

## Nurse Pleads Guilty To HIPAA Privacy Breach;

### *U.S. Attorney Cautions HIPAA-Covered Entities DOJ Is Serious About Enforcing HIPAA Compliance*

*April 28, 2008*

A 25-year old Trumann, Arkansas licensed practical nurse faces sentencing to up to 10 years in Federal prison, fines of up to \$250,000, or both after pleading guilty to wrongful disclosure of individually identifiable health information ("PHI") for personal gain and malicious harm in violation of the Privacy Standards of the Health Insurance Portability & Accountability Act ("HIPAA"). She is expected to be sentenced in the next 45 to 60 days.

The prosecution and its resulting plea agreement should alert health plans, health care providers and other health industry entities and the employees and business associates assisting them in carrying out their activities of the importance of complying with HIPAA's privacy and data security mandates.

According to an April 15, 2008 Department of Justice Press Release, nurse Andrea Smith and her husband, Justin Smith, were indicted on December 5, 2007 on charges of conspiracy to violate, and substantive violations of, the HIPAA privacy provisions. According to the indictment, Ms. Smith used her position as a nurse with the Northeast Arkansas Clinic ("NEAC") in Jonesboro, Arkansas on November 28, 2006 to access private medical information of an unnamed NEAC patient. Ms. Smith then disclosed that private medical information to her husband, Justin Smith, who subsequently called the unnamed patient and told the patient that Smith intended to use the information against the patient in "an upcoming legal proceeding." NEAC subsequently terminated Mrs. Smith's employment.

HIPAA prohibits health care providers, health plans, and health care clearinghouses ("covered entities") from using, accessing and disclosing individually identifiable health care information except as allowed under the Privacy and Security Standards. Under HIPAA, covered entities also are responsible for establishing and enforcing policies and procedures that safeguard protected health information against improper use, access or disclosure by employees, business associates, and other third parties.

The April plea agreement by Andrea Smith follows the prior HIPAA criminal conviction of Ferando Ferrer, Jr., and the guilty pleas of his co-conspirator, Isis Machado. In January 24, 2007, a Federal jury found Ferrer, the owner of a health claims administration company, guilty of 1 count of wrongful disclosure of PHI in violation of HIPAA, 5 counts of aggravated identity theft, 1 count of computer fraud, and 1 count of conspiring to defraud the United States after Ferrer misappropriated the personal data of more than 1,100 patients of the Cleveland Clinic through a Cleveland Clinic employee, Isis Machado. The misappropriated information included patients' names, birth dates, Social Security numbers, Medicare identification numbers and addresses. Ferrer and Machado used the misappropriated data to submit more than \$7 million in fraudulent Medicare claims, with approximately \$2.5 million paid to providers and suppliers. Machado, who was Ferrer's cousin, pled guilty on January 12, 2007 to conspiring with Ferrer to steal and misuse the data and testified against Ferrer at trial. The Justice Department also previously secured a guilty plea to violations of HIPAA from David Gibson, a clinic employee who admitted to using misappropriated charge card and other patient information to purchase items for his personal benefit.

Although criminal prosecutions under HIPAA to date remain infrequent, Federal officials caution covered entities and their employees and business associates against underestimating the Federal government's commitment to the enforcement of the HIPAA Privacy Standards.

Although NEAC was not charged in connection with the case, Jane W. Duke, United States Attorney for the Eastern District of Arkansas, provided a reminder to health care providers, health plans and other HIPAA covered entities of the importance of enforcing their own, and their employee's compliance with the HIPAA rules in announcing the plea agreement. "What every HIPAA-covered entity needs to realize and reinforce to its employees is that the privacy provisions of HIPAA are serious and have significant consequences if they are violated," Duke stated. She added, "Long gone are the days when medical employees were able to snoop around office files for 'juicy' information to share outside the office. We are committed to providing real meaning to HIPAA. We intend to accomplish this through vigorous enforcement of HIPAA's right-to-privacy protections and swift prosecution of those who violate HIPAA for economic or personal gain or malicious harm."

These prosecutions of employees of covered entities that misappropriate PHI comes as a surprise to many covered entities, who construed a June 1, 2005 memorandum issued by the Justice Department as meaning that the Justice Department did not intend to prosecute individuals working for covered entities under the HIPAA statute. In that 2005 memorandum, the Justice Department responded to the question of whether the only persons who may be directly liable under section 1320d-6 are health plans, health care clearinghouses, certain health care providers, and Medicare prescription drug card sponsors—or whether this provision may also render directly liable other persons, particularly those who obtain protected health information in a manner that causes a person to whom the substantive requirements of the subtitle apply to release the information in violation of that law. In response, the Justice Department memorandum stated, "We conclude that health plans, health care clearinghouses, those health care providers specified in the statute, and Medicare prescription drug card sponsors may be prosecuted for violations of section 1320d-6. In addition, depending on the facts of a given case, certain directors, officers, and employees of these entities may be liable directly under section 1320d-6, in accordance with general principles of corporate criminal liability, as these principles are developed in the course of particular prosecutions. Other persons may not be liable directly under

this provision. The liability of persons for conduct that may not be prosecuted directly under section 1320d-6 will be determined by principles of aiding and abetting liability and of conspiracy liability.”

The prosecutions provide evidence that there may be substance behind U.S. Attorney Duke’s warning the Justice Department takes HIPAA enforcement seriously and reinforce the importance of covered entities taking prompt and appropriate action to prevent and redress violations. Because the crimes in both the Smith and Ferrer cases involved included felony violations under Federal law by employees, the clinics involved in each situation could have faced criminal liability under the Federal Sentencing Guidelines for the criminal activities by their former employees, in addition to civil claims brought by patients and others whose personal information was misappropriated. The lack of prosecution of the employing clinics in both cases demonstrates that health care providers, health plans, and health care clearinghouses caught by surprise by a felonious employee or business associate may be able to substantially mitigate their criminal and civil liability risks if they can demonstrate they have made reasonable efforts to monitor and manage business associate and employee behavior and acted promptly and appropriately when the problem comes to light. In light of these convictions, health care providers, health plans, and health care clearinghouses should evaluate the adequacy not only of their written HIPAA privacy policies but also their operationalization and enforcement of compliance with these policies and those of the employees and business associates working for them. The enforcement actions taken against individual employees also raises questions about when and if Justice Department officials will be willing to pursue enforcement of HIPAA against employers who receive or use PHI from a health plan or other covered entity in violation of HIPAA-mandated safeguards that require health plans to establish safeguards to prevent disclosure of PHI to employers for employment related uses without authorization.

For assistance with assessing the strength of your HIPAA or other compliance policies and controls, to arrange HIPAA or other compliance training, or for help with other compliance and risk management concerns, please contact Cynthia Marcotte Stamer at [cstamer@solutionslawyer.net](mailto: cstamer@solutionslawyer.net), 972-419-7188, or Heidi Kocher at [hkocher@solutionslawyer.net](mailto:hkocher@solutionslawyer.net), 972-419-7107.

### *About Cynthia Marcotte Stamer & Heidi Kocher*

**Cynthia Marcotte Stamer, P.C.**, a member of the law firm of Glast, Phillips & Murray, P.C, has more than 20 years experience advising and representing health care providers, health plans, health information technology providers, and other health industry clients about health care operations, reimbursement, regulatory and public policy, risk management, human resources, credentialing, technology, privacy, and other concerns. Her clients include hospitals, physicians, clinics, IPAs, PHOs, skilled nursing facilities, assisted living and home health, rehabilitation, imaging and other diagnostic services providers, DME, physician practice management companies and other management services organizations, health care technology, and other health industry clients. Recognized in the International Who’s Who of Professionals and bearing the Martindale Hubble AV-Rating, Ms. Stamer is a highly regarded legal advisor and consultant, author and speaker, who regularly conducts management and other training on health care reimbursement and other health industry operational, regulatory, and public policy matters.

Chair of the American Bar Association (ABA) Health Law Section Managed Care & Insurance Interest Group and known for her practical, direct problem-solving approach, Ms. Stamer also applies her extensive industry experience in numerous professional and industry leadership roles. In addition to her ABA Health Law Section involvement, Ms. Stamer serves on the editorial advisory boards of and is a contributing author for the Bureau of National Affairs and other publications, served as the Compliance Committee Chair and a member of the Board of the National Kidney Foundation of North Texas Board of Directors, serves on the continuing education and conference planning committees of the ABA Joint Committee On Employee Benefits (JCEB), the HFMA Lone Star Chapter, TAHFA, the IRS TEGE Advisory Council, and numerous other health industry groups. She also is the past-president of the Alliance for Health Care Excellence, and founder of its Health Care Heroes and Patient Empowerment Programs. She also is active in numerous other industry organizations including the American Health Lawyers Association, the Medical Group Management Association, the Alliance for Healthcare Excellence, the Dallas Bar Association Health Law Section,

Ms. Stamer is a widely published author and highly sought-after speaker nationally and internationally sought out for her strategic knowledge and insights on operational and technical health care risk management and operational concerns. A columnist for MD News and recurring author for various other health industry publications, Ms. Stamer’s insights have been quoted by the Wall Street Journal, the Bureau of National Affairs (BNA), HIPAA Comply, Private Payer News, Modern Health Care, Managed Healthcare Executive, Health Leaders, Caring for The Elderly Magazine, For The Record, the Dallas Morning News, Spencer Publications, the Dallas Business Journal, the Houston Business Journal, and a various other national and local publications. Ms Stamer is the author of 100s of publications on health industry matters including numerous highly regarded works published by the American Bar Association, Aspen Publishers, BNA, the American Health Lawyers Association, the Medical Group Management Association, Government Institutes, Inc., Decision Health and others. She writes and speaks extensively about the management and mitigation of medical privacy and other privacy and data security risks arising from health care, human resources, employee benefit, technology, and other operations. Some of these works include "Other Liability-Tort & Regulatory Issues in E-Health Transactions," E-Health Business & Transactional Law (BNA/ABA)(2007); "Privacy Invasions of Medical Care-An Emerging Perspective," ERISA Litigation Manual (BNA) (2003-2007); "Privacy Challenges, The Quest For Interoperable Electronic Health Records: A Guide To Legal Issues In Establishing Health Information Networks (AHLA)(2005) (Contributing Author); "Cybercrime and Identity Theft: Health Information Security Beyond HIPAA," ABA Health eSource, (May, 2005); and "Privacy & Securities Standards-A Brief Nutshell," BNA Tax Management and Compliance Journal (February 4, 2005); "Update on HIPAA Fraud, Privacy & Securities Rules," ABA (2003) and others.

**Heidi Kocher** has over 10 years experience in healthcare law, having represented many kinds of healthcare providers, from small DME companies to large national health care organizations. Prior to returning to private practice, Ms. Kocher was in-house at one of the largest national hospital companies. Her wide-ranging experience includes advising corporate and individual clients on the myriad federal and state fraud and abuse laws, such as Stark, the Anti-kickback statute, and False Claims Act, structuring mergers, acquisitions, joint ventures, employment agreements, and other deals, developing compliance programs and plans, interfacing with fiscal intermediaries, carriers, and other payers, resolving reimbursement issues, conducting investigations, assisting with preparing for and responding to JCAHO surveys,

obtaining advisory opinions from the OIG, and representing providers in relation to federal and state agencies. She has worked with hospitals, physicians, mid-level practitioners, pharmacies, DME companies, LTACs, SNFs, home health and hospice agencies, inpatient rehab facilities, clinical laboratories, as well as allied health practitioners. She is active in the Health Care Compliance Association, and has written numerous articles and provided training on various healthcare law topics.

For more information about Ms. Stamer and Ms. Kocher, a listing of selected publications and other health industry links, information about workshops and other training and other health industry information and resources or other details about Cynthia Marcotte Stamer, P.C. and Glast, Phillips & Murray, P.C., see [CynthiaStamer.com](http://CynthiaStamer.com) or contact Ms. Stamer or Ms. Kocher.

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