



Legal Issues & HIPAA

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Name 2 legal issues that relate to HIPAA.

Mrs. Smith, a 17 year old, is brought to the local emergency room by ambulance. She appears unconscious, has burns over a large portion of her body, and is pregnant. She has never been to this hospital before & never seen this ER doctor before. A nurse recognizes her as a psychiatric patient from another hospital and tells the doctor. The doctor tells her he is going to help her & she says “No - No - No.” Her boyfriend arrives with a minister.....

What are the legal issues that I need to know about?

- Can I get sued ?
- Can I get sued for not following HIPAA?
- Can the government fine me or send me to prison for not following HIPAA?
- Can the government impose a civil penalty against me for not following HIPAA?
- Can I get sued for release of a patient's information?

The "Legal Issues"

- **Government Enforcement Actions**
- **Government Compliance Reviews**
- **Private lawsuits**
- **State Administrative Licensing Actions**
- **Failure to apply HIPAA (other than an improper release of information)**

Privacy Laws



Examples of Privacy / Confidentiality “Laws”

- KDHE Patient Rights
K.A.R. 28-34-3b
- Medicare Conditions
of Participation, sec.
482.13
- JCAHO, RI & IM.
- Privacy Act of 1974
- Institutional Review
Boards
- Confidentiality of
Alcohol & Drug
Abuse Records, 42
CFR Part 2
- State Laws
- Federal Laws
- Standards of Practice
- Case Law



HIPAA PRIVACY

- **Patient Confidentiality**
- **Protected Health Information**
- **Minimum Necessary**
- **Need to Know Basis**
- **Coordinated with all of the laws and interpretations of the laws on the federal and applicable state level**



Possible Legal Causes of Action

- Private Cause of Action: Invasion of Privacy
- Private Cause of Action: Defamation
- Government Action: HIPAA Violation
- Government Action:
 - Civil**
 - Criminal**
 - Administrative**

HIPAA

- **CIVIL PENALTIES:** Health plans, providers and clearinghouses that violate the HIPAA standards will be subject to civil liability.
- **Civil money penalties are \$100 per violation, up to \$25,000 per person, per year for each requirement or prohibition violated. 42 USC 1320d-5(a)**

HIPAA

- **FEDERAL CRIMINAL PENALTIES:** Up to \$50,000 & one year in prison for obtaining or disclosing PHI;
- up to \$100,000 & up to five years in prison for obtaining PHI under “false pretenses”;
- and up to \$250,000 & up to 10 years in prison for obtaining or disclosing PHI with the intent to sell, transfer or use it for commercial advantage, personal gain or malicious harm. 42 USC 1320d-6

The HIPAA “Good News”

The HIPAA Privacy Regulations will not be enforced until April 14, 2003.

The HIPAA Privacy Regulations are effective now but the compliance (& your obligation to follow them) and the enforcement is not until April 14, 2003.

The HIPAA “Bad News”

42 USC 1320d-6:

WRONGFUL DISCLOSURE OF
INDIVIDUALLY IDENTIFIABLE
HEALTH INFORMATION

42 USC 1320d-6:

(a) A person who knowingly and in violation of this part uses or causes to be used a unique health identifier; obtains individually identifiable health information relating to an individual; or disclosed individually identifiable health information to another person, shall be punished as provided in subsection (b) of this section.

42 USC 1320d-6:

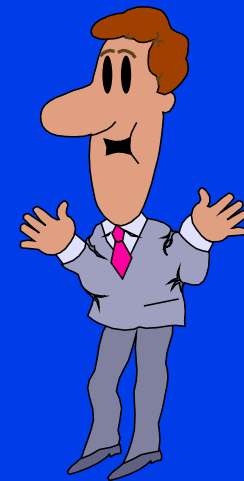
(b) A person described in subsection (a) of this section shall (1) be fined not more than \$50,000, imprisoned not more than 1 year, or both; (2) if the offense is committed under false pretenses, be fined not more than \$100,000, imprisoned not more than 5 years, or both; and (3) if the offense is committed with the intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm, be fined not more than \$250,000, imprisoned not more than 10 years, or both.

Why do I care about this
federal law now?

**The federal law, 42 USC 1320d-6
is on the books now and can be
enforced now.**

**What about a complaint
made to HHS?**

**Can HHS take any other
kind of action?**



HIPAA Sanctions

45 CFR 160.312

If a complaint is verified and indicates a failure to comply the Secretary of HHS will attempt to resolve the matter by informal means.

If the matter cannot be resolved through informal means the Secretary will issue written findings documenting the non-compliance.

What is the anticipated process if there has been a suspected violation?

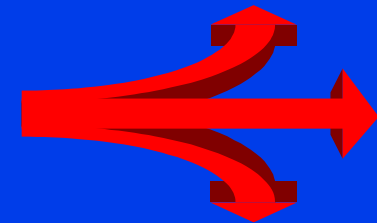
HHS OCR will seek to obtain voluntary compliance & where voluntary compliance cannot be achieved then OCR will seek monetary penalties and make referrals for criminal prosecution.

Is there a specific "enforcement" regulation so we know how OCR will approach these issues?

No.....HHS plans on issuing a specific Enforcement Rule that applies to all of the regulations under the HIPAA Administrative Simplification provisions.

What "rules" apply now?

- ◆ The compliance & enforcement provisions in the HIPAA Privacy regulation, 45 CFR 160.300, apply only to the "Privacy Standards" established by those regulations.
- ◆ The yet to be issued "Enforcement Rule" will apply to all of the Administrative Simplification provisions.

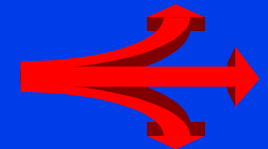


What "rules" apply now.

- ⇒ A covered entity that violates any HIPAA standard is subject to the same civil monetary penalty procedures imposed for violations of the Medicare requirements.
42 USC 1320d-5(a)(2)

“But I didn’t know I was violating the law -- is there any hope”?

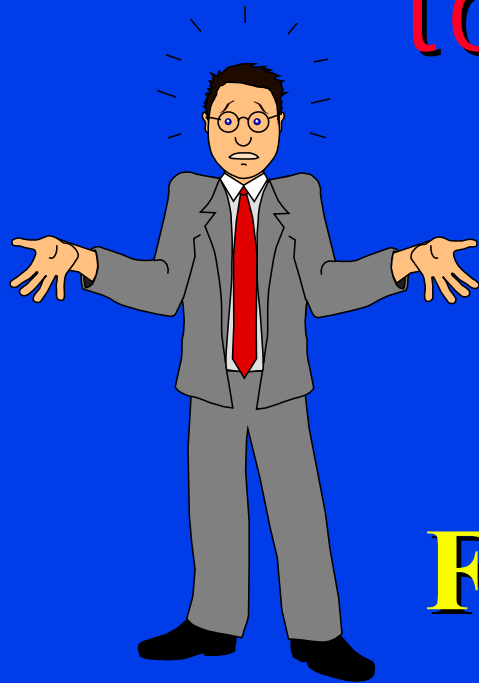
- YES
- HIPAA, Public Law 104-191, sec. 1176, states that a penalty may not be imposed if it is established to the satisfaction of the Secretary that the person liable for the penalty did not know, and by exercising reasonable diligence would not have known, that such person violated the provision.





In certain circumstances a penalty may not be imposed if the failure to comply was due to reasonable cause and not to willful neglect; ***and*** the failure to comply is corrected during the 30-day period beginning on the first date the person liable for the penalty knew, or by exercising reasonable diligence would have known, that the failure to comply occurred.

Is the HIPAA Privacy law
the only federal law I need
to know about now?



NO.

42 CFR Part 2

**Federal Substance Abuse
Privacy Law**

Plus *Others*

OK - as long as I don't release
PHI I don't have to comply to
HIPAA until April 2003 - Right?

A federal judge in Virginia has ordered the the
U.S. Attorneys office follow the provisions of
the HIPAA Privacy regulation now.

*“...the Standards indicate a strong federal policy to
protect the privacy of patient medical records, and
they provide guidance to the present case.....I find
these regulations to be persuasive in that they
demonstrate a strong federal policy of protection for
patient medical records.”*

Can a private person sue me?

- HIPAA does not create a private cause of action.
- Patients whose PHI or other medical information is improperly released can be expected to rely on HIPAA as a basis for suing and as what the requirements are as to the protection of confidential health information.

Kansas Law:

- **The remedy for an invasion of one's right to privacy is a civil action.**
- **One's right to privacy is invaded if another intentionally intrudes, physically or otherwise, upon one's solitude or seclusion and if the intrusion would be highly offensive to an ordinary person.**

Kansas Law:

- **Breach of Contract:** Was there a specific representation made or an expectation that the patient's health information would be confidential and not released?
- **Breach of Confidentiality Based on a Law:** Administrative licensing statutes many times have *confidentiality* provisions that a provider must follow.

SUMMARY:

- **“Legal Issues” relating to HIPAA are based on non-compliance = failure to follow the law.**
- **There are both civil & criminal penalties.**
- **There could also be licensing / disciplinary actions taken against a provider.**
- **There could be a civil lawsuit filed.**

PROTECTIONS:

- Do not share a patient's health information unless you are sure you can legally do so.
- Make sure you have the proper signed forms to share the information.
- Make sure you have the patient's permission to share the information.
- Document, Document, and **DOCUMENT.**

Special Issues:

- When is consent not needed.
- When is authorization needed.
- Who must have a Notice of Privacy Practices.
- When is oral permission from the patient sufficient to release information.
- Who is a personal representative of a patient.
- When can PHI be released and to whom.

More Special Issues:

- Uses & disclosures required by law.
- Uses & disclosures for public health activities.
- Disclosures about victims of abuse, neglect or domestic violence.
- Uses and disclosures for health oversight activities.
- Disclosures for judicial & administrative proceedings.
- Disclosures for law enforcement purposes.
- Uses & disclosures about decedents.

Still More Special Issues:

- Uses & disclosures for cadaveric organ, eye or tissue donation purposes.
- Uses & disclosures for research purposes.
- Uses & disclosures to avert a serious threat to health or safety.
- Uses & disclosures for specialized government functions.
- Disclosures for workers' compensation.

Thank You

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The End

