

Spencer Busby, APLC, and all others similarly situated v.
BACTES Imaging Solutions, LLC,
Case #2014-30629

FINAL STATEMENT OF DECISION AFTER COURT TRIAL

A Court trial in this case began on November 19, 2019 in Department 66 of the San Diego Superior Court, Judge Kenneth J. Medel presiding. Plaintiff Spencer Busby (hereinafter, "Mr. Busby") was represented by Attorney Robert Waller. Defendant BACTES Imaging Solutions, LLC (hereinafter, "BACTES") was represented by Attorneys Dan Towson and Grace Gower. Plaintiff Mr. Busby appeared for portions of the trial and Mr. Steve Socha was present throughout the trial as a representative of the Defendant BACTES.

Each side had one Motion In Limine and the Court ruled on each. There were also "housekeeping issues" that were discussed with the Court, but resolved amicably between the attorneys.

Class Action Definitions

As this was a class action lawsuit, the attorneys re-articulated the class definition and the stipulated class period. Certification of the class was approved by Court Order on June 22, 2017. Thereafter, the class definition and manner of providing notice was approved by Court Order Dated August 28, 2017. The class is defined as:

"Attorneys, who, from September 11, 2010 to the present, prior to filing an action or the appearance of a defendant in an action, requested medical records from a medical provider located in California pursuant to written authorization, whereby BACTES IMAGING SOLUTIONS provided the medical records on behalf of the medical provider and charged copy fees in excess of the 'reasonable costs' specified in California Evidence Code § 1158."

The parties have stipulated that, for the purpose of the trial, the class period will run between September 11, 2010 and July 31, 2019.

The class consists of 9,691 attorneys and involves 143,234 record requests.

Notice of class certification was provided to the class members via facsimile and direct mailing pursuant to the Court's August 28, 2017 Order.

Opening Statements

Plaintiff Opening Statement: Principle One: The Medical Care provider is not obliged to make copies for an attorney requesting his client's medical records prelitigation under Evidence Code Section 1158. Therefore, Defendant BACTES, as the agent of a medical care provider, would have been in lawful compliance with Evidence Code

Section 1158 by following one of two courses of action. (1) call the requesting Plaintiff's counsel right after receipt of the request for client records, before BACTES does any work to copy the records, and say to the attorney, "if you want us to copy the records for you here is our charge, what do you think?", *even if the charge is above the cost provisions of 1158*. BACTES would have also complied if it would have (2) accessed the medical file and copied it and then contacted the attorney and said, "your records are ready, and you owe us the exact amounts authorized by 1158." Both courses of action would pass muster under the statute.

The delicto here is in receiving the attorney request, not contacting the attorney to give options, then moving ahead to access, download, scan and copy the records---and only *after all of the work is done*, contacting the attorney to figuratively dangle the copied records before the attorney while saying you can buy them from us or have your own service come in." Mr. Waller asserts that as soon as the hospital gets the records it is obliged to "promptly" (subsection B) contact the attorney and let the attorney know that the records are available for inspection and copying by an agent of the attorney's choice---but that never happens. Also subsection D says that the failure to make the records available to the attorney within 5 days after receipt of the request may subject the medical care provider to liability for the cost of enforcing an action to comply under this section. Mr. Waller says that the five-day process never happens. It takes a minimum of two weeks to a month to hear from anybody. And that first contact is from BACTES as follows: "Here is the bill, we have your records".

Defense Opening Statement: Mr. Towson makes the point that both the class certification and the complaint in this case are predicated on an alleged violation of the *cost provision*, and that neither allege nor are predicated on the *timing* provisions. Therefore, the timing provisions are not a part of this case. Plaintiff's Counsel Mr. Waller agrees that the failure to abide by the timing is not the gravamen of the causes of action but may be relevant to the sequencing of the alleged overpricing.

Defense position is that under the conditions specified by BACTES in its fax transmission and offered to the requesting attorney, that BACTES is hired directly and independently by the Attorney as the *attorney's* agent for purposes of copying the records, which arrangement is allowed under the statute. This creates an employment relationship between attorney & BACTES outside of, not governed by, the statute. When asked "what about if you are an agent for both at the same time, a double agent?", Mr. Towson replies: The two agency relationships are separable, divorceable. Once the attorney agrees to the offer, a new contract is made that is outside of 1158. The reason an independent and separable principle-agent relationship can occur is because 1158 does not require the hospital to make the copies. And if an attorney accepts this

proposal, it also gives rise to the Defense of a Voluntary Waiver of a Statutory Benefit – a different side of the coin of the same argument.

1158 pertains to an attorney getting records before a lawsuit is filed and therefore without a subpoena. The Defense highlights that the statutory history of 1158 is a mess, not matching, outdated availability provisions created in 1968. The outdated cost provisions were added in 1978. Even the charge for clerical time, \$16 per hour, is outdated, that was added in 1986. Towson concedes that the outdated nature of the cost provisions will not make a difference on the liability issues, but, as the Court sits in equity on the B & P 17200 claim, the argument may impact damages.

Mr. Towson says that the entire industry operates in this respect as BACTES does. “We will talk about how it is impossible to do work under these cost provisions.” This has become even more problematic with the change to electronic medical records. Mr. Towson discusses the difficulty of the task due to compartmentalization of records, with some records being in a cardiology database, others in a neurology database, and billing records being in yet another database. This makes it difficult to access, locate and screen properly without using an expert.

Towson also describes the scope of BACTES work, including nationwide representatives for hospitals and medical care providers; providing software support, cloud storage, document management, and responding to billable requests for copies.

BACTES arrangement with a client medical care provider involves two contracts; (1) The Service Agreement wherein BACTES agrees to respond to medical record requests at no cost to the medical care provider. This agreement does not *require* BACTES to make copies, and nothing in the agreement prevents BACTES from contracting directly with an attorney). (2) The Business Associate Agreement. This is entered into for the protection of the medical care provider; “BACTES will maintain confidentiality, read authorizations carefully, will have the minimum insurance in the event of a mistake, such as unauthorized release of medical information, providing records for the wrong patient, etc.; will name the medical care provider as an additional insured including express indemnity language---if there is a breach of privacy BACTES is on the hook. The Business Associate Agreement does not prevent BACTES from contracting directly with the attorney.

Mr. Towson describes the history of the FAX cover sheet which signals the attorney that the records are ready and available and makes the offer to the requesting attorney as specified above. The arrangements specified in the FAX cover sheet is the result of prior litigation, namely the two prior Thornburg cases. In 2007 after these cases the entire copy/records industry began approaching the requesting attorneys in this way; seeking the attorney’s approval by independently retaining the company as its agent for

copying the records. If the arrangement outlined by BACTES in the fax is accepted, then the attorney retains BACTES, representing the attorney's ratification of BACTES' prior conduct of accessing, screening, downloading and printing the requested medical records. Importantly, BACTES does not require attorneys to accept the fax or force BACTES to use BACTES services. If the attorney does not want to use BACTES for the copies, BACTES will eat the cost of all they have done to this point, including making the copies. The fax clearly specifies that the attorney still has the right to access and copy the medical records his or herself but would have to deal with the medical care provider directly, if so.

According the BACTES former CEO/Sharecare's SVP of Central Operations, Mr. Socha, the reason BACTES does all the work first and then contacts the attorney later, is to provide the attorney with the precise full and accurate cost of the copies instead of an estimate or guess. If you talk to the attorney first before copying the records, the first question the attorney will ask is how much it will cost? Copying the records first, thus saves time.

Mr. Towson points out that Ms. Nickel, the office manager for Plaintiff Mr. Busby's office, says that Busby's office needs medical records in order to resolve case before litigation, and most cases do resolve before litigation. She will also say, that when the case resolves by a money settlement, Busby takes his medical records costs from the money paid by settlement or judgment. Therefore, neither Mr. Busby himself nor his office suffer any actual loss as it pertains to BACTES cost of processing the medical records; ultimately BACTES costs are borne by the clients. Ironically Mr. Busby and Ms. Nickel still use the BACTES system to obtain pre-litigation client medical records.

Plaintiff's Case

Witness: Tina Nickel: Ms. Nickel has been the office manager and Chief Financial Officer for Spencer Busby, APLC. Plaintiff Mr. Busby is a solo practitioner with a plaintiff law firm handling personal injury cases for the last twenty-four years. Ms. Nickel has a Bachelor of Arts Degree in Business Administration from Point Loma Nazarene College in San Diego. She manages the entire law firm; managing the employees, all aspects of the corporation, monitoring client files, paying client costs and all bills associated with the firm.

Mr. Busby's practice is personal injury on the Plaintiff's side, primarily dealing with automobile accidents. It is a contingency fee practice where the firm fronts costs of litigation later recouped by Busby's firm when settlement or judgment proceeds are obtained. These costs include the cost of obtaining medical records as will be described below.

Ms. Nickel estimates that the firm is reimbursed for 100% of the cost of obtaining medical records in about 70% of the cases. Typically, when a case resolves, the attorney and client will meet to square up allocation of the recovery. During that process Mr. Busby may compromise either his fee or the recouping of costs to make the client happy.

At the outset of the attorney representation, Mr. Busby will have the client identify medical care providers and have the client sign medical record authorization forms for use in obtaining the records from each medical care provider. Once this is accomplished, Ms. Nickel is in charge of obtaining the Medical Records. Ms. Nickel assigns this task to one of the firm's legal assistants. Actual obtaining the records starts with calling the medical care provider to confirm where to send the request, and then sending a written request directly to the medical care provider. The firm never sends a medical record request directly to BACTES.

Busby's firm has used a standardized letter requesting medical records for 15 years, with only minor case-to-case changes during that time. The office sends the letter to a medical care provider to obtain medical records. The letter does not ask for the records to be "made available for inspection and/or copying". Rather, it asks the medical care facility to provide records to Busby's office. Nor does the letter request and identify some outside copy service chosen by Mr. Busby's office, such as Diversified Copy Service, to come to the medical facility to copy the records. The request in the letter is for the copies to be provided to Busby's office.

Routinely the letter requested that the medical records be expedited. Busby's office wanted the records as soon as possible. It says in part, "Please also accept this letter as a request to be placed on your Urgent List." It is important to obtain the medical records rapidly because it moves the case forward apace, hopefully toward a demand for settlement. Without medical records Mr. Busby cannot evaluate the client's claim.

Ex. 18: Standardized letter from Mr. Busby's office requesting Medical Records from the Medical Care Provider, here Vista Community Clinic: Ms. Nickel signs the letter for Mr. Busby. The letter does not reference Evidence Code Section 1158. She understood 1158 allows for the inspection and copying of medical records and limits the cost of charges for the copying of the records. Also, the letter does not identify whether or not, at the time the letter is sent, whether the case is in a pre-litigation stage or sent after a lawsuit has been filed. Along with this letter, Busby's office sent a medical authorization form.

Sometimes billing and medical records are requested with only one letter and authorization, other times it is necessary to send separate requests for billing and then medical records. Ex. 19 is an invoice BACTES sent Busby's office for copying the Vista

Community Clinic billing records. In either event, Busby's office never hears from BACTES after she has sent the Medical Record Request to the Provider and before she receives the BACTES invoice.

The first time she hears anything concerning the request for medical records is when BACTES faxes over the invoice with a fax cover sheet. The invoice has always come with a fax cover sheet. When this occurs, a receptionist at Busby's office picks up the fax sheet and invoice, brings it to Ms. Nickel's office. Ms. Nickel then matches it to a ledger of client requests and pays the invoice. She does not read the fax sheet that accompanies the invoice, nor does she save the fax sheet, but recycles the fax sheet.

Ms. Nickel has previously read and understood the writing on the BACTES fax cover sheet. However, she does not read it every time. When she did read it, she understood that BACTES was representing that BACTES was the on-site copy service of the medical care provider. The fax form identifies Evidence Code Section 1158 and informs the attorney that he or she has options as to obtaining copies of medical records. The form represents that "BACTES is cheaper and our turnaround time is faster." It says that if you hire and retain BACTES you are agreeing to hire BACTES as your agent for the purpose of copying the records. Ms. Nickel is authorized to enter into these kinds of contracts for the Busby law firm.

Exhibit 223 and Exhibit 27 reflect that in the last year Sharecare now has the disclaimer language both on the fax transmission form and the invoice. (Offer of proof: In 2007 Sharecare bought BACTES. In 2017 BACTES was rebranded as Sharecare.) Exhibits 223 and 77 bear language from BACTES to the effect that "BACTES has received your records request". But Ms. Nickel never sent the medical records request to BACTES, she sent it to the medical care providers. Also, when these forms say that BACTES is the onsite medical record management service for the medical care provider, Ms. Nickel understood that to mean that the medical care provider hired BACTES on-site to copy records.

Ex. 20 is the Busby check stub representing the payment for medical record copies requested in Ex. 18 and invoiced by BACTES in Ex. 19. When Ms. Nickel receives the invoice and is ready to pay it, she will cut along the dotted line and send in the bottom third of the invoice with check payment. In sending out checks to BACTES to pay for copies of the medical records, Ms. Nickel never understood that Busby was hiring BACTES as Busby's representative for the purpose of making copies.

Ex. 16 is the BACTES invoice related to the Vista Community Clinic medical records corresponding to the billing records requested in Ex. 18. Exhibit 21 is the BACTES invoice for the medical records reflecting a charge of \$44.68 for processing 16 pages. Upon receipt of the invoice is the first time Busby's office will become aware of the

charges for copying; before receipt of the invoice, there is no communication from BACTES providing pricing or cost information. Ms. Nickel notes that the original request for medical records occurred on December 13, 2013 and BACTES faxed its invoice on January 23, 2013. Ms. Nickel did not hear anything from either the medical care provider or BACTES during that period of time. Ex 22 is the check stub for \$49.33 reflecting payment. When she makes this payment, she does not understand that she is hiring BACTES to do the copying for her office in response to her request for medical records.

Ex. 24 was a December 13, 2013 medical records request from Busby to Graybill Medical Group, Ex. 25 is the corresponding December 27, 2013 invoice from BACTES charging \$44.88 for six copied pages. The medical records request is always sent to the medical care provider. Before receiving the invoice, she does not hear from either the medical care provider or BACTES concerning the request. The first time she hears anything concerning her medical records request is when she receives the bill. When she made the payment on the invoice, she did not have an understanding that she was hiring BACTES to do your copying for you per your records request.

Sometimes after receiving an initial fax transmission and invoice from BACTES, BACTES will re-fax the invoice at intervals of two, four, and six weeks. Upon receipt of an invoice, Ms. Nickel has in her mind paying the invoice quickly. The turn-around time from the time she receives the invoice to the time she pays the invoice varies depending on what she is doing in the office at the time, given the firm's 600 clients. But an average turnaround time is two weeks to a month. An example of turnaround time is the Exhibit 18 request, dated December 13, 2013, corresponding to a BACTES invoice dated December 23 and received in Busby's office on December 24, 2013 per Exhibit 19. Exhibit 20 is the check stub that reflects Busby's office sent payment on March 7, 2014. The turnaround time from receipt of invoice to payment was six weeks or one and one half months.

Ex 227 is an August 2002 letter from Busby's office to BACTES complaining about the exorbitant pricing for copies having to do with UC San Diego Medical Center. [Letter is outside the class definition but let in for state of mind]. This is the only writing Busby's office has complaining about the cost of BACTES services. The letter refers directly to EC 1158. Since this letter she has complained over the telephone a couple times to BACTES about the copies being too expensive. She remembers a two to three-page copy cost \$40-50. BACTES simply responded, "those are our charges; if you want the copies you have to pay the cost." On cross examination, Ms. Nickel confirmed that she testified at deposition that she has had only one conversation with BACTES in the last ten years where she discussed the cost of medical records.

After this, Ms. Nickel directed her legal assistants to contact the medical care provider directly to ask them if Busby could use their own outside copy service to make copies. The legal assistants reported back that the medical care provider said they had contacted with BACTES and that Busby's office could not use outside sources. [Hearsay objection overruled, but let in only for Busby's state of mind as to why not solicit outside copy services.] This is why Busby's office did not go to an outside source to make the copies. Because of this, Ms. Nickel always pays the BACTES invoices, because she cannot get the records otherwise.

Ex 27 is a Busby January 17, 2014 request for Menifee Valley Medical Records. Ex 29 is BACTES February 24, 2014 invoice ten pages \$44.88 that Busby paid for as evidenced by Ex. 30 is the check stub. After request sent, Busby's office never heard back promptly that records were available for inspection and copying until receiving invoice. Didn't hear from BACTES about any options available for obtaining medical records. Didn't get any information from BACTES regarding, here is what we charge during that time. In fact, didn't hear from medical care provider or BACTES at all during that time.

Although Ms. Nickel through her legal assistants have reached out to a medical provider to find out if an outside copy service can be employed and the assistants were told BACTES was the only copy service, she has never asked BACTES *after* receiving the invoice whether an outside copy service could be used. She didn't do so, because of those prior experiences where she was informed that the medical care provider had contracted with BACTES to be the copy service. We understood we had no other option.

In fact, Busby's office did have a "go-to" copy service used for Busby's office needs; this was Diversified Legal Services that has now converted to Nationwide. Busby's office has reached out to Nationwide to make medical record copies, but Nationwide then told Ms. Nickel that the medical care provider said that they had contracted with BACTES and that Nationwide would have to contact BACTES to arrange for the records. Ms. Nickel figured that this would essentially be hiring two copy services. We didn't want to do that.

In subsequent efforts when Ms. Nickel tried to enlist Nationwide to get records directly from the medical care provider, the medical provider reaffirmed to Nationwide that it would have to go to BACTES to get the records. Ms. Nickel's concern about this arrangement was being double charged.

Ex 31 Busby Request for medical records and itemized billings from Center for Family Health. Letter illustrates that sometimes Busby's office asks for the entire medical record from a facility, and sometimes the request is limited to discreet dates of treatment. EX 33 is the BACTES invoice 88 pages for \$57.50. Second item says pages 31

to 100, 58 pages at 50 cents apiece. Ex 34 is the Busby check stub reflecting payment. Nickel paid this because it has been in her experience in dealing with the various medical care providers that without doing so Busby's office would not get the records--- that we can't get a copy service to do it.

Ms. Nickel testifies in summary, based on her experience, after sending a request for records and an authorization to a medical care provider, she has never received a communication from the medical care provider saying that the records are available for inspection and copying. Nor has she received any such communication from BACTES saying records are ready for you to inspect and copy or for your copy service to do so. Granting some extra time to the "promptly" and five-day standards, she has never received such a communication even within two weeks of sending the request and authorization that records were available for Busby's inspection and copying or an outside service to copy. The first time there is a response to the medical records request to the medical care provider is when BACTES sends the invoice and fax sheet through a fax transmission. (Ms. Nickel points out that BACTES name has changed to Sharecare, and that all these same statements and principles apply).

It has always been the case that BACTES sends paper copies of the medical records.

There has been a change recently as to Sharecare. "Just this week we received copies of medical records from Sharecare with the invoice on the top. I had never before actually received the copies without having paid the invoice first."

On cross examination, Ms. Nickel indicated that in 2010 she contacted UC San Diego Medical Center to get medical records and UCSD told her she need to use BACTES. But BACTES didn't tell her that, it was the medical care provider that told her that.

Mr. Towson asked Ms. Nickel whether she or Mr. Busby have paid trial counsel any fees for their service. The Court sustained Plaintiff's objection as to attorney-client privilege, but only after the parties stipulated that neither Plaintiff nor Defendant will introduce any evidence of what Plaintiff has paid his attorneys and that Plaintiff is not making a claim for damages consisting of attorney's fees, only overages in the cost of medical records.

On cross Ms. Nickel testified that Mr. Busby's office will continue to request medical records even after the lawsuit has been filed using the above-described request letter with a client/patient authorization. The letter is not revised to reflect that a lawsuit has been filed.

On redirect, Ms. Nickel testified that 89% of Busby's 600 cases settle before a lawsuit is filed with the Court. By far the majority of medical record requests are pre-litigation.

Of the cases that are actually in litigation, 11% of the total, or 30-40 cases, 50% necessitate additional records requests.

Alicia Raygoza: Ms. Raygoza worked with Nationwide Legal beginning in October 2017 for two years as a customer service representative in the reprographics department. Her duties included calling locations to see if records were ready for Nationwide to send a field representative to copy or pick up, or to determine whether the provider was ready to either fax or mail the records to Nationwide.

On one occasion, Adrianna from Mr. Busby's office contacted Ms. Raygoza asking Nationwide to retrieve medical records from UCI Medical Center pursuant to a subpoena for records Mr. Busby's office sent to UCI. In demonstrative Ex. 109, an e-mail, Adrianna, asked Nationwide for a status on the records. As a consequence of this conversation, Ms. Raygoza reached out to UC Irvine Medical Center records department to try to obtain the records. UC Irvine Medical Center did not give Ms. Raygoza (Nationwide) permission to copy the records requested because UCI used Sharecare for this purpose. Nationwide would have to go through Sharecare to get the records. Nationwide never did get the records.

Stephen Socha: Since March 2003, Mr. Socha has worked with BACTES which later became Sharecare. He started as the General Manager and in 2010 became Chief Operation Officer. He is currently Senior Vice President of Central Operations. As SVP Central Operations and in his current position he has overseen quality control, company compliance and customer service.

One of BACTES/Sharecare's primary tasks is to handle Release of Information Requests (ROIs), including requests for patient records accompanied by a patient authorization/release from attorneys. In so doing, BACTES does not attempt to determine whether the attorney request is occurring before a lawsuit has been filed or after. Mr. Socha is familiar with Evidence Code Section 1158 which addresses attorneys' requests for client medical records. He has had training in Section 1158 and has read it more times that he would like to count.

In May 2016 BACTES had a website, Exhibit 69, that represented that for over 23 years, BACTES has been a trusted partner for practices and clinical groups and hospitals nationwide. The website portrayed BACTES as a leader in providing secure electronic exchange, delivery and integration of protected health information to thousands of health-care providers across the United States. In so many words, the website reassures medical care providers (hospitals, doctors, medical offices) that BACTES will take care of all of the medical record requests that a medical care provider receives so that the provider does not need to worry about ROIs and can concentrate on taking care of patients.

BACTES also will work with the medical care provider to facilitate the scanning of information into the facilities electronic medical record, Exhibit 70. BACTES offers the medical facility the ability to have BACTES access a facilities electronic medical record remotely for the purpose of responding to ROIs. This includes addressing attorneys' requests for clients' medical records, Exhibit 71. BACTES also offered mobile services, where BACTES would arrive at a medical facility to provide release of information services.

Mr. Socha's responsibility for quality control encompasses overseeing the Production Group at BACTES; the group that handles all medical record requests from the point the request comes to BACTES to the point that BACTES sends the records out to the requesters. Quality control means ensuring that BACTES is sending out the right records for the right patient with the proper release responsive to the request. BACTES has an extensive field organization to acquire medical records from medical facilities, some at the facility, some at BACTES service centers doing work remotely. Three fourths of the workers are outside of San Diego.

Mr. Socha understands that Evidence Code Section 1158 sets forth amounts that a medical care facility can charge when the medical care facility copies medical records at the request of an attorney. BACTES employees who handle medical record requests are trained on Section 1158. In many cases BACTES contracts with medical care facilities to handle all of their requests for medical records. But, there are situations where the release of information will be done by the facilities themselves.

There are different arrangements BACTES has with different medical care providers, with some providers having a BACTES representative on the caregiver's site, sometimes five days per week, and at other times the BACTES representative visiting on a regular basis. For the representatives onsite, they simply process the medical records at that location. Finally, the BACTES representative may work remotely through a secure electronic connection with the medical care facility. In that instance the medical care facility hands over the attorney request for records to BACTES.

The reality is that BACTES never receives the medical record requests directly from the attorney. BACTES representatives receive and review the attorney request letter either by the provider handing it over to or faxing the request to BACTES or by BACTES accessing the request already scanned into the facility's electronic record.

Upon receipt of the request the first thing BACTES does is to make sure that it is HIPAA compliant, including ensuring that the person who made the request had the authority to do so and that the client authorization/release is proper. There are times when a request is handed back to a client, or BACTES sends the requesting attorney a deficiency notice.

How BACTES gets the records depends on whether the records are either paper or electronic. If the records are paper, then the facility will either pull the chart for BACTES to copy or BACTES has access to the file room itself to pull the chart. BACTES then takes the paper records and scans them into a digital file. BACTES calls this process "abstracting".

If the facility keeps an electronic record, then the BACTES field representatives have the credentials to directly enter the facilities electronic database and abstract the records directly. It is rare for the facilities to copy the records themselves and just hand them over to BACTES. In fact, under BACTES agreement with the facility, BACTES is the one who does the copying.

As to the service contracts or agreement for services BACTES main role is to provide those release of information services to the medical care provider. BACTES works with the hospitals and clinics to provide those release of information services to those facilities. He quibbles that in not all cases do the services includes fulfilling the records request and giving out copies to the requester; but at deposition he agreed "generally our main role is release of information, so we do work on behalf of hospitals and individual doctor's offices to respond to requests for medical records. And that would include fulfilling the request by giving out copies of the requested medical records."

Demonstrative Exhibit 15 was the list of 280 medical facilities in California that have contracted with BACTES for medical records and release of information services. There are service agreements with each one of those facilities. Exhibit 3 another demonstrative was the service agreement between BACTES and Vista Community Clinic. In that agreement Vista Community services agrees to use BACTES exclusively for release of information for all sites. BACTES preferred to have "exclusive" arrangements for these services with the medical provider. Exhibit 2 (demonstrative) is an agreement for services with Valley Health is similar. Every one of those agreements requires BACTES to respond to a medical record request and to provide copies to the requester if the requester "chooses to hire us". Exhibits 74 (Huntington Hospital, 93 (Sharp Rees-Stealy), 81, 82 (El Centro Regional Medical Center), 103 (San Ysidro Health) are all similar service contracts with BACTES.

In looking at Exhibit 2, agreement with Valley Health Systems, the first couple of pages are the agreement for copying medical records. The third page is the business associate agreement. And the last page is the addendum to the agreement. The addendum usually spells out the multiple locations where the contract applies for a specific health care provider. Another example of multi-location provider was Sharp Rees-Stealy Medical Group ex. 213 where the addendum spells out the locations, similar to the multiple locations identified for El Centro Regional Medical Center Ex. 82.

In Exhibit 82 there is a page that identifies charges. For the “per page fee” there is no charge to the Medical facility. When BACTES bills the requester for the cost of the copies, BACTES keeps all of that money. There is no revenue sharing with the medical care provider. Throughout the class period here, this was BACTES arrangement; it kept all the fees collected from the requesting attorneys, and did not share those moneys with the medical care provider. And BACTES did not charge the Medical Care providers a fee.

There have been times when a medical care provider has asked BACTES to do services at a location not listed in the agreement. When that occurred, BACTES required that the location be added to the contract.

Mr. Socha is familiar with HIPAA governing use and access to patient information, and the business associate agreements that cover HIPAA. BACTES has executes business associate agreements with each of its facilities to provide ROI services. BACTES is not required to have a Business Associate Agreement that covers HIPAA. It is the medical services provider that is required to have the agreement in order to share the protected health information with others. BACTES business associate agreement exists to protect the medical care provider. Generally, BACTES would not be allowed to access a patient medical chart without the BAA in place. Socha is not aware of BACTES providing these services without a Business Associate Agreement in place, because it is required. Everything BACTES does has to run through a HIPAA filter.

THE BAA is required so that the patient can't come into the facility and say, “you can't give my records to BACTES.” BACTES is able to access the records of its medical care facilities because of the business associate agreements. And it is able to copy the records and provide them to the requester by virtue of the business associate agreement with the medical care provider.

Ex. 12: BACTES QC workflow SDSC processed only, another demonstrative. QC stands for quality control. SDSC stands for San Diego Service Center on Clairemont Mesa Boulevard. This outlines the process BACTES follows to ensure it is following HIPAA, and only releasing the appropriate records requested. Process described as follows

“Step 1: Verify the request, verified request and chart”. After BACTES rep is given the authorization & release, the rep verifies that the request and the chart are for the same patient. At this stage, with authorization & release in hand, BACTES *does not* contact the requesting attorney to let the attorney know that the records are available for inspection or copying. A. “Why would we?” “Q: Why wouldn't you?” Socha is familiar with Evidence Code 1158. When BACTES gets the release and authorization, BACTES makes copies of the records and makes them aware that the records are copied and available, and then offers BACTES services.

Before copying records, preparing invoices, or any other step, the medical facility hands the release to BACTES who then verifies the release is HIPAA Compliant and that the records match the release. But at and before that point, BACTES does nothing to reach out to the requesting lawyer to let him/her know that the records are available for inspection or copying by either the lawyer or the copy service of the lawyer's choice.

Socha can't say for sure whether BACTES receives the authorization from the medical provider within a day or two from when they arrive at the medical facility. He would expect that BACTES would get them soon after the medical care provider receives them, but that's not always the case. If BACTES has a representative onsite of a medical facility 5 days a week, BACTES would expect to receive the medical authorization and release immediately after it came into the facility. But with release in BACTES hand, it does nothing to contact the requesting attorney.

"Step 2: View the request for HIPAA compliance, check authorization for (and there are six steps under that)" "Review the request for HIPAA" compliance" making sure the attorney's request and the authorization comply with HIPAA. BACTES employees are trained in HIPAA. If there is a HIPAA problem, like the name on the authorization does not match the name on the records, sometimes the medical facility will want to handle contacting the attorney to resolve the discrepancy, and there are times when BACTES will handle it by either fax or e-mail or otherwise contacting the requestor. Under Step 2 item 4, it may be that the purpose for the medical records request is unclear---depending on the facility, BACTES may ("it's possible") send the requesting attorney a notification about this problem; "you didn't tell us the purpose of the records request". Some locations have a form checklist identifying the deficiency for this purpose that is sent to the requesting lawyer.

"Step 3: Scan or import the records into the BACTES system". Step 3 may have to be repeated on multiple systems by the time it is completed. Once BACTES has all of the records pertinent to the attorney's request, the records are transmitted to the San Diego Office where they are ingested into the BACTES database. Then the records go through a data entry step where BACTES checks the records again to make sure the request and records are HIPAA compliant—that the records match the request.

"Step 5: Invoice is created." At the end, BACTES adds any other information necessary for proper billing and creates the invoice if the records are to be invoiced. Once the records are copied or scanned or abstracted the number of pages copied is identified. Part of the process, specifically stated in Step 5, is to verify that invoicing of the records is according to state statutes, national agreements, and/or other applicable guidelines.

It is not BACTES general practice to bill attorneys the rates specified in EC 1158, namely \$4 per quarter hour, 10 cents per page, for records requested in California. Depo

question: "Does BACTES ever bill an attorney rates that fall in what is specified in EC 1158? Ever?" A. "Ever is pretty broad. But generally I would say no". No matter what state or locality the requester is from, if the request California records all are charged the same.

The steps articulated above are followed with all requests any authorization and release obtained from a contracting medical care provider.

Ex. 14 (also 223): This is the fax cover sheet that represents the first contact BACTES has with the requesting attorney. During all of the steps articulated in Ex. 12 (quality control steps) at no point does BACTES contact the requesting lawyer and say "we have your records, we have counted the pages, we have abstracted them, if you want to hire us, go ahead but the records are available for you inspection or copying by your or the copy service of your choice other than BACTES." That is done first with the fax coversheet that represents EX. 14. By the time BACTES sends the fax cover sheet to the requesting attorney, BACTES already has the requested records; downloaded, copied, abstracted, whatever was necessary to make the records available to the requesting attorney. The same would apply no matter what state the requesting attorney was from.

BACTES does not make the requested records available for inspection and/or copying for an attorney or his/her representative within five days after BACTES received the request from the medical care provider. That would only happen if the attorney actually requested it.

Ex. 13 demonstrative: Confidential California Fee Schedule: When BACTES sends the fax to the requestor it does not send Ex. 13. It is confidential. BACTES does not send information to the requesting attorney that outlines the charges if the attorney wants to hire BACTES, such as "20 pages or less is flat fee of \$44.88; 30 pages \$57 plus postage", it just send an actual invoice with total cost of copying. At no point in the Ex 12 quality control process, starting with receipt of the authorization, does BACTES send a notification to the requesting attorney, "we don't know exactly how many pages will be copied, but if you want to hire BACTES, here is what it will we will charge."

Using EX 24 standard letter Busby's office uses to request medical records, in this case to Graybill. Nothing in this letter from Busby identifies BACTES as Busby's photocopy agent. In fact, it does not identify any entity as the photocopying agent. BACTES would routinely receive a letter like this with the authorization. When BACTES receives a letter like this BACTES does not call or otherwise communicate to the requesting attorney, "you didn't identify your copy service; BACTES is available, would you like BACTES to do it?" Usually, before BACTES sends out the faxed invoice, it does not have any letter or other communication from the requesting attorney

identifying that the attorney seeks to use BACTES. True also re the patient; nothing where patient says, "I want to use BACTES to copy my records."

There is really never a situation where the lawyer's request for medical records to the medical provider says, "oh by the way, I want BACTES to be my copy service." That doesn't happen when a patient requests records either. So, the only reason BACTES gets an authorization is because it has a contract with the medical care provider to respond to the release request. Legally this can only happen when BACTES has a business associate agreement with the medical care provider. If that agreement did not exist, it would possibly be a HIPAA violation for the Hospital to give BACTES permission for access to the records.

BACTES bills medical records and billing records separately. For medical records less than 30 pages the charge is \$44.88. For billing records there is a location-based processing fee of \$24 and a ten cents per page fee. The amount of the processing fee was established to meet BACTES business needs---they have to pay their employees. The charges are different because in most medical care facilities the billing records and the medical records are not in the same system; often not in the same building; they are handled by different groups; completely separate activities. Looking at Ex 24 Busby's request for records from Graybill, he seeks both medical and billing records; BACTES would send Busby two bills.

Before the fax cover sheet is sent to the requesting attorney, BACTES does not reach out to the attorney to advise "you have options; you can use us or you can have some other copy service copy the records."

Mr. Socha's testimony was interrupted by other witnesses but resumed later as follows.

Mr. Waller's EC 776 cross-examination: If there is a problem with the request from the attorney, that is, some deficiency, many facilities have BACTES contact the attorney, but it depends on the facility.

Ex. 135: BACTES checklist for complying with HIPAA and state law on these requests: It represents the things the BACTES representative must do and then check off upon receipt of an attorney medical records request to be HIPAA and state compliant. For example, there is one check mark on the list to make sure that the attorney indicates the reason why he or she is requesting records. If not, the BACTES employee will contact the attorney and tell the attorney to forward the missing information directly to the medical facility, not to BACTES.

If a BACTES representative contacts a lawyer to discuss a deficiency in the request, BACTES does not at that time say, "our medical records will be or are available for inspection and copying, we will copy them for you as your agent, unless you would like

to your own representative to copy them.” That’s because, the lawyer is already requesting records under Evidence Code Section 1158; we would expect the lawyer to know the options under 1158. The reason that is said when the fax cover sheet is sent out is as a reminder and because of a previous lawsuit.

If the BACTES rep contacted the attorney about a deficiency in the request, the rep would not tell the attorney, “by the way, here is what BACTES charges for copying the records”. That’s because BACTES hasn’t done the work yet and does not yet know what it will charge for this request. By the time, the fax sheet is sent out to the attorney, BACTES has done the work and knows the cost exactly.

Direct Examination: BACTES provides these additional services: online records storage to share access with other business associates or payors or others; audit services, one of the biggest growing areas, including payor audits and quality audits which can overwhelm a client coming in with hundreds of records at a time. Providing copies is only one aspect of the Request for Information Services.

BACTES is located on Clairemont Mesa Boulevard in San Diego with employees also working remotely. BACTES is a national company working in 44 states with their biggest competitors being CIOX, MRO, and Verisma. By far CIOX is the largest provider, but BACTES has good representation in certain areas including California; it tends to be regional.

BACTES handles many requests for medical records; some from patients wanting their own records, some from doctor wanting another doctor’s records. And then there are billable requests usually covered under state statutes that are attorney requests, subpoenas, insurance requests, disability, APS or attending physician requests. Attorneys requests are just one type of the many requests.

As former COO and now senior Vice President, he is familiar with the contracts BACTES enters into with medical care providers. The service agreement requires BACTES to respond to attorneys’ requests for medical records. But it does not require that BACTES create and generate copies on behalf of a provider in response to an attorney request. Nor does the agreement prohibit BACTES from contracting directly with the requesting attorney for the attorney to hire BACTES as his or her agent for the purpose of copying records.

The purpose of the Business Associate Agreement is to protect the patients’ privacy, but also to protect the covered entity or client, be it a hospital or clinic, so that the client is covered in sharing medical information with a business associate, namely BACTES. In short the Business Associate Agreement protects the patient and the client.

For example, it would violate HIPAA and patient privacy if the client were to hand over medical information to a third party without having the BAA. Also, in the BAA is an indemnification clause which further protects the client, by BACTES accepting legal responsibility if BACTES inadvertently or accidentally discloses patient information. The agreement also requires BACTES to have a certain amount of liability insurance, cyber protection, various types of coverage and umbrella policies. BACTES is required to have a minimum amount of insurance in the event of breach of confidential information and to name the medical care provider as an additional insured.

There is nothing in the Business Associate Agreement that requires BACTES to generate copies to an attorney pursuant to an attorney request. There is nothing in the agreement that forbids BACTES from contracting directly with the attorney to make copies of the record. The primary purpose of the BAA is to ensure that BACTES follows HIPAA by protecting the patient information and to cover the client by ensuring there is a contract in place designed to follow HIPAA.

As to the Service Agreement, BACTES is required to respond to billable requests made to the medical care provider at no cost to the medical care provider. The service agreement doesn't require BACTES to generate and create copies in response to an attorney request. It only requires BACTES to deal with the request in some way and there are options to do so, such as allowing the attorneys own service do it.

The industry standard is that medical care providers do not expect to pay ROI vendors to respond to billable requests. BACTES competitors work on the same business model where client medical care providers do not have to pay the copy service. The standard within this industry is that ROI vendors will respond to attorneys' requests for copies by seeking the consent of the requesting attorney to become the agent. He knows this as BACTES is a member of a trade association called AHIOS, the Association of Health Information Outsourcing Services. BACTES also confers with other services that do similar activities in California. As a former COO and Vice President, you need to know what your competitors are doing.

The reason that BACTES does not charge the rates specified in EC 1158 to process attorney requests is because it would not be economically feasible. The per page rate in EC 1158 was set in 1978 and the labor rate in 1986. The labor rates are going up one dollar a year right now. We would not be able to pay our employees. BACTES does not pay its employees minimum wage, and it provides benefits to its employees.

Why not have an agreement with the client medical care provider to bill the attorney a reasonable rate, but then back charge the medical care provider \$25 per copy request? The problem is that the medical care providers do not have a budget for this. BACTES would lose clients if this was BACTES policy. The standard in the community is that

BACTES provides this service to its medical care providers at no charge and that this is the expectation of the medical care providers.

Ex. 12 is the BACTES workflow chart on how to process these attorney medical record requests.

The shift to electronic medical records has made it more difficult and a slower process for BACTES. First, many providers went to an electronic system, but subsequently didn't like that system and moved on to a second, third system or more. One facility had a dozen different electronic systems where medical records were stored. Second, there are still hybrid systems, combining a mixture of electronic and paper records. It is also much easier to see and read a paper chart versus an electronic chart. Third, when medical records were all paper there were trained professional persons from the medical facility who understood how to keep a medical file in shape. When the medical records went electronic, the facilities hired people who did not always properly scan records into their system. The number of misfiled records went up when the conversion to electronic occurred. Productivity, the time to produce a record, was cut in half with electronic records. For these reasons, electronic medical records have also made it more difficult for BACTES to do its work concerning HIPAA and patient privacy.

BACTES quality control function, screening the records carefully, takes time. There are various concerns including making sure every page belongs to the patient; that the record is responsive to the request; the existence of sensitive information in the record that could only be released with a special authorization like HIV results, alcohol or drug abuse, or behavioral issues. If records are produced that are not HIPAA compliant, there would be a HIPAA violation that would subject BACTES to the "walk of shame" requiring an admission to the client, impairing relations with the client. A violation could escalate to the case being referred to the Office for Civil Rights which can issue fines.

Exhibit 14 & 223: As a result of the Thornburg case, around 2006/2007 BACTES started using fax transmission sheets to attorneys to signal that copies were made. There are two purposes to the fax sheet: One is to remind the attorney that he or she does have options under Evidence Code Section 1158. Second is for BACTES to make an offer for the attorney to employ BACTES as his/her copy service for that record.

Mr. Socha has seen thousands of attorney request letters and Exhibit 1 from Mr. Busby's office is typical. The typical letter says, "please generate and give me copies". The typical letter does not identify whether a lawsuit has been filed. When BACTES gets the request from the medical care provider, BACTES does not contact the medical care provider to let it know that it now has the request. But BACTES does begin to gather

records at that point, for the purpose of BACTES to figure out what BACTES would charge.

The medical care provider is not required to make copies of the records for the attorney. At the point of BACTES receiving the medical records request, BACTES does not contact the requesting attorney because it would take more time and actually slow down the process. BACTES would not yet know what the final page count was and what it was charging. BACTES wouldn't be able to answer the attorney's first question, "how much will this cost?"

Before sending the fax sheet, BACTES does not contact the requesting attorney to discuss what the attorney's options are under EC 1158. BACTES assumes the attorney requested the records under EC 1158 and therefore understands what his or her options are under the statute. The most efficient practice is to let them know of the copies and make the offer at the time of sending the invoice.

If an attorney receives the invoice and does not pay, the request would stay open for 60 days, and then BACTES would cancel it. If the attorney decided to come back any time before 6 months expired, BACTES would still be able to fulfill the copy request. If ultimately the attorney does not pay for the request, then BACTES would absorb it.

If there is no response by the attorney after the initial invoice is sent, then BACTES sends it out again periodically at two, four and eight weeks. Sometimes attorneys are trying to settle their case without incurring the expense of the medical records, so they may wait months before responding to BACTES, perhaps indicating they may need the records for a hearing. BACTES will receive a payment.

BACTES never requires attorney to use BACTES services. If an attorney says "no" to an invoice BACTES has sent, BACTES cancels the request and point them back to the medical facility to handle at that point. BACTES does not manage, supervise or control its medical care providers health information departments; BACTES is an independent contractor to its client medical care providers. Nor does BACTES establish or set policy, or advise its client medical care providers regarding their health information management policies and procedures.

There are occasions, several times a month, when attorney will respond to the invoice and complain about it. In that instance, BACTES and the attorney will negotiate a compromise. In California, BACTES handles about two thousand of this kind of attorney's request per month. It is not that common for an attorney to dispute the invoice or arrangement BACTES offers. BACTES only gets about one complaint per month; it is uncommon.

In the fax cover sheet, BACTES represents that its services are cheaper than outside services. Mr. Socha believes that this is true. The original rates were set by the company founder and his partner who were principals at attorney services. They were all well aware of the competitive rates. BACTES does not charge mileage to respond.

In Mr. Socha's experience, BACTES has never been contacted by an attorney requesting to use its own copy service as part of an attorney request. He is not aware of client medical care providers who have received such requests. If an attorney does not want to retain BACTES per the fax offer, there are various options depending on the medical care facility. The attorney can hire an outside service to go to the facility and copy records on his/her behalf. A rare circumstance is that the facility allows the lawyer to become an associate and come into the facility to copy the records.

If the records are electronic and BACTES is not selected as the copy service, and if the outside copy service is not a "business associate" of the provider, then the medical care provider would have to go into the system and pull the records and do the abstracting itself and follow the guidelines. Mr. Socha has seen situations where medical providers have done this. The medical care provider can have the outside service become a business associate.

When this occurs, once in a while, the medical care provider will contact BACTES and say, "no, you (BACTES) need to generate and create hard copies of these records on our behalf. In that situation, BACTES would bill according to the EC 1158 rate because it is the medical care provider that is instructing BACTES on its behalf to make the records available. Mr. Socha understands that under EC 1158 that medical care providers are required to cooperate with outside copying services.

After hearing the testimony of Mr. Rodriguez (from San Ysidro Health) and Ms. Ofeciar (from Orthopedic Specialists of North County), see below, Mr. Socha is concerned that they are not following the law. If an attorney said "I don't want BACTES to do the copying" and the medical care provider refused to cooperate with the attorney, BACTES would tell the provider that you have to cooperate, check with your legal or risk management team.

The Court inquires of Mr. Socha: Where did some of the witnesses who were medical record employees for BACTES clients, get the idea that "our exclusive contract with BACTES forbids us from allowing an outside copy service to respond to an attorney request"? BACTES does not train the client's medical records employees. Socha does not know where these witness client employees may have received that information. They were not people who signed the agreement.

When BACTES meets with clients, usually the H.I.M. manager or higher, to set up these agreements, we discuss how BACTES will respond to all of these requests. Some

facilities are more sophisticated than others. But like any other business there is lots of turnover. Mr. Socha does not know how the information about the relationship with BACTES is passed from one group of employees to another. There is no written or verbal communication from BACTES to the medical care provider that "Thou shalt only use us!" This is true even if an alternate request is made under 1158 for an alternate copy service.

BACTES expects that all of BACTES client medical care providers are obligated to understand the laws that deal with responding to record requests in California. BACTES does not provide education on this subject to its clients. But if BACTES hears something that suggests the client is handling a situation incorrectly we will tell them we feel this is incorrect and recommend they advise their legal or risk department.

Mr. Socha read Tina Nickel's (office manager for Plaintiff Busby) deposition and heard her testimony; in particular the one time in 2010 she contacted UCSD Medical Center and asked to use an outside copy service and that UCSD told her to use BACTES. But in 2010 BACTES was not the copy service for UCSD Medical Center. UCSD was a client when Mr. Socha first started, but BACTES lost that account in 2005 and this was before BACTES started using the fax cover sheet.

Also, Ms. Nickel testified that recently the medical records simply arrived from Sharecare at her office with an invoice---different from the BACTES practice of sending a fax transmission, invoice, and offering that BACTES become an agent to the lawyer before records are sent. Mr. Socha comments that what Ms. Nickel described is not Sharecare's new practice. Upon hearing that testimony Mr. Socha texted the office and said "we have to fix that!" Mr. Socha's director could not find such an order to Mr. Busby's office that occurred over the last week, but Mr. Socha sought to investigate further. This has in fact happened in the past by human error. BACTES would credit the invoice and there would be no charge for that record.

Other than this lawsuit, Mr. Socha has never been aware of Spencer Busby's office contacting BACTES to complain about its rates.

Ex. 227: Letter sent August 28, 2002. The letter contests certain Invoices that BACTES sent. Mr. Socha only saw this in reviewing for this case, but not as part of his business. As of 2002, BACTES was not using the fax cover sheet. From this letter, Mr. Socha can say that this invoice for "Diana Doe" would represent the 82nd invoice; that it was sent on April 4, 2002; that it complained about invoices sent in January, February and April (the first three); one bill was prepaid and the other were not paid.

The timing issue in fulfilling attorney requests: The attorney mails or faxes the medical record request directly to the medical care provider. BACTES has no control over how quickly the medical provider receives the request and then turns it around and provides

it to BACTES to fulfill. The time it takes for a medical care provider to get a request and turn it over to BACTES can vary from the same day to weeks later, unfortunately. The delays may be occasioned by the providers' internal processes or any other reason it might be delayed by its team. BACTES has no control over how the medical care provider handles the request; doesn't set their policies or practices.

Mr. Socha gives an example of a substantial delay in BACTES getting a request from a provider. Many years ago a facility had a mail room employee who went on vacation. Until he or she returned no one opened the mail, so no requests were processed for two weeks.

As to the timing of BACTES turnaround from receiving the request to send out the fax transmission to the attorney there are two parts. First the part where the BACTES representative goes to the remote site in the field to abstract the records the expectation is that this would be accomplished within 48 hours of BACTES receiving the request. The request comes to BACTES San Diego system, the data entry is accomplished, and then the invoice is created which would take another 24 to 48 hours. So adding the two parts together the outside time of turnaround, from receipt of the request to sending the invoice to the requesting attorney, is anywhere from three to five business days. BACTES has incentive to move quickly; the sooner BACTES get them out, the more of them get paid and the sooner BACTES gets paid.

Re-cross examination: On the issue of "exclusivity" Exhibit 3 an Agreement for Service: First Full Paragraph: "Customer agrees to use BACTES exclusively for release of information for all sites outlined in Exhibit A during the term of the agreement or any renewal periods." Mr. Waller asks the witness if perhaps this is where some of the client witnesses got the idea that they had to use BACTES on attorney record requests and could not permit an outside service to copy records. Mr. Socha responds that this provision pertains only to being a "release of information provider" which is different than a "copy service". The terms are used interchangeably but they are not the same.

The release of information provider is fully exposed to be a HIPAA business associate. This verbiage refers to BACTES being the exclusive on-site HIPAA business associate. A "copy service" is not held to HIPAA and therefore would represent a different job compared to what BACTES does. True BACTES can act as a copy service, but being a release of information provider is BACTES primary job as a HIPAA associate of our clients.

Court poses a paraphrase that Mr. Socha adopts: These words mean that BACTES agrees to be the client's exclusive agent for the purpose of proper confidentiality and for starting the process of releasing this information to the requesters. But that doesn't preclude another service from copying them. It just prevents the situation where

BACTES would be forced to work side by side with a competitor in the medical care provider's facility. We are signing an agreement that the client is not going to hire BACTES to do part of your work, then CIOX or MRO to do another part. "We want to be your business partner. We want to do all of your release of information work."

The Court inquires again: When Mr. Busby asks for an outside provider to copy the records (assume a paper chart), what's the difference between what the outside service would do and what BACTES has been doing? First BACTES has to go through the HIPAA filter, making sure that the request is HIPAA compliant; if not BACTES must kick it back. BACTES then has to enter the request into the client system(s) depending on how many are impacted. BACTES may have to log the request in if the client has a log. BACTES must track those employees who worked on the record, then copy the record for the minimum necessary which is not something a copy service is required to do, make sure that only the information released on request is copied which is in the best interest of the facility, but, again not a requirement for a copy service who will copy whatever it wants to copy.

The biggest piece is that an outside copy service does not have to follow HIPAA and doing so adds a whole lot of restrictions on what BACTES has to do and how BACTES does it. IT is the big reason why clients hire BACTES; they can't keep up with the rules and regulations. And anyone outside of being a HIPAA business associate is not held to the same standards.

The Court asks the same question as to a computer/electronic file: An outside copy service is not a business associate. It cannot go into the electronic system and get the records. That places the burden back on the health care facility to go in and generate the appropriate records which many are afraid to do because they are not well suited to do it anymore. But the clients will do it, and when they do so, they make sure they are pulling just the right records to give to the copy service.

Exhibit 82: Contract between BACTES and El Centro Regional Medical Center: Last sentence: "customer agrees to use BACTES exclusively for ROI information for all sites outlined in Addendum A. BACTES would prefer to have an exclusive arrangement with a hospital to provide ROI services. The medical care provider doesn't require the exclusivity, it's something that BACTES is interested in having.

Mr. Socha expected that Attorneys who requested records under Section 1158 understood that a medical care provider was required to make records available for inspection and copying promptly after the provider or its agent receives the release. He did not necessarily expect the attorney to know that if the lawyer didn't hear anything from the medical care facility that "1158 was going to kick-in".

The court asks whether Mr. Socha's theme is that it is not BACTES responsible, rather it's the medical care provider's responsibility, to reach out to the attorney and notify him/her of the presence of the records and the availability of the attorney or his copy service to inspect or copy them: Mr. Socha's responds that his main perspective is that BACTES needs to respond to the request and that the request asks for copies, not asking for notification as to when the records are available to come to copy.

The court asks again: Under 1158, the medical care provider is charged with contacting the attorney promptly after receiving the request and verifying the correctness of the documents that the records are available for inspection and copying: Given BACTES service agreement with a medical care provider, is BACTES required to comply with this provision? Does BACTES accept responsibility for complying with that provision? Mr. Socha answers: "We respond the way we currently respond." Mr. Socha believes that BACTES turnaround time and method of responding is appropriate to the statute generally.

Mr. Waller inquires about the provision in 1158(c): "no copying is to be done by a medical care provider or an agent thereof if the lawyer has hired their own copy service." Mr. Socha expected the requesting attorney to know this. Mr. Socha knew that if the medical care provider or its agent does the copying under Subsection E, it can only charge 10 cents per page and \$16 per hour in quarter hour increments, but he didn't know what the requesting attorneys knew or didn't know about this provision. All BACTES could do was respond to the request BACTES received, which was for copies.

BACTES does not charge 10 cents per page and \$16 per hour because it would lose money.

In relation to the scope of services BACTES offered, Mr. Socha testified earlier that BACTES was not obligated to copy records. Exhibit 2: pgh. 3: Service Agreement exemplar: A billable includes an attorney request. No. 3 says "BACTES will photocopy". That means that BACTES will make photocopies.

Ex. 3: Another Exemplar Service Agreement: Second page: Item 6: "BACTES will process and pay for the mailing of all billables. Billable correspondence means attorneys". The phrase "BACTES will process" includes that BACTES will make copies.

Exhibit 81: 2007 Agreement with El Centro Regional Medical Center: pgh. 3, first sentence: "BACTES will photocopy". Under the terms of this service agreement that means that BACTES is going to make copies.

Exhibit 82: Updated version of contract with El Centro Regional Medical Center: Addendum B: Release of Information Pricing Medical Records: The request type under

billable records includes attorneys' requests. The comment that BACTES will digitize means the same thing as making copies.

When an attorney communicates a complaint to BACTES it can be that the bill is too high, but it gets calls for other things where an attorney didn't get all of the records he or she wanted or got too many records. To say that 99% of the complaints are about too high a bill is on the high side. In fact, Mr. Socha would say that the majority of the complaints are not that the bill is too high.

Mr. Socha has attended trade shows of his industry but does not share his charging information with others and has never seen a discussion about 1158.

When a BACTES employee receives an attorney request, that employee will not know how long it will take to fulfill the request. The reason BACTES at that point does not contact the attorney to explain the options is that, from a process standpoint, it takes more time to do that, and we would have to set the records aside and then wait for a response as opposed to let's get the work done and get the records to the requestor. True it doesn't take a long time to send a fax, but BACTES does not know the size of the request at that point.

Ex. 104: Service Agreement with UC Irvine Health: BACTES had a contract with UC Irvine Health, but not anymore. Matt Walker was the regional west region president at the time. Ex. 104: Page 6: The request types on the form reference billable requests at that facility represented by a chart with Xs on who is going to do what task. Under the BACTES category, it says "print or export from EMR system". This means that BACTES will make copies of medical records from the EMR system that the attorney requested. If it's a paper chart then scanning the chart would be a customer function, but combining the EMR with the paper portion is a BACTES function for the billables. An attorney's request is a billable request. As to print EMR and export EMR BACTES is making copies.

Ex. 108 is a letter from UC Irvine Health Care. It is a template that Mr. Socha has seen before. Mr. Socha doesn't know how this came to be drafted; he believes UCI sends it out. He is not aware of any other BACTES/Sharecare clients who use a letter like this. He believes this letter is an "outlier" or anomaly from normal practice.

In Exhibit 108 second page, there are cost items, then it says, "we understand Sharecare will send us an itemized fee approval invoice if the fee exceeds \$700." Mr. Socha does not know if BACTES was involved in drafting that provision. Then it says, "if the fees do not exceed \$150, medical records will be mailed to his law firm along with an invoice, which I agree to pay, within 30 days of receipt." Mr. Socha is not sure whether BACTES was involved in drafting that portion of the letter. He takes a jump in interpreting the verbiage is for invoices between \$150 and \$700: The first one says if it's

over \$700, nothing will be done. If it is between \$150 and \$700, he assumes that the records will be copied.

Tina Nickels testimony, if true, that she recently received medical records from Sharecare with the invoice attached, is a total outlier. It is not the way BACTES or Sharecare do business. Looking at Ex. 108 letter, BACTES' normal business practice would not be to send the records with an invoice if it is less than \$150.

Re-Direct Mr. Socha: Given his familiarity with requests of medical records, if an attorney retains an independent copy service that typically occurs at the very beginning of the process. The request comes to the medical care facility via the copy service. If an attorney sends a request directly to the medical care provider just asking for copies, without identifying a copy service, it is not typical for that attorney to later suddenly change his mind and demand to retain a copy service.

Mr. Socha understands that under 1158, a medical care provider is not required to make copies of medical records within five days or to notify anybody within five days. Mr. Socha's involvement in this business predated electronic records. This was when records were on paper. There would be calls made to copy services to come view records that needed to be done within five days. His understanding of this 5-day window in 1158 is that it was to accommodate a copy service coming in to make hard copies.

Mr. Towson refers Mr. Socha to the cross examination about the exclusivity provision in the service agreements: The purpose of the scope of work provisions in these contracts is primarily to make sure that it is clear between the two parties what they are going to be billed for and what they are not going to be billed for. The purpose of the language is not to define what BACTES statutory or legal obligations are. The propose was to define pricing between BACTES and its clients.

Court asks for final clarification as to the purpose of the exclusivity provisions in the service contracts: The exclusivity provisions pertain to the release of information services which include access to the client's systems and records, following the provision of the business associate agreement, with both of those usually combined and joined at the hip so that BACTES is following all of the HIPAA rules to protect patient privacy and to protect BACTES clients. The exclusivity provisions do not prevent an outside copier from gaining access to a client's medical records; they do it all of the time. However, if a request comes in and the attorney does not identify anyone as his/her agent to copy records, then the medical provider's exclusivity responsibility is to send those request/release to BACTES.

First Judicial Notice request by Defendant: Mr. Towson's first request is for the Court to take judicial notice of Court Records and Official Acts and Legislative Enactments of Judicial Branch which are Exhibits "A" through "M."

Defendant's request involves the class settlement in the Buzzi v. BACTES Imaging Solutions, Inc./Thornburg v. BACTES Imaging Solutions Inc. (Imperial County Superior Court Case No. L-00932, three unpublished Superior Court decisions from other jurisdictions, two related unpublished appellate decisions, and a printout from the Department of Industrial Relations. The first Superior Court case involves Lott v. Eden Medical Center, et al. (Alameda Superior Court Case No. RG12 640770) ; a motion for summary judgement which was granted by the trial court and then affirmed on appeal by the First Appellate District. The second Superior Court case involves Sui v. California Pacific Medical Center, et al. (San Francisco Superior Court Case No. CGC-12-522567), a bench trial that resulted in a written decision, also affirmed on appeal by First Appellate District. The third Superior Court case is Law Offices of Michael J. Kielty v. CopyInc. Corporation (Riverside County Superior Court Case No. RIC1712167) brought before Judge Water in Riverside Superior Court where the Court granted judgment on the pleadings.

Plaintiff objects to the Superior Court documents and cases. The Court declines to read decisions of a sister Superior Court including rulings on motion for judgment on the pleadings from another Court and two unpublished appellate decisions. The Court finds the minimum wage information not relevant.

Second Request for Judicial Notice by Defendant: Mr. Towson's second request is for the Court to take judicial notice of the Legislative History of Evidence Code section 1158, attached as Exhibits "A" through "O."

Mr. Waller for Plaintiff raises no objection to the Legislative History on EC Section 1158. The Court grants this request.

Michael Rodriguez: Mr. Rodriguez works for San Ysidro Health as the Health & Information Specialist. San Ysidro health has numerous locations in Chula Vista. But he works in the Otay Family Health Center. Mr. Rodriguez is "like a supervisor" that oversees his department. Part of his job is to focus on attorneys' requests to obtain a patients' medical records, that come to him on a regular basis.

When a record request comes in from an attorney with an authorization, his department first checks and verifies that the patient is San Ysidro Health's patient and that SYH has records for this patient. Then they do a HIPAA check, checking the name, date of birth, verbiage, proper patient signature and date to verify that everything is in order. Then his department forwards the task to BACTES, the group's copy service. This is all done electronically through an internal computer system called "Nextgen", sort of e-mail style.

BACTES and SYH have worked together for the last five years that Mr. Rodriguez has worked at SYH and before, but he does not know exactly how many years before his arrival. Through that time SYH used BACTES exclusively to handle attorney record requests.

When SYH receives the request and authorization, it does not contact the requesting attorney to let them know of the receipt of the request and that the records are available for inspection and copying by either the lawyer or the copy service of the lawyer's choice because the process is to send the request to the in-house copy service BACTES. BACTES has a business associate agreement with SYH.

All of the requests for medical records that SYH receives come directly from the attorney. He has never seen the situation where BACTES first brings an Attorney's Request for Records to SYH's attention.

Over the past five years the majority of SYH records are electronic. SYH turned electronic in 2013. It is a rarity to have a paper chart now. Nevertheless, should the attorney request involve a paper chart, the procedure is to contact BACTES who will send a representative over to copy the paper chart. With a paper chart SYH does not contact the requesting attorney to say "we have your records in a paper chart, if you want to send someone over to copy them."

Once SYH tasks BACTES with handling the release and authorization, SYH has no further involvement in handling the release or fulfilling the request.

If an attorney wanted to bring in his or her own copy service to access SYH electronic patient records, Mr. Rodriguez would not allow this. If an attorney called SYH and said, "I would like to use my own copy service, not BACTES", Mr. Rodriguez would inform the attorney, "We already have an in-house copy service, namely BACTES".

Otago SYH does not send any billing for copying services to an attorney. I would inform the attorney that he or she had to go through BACTES once we sent over the request for records to BACTES. BACTES has an external portal off-site from SYH that allows BACTES to access SYH's medical records. BACTES processes records remotely through a connection with SYH's system. Only if there were a paper record would a BACTES representative need to come to SYH to access and copy records. Even in that situation, SYH does not make any copies itself, BACTES comes over and copies the paper record.

When SYH receives an attorney request, it likes to process it within a day; the outside time is 24 hours.

If a lawyer insisted on having his/her own copy service come in and copy the records, SYH would say that's not possible we have our own copy service, namely BACTES.

Defendant's Cross Exam: In his deposition Mr. Rodriguez said that if an attorney asked to have his own service copy electronic records, Mr. Rodriguez would decline saying BACTES is our copy service. But, if the attorney absolutely insisted and if there was a special circumstance, then Mr. Rodriguez would talk to his manager. If somehow the manager approved of the attorney's request, he would process it personally and have the attorney come and pick up the records. However, this has only happened one time in Mr. Rodriguez's experience.

To his knowledge, Spencer Busby's Law Office has never contacted SYH seeking to use Busby's own copy service to obtain his client's medical records, nor has Office Manager Tina Nickel, nor has Diversified (copy service) on behalf of Mr. Busby ever contacted SYH and sought to copy the records.

Mr. Rodriguez is not familiar with Evidence Code Section 1158, but understands that SYH has an obligation to make records available if the patient is the requestor. SYH does that by sending the request to BACTES whether the request comes from the attorney, the patient or someone else.

To his knowledge an outside attorney service has never contacted his office asking that it come in and copy patient records.

SYH has no involvement and no knowledge of what happens billing-wise between BACTES and the requesting attorney. SYH has no problem with BACTES invoicing the lawyer for the cost of the copies.

SYH can tell when BACTES processes the copy request by looking in the computer as to a ph1 log that shows that information.

Once Mr. Rodriguez does his work after receiving a request, it is BACTES that determines which records to copy.

Leslie Ofeciar: Ms. Ofeciar has worked for the last eight years at Orthopedic Specialists of North County. As of December 2017 OSN has merged with Tri City Medical Center. She works in medical records. She is responsible for receiving attorney requests for clients' medical records. There used to be three persons working at OSN in medical records, but when OSN signed a contract with BACTES to process attorney medical records requests, she became the sole OSN medical records person.

When she worked at Orthopedic Specialists of North County and a request and authorization for medical records came in, OSN would first check that the name of the company and the patient's name, birthdate and social security number were all correct. If so, OSN would scan the request and authorization into the patient's chart and send it to the BACTES pool. The IT Department made the pool for BACTES to enable medical OSN assistants to send documents to BACTES.

If an attorney should call and inquire about the records, OSN would tell the attorney "we have sent the request off to BACTES". OSN lets the attorney know that OSN uses BACTES as our copy service. Upon receipt of the records request and upon verification, OSN did not call an attorney and say, "We have your request here and we have verified that we have your client's records in case you want to use your own copy service to come copy them." In fact, OSN would not contact the attorney at all.

After the request is sent to BACTES, if the attorney should call to inquire about the status of the request, OSN does have access to the status to see if the request has been completed in its computer system. OSN records departments leaves all of the processing to BACTES. At the time OSN receives and verifies the request and at the time the records request is sent to BACTES, OSN does not contact the attorney.

Now, all of the medical records for OSN/Tri City are electronic. Over the last five years most of the records have become electronic but there are still some paper records. If a request is received for a paper chart OSN scans the chart and places into the patient's computer file. But OSN does not contact the requesting attorney to confirm OSN has the records nor tell the attorney the records are available for the attorney to copy because OSN has contracted with BACTES.

Cross Examination by Defendant: If an attorney wanted to bring an outside copy service to OSN to copy records, OSN would not cooperate because OSN has contracted with BACTES to do all of the copying. Also outside copy services do not have access to OSN's patient record database. OSN would be concerned about violating HIPAA, by breaching patient privacy.

In the past the witness was aware that OSN had a duty to allow an attorney requester access to the medical records for copying; OSN would have outside copier services come in and they would copy the chart. But since contracting with BACTES no outside company can come in and scan the charts.

Now, with the merge of OSN and Tri City Hospital, Tri City processes all of the attorney requests even those directed to OSN, because Tri City now has access to OSN records. Now Tri City Hospital makes the copies and lets the attorney know when to come pick them up. Her department at OSN would print and copy the billing records and have the attorney come pick them up.

Before the merger with Tri City, OSN had an agreement with BACTES to process all medical records requests. Since the merger, OSN/Tri City does not use BACTES; medical record requests does not go through BACTES. Now OSN/Tri City Hospital processes the requests themselves.

When BACTES and OSN entered into a contract, this is when the practice of allowing attorneys copy services to come into copy records ended.

Erica Whannel: Health Information Management Manager at El Centro Regional Medical Center. She holds a Registered Healthcare Information Technician credential where she received HIPAA training. She supervises twelve people in her department. Her department processes medical records and requests for medical records, including requests directly from attorneys on behalf of their clients.

When her office receives a request from an attorney for medical records, it first stamps it, reviews it, completes a checklist if the request meets all of the criteria, then the request is processed by either forwarding to BACTES or make arrangement for an outside service to copy the records if her department has been notified that the attorney would like to send his or her own copy service out. If the attorneys request does not say the attorney would like an outside copy service to be involved, then the department forwards the request to BACTES. BACTES has a designated place in the ECRMC information department for requests that will be turned over to them. Once or twice a week a BACTES employee comes to ECRMC. ECRMC has a policy that attorneys requests for medical records will be turned over to BACTES within three to five days.

Terry Kimble: Person most qualified at Sharp Rees-Stealy Medical Group regarding patient record requests. Mr. Kimble is the Health Information Management Supervisor, the Release of Information (ROI) Supervisor. He currently oversees 32 employees responsible for receiving and processing release of records, including requests and authorizations received from attorneys for client records. In the central location, Mr. Kimble has held this position for eight or nine years.

Beginning in 2004/2005 Mr. Kimble was releasing records as an employee. In 2010/2011 SRSMG centralized the release of information process and he took over the supervision of that department. SRSMG has a policy that attorneys' requests go directly to the central records room. SRSMG process is that upon receipt of the request at an outlying side facility, it is scanned into the system and forwarded to the central records office. Initially the request was forward by the outlying facility by e-mail, but that method changed in July 2019.

SRSMG now has a new piece of software that allows sites to directly upload the request into "release of information" software, and the computer transmits the record electronically to central. E-mail is not used for this purpose anymore. SRSMG has kept electronic records beginning in February 14, 2006 and all SRSMG medical records are electronic today.

SRSMG uses BACTES as its ROI vendor, contracting with them starting in September 2014. BACTES only function is to fulfill release of information requests, including

attorney requests. All attorneys' requests that come to the central records office are sent directly by the attorney. Neither Mr. Kimble nor any SRSMG employee to his knowledge, have ever had the experience where it was BACTES that first directly received an attorney request and with BACTES coming to SRSMG saying "we need to fulfill it with your records".

When an attorney request comes into the central office the first things SRSMG does is to see if it pertains to a patient of Sharp Rees-Stealy Medical Group. SRSMG will notate the patient's medical record number (Sharp HealthCare number) on the authorization, stamp it with a date received, and put it in pile for scanning into the release of information software. That software is provided to SRSMG by BACTES and it is called HDS meaning Health Data Systems or Services.

So, when SRSMG gets an attorney request SRSMG uploads it directly into the BACTES system. SRSMG does not copy the records. If the records are a paper chart, the chart will be requested, and the notes scanned in or the paper chart made available to the ShareCare employee who will be copying the records.

But BACTES has not always had an employee that comes to SRSMG to collect the attorney requests. Sometime in 2016 or 2017, SRSMG received word from BACTES that BACTES would like to have an employee come in to take care of those requests from beginning to end. Before that, the SRSMG staff were processing those requests from beginning to when the staff transferred them over to BACTES Sharecare. Once SRSMG was finished with its processing, BACTES would take over per the contract. In other words, before 2016-2017, SRSMG would verify the identity of the patient as belonging to SRSMG, process the request up to the point of placing the records in the electronic tracking system which included looking-up the patient, ensuring that he/she was a patient of SRSMG, scanning the request into the RMS (record management software), collecting the record either through a paper records or electronic record, compiling the records, doing verification so as to make sure SRSMG is sending the correct information---and then it would go over to BACTES through record management software. BACTES would then do quality assurance, distribution, invoicing and mailing.

In the process of checking that the patient belongs to SRSMG and collecting the records, SRSMG does not contact the requesting lawyer to let him or her know that records are available for inspection and copying by the lawyer or the copy service of the lawyer's choice. BACTES takes care of that. This has always been the process even before 2016. Even today SRSMG does not contact the attorneys, only in instances where SRSMG ask questions to clarify. Even then, SRSMG tells the lawyer that BACTES/Sharecare will be the ones sending you the invoice. But as a rule, SRSMG does not call attorneys to let them know that specific purpose. If we should talk to an attorney we tell them that we

use BACTES who will be taking care of their request, usually as a side note to another question SRSMG has.

In instances where SRSMG notices a discrepancy in the spelling or a patient's name or the birth date is wrong, SRSMG does not contact the lawyer to notify the lawyer of the problem. The normal practice is to upload the information into the BACTES software and let BACTES take care of it. SRSMG would leave a note on the file for the BACTES representative to that effect, that there is a discrepancy on this attorney's request or authorization. Then SRSMG relies on BACTES to take care of it. There are a handful of occasions per month where SRSMG may contact an attorney because there is something else SRSMG needs before SRSMG can upload the request to Sharecare.

If an attorney request received by SRSMG is accompanied by a \$15 check to SRSMG that check would be handed over to BACTES. SRSMG does not contact attorneys re requests for release of information, because SRSMG wants to remove itself from that process. SRSMG has contracted with BACTES to manage and handle all of the attorneys' requests from beginning to end.

EX. 96 is a letter that SRSMG sent all attorney requesters to inform them that SRSMG was now partnering with BACTES and that BACTES would be handling the distribution, invoicing of records for SRSMG. In the second to last sentence the letter indicates that the fee schedule will be updated based on Evidence Code Section 1158 for attorney requests and 11563 for subpoenas. Mr. Kimble understood that the fees that would be charged to an attorney who submits a request for patient records to SRSMG would comply with EC 1158. This letter was given to all of our requesters, whether physicians or attorneys. Any time someone made a request the letter would be forwarded to them. This was a notification letter that began in August in preparation for SRSMG going with Sharecare in September.

Cross Exam by Ms. Gower: It is extremely rare for an attorney requester to ask SRSMG to allow an outside copy service to copy client records. Maybe in the last year, less than ten attorneys have asked to bring in their own copy service to Mr. Kimble personally. SRSMG does not conceal the fact that an attorney may send the attorney's own copy service. If an attorney asks, SRSMG will let them know. If the requestor asks SRSMG to bring in an outside attorney service SRSMG will cooperate to make records available, if SRSMG is able to do it. If the records are kept electronically, SRSMG does not have a process to allow copy services into our electronic health record. It is in those cases where SRSMG utilizes BACTES and Sharecare to do that for us. This pertains to HIPAA concerns. BACTES has signed an associate's agreement. When there is an electronic record, no outside copy service can access it.

However, if an attorney insisted on an outside copy service for an electronic record, SRSMG would make those available and work with that outside copy service. One way would be to provide the outside service a printout of the electronic health record and a copy of the paper record if it exists. The other option with an electronic record is SRSMG would print out the entire record and give it to the copy service to take with them.

He does not recall that the Law Office of Spencer Busby ever contacted SRSMG requesting to use an outside copy service to fulfill that law office's request. He is not aware that anyone from Nationwide Copy Service has ever contacted SRSMG to ask to copy records on behalf of the Law Offices of Spencer Busby. The witness confirms that had this happened, he would have remembered. In his role as managing the records department at SRSMG, he is not aware of anyone named Tina Nickel ever contacting SRSMG requesting to use an outside copy service to fulfill requests made by the law office of Spencer Busby

Re-direct Exam: In the instances when lawyers have contacted SRSMG to inquire about bringing in their own copy service, this call usually occurs after SRSMG has sent the request to BACTES, although it does vary.

Plaintiff rested at this point.

Defense called no further witnesses but asked the Court to read the deposition transcript of witness Janet Henderson. With no objection the Court complied.

Deposition of Janet Henderson: Ms. Henderson is the Person Most Knowledgeable at UCI Health Care in the health information department. Ms. Henderson believes that she is the person most knowledgeable at UCI Health Care as to medical records, except there is a separate custodian for billing records. But BACTES does not have a separate contract with UCI for handling billing records. Ms. Henderson has been with UCI twenty years.

Ms. Henderson has oversight of all functions within the Health Information Management which includes the gathering and retention of the documentation, the use of the EMR, monitoring the physician's completion of the medical records, "our release of information functionality and our coding and abstracting of the medical information for both billing purposes and research activities at the University". She does not have day to day responsibility for release of information services because there is a manager, Dana Victor, that oversees that unit. Ms. Victor is the Health Information Management Mangers.

She identifies Ex. 2 as the contract between BACTES and UC Irvine. Ex. 3 is the administrative policy and procedure regarding patient access to medical information.

Ex. 4 is “our departmental patient access policy & procedure”. Ex 5 is the administrative confidentiality policy which outlines the workflow and the process and the documents that BACTES must sign.

Not all medical records are electronically based these days at UCI. UCI is still in a hybrid situation. UCI’s initial EMR went live in 2010 and recently converted from one EMR to another last November. But it was gradual, starting with inpatients, emergency room patients and, once the system was smooth, then to the ambulatory setting. It was not a big bang conversion, but one that occurred over three years. The paper medical records are older from 2010 and back. It is not true that from 2014 on that *all* the records were electronic, because there were some powerful holdouts, like plastic surgery and urology. But during that time these were the exception and electronic records were the rule.

UCI has contracted with BACTES as need be. We have a monthly meeting scheduled with our BACTES representative. Until recently the BACTES representative was named “Andy”.

She is familiar with Evidence Code Section 1158. This is where an attorney has provided the patient’s authorization to release the records to the attorney and there is a time frame of five days that we are obligated to respond to that request. She knows there are costs outlined in this regulation. To comply with 1158, once UCI gets a request for records, we enter it into an electronic tracking application. There are settings within the application that will notify us where we are with those requests as reminders. This is a tracking system that is maintained by UCI.

An attorney request is delivered to building 25A on site in the City of Orange. UCI has a centralized release of information process, Health Information Management (HIM), that processes all the requests for records that are received by the organization including patient requests, subpoenas, and authorizations.

When UCI receives a request, it is opened by a clerk at UCI. The clerk ensures that everything is there, valid authorization, fees required, etc., then date stamps it, signifying date of receipt, and sets it aside for the next step. For this UCI charges a standard \$15 clerical fee. UCI deposits that check that day and does not turn it over to anybody else such as BACTES.

The next step is for a UCI employee to identify the patient’s medical record number by looking up the patient in our EMR based on first and last name, and a second identifier such as date of birth. Workflow for attorneys’ requests are a little bit different. Once we’ve identified the patient, we look them up with the name and the second identifier and we have a medical record number if this is the initial request from the attorney’s office with the authorization. We validate that the request and the authorization are

HIPAA compliant, then our first step is to enter the request into our tracking system, so we have a record of that request.

Then we print out the “attorney fee” letter from our tracking application and we return everything back to the attorney’s office. The attorney fee letter asks the attorneys office to acknowledge that BACTES is our copy service and that by signing this agreement, they are agreeing to work with BACTES and thus removing UCI from that agreement. Ex 6 is an example of the Attorney Fee Letter. UCI has been using Ex. 6 for at least 15 years.

She has had occasions where an attorney has refused to sign the second page of the letter. When that has occurred, the attorney was advised to contact UCI’s release of information folks indicated in the attorney fee letter and identify a copy service that will be coming in to copy those records. If an attorney does not want to use BACTES or has refused to sign the second page of Ex. 6, the attorney should contact our Release of Information department.

The Release of Information department will ask the attorney’s office to send back the request for medical records and authorization (because everything has already been returned to the attorney) with a letter explaining the attorney wants to contract with X,Y,Z copy service. Once we’ve received that information back from the law office, we would then process that request to completion; identify if the records were in a hybrid situation, meaning paper and electronic, or what type of records we were dealing with. If paper records, we would retrieve them and make them available to the outside copy service for copying. We would print out any electronic copies and match them with the request. At that point they would be available and UCI would then schedule an appointment with the X,Y,Z copy service to come in. When electronic records are printed, UCI does not simply mail them to the attorney, because it is UCI’s workflow that they pick them up.

The attorney who is requesting records is required by UCI to either use BACTES or an outside copy service. The reason UCI does not make copies and provide them directly to the attorney, dates back to when this entire workflow was developed. It was an effort to remove UCI from that direct release to attorneys.

If the medical record is completely electronic, X,Y,Z copy service would not get access to UCI’s EMR. UCI would print those and have those available for pickup. X,Y,Z is not permitted to access UCI’s electronic medical records database because it would be a difficult process to manage. That would give numerous outside agencies access to our electronic medical record. It would require someone to sign a confidentiality agreement. The department would need to sponsor them as a requester, and it’s just not feasible to have that workflow in place.

UCI and BACTES have an agreement that allows BACTES to access its electronic medical records database. To her knowledge UCI's release of information office does not have the practice of telling attorneys "if you want to use a copy services other than BACTES/Sharecare, like XYZ copy service, the outside copy service must contact BACTES to get copies of the requested records."

Ms. Henderson was not involved in a December 2017 e-mail exchange or discussion reflected by Ex. 7 that included Nationwide Legal and an Adriana. EX. 7 refers to an employee from Nationwide Legal, Alicia Raygoza, saying to an "Adriana" that the Ms. Raygoza spoke to the custodian of records (at UCI) who said that BACTES is the only copy service to use to obtain records. It goes on to say, "I know that Nationwide has a contract with BACTES, so they will download the records into our portal as soon as they are ready." Ms. Henderson is not sure who "Alicia Raygoza" is that Adriana claimed to have spoken to at UCI, but it was not Ms. Henderson. It was not the current HIM manager, Dana Victor who started December 5, 2017. But at that time there were a number of clerical positions that could have answered the phone including a receptionist, a lead and four or five clerks. Whoever told the Nationwide employee that "BACTES is the only copy service used to obtain records and that if Nationwide wanted copies, they still had to work with BACTES" was wrong. That procedure would have been in violation of UCI's policy regarding release of information.

If UCI retrieves a paper chart and makes it available for copying, the fee for that is covered by the \$15 fee.

BACTES has an employee who maintains an office or a desk in the UCI Release of Information office. Under the previous hypothetical, once the request for records and authorization has been returned to UCI with a cover letter from the attorney that they now agree to work with BACTES on the release of records, and after UCI has matched it to the paper records or electronic records, that is when UCI turns it over to BACTES. In other words, before BACTES receives the patient authorization and the attorney request letter, UCI ROI people have already identified what records have been requested. It is UCI's responsibility to review the authorization and the request to determine if there is a certain time frame, if it any and all records, and what type of records would satisfy the request. Paper records are not pulled until the fee letter, Ex. 6 comes back signed, sealed and ready to process.

The process summarized: The attorney's request comes into the Release of Information office at UCI with the patient authorization. UCI then checks to ensure that the patient authorization is complete and valid. Then UCI sends Ex. 6, the fee letter, to the attorney. Assuming the attorney signs and returns the fee letter, then UCI ROI person identifies what needs to be pulled if it is a paper chart. The employee reviews the list of encounters in the master patient index; there are service codes they are trained to

understand and decipher. We look at the dates of service to determine if it was paper, electronic; and then if its paper, what type of record we need to request. The UCI personnel makes the request to retrieve the paper chart, the request going to a separate unit for record retrieval. Somebody in that unit gathers up the paper records, without culling them or removing any record, then makes those available to the Release of Information staff. The Release of information staff would then review the paper record to ensure that the requested time frame dates of service are in that folder. Once everything is gathered, they would make the records available.

With an electronic record, once the Ex. 6 Fee letter is returned from the attorney, the UC Irvine ROI department does nothing because BACTES has unfettered access to the patient records to print what BACTES needs. There may be an occasion, where a UCI ROI staff member may check to see if the records requested are actually in the EMR if there are questions from BACTES staff relative to where to find something. UCI may assist BACTES in finding something, either in a paper or electronic record.

Defendant Mr. Towson cross-exam: UCI sends the EX 6 attorney fee letter to a requesting attorney via hard copy mailed back to the attorney's office. Ms. Henderson believes that there are different legal provisions that govern patient record requests from attorney record requests.

BACTES and UCI have entered into a HIPAA business associate agreement and a confidentiality agreement. These agreements allow BACTES Staff access to UCI's EMR once a secure identifier or log-in for that BACTES user has been created and a secure password unique to that BACTES person. As to a paper medical record, the UCI staff grabs them and provides them to BACTES to make copies. For electronic records BACTES, as a business associate, goes into the EMR to select the records not UCI Staff.

UCI tracks the timing of completions as to responses to medical record requests. When BACTES has completed the task BACTES enters a notation into the UCI tracking system. BACTES would close the request and make the notation in the medical record to signify it.

Mr. Waller for Plaintiff re-cross: As to EC 1158, UC Irvine complies with the initial letter request by the attorney by returning everything back to the attorney including the attorney fee letter, within five days. Once the attorney has signed the attorney fee letter and returned it back to UC Irvine, UCI would then comply with that secondary request within that five days.

She is sure that she has received an attorney's request letter with a signed release which says, "we're making a request for these records and we want to use XYZ copy service." Under that circumstance, UC Irvine would not send the attorney fee letter Ex. 6. To the best of her knowledge and understanding of the workflow, that request would come

from XYZ copy service indicating an arrangement between the law office and the outside copy service, and also providing the patient authorization. From that point, UC Irvine would just work with XYZ copy service in the production of records. If it was a paper chart, UCI would go pull the chart or the records, and if it is an EMR, UCI would print the medical records for XYZ company.

Ex 8 is a finance department indication of payments made between BACTES & UCI from the beginning of the contract to the present: \$15,000. But nobody actually paid anybody \$15,000. When you set up a purchase order you have to have a dollar amount as a fee.

EX 2 is UCI's Services Agreement with BACTES: p1, 1st pgph; "The customer agrees to use BACTES exclusively for release of information for all sites outlined in addendum A during the term of the agreement or any renewal period." She understands that this contract limits UCI's ability to contract with any other copy service for release of information services. Release of Information services kicks in when BACTES gets the release signed by the patient with the attorney letter. Before that BACTES is not involved in any of the previous steps in the process.

Ex. 2 p. 5: Addendum B: Statement of Work with flow chart: According to this chart, and to Ms. Henderson's understanding, BACTES is on UC Irvine site in only one location, the Health Information Management department in Orange, the centralized release of information department. BACTES has a little workstation there.

UCI has a centralized release of information process. UCI has multiple off-site locations where patients are treated and seen. If a request were to go to one of those decentralized locations, the location is directed to send the request to the central location by fax or however. The request is then processed from the central location.

After UCI turns over the request and authorization to BACTES, UCI depends on BACTES to fulfill the request. UCI has made sure that it has the requested records for that time frame to satisfy the request, then UCI hands it over to BACTES. It is then between BACTES and the lawyer as to what records are produced, what the costs are, etc.

If UCI has not yet handed the release and authorization to BACTES and an attorney has a question, UCI will field the question. If UCI already handed-off the request to BACTES, UCI would ask the attorney's office to speak with BACTES.

A provision in Ex. 2 states, "forward attorneys and copy services directly to BACTES service center". BACTES has a service center in Fullerton. Prior to UCI contracting with BACTES, outside copy services trying to serve subpoenas would come to UCI's ROI

records department. Since that was a lot of traffic, when BACTES came on board, it was redirected to the BACTES service center in Fullerton. But that is limited to subpoenas.

Ex. 7 E-mail. Ms. Henderson has not seen a situation where a lawyer has identified a copy service other than BACTES and one of her staff members comes to her and says this provision requires us to refer them to BACTES. Ms. Henderson emphasized that the content of the Ex. 7 e-mail is incorrect whoever made the statement.

Ms. Henderson does not know whether UC Irvine charges an outside copy service for readying the medical records when an attorney requests and outside copy service to copy the records.

Ex. 2, p. 6: Service Agreement: Third Column: "Billable request received at customer facility"; this is where attorney submits a signed authorization by the patient directly to UCI. The two columns for "billable requests received at customer facility" reflect the delegation of duties between BACTES and UCI for fulfilling an attorney's request.

In a situation where the attorney says, "I'll just have my client, the patient, come and pick up the records", she can't recollect that ever happening, UCI would fulfill the request on behalf of the patient even if the attorney had previously sent a request.

As to EX 6 the attorney fee letter, UCI sends this to the attorney returning the attorney's original authorization and request before ever checking whether there are actual medical records in the EMR or a paper chart or how many pages there are in the chart. This system was set up many years ago on advice of legal counsel. It is not our workflow.

The majority of records are stored offsite, archival storage with a vendor. If we retrieved the record and counted the pages we would incur that cost from that storage vendor to bring those records back to us as well as an additional cost of time and resources to get that information out to the attorney, before the attorney signs the authorization letter. We do not always know if the attorney will return the letter. If not, we would have to send the records back to archival storage vendor and incur another cost or have some other mechanism to store them in the department. Based on our transition from paper to electronic records, our storage space within the department has dwindled. I do not have the physical resources to maintain those paper copies waiting for this fee letter coming back from the attorney.

If an attorney has sent UCI a request, as well as the signed authorization letter (EX. 6) and UCI has turned over the request to BACTES, she has seen the situation where the attorney calls and has decided he/she does not want to use BACTES but some other copy service. UCI would tell the law office you can then contract with your own copy service to get those records copied for you or you can contact BACTES. My

understanding is that if it is a law office that is a frequent requester from UCI, perhaps local to the organization, BACTES will set up a fee schedule for that office or negotiate some type of terms. If that did not happen, UCI would allow a patient to come in and request their own records even after the attorney has signed Ex. 6. UCI would allow an attorney to bring in a separate copy service after the attorney has signed Ex. 6, the fee letter.

Ex. 2, p. 9 Agreement for Services: These are “quality process steps” performed by BACTES. No. 4 is “verify and invoice the record according to state statutes”, this is a BACTES function. BACTES drafted the following language: P. 11, addendum C, “release of information pricing medical records”, no. 2 “Billable requests, attorney special instructions”, “forward, request from attorneys”, “without the written pre-approval letter”.

BACTES does not charge UCI for fulfilling attorney requests. The agreement as a whole, pages 1-13, is a contract whereby BACTES will provide services to UCI to respond to and provide copies to requesting attorney of patient records. But it also includes other requests, such as patient requests, doctor requests, subpoena requests.

Authorities and Materials Received under Judicial Notice, Evidence Code Section 452(c). The Court granted the defendant’s motion to take judicial notice of certain documents pertaining to the enactment and legislative history behind the evolution of Section 1158. Exhibits A through O. They establish that Section 1158 was enacted in 1968, that the provisions allowing a medical provider to charge the attorney for costs of preparing for inspection and copying, and the amounts specified for those costs, were enacted in 1978. Reasonable clerical costs were added in 1986.

Closing Arguments

The Court will make reference to and analyze the points both parties made in closing argument in the Ruling Section that follows.

Ruling

1. Introduction: The Court is called upon to decide whether the evidence presented at trial supports a finding of liability against Defendant BACTES for a civil violation of Evidence Code Section 1158. At the commencement of trial, the parties agreed to an important limitation on the scope of the relevant issues pertaining to that decision. The parties stipulated during opening statements “that both the class certification and the complaint are predicated on an alleged violation of the *cost provisions* [of EC 1158], and neither are predicated on the *timing* provisions. The timing provisions are not a part of this case.” Although there was substantial evidence presented at trial directed at the

timing provisions, the Court will honor the stipulation, and focus only on whether Plaintiff proved that BACTES violated the cost provisions of Section 1158.

2. Evidence Code Section 1158: Section 1158 sets out rules and guidelines as to how health care providers should respond after receiving a written request for patient records from an attorney on behalf of a client before litigation has commenced. The portions of Section 1158 relevant to the Court's consideration are set forth below:

(a) For purposes of this section, "medical provider" means physician and surgeon, dentist, registered nurse, dispensing optician, registered physical therapist, podiatrist, licensed psychologist, osteopathic physician and surgeon, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, or pharmacist or pharmacy, duly licensed as such under the laws of the state, or a licensed hospital.

(b) Before the filing of any action or the appearance of a defendant in an action, if an attorney at law or his or her representative presents a written authorization therefor signed by an adult patient, by the guardian or conservator of his or her person or estate, or, in the case of a minor, by a parent or guardian of the minor, or by the personal representative or an heir of a deceased patient, or a copy thereof, to a medical provider, the medical provider shall promptly make all of the patient's records under the medical provider's custody or control available for inspection and copying by the attorney at law or his or her representative.

(c) Copying of medical records shall not be performed by a medical provider, or by an agent thereof, when the requesting attorney has employed a professional photocopier or anyone identified in Section 22451 of the Business and Professions Code as his or her representative to obtain or review the records on his or her behalf. The presentation of the authorization by the agent on behalf of the attorney shall be sufficient proof that the agent is the attorney's representative.

(d) Failure to make the records available during business hours, within five days after the presentation of the written authorization, may subject the medical provider having custody or control of the records to liability for all reasonable expenses, including attorney's fees, incurred in any proceeding to enforce this section.

(e)(1) All reasonable costs incurred by a medical provider in making patient records available pursuant to this section may be charged against the attorney who requested the records.

(2) "Reasonable cost," as used in this section, shall include, but not be limited to, the following specific costs: ten cents (\$0.10) per page for standard reproduction of documents of a size 8 1/2 by 14 inches or less; twenty cents (\$0.20) per page for copying of documents from microfilm; actual costs for the reproduction of oversize documents or the reproduction of documents requiring special processing which are made in response to an authorization; reasonable clerical costs incurred in locating and making the records available to be billed at the maximum rate of sixteen dollars (\$16) per hour per person, computed on the basis of four dollars

(\$4) per quarter hour or fraction thereof; actual postage charges; and actual costs, if any, charged to the witness by a third person for the retrieval and return of records held by that third person.

For the purpose of clarity, the timing provisions of Section 1158, the violation of which are *not* claimed as a gravamen of Plaintiff's claim, are segregated as set forth below:

(b) Before the filing of an action . . . if an attorney . . . or his or her representative . . . presents a written authorization signed by [a] . . . patient . . . to a medical provider, the medical provider shall promptly make all of the patient's records . . . available for inspection and copying by the attorney at law or his or her representative." [Emphasis supplied by the Court.]

(d) Failure to make the records available during business hours, within five days after presentation of the written authorization, may subject the medical provider having custody or control of the records to liability for all reasonable expenses, including attorney's fees, incurred in any proceeding to enforce this section. [Emphasis supplied by the Court.]

Specific to the Courts earlier identification of the issues before it, the court focuses on the cost provisions. Whether or not BACTES, as the claimed agent of a health care provider, *promptly* made records available to Plaintiffs' counsel upon receipt of a request letter, whether or not BACTES notified Plaintiff's counsel that the records were "available for inspection and/or copying" *within five days* of receipt of the request letter and authorization, and whether or not BACTES overall method of responding to medical record requests are consistent or inconsistent with the implied underlying "temporal" ends of Section 1158 toward ensuring prompt resolution of pre-trial civil matters, are not issues before the Court as potential violations of the statute.

The ultimate issue, therefore, is whether BACTES violated Section 1158 in the method and manner in which it responded to attorneys' pre-litigation requests for client medical records as it relates to the cost provisions.

3. Does BACTES "qualify for", or is it "subject to", liability for violation of Section 1158 under the Thornburg decision?: To determine whether BACTES in fact violated Section 1158, the Court must first address whether or not BACTES qualifies for a finding of liability under the principals set forth in Thornburg v. Superior Court (BACTES Imaging Solutions, Inc.) (2006) 138 Ca. App. 4th. 43 [hereinafter, Thornburg]. Thornburg specified three foundational questions the trier of fact must resolve to determine whether "an agent" of a medical care provider could be subject to liability for violating Section 1158.

The first question is "(1) Did BACTES assume the duty of responding to Section 1158 requests in behalf of its clients?" There is no controversy whatsoever that this is true.

All the evidence supports a finding that *the* primary duty and responsibility of BACTES & Share/Care [hereinafter, "BACTES"] was to respond to the health care facilities' records request, including from requesting attorneys who sought client medical records before litigation commenced. The supporting evidence includes both the service agreement and the business associate agreement between BACTES and its client medical care facility, the testimony of Mr. Socha (BACTES managing officer), and the collective testimony at trial of the medical records personnel employed by medical care providers that were clients of BACTES.

A more thorough discussion is prompted by the second issue advanced by Thornburg: "(2) When responding to attorneys' requests for medical records, was BACTES acting as an agent for its medical care providers?" A related question, is, if so, what might be the legal effect of BACTES establishing an agency relationship with the requesting attorney for the purpose of copying and providing the records?" Again the court provides a hybrid analysis.

There is no question that an integral duty and responsibility BACTES assumed through the contract with its facility clients was to "respond to" attorneys' requests for client medical records *in behalf of the facility*. An agent is defined as one who represents another, called the principal, in dealings with third persons. Civil Code Section 2295. The relationship BACTES had with the medical care facilities to handle all requests for medical records from attorneys is a classic "actual" principal-agent relationship under Civil Code Section 2298, 2299. See also, Kinney v. Vacarri (1980) 27 Ca. 3d. 348. Therefore, the Court finds that BACTES' method of fax transmission with invoice as "the response" sent to the attorney was generally accomplished as the agent of the client medical care facility. Nevertheless, the Court will discuss below an important distinction to that finding.

The Court takes a moment to summarize the medical records process involving the requesting lawyer, the medical care provider and BACTES. BACTES method of sending the fax cover sheet response to the attorney with options, was clearly developed as a reaction to Thornburg with advice from BACTES attorneys.

To a plaintiff's attorney, a client's medical records are important to properly evaluate the client's personal injury case with a view toward early resolution; expeditious monetary settlement preferred. Early resolution avoids court costs and other costs of litigation which can substantially reduce the client's recovery. At the outset of the attorney client relationship, Mr. Busby meets with his client who identifies the treating healthcare providers. Early on, Mr. Busby sends a letter to each provider asking for copies of the client's medical records.

Consistent with Mr. Busby's form request letter (see Exhibit 18), the sole request of nearly all attorneys is for "copies" of the medical records from the facility. There is little evidence that any ask for the facility to "make the records available for inspection & copying", which is the only end-point obligation specifically imposed on the medical care provider under Section 1158. Almost none of the attorneys' letters ask for or demand that a copy service of the attorney's choice be permitted to copy the records, also consistent with Mr. Busby's form request letter. In short, the letters just ask the medical care facility for copies.

Upon receipt of the request and client authorization from the attorney, the medical care provider, in most cases, performs initial screening of the documents, verifying the propriety of the request and authorization. Minimum baseline checks include the obvious; whether the attorney's client is a patient of the facility and whether records exist. A BACTES employee then obtains the request and authorization from the provider by picking-up the documents, either by visiting the facility or, if the BACTES employee has an onsite presence at the facility, simply taking the documents out of a bin, or by the facility sending the documents to BACTES by courier or electronically.

Once BACTES has this documentation, the medical care facility is no longer involved in the process except on the rare occasion there is a problem. BACTES takes on full responsibility for any further action related to responding to the request. BACTES does not charge the medical care facility for any component of BACTES services, because BACTES will receive its compensation by submitting an invoice to, and receiving payment from, the requesting attorney, assuming the attorney chooses to engage BACTES.

BACTES then moves ahead to independently check the propriety and scope of the request and authorization, including ensuring that the request is HIPAA compliant. If so, BACTES then accesses and identifies the appropriate records, always with the privacy protections of HIPAA in mind. In many cases, this is a complicated endeavor due to a variety of technological, practical, logistical and legal factors which are described in the evidence section above and referenced below.

Ensuring compliance with HIPAA all through the process is one of the important services performed by BACTES. It is required by both the service agreement and the business associate agreement. In almost all cases, BACTES has special access to the facility's storage area for paper records and to the facility's computer programs for electronic records. For BACTES to have such access as the facility's contracted copy provider, the law requires the facility to have a Business Associate Agreement with BACTES, ensuring all proper HIPAA precautions are taken and that both BACTES and the facility are insured properly against any errors by BACTES resulting in HIPAA or other violations.

Next, BACTES moves forward to either scan the paper records into its computer, or to transfer the data from the facility's computer to its own computer, to make prints for the attorney. Once the data is scanned or transferred, BACTES marches ahead to make the paper "prints" or "copies" that were requested in the attorney's letter. Up to this point neither the medical care provider nor BACTES has ever "responded" in any way to the attorney's request letter by contacting the attorney, including communicating to the attorney in the manner described by Section 1158, "we have your records and they are available for inspection and/or copying."

Now for the first time, with the process of preparing "copies" for the attorney completed, and the records in BACTES' hand, BACTES responds to the requesting attorney by sending a fax cover sheet and an invoice for the cost of the records. The fax describes two courses of action that an attorney may take to secure the records. Here is the language on a representative BACTES fax cover sheet as reflected by Exhibit 223:

"We have received your attorney request for MEDICAL and/or billing records for the patient listed on the enclosed invoice. BACTES Imaging Solutions ("BACTES") is the on-site record management service for the provider listed on the enclosed invoice and is a professional photocopy service in accordance with Business & Professions Code Section 22451. Pursuant to Evidence Code Section 1158, you have several choices for obtaining patient records, including retaining an outside copy service, visiting the provider listed on the following invoice, and inspecting the records during business hours, or retaining BACTES as your copy service. Should you elect to retain BACTES, the fee for copying your client's medical records is provided on the enclosed invoice. You should find that as the on-site record management service for the provider listed on the following invoice, BACTES' rates are cheaper than an outside copy service and our turnaround time is much faster. Please be informed that if you retain BACTES to copy your client's records, you are agreeing to employ BACTES as your agent. Upon receipt of payment, or proof of payment, we will release records. If records have been requested on behalf of a Social Security claim or appeal, forward substantiating documentation and a BACTES' Representative will respond accordingly.

The invoice that accompanies the "already-copied" records is predicated on a BACTES cost schedule that significantly exceeds the Section 1158 "cost" provisions as to what a medical care facility may charge the attorney for "making records available for inspection or copying".¹ If the lawyer accepts BACTES proposal of establishing a

¹ Examples of BACTES pricing: 88 pages for \$5,750 3-13-15 (through testimony, with reference to Ex. 31 which is a letter not a bill); 69 pages at \$99.17 (\$.50 a piece, for pages 31-100), 3-20-15, Ex.

principal-agent relationship between the attorney and BACTES, with BACTES now acting as the attorney's agent as it pertains to the making of copies, then the attorney simply pays the invoice and promptly receives the records. On the other hand, if the attorney seeks his or her own copy service to make the copies, BACTES refers the attorney back to the records department of the medical care facility for further processing.

In evaluating this arrangement under the law of agency, the Court concludes that BACTES' "response" to the attorney via fax is performed as the agent of the medical care facility. It is one of BACTES' prime contractual responsibilities. However, the fax itself, after directing the attorney to Section 1158, invites an optional arrangement for the transmission of the records to the attorney, which, if accepted, would establish a principal-agent relationship between the attorney and BACTES independent of BACTES' agency relationship with the medical care facility.

In other words, for BACTES to transmit the records in hand, the attorney would have to agree to hire BACTES as its copying agent, just as the attorney might hire some other outside service if it chose that option. The Court finds this arrangement is at arms-length between knowledgeable, professional parties. The attorney either understands Section 1158 or is free to become familiar with it. The attorney has the training and expertise to evaluate the offer intelligently, weigh the options, and decide to accept or reject the offer.

A critical component supporting the legality of this arrangement is that Section 1158 does not require either a medical care facility or its agent to make copies for an attorney, which is the only service that Mr. Busby's letter, and most other attorney letters request. Upon receipt of a letter, both the medical care facility and BACTES are free under the law to decline to make copies. BACTES practice of making the records was not required by the law and nothing in the law requires BACTES to hand over the records it has made.

In addition, the testimony convinces the court that the cost provisions of section 1158 are so outdated² that no copy service who has contracted to be a facility's "go-to" or "onsite" everyday copy agent, like BACTES, could possibly perform the task from an economic standpoint. Ironically, the "outside" copy service who the attorney might choose to perform the task, is not bound one iota by the cost limitations specified in

33; 5 pages for \$26.92. Ex. 19, 1-2-14; 16 pages for \$49.33. Ex. 21, 1-23-14; 6 pages at \$49.13. Ex. 25. 12-26-13; 10 pages for \$49.15. Ex. 29 2-24-14; 5 pages for \$45.31 Ex. 77 (now Sharecare) 8-28-19.

² Section 1158 was created in 1968. The costs a medical care facility may charge the attorney to prepare for "inspection & copying" were added in 1978. The charge for clerical time was added in 1986.

Section 1158. The outside copy service has carte blanche to charge prevailing market rates.

Likewise, the evidence convinces the court that, across the nation, the working dynamic among medical care facility, the facility-contracted or onsite copy agent like BACTES, and the attorney, has so changed industry-wide in favor of the BACTES-style model, that it would impose an enormous economic detriment for medical care facilities in California to revert the process backwards. The unimpeached testimony of Mr. Socha was that neither BACTES nor similarly situated services could possibly survive economically if forced to operate under the outdated cost provisions of Section 1158. Without a BACTES-style arrangement, only outside copy services, not bound by 1158 could do the actual scanning and copying of the records.

But an outside copy services chosen by the attorney would lack the protections afforded by the Business Associate Agreement. It would not have the same intimate access to storage areas for paper records, access to the facility's sometimes multiple systems of electronic medical records, access to the myriad different medical specialty departments where pertinent records may be located, such as neurology, orthopedics, internal medicine, not to mention access to billing records. The outside copy agent, without enormous assistance from a newly constructed medical records staff, could not itself independently arrange for copying or scanning of both paper and computer records simultaneously.

Statewide, the great bulk of the work of screening the propriety of the request letter and authorization, the locating and accessing of records, the examination of records for pertinence and privacy concerns, the extraction of records from their source, and all other preparation work (all done currently by BACTES/ShareCare) would necessarily fall to the hospital medical records staff and away from the outside copy service. Medical care facilities that have pared down staff under the current arrangement would need to substantially increase their medical records personnel and re-train each individual to perform the tasks that BACTES currently performs at no cost to the facility, all in anticipation of a new panoply of outside copy services retained by attorneys. The medical facility may well lose the assurance of patient privacy protections under HIPAA through the Business Associate Agreement as the medical care provider is forced to forego a vetted, trusted business partner contractually bound to ensure those protections. The new independent copy services will have contracted only with the attorney, not with the hospital. Finally, the Court heard no evidence suggesting that an outside copy service would be required by law to provide insurance and indemnification to the medical care facility in the event a violation of patient privacy occurs, as is mandated by the Business Associate Agreement between BACTES and a client medical facility.

With that background in mind, the Court construes the import of BACTES fax transmission offer with much broader implication than reflected in the words themselves. The Court takes the liberty to characterize or interpret BACTES offer more expansively as follows:

“You, Requesting Attorney, have asked the medical care provider, who is BACTES principal, to make you copies of your clients’ records. But, understand that Section 1158 does not require either the hospital or its agent to make copies for you, only to make records available for inspection or copying. I am sorry to tell you that neither the hospital nor BACTES, as an agent of the hospital, are able to make copies for you under the outdated conditions set forth in 1158 as a matter of impracticable cost, established long ago. Since we do not have to make copies, we will not, under those conditions.

“The good news is that “yes” your client was a patient of the facility, “yes” the facility has your client’s medical records, “yes” they can be made available to you or your chosen copy service for inspection and copying, by simply contacting the medical care facility. This is the same notification you might have received had it been the medical facility notifying you, “your records are here and available for inspection and copying”.

“We, BACTES, know of the availability of the records, because we have already accessed the medical record and copied them. As an option to you retaining an outside copy service, BACTES would be able to provide you with the records in hand, but only under one condition: You can retain BACTES as *your* copy service and as *your* agent for the purpose of copying and transmitting the record to you, just as you might retain an outside copy service to do so. This principal-agent relationship between us would be independent and separate from the agency relationship we have established by contract with the facility. To establish this principal-agency relationship, just pay the bill and it shall be done; you will receive the records.

Unfortunately, this is the only way we are able to provide you with the records that we have copied, but rest assured, you do not have to accept this offer, you can always retain your own copy service. In fact, if you end-up retaining an outside service, BACTES will charge you nothing and absorb the cost of the work already done. But you will find that we are usually cheaper than an outside copy service.”

It is obvious to the Court that BACTES implemented this proffered arrangement conscious of the possibility that some Court or jury could someday construe the cost provisions of Section 1158 to be binding on BACTES. Continuing BACTES previous

practice as described in Thornburg, “we have your records, and the only means by which you can obtain them is by paying our invoice”, put BACTES at risk. The new civil cause of action created by Thornburg increased that threat. Thornburg was clearly the motivation behind BACTES and its attorneys evolving its practice conscious of that risk. The solution was that BACTES would become the agent of the lawyer as it related to ex post facto preparing and in real-time transmitting the records.

The Court finds that BACTES made a legally sound decision to evolve its practice to comply with the law, rather than engage in a conspiracy to undermine it. Whatever the motivation, the Court finds that the new arrangement meets appropriate legal standards and does not offend Section 1158’s cost provisions. In short, there is no legal bar to BACTES establishing an agent-principal relationship with the requesting attorney, independent and separate from the ongoing contractual agency relationship between BACTES and the medical facility.

The fact that BACTES has already done the lion’s share of the work contemplated in the new contract with the attorney, *before offering or entering into it*, does not bar the new relationship. “Agency may be created on authority conferred by the subsequent ratification, as well as by precedent authorization.” Civil Code Sections 2307, 2310; John Paul Lumber Co. v. Agnew (1954) 125 Cal. App. 2nd 613, 621-622. Likewise, neither the Services Agreement, nor the Business Associate Agreement between BACTES and a client medical care provider prohibited BACTES from forming a new and independent relationship with the requesting attorney.

While BACTES maintained a contractual relationship with its medical provider client, the law permitted BACTES to establish a new and independent principal-agent relationship with the attorney, who voluntarily hired and paid BACTES as the attorney’s own copy service for the purpose of obtaining the records. As the agent of the attorney for this specific purpose, BACTES was not bound by the cost provisions of Section 1158 and could charge market rates. The arrangement is not a violation of the cost provisions of Evidence Code Section 1158.

Thornburg posed a third question: “(3) was BACTES acting for its own advantage and benefit as well as the interests of the entities it assisted?” The business model between BACTES and the facility was mutually advantageous and beneficial. The medical facility’s burden and expense of preparing for inspection and/or copying records was almost completely eliminated by the arrangement and at no charge to the medical care facility.

The contract allowed the medical care facility to reduce its medical records staff and hire a smaller records crew that did not require the same level of expertise. It cut down on staff training because BACTES would do most of the technical work heretofore done

by facility medical records personnel. In exchange, the facility fed BACTES a steady diet of attorney requests for medical records enabling BACTES to charge the requesting attorneys for the service, if the attorneys chose BACTES. There is no question that the overall relationship provided both BACTES and the medical care facility advantages and benefits and was in the interest of both.

BACTES prime responsibility in behalf of the medical facility was to “respond” to all ROIs. The advantage/benefit focal point shifts when the attorney selects BACTES as the copy service to provide the copies per the fax proposal. When that agreement is made between BACTES and the attorney, the primary advantage/benefit is bestowed on the attorney who obtains records and BACTES who is paid for its work, all arising from a new and independent principal-agent relationship formed by contract.

4. Other claims that BACTES violated Section 1158: Plaintiff argued that other BACTES’ practices violated Section 1158.

(a) Plaintiff claims that the offer BACTES made to the attorney by fax, “buy our records as your agent, or choose your own service”, was illusory. The suggestion is that BACTES and each client medical care facility promised each other by contract, or by secret agreement, or by some other conspiracy, that the facility would never allow any copy service other than BACTES to copy the facility’s records. The Court finds insufficient proof to establish this claim by the standard of “more likely than not true”.

The credibility of the evidence upon which Plaintiff relied for this assertion was impaired by defects in reliability. It came in the form of inherently unreliable hearsay vignettes that were admitted only for the witness’s state of mind or to explain his or her company’s conduct or policy. It also came in through medical facility employee witnesses who worked in the records departments and gave their understanding of facility policy, but who were not “deal-makers, policy makers, or contracting officers” and were not in a position to know the origin, source or authority behind their understanding. Finally, the theory was presented in part through recounting incidents that were most likely anachronistic to the BACTES’ policies under consideration.

Examples of hearsay vignettes came first from Ms. Nickel, Busby’s office manager. She recounted the following occurrences: That sometime “after 2002” one of her office staff told her that a medical provider said that only BACTES could copy the records; that an employee of Nationwide, Busby’s preferred copy service, told her that a medical care provider said that only BACTES could copy records; that Ms. Nickel tried to send her copy service to UCSD and someone from UCSD told her, “we only use BACTES”.

Likewise, a Nationwide representative, Ms. Raygoza, testified that someone at UCI Medical Center named “Adriana”, said that UCI only uses ShareCare for copying records. As to all these examples, the Court rejected the content of each statement as

hearsay. But the Court liberally received the statements to explain the actions or thinking of the witness or the witness's office.

Two witnesses, who were medical facility clients of BACTES, testified that if an attorney sought to use an outside copy service, he or she would tell them that "no, you have to use BACTES". Mr. Rodriguez, a records supervisor from San Ysidro Health, said that if the attorney insisted, he would take it to his manager. He added that this has only happened once in his experience. Leslie Ofeciar was a records supervisor for Orthopedic Specialists of North County before it merged in 2017 with Tri City Medical Care. She testified that before the merger if an attorney requested that OSN permit an outside service to make copies, that OSN would require that BACTES make the copies.

But neither Mr. Rodriguez nor Ms. Ofeciar held an administrative position that would allow them to contract with a vendor, or to "establish" or influence policy for their facilities. Nor were they employees with firsthand knowledge of the contractual arrangement between BACTES and their facility. They did not specify the authority behind or source of their understanding. Neither negotiated the terms of the contract with BACTES. There was no evidence that either had ever seen the contract with BACTES.

This left important questions unanswered. Was this simply a policy or preference of the medical facility, unbeknownst to BACTES? Did the facility's policy grow out of some misunderstanding of the terms of the agreement with BACTES? Or, was the facility's policy to refuse an outside copy service required by some pre-arrangement with BACTES?

Some of these questions were answered convincingly by countering evidence from the defense. The contracts between BACTES and facility clients did not preclude an outside service from copying records at the insistence of a requesting attorney under Section 1158. True, the Business Associate Agreement required a form of "exclusivity" or loyalty to BACTES from the client medical care facility. BACTES offered itself to its clients as the company who would work side-by-side as a partner, its Business Associate, to handle any and all ROI requests. BACTES would be the facility's regular, routine, everyday "onsite" copy service, with intimate access to the EMR, to records rooms, etc. But there is a crowd; the facility agreed as a condition of the contract that it would not employ some other copy company to serve that important "partner", Business Associate, function.

This form of "exclusivity" in no way restricted the facility from allowing an outside copy service from making copies on the rare occasion that an attorney requested it under Section 1158. Mr. Socha testified credibly that neither BACTES nor Sharecare ever required a client to ignore Section 1158 during the class period. If a client asked

BACTES, BACTES would have recommended that the client refer to and comply with Section 1158. Similarly, neither BACTES' contractual obligation to "make copies" for a client facility, nor BACTES designating "making copies" as a "billable event," in any way suggests that an outside copy service should be precluded when requested by an attorney under Section 1158.

Finally, three medical records employees from three different client medical facilities that had contracted with BACTES, testified that if an attorney requested an outside copy service to make copies, they would comply. They were Erica Whannel of El Centro Regional Medical Center, Mr. Kimble from Sharp Rees-Stealy Medical Group and Janet Henderson from UC Irvine Medical Center. Indeed Ms. Henderson, who *was* in a policy-making position, declared that the statement attributed to "Adriana", that UCI would not allow an outside copy service to make copies, was false. She did not recognize "Adrianna's name, but there were many "on the line clerks" at that time who would not be in a position to contract with a vendor or make policy decisions for UCI.

The allegation that BACTES and its clients agreed that a client would blackball any effort by a requesting attorney to use a preferred outside copy service under Section 1158 was not proven.

(b) Plaintiff asserts that neither the medical care provider nor BACTES ever notifies the lawyer of the availability of the records "for inspection or copying" as required by Section 1158. This is not true. BACTES fax transmission itself serves that purpose. In fact, it goes even further by saying "the records are here for you".

As a matter of practice, neither Mr. Busby, nor other attorneys, ever request that the records "be made available for inspection or copying". The attorneys only ask for copies. There seems to be a disconnect between this grievance and attorney practice that likely would have impacted the elements of "causation" and "damages" had the Court been required to address them.

True, if the attorney chooses to employ an outside copy service as an alternative, BACTES will need to connect the lawyer with the proper records employee at the medical facility, or the lawyer will need to contact a facility records employee to make further arrangements. Nevertheless, the Court finds that the fax transmission substantially complies with the spirit of the 1158 requirement that the facility let the attorney know that "we have your client's records and that arrangements can be made for you to get them".

During the presentation of the evidence, Plaintiff focused more on the timing of the fax transmission in relation to the receipt of the request letter, vis-à-vis Section 1158. Generally, 1158 requires a medical care facility to respond "promptly" to a records request, and specifically to notify the attorney of the availability of the records for

inspection and copying “within five days of receipt of the request”. Ms. Nickel, Mr. Busby’s Office Manager, provided three examples of records requests and in each BACTES responsive fax with invoice arrived in Busby’s office more than a month after the records request, with no communication from the medical care provider or BACTES in between.

Mr. Socha, however, testified that BACTES was at the mercy of its client providers in terms of when BACTES might obtain the request and authorization; sometimes rapidly, sometimes not. But, BACTES generally had a three to five-day turnaround from receipt of the request and authorization to the fax transmission to the attorney.

We need not belabor this controversy. The parties stipulated that the “timing” provisions set forth in Section 1158 were not issues framed by the pleadings and therefore not before the Court.

(c) Plaintiff suggests that BACTES violated Section 1158 by charging ahead to make copies before ever contacting the attorney. But the statute does not prohibit either the medical provider or BACTES from making copies upon receipt of the request and authorization, except in one circumstance specified in subsection (c). Neither the medical care provider nor its agent can make copies *when the requesting attorney has employed a professional photocopier* to do so.

As stated previously, Mr. Busby’s form request letter and the requesting letters of almost all other lawyers simply ask the medical facility for copies. The letters do not seek an outside service to copy the records, nor indicate that the lawyer has already employed a professional photocopier to do so. In short, the sole circumstance that would prevent BACTES from moving ahead to copy the records never arises.

Moreover, Mr. Socha testified credibly, that during the class period, BACTES policy would have been to not move ahead with copies if BACTES had been informed specifically that the lawyer wanted to employ an outside service. This theme was echoed by some of the client medical facility witnesses. There is no violation of Section 1158 described in this scenario.

(d) Plaintiff implied legal infirmity in BACTES not disclosing its billing amount until the invoice was faxed to the requesting attorney. But Mr. Socha testified that estimating a billing price in any given case required accessing the medical record, counting pages and a number of other tasks. Ballparking a price is difficult and inaccurate without performing the tedious task of accessing and counting the pages. For BACTES, it made much more sense to plow ahead with the copies, and provide the attorney with the precise cost when the records were definitively established.

The Court has determined that there is nothing legally amiss about the options presented to the attorney through the fax transmission with attached invoice. The attorney could either accept BACTES pricing or choose some other copy service. The Court has not been made aware of any provision or other law that requires BACTES to disclose its pricing earlier or that the failure to do so violates Section 1158. This same analysis applies to the allegation that BACTES illegally prepares copies as an inducement for the attorney to choose the option of buying records from BACTES.

(e) Finally, the Court does not find that BACTES faxed offer to the attorney represents a solicitation for an unlawful exculpatory contract under Civil Code Section 1668. Under Section 1668, it is against the policy of the law if the direct or indirect object of a contract is to exempt someone from a violation of law. Here, Section 1668 does not apply because no medical care provider and no copy service who is a Business Associate of a medical care provider, like BACTES, is required to make copies for an attorney under Section 1158 or under any other provision of the law. Therefore, BACTES informs the attorney that he or she has a choice as to which copy service, he or she will contract with to make the copies. The effect of the offer is that BACTES is simply asking to be considered as one of those possible choices contracting with, and becoming the agent of, the attorney. The design was not to violate Section 1158, but to create a new relationship outside of the scope of Section 1158.

Decision

The Court finds that Plaintiff did not prove that BACTES violated Evidence Code Section 1158 as defined by Thornburg or otherwise.

The cause of action for alleged violation of Business and Profession Code Section 17200 was dependent on a violation of Section 1158. Therefore, that cause of action was not proven.

All other causes of action were withdrawn by Plaintiff's counsel during or after closing argument.

Judgment in favor of Defendant BACTES who is entitled to costs of prevailing party.

KJM