

## INSIDERS' INSIGHTS

## HIPAA LIABILITY?

Physicians, hospitals and health plans face increased risks of potential litigation under the Health Insurance Portability and Accountability Act, healthcare attorneys say. But their best defense could be following their own procedures.

—SUSANNE HOPKINS



**Andrew B. Wachler**  
Principal partner  
Wachler & Associates  
Royal Oak, Mich.

THERE ARE THREE AREAS OF LIABILITY—civil liability under the federal statute and regulations, criminal liability, and civil liability under state law that will use HIPAA as the setting for the standard of practice. The most exposure in regard to the regulations is going to be individuals suing covered entities under state law using HIPAA as the standard. We are seeing that. Make sure that if a violation occurs, you try to mitigate any impact. Also look at your facility and monitor and audit compliance.

Are you following all the policies you have written? Are you monitoring that your employees are following these policies? You've let your patients know their rights and what your duties are. If you are not compliant, you leave yourself quite exposed.



**Stephen Page**  
Healthcare/IP attorney  
Waller Lansden Dortch & Davis  
Nashville, Tenn.

I EXPECT THE MAJOR AREA OF LIABILITY for plans and providers to be civil and criminal penalties for HIPAA violations rather than patient lawsuits. The U.S. Department of Health and Human Services' Office for Civil Rights is responsible for assessing civil penalties. OCR has indicated that enforcement will be driven primarily by patient complaints, not random compliance audits. Civil penalties range from \$100 per violation to a maximum of \$25,000 each calendar year for repeated violations of the same requirement. But inappropriate disclosures often violate several requirements. Criminal penalties are more significant for a person who knowingly violates HIPAA, ranging from \$50,000 in fines and one year's imprisonment to \$250,000 and 10 years' imprisonment for a person who intends to sell or use the information for commercial advantage.

VIRTUALLY EVERY STATE ENACTED ITS own version of HIPAA as a supplement to its own privacy rules, and all apply their own remedies. You must know what your duties are—not only how you view and access information and disclose it, but when you *must* disclose it. Don't get so focused on the technicalities of HIPAA that you forget about the other areas. Look beyond the federal statute. Put into practice ways to comply with those regulations and put in safety elements. Even if you do the right thing, parties on the other side may not agree with what you do. You have to operationalize the procedures—you have to write them down, then you have to do it. Then you have to be prepared to prove it.



**Cynthia Marcotte Stamer**  
Partner, national health-care practice  
Epstein Becker Green Wickdiff & Hall, Dallas



**Marcy Wilder**  
Partner  
Hogan & Hartson  
Washington, D.C.

HIPAA HAS DRAMATICALLY INCREASED awareness of medical-privacy issues among patients and may therefore lead to increased privacy litigation. But HIPAA doesn't provide patients with a private right of action and, at least for the first wave, HIPAA privacy-related complaints will be addressed mostly through enforcement actions by the government. Since the privacy rule took effect, more than 5,000 complaints have been filed. The complaints often focus on the wrongful disclosure of individually identifiable health information; lack of adequate safeguards; failure to provide a copy of records to patients; disclosures that exceed the minimum necessary standard; and failure to give notice of privacy practices. The HIPAA privacy rule is already making its presence felt in state privacy litigation across the country and that trend will only increase.

*HealthLeaders Wants to Know: Has your hospital or health plan faced any HIPAA-related legal action since the rules went into effect? E-mail us at [magazine@healthleaders.com](mailto:magazine@healthleaders.com).*

### » EMERGENCY CONDITIONS

Seventy-six percent of hospitals diverted ED patients to other facilities last year, due to a lack of specialty physician coverage. One-third of the 681 hospitals surveyed by Lafayette, La.-based The Schumacher Group said uncompensated care was the reason specialists stopped covering the ED.

### » AID FROM ABROAD

Thirty-five million Americans live without adequate physician coverage and immigrant healthcare professionals are filling the void. Thirteen percent of U.S. providers are foreign-born, and 25% of all physicians and 11.5% of RNs are immigrants, says a report by the Washington, D.C.-based Immigration Policy Center.