Civil Rights will investigate HIPAA violations and punish Covered Entities for violations. Persons who assist or work with the Covered Entity in the violation may be liable as conspirators or persons aiding and abetting the violation.

## 7. Other Privacy Laws

HIPAA is not the only law penalizing the improper disclosure of PHI. Persons who may not be Covered Entities under HIPAA could still be liable for identity theft for disclosure of PHI for improper purposes. Such persons also could be liable under invasion of privacy or other state law theories.

## 8. Archiving and Retrieval of Data

One important aspect to freelance scoring is sleep study archiving and retrieval. Freelancers should make clear in their arrangements with laboratories and physicians which party is to archive the studies and at whose cost. State law may require retention up to 10 years. Procedures for retrieving archived studies also should be considered.

## 9. Corporate Practice of Medicine

Sleep test scoring does not constitute the practice of medicine requiring state licensure. As such, polysomnographers are free from restrictive licensure laws limiting how physicians may organize their practices. However, if scorers wish to join with physicians for interpretation services, corporate practice laws may interfere with these combinations. If interpretations are to be provided, it may be more appropriate—but less independent—for the scorer to join the distant physician's employ. But telemedicine performed by physicians presents its own array of legal issues, which is a story for another day.

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