Defense Lessons From Recent Criminal HIPAA Cases

By **Ryan O'Neill** (October 6, 2022)

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Federal health care prosecutors have grown increasingly fond of the criminal Health Insurance Portability and Accountability Act statute in the past few years, and for good reason.

The elements of the crime are fairly straightforward and simple to prove — knowing appropriation of protected health information, or PHI, for commercial gain — and the consequences are quite serious when money is the motivation: a 10-year maximum prison sentence.

Marketers of medications, durable medical equipment, cancer screens and COVID-19 screens, along with physicians that closely interact with those marketers, are the primary targets of HIPAA prosecutions. Typically, the government charges criminal violations of HIPAA[1] alongside other health care offenses.

So, what of it? Well, traditionally, if the government has the goods, defense counsel's first ask is to narrow the charges to a single count of wire fraud, which has a five-year maximum sentence.

Wire fraud is a much kinder and gentler animal than health care fraud or anti-kickback violations — both carry a 10-year maximum sentence — especially in high-dollar cases that drive guidelines ranges well above five years.

This is a fair strategy, as health care cases are often nuanced and require a lot of work on the part of the government, so oftentimes a plea to wire fraud gets things done.

But, the "HIPAA kicker," as I like to call it, places defendants in a fairly new and perhaps more difficult bargaining position, and prosecutors know it. It's their safety net — either they have it or they don't, and they usually do on the occasions they charge it.

And, defendants can be convicted absent any knowledge of the rule's specifics, so long as they knowingly acted, and such action was in violation of HIPAA. Bottom line: Physicians, pharmacists, marketers and other individuals who routinely work in health care are expected to know.

The government also uses this slam-dunk, not-too-often-charged offense as leverage to secure testimony from less-significant actors who initially decline to cooperate in larger health care fraud investigations — folks who normally would have no reason to walk into the office. In the health care space, this is unprecedented leverage over minor participants.

Now, the good news is that despite the 10-year maximum, courts seem reluctant to sentence offenders anywhere near that level absent aggravating conduct, even in high-dollar cases. So, depending on the government's proof and where your client falls in the scheme, a criminal HIPAA charge may be the least of all evils — even less so than our usual friend, wire fraud.

Outcomes in Recent Cases

Below are examples of recent HIPAA prosecutions, along with my take on some of the

multicount dispositions.

June 2022

This June, in U.S. v. Ortiz, the U.S. District Court for the Southern District of Iowa sentenced the defendant to 27 months in prison after his guilty plea to wrongfully obtaining PHI. He admitted to conspiring with a Veterans Affairs employee to obtain PHI from a U.S. Department of Veterans Affairs hospital, and then disclosed the records to a third party in exchange for cash.

One year prior, in U.S. v. Bacor, the U.S. District Court for the Northern District of Iowa sentenced a former hospital employee to a five-year term of probation for wrongfully accessing and distributing her ex-boyfriend's medical records.

As evidenced by these cases, the nature and vulnerability of the victim — e.g., a VA hospital — is a significant sentencing factor.

February 2022

In U.S. v. LaParl, a marketer pled guilty to one count of violating HIPAA for commercial gain. The U.S. District Court for the District of Massachusetts sentenced him to a three-year term of probation related to his role in a multimillion-dollar Medicare fraud scheme — nowhere near the maximum.

Given the seriousness of the alleged conduct and the amount of financial loss, $109 million in fraudulent claims, this case smells of a prosecution with less than impressive evidence of fraud — but, as explained above, a slam dunk HIPAA case.

July 2021

In U.S v. Cervantes, the U.S. District Court for the Eastern District of Texas sentenced a computer hacker to a 30-month prison sentence for stealing PHI from a physician's office and using the data to generate fake physicians' orders for durable medical equipment, to the tune of nearly $1.4 million in fraudulent claims. Again, far short of the five-year maximum, despite the high loss value.

May 2020

In U.S. v. Hendricks, the U.S. District Court for the Middle District of Florida sentenced a medical office administrator to a 48-month prison term after she pled guilty to aggravated identity theft and wire fraud.

The defendant photographed medical records and sold the files for $100 a pop. She ultimately sold to the wrong people — undercover agents — and was indicted on multiple counts, including criminal HIPAA.

In this case, it appears the defendant opted to address the data-related misconduct with a plea to aggravated identify theft — a mandatory two-year consecutive sentence — in lieu of criminal HIPAA.

The gamble there is that aggravated identify theft is always a two-year sentence that must be stacked, or run consecutive to, sentences on other counts; in this case, wire fraud.

As a result, if the government is seeking anywhere near the five-year maximum on a wire fraud count, your client is better off with a HIPAA kicker as a second charge. And, in my opinion, identity theft just sounds worse. Many of us have been victims of identity theft — it's a pain — whereas marketers' bulk trading of health information typically is not a life-changing event for victims.

Aiding and Abetting

It's important to note that aiding and abetting violations of HIPAA is also a viable charge and should be of special concern to physicians who interact with industrious sales representatives or who routinely share patient information with third parties in the course of their business.

For example, in U.S. v. Luthra in the District of Massachusetts, a jury found that a doctor aided and abetted the wrongful disclosure of PHI by allowing a sales representative to access PHI housed in the physician's office.

Though there was little proof the doctor saw any money, evidence at trial showed that the sales representative accessed PHI, and that the doctor knew it. That's all it took to convict. The physician was sentenced to a one-year term of probation. The U.S. Court of Appeals for the First Circuit later affirmed the conviction.

Give Clients the Full Picture

When health care clients think of HIPAA violations, they typically do not envision the prospect of criminal charges. They should.

First, the takeaway from the cases above is that a practitioner's permissive use or even passive knowledge of unauthorized use of PHI by an unauthorized person may amount to a felony.

This is not a readily apparent problem for many practitioners. They often, sometimes reasonably, rely on the expertise of sales reps with respect to the product, and how best to communicate the need and use of the product to insurance companies — it's an art.

So, any legal advice from counsel on HIPAA compliance should include the bigger picture, namely, that interactions with individuals who might financially benefit from obtaining patient information, including sales reps, must be closely monitored or, in my opinion, should be banned from campus altogether.

Second, though it may seem obvious, physicians should never trust outsiders with office work. As a prosecutor, I saw countless instances of physicians tasking or allowing sales reps to draft letters of medical necessity and prior authorization forms, counseling patients, reminding the office and patients of refills, etc.

In most cases, the physician did not give express consent but rather deferred to the judgment of his or her administrative staff without supervision — a "just get things done" approach — which amounts to an improper and illegal delegation.

Physicians' offices, labs and other entities maintaining patient information should train staff and post written policies in plain view expressly forbidding this practice.

Propose the HIPAA Kicker

When you believe it is in your client's best interest to take a plea and cooperate in a health care case, usually one question remains: What charge will the government insist your client eat to preserve his or her credibility at trial?

As discussed above, in certain cases, the HIPAA kicker might get the job done and provide your client with a softer landing at sentencing.

This is especially true of minor players. It's a felony, directly relates to most health care offenses, often facilitates larger fraud schemes, and, at least on paper, potentially carries a significant degree of accountability.

Do not assume that the government has considered and dismissed the prospect of a stand-alone HIPAA charge. Not every prosecutor is familiar with the criminal aspects of the statute or the dispositions highlighted above.

Use the trend to your client's advantage — make the case.

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[1] 42 U.S.C. § 1320d–6.