

# High profile HIPAA fines rattle health biz

## Health care regulations

By Carol Lundberg

The best thing about electronic medical records is the same thing as the worst thing about electronic medical records — they're easily and quickly accessible.

While access adds to efficiency and improved patient care, it also makes health care providers, and everyone who shares records with them, susceptible to data breaches.

As a result, "[The Health Insurance Portability and Accountability Act] (HIPAA) enforcement is at an all-time high," said Robert S. Iwrey of The Health Law Partners

in Southfield.

"Greater resources are being expended and additional enforcement tools have been added as part of recent health care reform legislation in hopes of deterring and preventing violations of HIPAA through stiffer and more severe penalties," he noted.

There have already been three cases that grabbed headlines this year and caught the attention of health care providers who wondered if they could be next.

"At the same time, there is a huge public policy push to make health records more electronic, more accessible," said Elizabeth Callahan-Morris of Hall, Render, Killian, Heath & Lyman PLLC in Troy. "That makes people nervous, the



"Greater resources are being expended and additional enforcement tools have been added as part of recent health care reform legislation in hopes of deterring and preventing violations of HIPAA through stiffer and more severe penalties."

— Robert S. Iwrey,  
The Health Law Partners

idea of their personal health information being out there and available. You can't push for that without reassuring the public that there is security in place."

So in 2009, President Barack Obama signed into law the Health Information Technology for Economic and Clinical Health Act (HITECH), which amended HIPAA to improve enforcement.

Prior to HITECH, the HIPAA violations could lead to penalties of \$100 per violation, with a cap of \$25,000 per year. HITECH ramped up the maximum penalties, which are now \$50,000 per violation with a cap of \$1.5 million per year, depending on the nature and extent of the violation.

That got everyone's attention.

HIPAA complaints tend to not be made willy-nilly, Iwrey points out, noting that according to the Department of Health and Human Services (HHS) website, of all the complaints in Michigan between 2003 and 2010, there were no violations in only 12 percent. Sixty-nine percent were re-

Davis. Davis ran for re-election with only weeks to organize a campaign, but lost in the November election.

— CAROL LUNDBERG

## Another swing at revising client solicitation rules

There was considerable uproar in May when the Michigan Supreme Court amended MRPC 7.3 and published for comment further revisions of when, how and under what circumstances attorneys could solicit potential clients.

When the proposal was first floated in July 2010, it was almost universally panned by those submitting comments on the Court's website.

Last week, the Court backtracked:

See "Briefly," page 21

## [ Contents ]

### News & Features

DMBA News .....	page 8
Briefly Speaking .....	page 2
Calendar & Events .....	page 6
LawBiz Coach's Corner .....	page 4
Letter to the Editor .....	page 4
People in the Law .....	page 5
Verdicts & Settlements .....	page 22

### This Week's Decisions

6th U.S. Circuit .....	page 9
Michigan Supreme Court .....	page 9
Court of Appeals .....	page 10
Attorney Discipline Board .....	page 16

### Directories

Alternative Dispute Resolution ...	page 19
Classified .....	page 17
Experts .....	page 19
Lawyer to Lawyer Referral .....	page 17
Legal Products & Services .....	page 17

# Cradle to grave.

**HONE LAW FIRM, PROFESSIONAL CORPORATION.**

Now offering services in nursing home abuse and neglect, in addition to medical negligence and birth issues

**PhoneHone: 248-948-9800**

email: [erbsnalsylaw@aol.com](mailto:erbsnalsylaw@aol.com) or [hhone@honefirm.com](mailto:hhone@honefirm.com) • website: [www.honelawfirm.com](http://www.honelawfirm.com)

See "HIPAA" page 21

# HIPAA

Continued from page 2

solved after intake and review, and 19 percent required corrective action.

"It's not like they're getting spurious allegations," Iwrey said. "And there have been significant cases since the end of 2010."

The most recent was early in July, when HHS's Office for Civil Rights (OCR) settled with University of California at Los Angeles Health System over potential violations of HIPAA privacy and security rules. The settlement was \$865,500, and UCLAHS had to commit to a corrective action plan to remedy the gaps in compliance.

The gaps allowed employees of the health system to repeatedly, and without permission, look at protected health information of some of the hospital's celebrity patients.



ROMEJ

Though that sounds like the kind of thing that results from a few rogue employees disregarding hospital policy, Carol A. Romej, also of Hall Render, said an investigation showed that UCLAHS did not have procedures in place to prevent such a breach, did not have a proper privacy training program in place, and did not have proper disciplinary procedures.

"Those things are not so uncommon," she said.

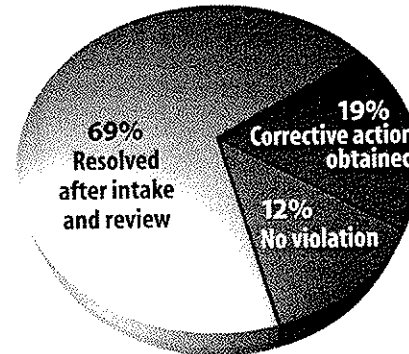
Another egregious breach came to light earlier this year, when the General Hospital Corp. and Massachusetts General Physicians Organization, Inc. (Mass General) agreed to pay the U.S. government \$1 million to settle potential violations.

In that case, an employee was taking work home, and accidentally left protected health information belonging to 192 patients on a subway train.

"That one made people nervous," said Callahan-Morris. Many of her clients are

## HIPAA Enforcement Results for Michigan

April 14, 2003 – Dec 31, 2010



Source: U.S. Department of Health and Human Services



**"[T]here is a huge public policy push to make health records more electronic, more accessible. That makes people nervous, the idea of their personal health information being out there and available."**

— Elizabeth Callahan-Morris, Hall, Render, Killian, Heath & Lyman PLLC

health systems, large and small physicians groups, and some health plans.

The reason it made clients nervous is that many of them allow their employees to take work home, which can present a significant security risk. A security breach like losing a laptop, flash drive or paper files would all require reporting to OCR. Large breaches, those impacting more than 500 people, require reporting to OCR at the same time that the individuals are notified. Smaller breaches can be reported a bit later — 60 days after the end of the calendar year during which the breach occurred.

That can be a difficult judgment call, determining which breaches must be reported, and which do not, said Amy Kristin Fehn, of Royal Oak-based Wachler & Associates PC.

For example, she said, if an employee takes information home on a laptop, and loses the laptop, if the information is encrypted, it may not have to be reported. Or if there is a way to remotely wipe data from a device, that data loss may not measure up to a reportable breach.

"But if you do not report it," Fehn cau-



FEHN

"That's where cloud computing may make the most sense," she said, because that information could not be lost, stolen, or improperly discarded like paper files in a dumpster would be.

Even if the information stored on a cloud is attacked by a hacker, her client would be at least somewhat protected.

"It does spread the responsibility a little bit," Fehn said.

Another recent case illustrates how once a breach occurs, it's crucial to cooperate and report all the information.

In February, HHS imposed a \$4.3 million penalty on Cignet Health of Prince George's County, MD, which violated the HIPAA privacy rule by not supplying patients with their records within 30 days of patients' requests. Only \$1.3 million of the fine stems from the violations. The rest is the result of failure to cooperate with the OCR investigation and failure to produce records in response to an OCR subpoena.

"That was just willful lack of cooperation," she said. "I don't think that case caused any panic, but I can't wait for the book to come out on the lawyers giving Cignet advice."

Still, there is a takeaway for clients, Callahan-Morris said: "Don't ignore patients who are exercising their federal rights. And if you do get a complaint, respond."

HHS is sending a message, Iwrey said.

"Their point was we're going to fine you," he said. "And the lack of cooperation was huge."

*If you would like to comment on this story, please contact Carol Lundberg at (248) 865-3105 or carol.lundberg@mi.lawyersweekly.com.*