

Legal Q/A

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Q: *I've heard that thousands of complaints have been filed with the government alleging violations of HIPAA, but very few providers have been sanctioned. Have the concerns about medical records privacy under HIPAA been overblown?*

A: A patient who believes that his or her privacy rights under the Health Insurance Portability and Accountability Act (HIPAA) have been violated may file a written complaint with the Office of Civil Rights (OCR) in the Department of Health and Human Services. The OCR will investigate and has the statutory authority to impose civil monetary penalties of \$100 per violation, with a cap of \$25,000 in any calendar year for the same kind of violations.

In the first three years after the enactment of the HIPAA Privacy Rule, there were approximately 22,000 complaints filed with the OCR. About 75% of those did not warrant further investigation. Of the 5,000 complaints that were pursued, 68% were resolved by informal action. Most notably, there were no fines imposed against any providers.

But this does not mean that violations of HIPAA cannot have serious

consequences for physicians. Although HIPAA does not allow a private cause of action for a violation – only the government has that right – a recent appeals case in North Carolina may portend liability exposure for HIPAA violations under other legal theories.

In *Acosta v. Byrum* (decided December 19, 2006), a patient sued her physician on the theory of negligent infliction of emotional distress – a legally recognized tort in most states. The patient claimed that the physician allowed the office manager to retrieve her confidential psychiatric and other medical records and provided them to third parties without her consent.

At first, the trial court dismissed the patient's claim because HIPAA does not provide for a private cause of action in favor of aggrieved parties. But the appeals court looked at it differently. It said the plaintiff wasn't seeking damages for a statutory violation of HIPAA. Instead, she was using HIPAA to define the *standard of care* that the physician should have followed to protect her medical information from unauthorized disclosure. Essentially, the patient used the HIPAA violation to bootstrap a case of common law negligence against the physician.

Quite likely, the most serious consequence of a HIPAA violation for

a physician arises under the New York professional misconduct law. It is considered an act of professional misconduct for a physician to reveal personally identifiable facts, data, or information obtained in a professional capacity without the prior consent of the patient, except as authorized or required by law. In addition, a willful or grossly negligent failure to comply with substantial provisions of federal, state, or local laws, rules, or regulations governing the practice of medicine constitutes professional misconduct. Many professional misconduct investigations conducted by OPMC originate

from complaints filed by patients, so the chances of a HIPAA violation turning into an OPMC prosecution are not remote.

In the end, the collateral effects of an alleged HIPAA violation can cause more damage to the physician's pocketbook and reputation than an investigation by the Office of Civil Rights.

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