Criminal Prosecutions under HIPAA

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This article is about criminal prosecutions for violations of the Standards for Privacy of Individually Identifiable Health Information, commonly referred to as the "HIPAA Rules." It examines three questions: (1) who, given the language in the statute, is subject to criminal prosecution for a knowing violation of the Rules, (2) how a recent legal opinion by the Office of Legal Counsel of the Department of Justice (the OLC Opinion) appears to limit the scope of HIPAA criminal prosecutions, and (3) how another criminal statute, 18 U.S.C. § 2(b), works in conjunction with HIPAA's criminal provisions to still permit prosecutions of many individuals, in spite of the problems with direct prosecutions identified in the OLC Opinion.

The HIPAA Rules were promulgated pursuant to the Administrative Simplification provisions of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). The Rules apply, as a direct matter, to "covered entities"–defined to be health care payers, health care clearinghouses and health care providers who transmit health information in electronic form in connection with standardized transactions governed by the Administrative Simplification Provisions of HIPAA.[1] In general, except as otherwise required by law or where there is express authorization by the patient, covered entities are prohibited from disclosing a patient's personally identifiable health information or PHI, for any purpose other than treatment, payment, or health care oversight.

Most covered entities are artificial persons–corporations and partnerships.[2] As a practical matter, the employees of covered entities, who are not covered entities themselves, need access to PHI to do their jobs. Likewise, covered entities share PHI with each other, and provide access to PHI to medical billing companies, pharmacy benefit management companies, utilization review and management companies, accounting firms and lawyers, and others who perform important and legitimate services for covered entities. This last group of entities are called "business associates" under the Rules.

Recognizing the existence and necessity of widespread information sharing in the health care industry, the Rules also protect the confidentiality PHI when it is disclosed downstream to employees and to business associates. Covered entities are required to train their employees to use proper care to maintain the confidentiality of PHI, and are required to sanction appropriately any employee who fails to do so.[3] Likewise, a covered entity is prohibited from transmitting PHI downstream to any business associate until the business associate enters into a written contract guaranteeing that it will provide the same level of confidentiality for PHI as the covered entity itself is required to provide under the Rules.[4] This

[1] 42 U.S.C. § 1320d-1(a); 45 C.F.R. Parts 160 and 164. In the Medicare Prescription Drug Improvement and Modernization Act of 2003, Congress added to the list of "covered entities" Medicare prescription drug card sponsors. Pub. L. No. 108-173, § 101(a)(2), 117 Stat. 2071, 2144 (2003), codified at 42 U.S.C. § 1395w-141(h)(6) (West 2004).

[2] Virtually all health care payers, of course, are corporations, as are most institutional health care providers such as hospitals and clinics. Even most individual physicians operate through separately incorporated professional associations.

[3] 42 C.F.R. § 164.530(b) (training requirements for employees with respect to the requirements of the HIPAA Rules); 42 C.F.R. § 164.530(e) (requirement that covered entities sanction employees who fail to comply with the requirements of the HIPAA Rules).

[4] 42 C.F.R. § 164.504(e)(2)(ii)(A) (covered entities may not disclose protected health information to such third party contractors without first entering into a business associate agreement with the covered entity where the third party company, or business associate must promise not to use or further disclose PHI inconsistent with the terms of the HIPAA Rules). Note that other assurances or requirements of law may

combination of direct regulation of covered entities with indirect regulation of downstream disclosures to employees and business associates is intended to create a "chain of trust," protecting the privacy and confidentiality of PHI throughout the entire health care system.

The chain of trust imposed by the HIPAA Rules is based on the way the common law tort system protected health information prior to the enactment of the HIPAA Rules. Common law tort liability for breach of confidentiality applies not only to doctors, but to downstream users with duties of confidentially, as well.[5] While the HIPAA Rules did not substantially alter the nature of the *duties* established under prior law, the *penalties* imposed are different. HIPAA does not provide for a private cause of action. Instead, it provides for civil monetary penalties,[6] and the possibility of criminal prosecution.

The civil monetary penalties are imposed by the Office for Civil Rights of the Department of Health and Human Services ("OCR"), and are imposed in an administrative proceeding. These administrative sanctions are limited to $100 per violation, with a maximum penalty of $25,000 for each calendar year. OCR interprets its authority to bring civil monetary penalty actions as limited *to covered entities only*; and, to date, it has engaged only in "educational" efforts and has not brought a single enforcement proceeding pursuant to its civil monetary penalty authority.[7] On the other hand, HIPAA's criminal provisions are enforced by the Department of Justice, which has brought at least one successful prosecution of an individual, and has several active investigations pending. Criminal penalties under HIPAA range from a fine of up to $50,000 and imprisonment for up to one year for a simple violation; to a fine of up to $100,000 and imprisonment for up to five years for an offense committed under false pretenses; and to a fine of up to $250,000 and imprisonment for up to ten years for an offense committed with intent to sell, transfer, or use individually identifiable health information for commercial advantage, gain or malicious harm.[8]

Unfortunately, when health care lawyers attempt to understand how the HIPAA criminal penalties work, they are faced with a criminal statute that is not exactly a model of clarity. The language of Section 1320d-6 reads as follows:

> A person who knowingly and in violation of this part —
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> (1) uses or causes to be used a unique health identifier;
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> (2) obtains individually identifiable health information relating to an individual; or
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> (3) discloses individual identifiable health information to another person, shall be punished as provided in subsection (b) of this section.

How broadly does this language apply? According to the language of the statute, criminal liability under Section 1320d-6 extends to "a person" who "obtains or discloses" individually identifiable health information "in violation of this part." "This part" refers to the administrative simplification provisions of HIPAA, under which

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substitute for an agreement where the covered entity and the business associate are both a government entity, 42 C.R.F. § 164.504(e)(3)(i), or if the business associate is required by law to perform a function or activity on behalf of, or provide services to, a covered entity. 42 C.F.R. § 164.504(e)(3)(ii).

[5] *De May v. Roberts*, 9 N.W. 146 (Mich. 1881) (holding not only a doctor liable for breach of confidentiality, but finding liability for his "assistant" as well). For the scope of common law liability for wrongful downstream disclosures of PHI, *see* Winn, *Confidentiality in Cyberspace: the HIPAA Privacy Rules and the Common Law*, 33 RUTGERS L. J. 617 (2002).

[6] 42 U.S.C. § 1320d-5.

[7] *Id.*

[8] 42 U.S.C. § 1320d-6

> A person described in subsection (a) of this section shall–
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> (1) be fined not more than $50,000, imprisoned not more than 1 year, or both; and
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> (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
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> (3) if the offense is committed with 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.

the Health Privacy Rules were promulgated. Accordingly, it would appear that in order to "obtain or disclose" individually identifiable health information "in violation of this part" one would first have to be subject to "this part." While, by definition, a covered entity would be subject to "this part," who, if anyone else, would?

One reading of the statute would be to approach Section 1320d-6 narrowly, as applying only to those entities who are *directly* responsible for protecting personal health information under HIPAA–that is, to covered entities alone. On this view, employees of covered entities and their business associates would not be subject to prosecution under Section 1320d-6 even if they otherwise violated the statute by intentionally disclosing protected health information in violation of the HIPAA Rules. Under this line of thought, an employee might be fired, and a business associate might have its contract terminated, but neither would go to jail for the violation.

A second reading would be to read Section 1320d-6 as covering persons in the chain of trust, who have undertaken, either as a condition of their employment or through a business associate contract, to be subject to HIPAA's duties of confidentiality. On this reading, a violation of their duties of confidentiality by employees or by business associates would constitute a violation of "this part," and would subject them to criminal prosecution like covered entities.

The third reading would read Section 1320d-6 more broadly, to cover any person who "caused" a violation of "this part"–that is, not only covered entities, employees and business associates, but any persons in or outside the chain of trust who caused an improper disclosure of PHI. This broad reading of the statute is supported by the statutory prohibition on wrongfully "obtaining" PHI, language which would make little sense if Congress intended the law to be restricted to covered entities alone.

A recent opinion issued by the Office of Legal Counsel of the Department of Justice (the "OLC") has provided some guidance as to the scope of Section 1320d-6.[9] OLC opinions are not legally binding on the judiciary, but are binding on all executive branch agencies, including prosecutors at the Department of Justice. The OLC Opinion addresses the question: which persons may be prosecuted for direct liability under Section 1320d-6? More specifically, it addresses the question of whether section 1320d-6 renders liable only those specifically listed covered entities in HIPAA, or whether the provision applies to any person who obtains protected health information in a manner that *causes* a covered entity to violate the statute or regulations, in which case liability would extend to a universe larger than covered entities. Indirectly, the OLC Opinion also addresses the extent to which employees and business associates of covered entities can be prosecuted for violations of Section 1320d-6.

The OLC concludes that "liability under Section 1320d-6 must begin with covered entities, the only persons to whom the standards apply." While it also notes that "depending on the facts of a given case, certain directors, officers and employees of these entities may also be liable directly under Section 1320d-6, in accordance with general principles of corporate criminal liability," OLC specifically *rejects* an interpretation of Section 1320d-6 which would make directly liable a person who obtains protected heath information in a manner that *causes* a covered entity to violate the statute or regulations. In other words, the OLC Opinion agrees with interpretation number one, specifically rejects interpretation number three, and suggests that the scope of liability under interpretation number two may be very narrow indeed. In reaching this conclusion, the OLC Opinion interprets the scope of the criminal statute as having the same scope as the scope of HHS' administrative enforcement powers.

As a practical matter, the OLC Opinion forecloses the use of Section 1320d-6, *operating by itself*, for the prosecution of anyone other than a fairly narrow group of entities–and an even narrower group of individuals–for the bad acts described in Section 1320d-6. However, other criminal statutes, operating in conjunction with Section 1320d-6, may still reach a significant portion of these bad acts. The OLC Opinion carefully limits itself to discussing who can be prosecuted for *directly* violating Section 1320d-6, but leaves open the possibility that employees and business associates could still be prosecuted in other ways. In this respect, the OLC Opinion

[9] A copy of the OLC Opinion has been included in this Bulletin. It can also be found at: http://www.usdoj.gov/olc/hipaa_final.htm.

states that "[t]he 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 conspiracy liability." In this context, the OLC Opinion specifically quotes 18 U.S.C. § 2 which renders "punishable as a principal" anyone who "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States." *Id.* The scope of such *indirect* criminal liability the OLC leaves open "for consideration [by courts] in the ordinary course of prosecutions."

Of the various criminal statutes mentioned in the OLC Opinion to enable indirect prosecutions of Section 1320d-6, 18 U.S.C. Section 2(b) is probably the most important. Section 2(b) is a codification of the common law maxim *qui facit per alium facit per se*: "He who acts through another, acts himself." As such, Section 2(b) is the means by which the federal statutory criminal system currently holds responsible parties responsible for their conduct, even if they act through the agency of others.[10]

Title 18 U.S.C. § 2(b) reads as follows: "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

As originally enacted in 1948, 18 U.S.C. § 2(b) provided that "whoever willfully causes an act to be done which if directly performed by him would be an offense against the United States, is punishable as a principal." 62 Stat. 684 (1948). In 1951, Congress added the words "or another" to the statute. The Senate Report accompanying the proposed amendment, explained the purpose of the amendment as follows:

> This section is intended to clarify and make certain the intent to punish aiders and abettors regardless of the fact that they may be incapable of committing the specific violation which they are charged to have aided and abetted. Some criminal statutes of title 18 are limited in terms to officers and employees of the Government, judges, judicial officers, witnesses, officers or employees or persons connected with national banks or member banks.
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> Section 2(b) of title 18 is limited by the phrase "which if directly performed by him would be an offense against the United States," to persons capable of committing the specific offense. . . . It has been argued that one who is not a bank officer or employee cannot be a principal offender in violation of section 656 or 657 of title 18 and that, therefore, persons not bank officers or employees cannot be prosecuted as principals under section 2(g). Criminal statutes should be definite and certain.[11]

It thus seems clear that when it enacted the 1951 amendment to Section 2(b), Congress intended to "to . . . make certain the intent to punish (persons embraced within Section 2) . . . regardless of the fact that they may be incapable of committing the specific violation."[12]

Like the bank fraud statutes enumerated in the legislative history of Section 2(b), Section 1320d-6 is also a *capacity* statute, in which direct liability is restricted to those types of entities specifically covered in the statute, itself. However, when Congress amended Section 2(b) in 1951, it made sure that the limitations of capacity statutes would not prevent the law from holding agents responsible for their deliberate misconduct, at least when such agents derived their capacity to violate the statute from the agency relationship itself. Unlike its sister statute, Section 2(a), which applies to "aiding and abetting," Section 2(b) permits prosecution of an agent for the commission of a crime, even when the principal may be entirely innocent of wrongdoing. In such a case, Section 2(b) treats the agent, himself, as the principal.

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[10] Reported decisions applying this principle date from the famous 16th Century decision reported by Edmund Plowden, *The Queen v. Saunders and Archer*, 2 Plowd. 473, 474 (1575, 1816 Edition) (a poisoner who acts through an unwitting intermediary, can still be prosecuted as the principal for "causing" the poisoning to take place); *see United States v. Ruffin*, 613 F.2d 408, 413 (2d Cir. 1979), *quoting United States v. Lester*, 373 F.2d 68, 72 (6th Cir. 1966), *citing United States v. Gooding*, 25 U.S. (12 Wheat.) 460 (1827).

[11] 1951 U.S. Code Cong. serv. 2578, 2583.

[12] S. Rep. No. 1020, 82nd Cong., 1st Sess., 1951 U.S. Code Cong. and Admin. Serv. 2578, p. 2583. (1951 U.S. Code Cong. Service pp. 2578, 2583. *See generally*, 52 ALR Fed. 769).

With this in mind, if an employee of a covered entity intentionally caused a disclosure of a patient's confidential health information, which action, if directly performed by another–that is, the covered entity–would be an offense against the United States, then the employee is punishable as a principal–that is, as if the covered entity, itself, had performed the act. An employee may not be, according to the OLC Opinion, within the category of persons to whom the criminal statute directly applies. The employee could, however, be punishable as a principal under Section 2(b) if they committed an act which would be an offense *if committed directly by the covered entity.* Under section 2(b), it is not necessary that the employee action cause the covered entity to commit any crime–that is to confuse liability under section 2(b) with the vicarious liability of an employer for a wrong committed by an employee. It is not even necessary for the actions of the employee to render the covered entity vicariously liable in tort. The covered entity could be completely innocent of all civil or criminal liability. All that is necessary under the language of section 2(b) to render an employee subject to criminal prosecution is for the employee to have caused an act to take place which, if it had been directly committed by another, would be an offense against the United States.

Of course, in order to commit an act which would be a crime if committed by the entity with the capacity to do so, one ordinarily needs to be in some relationship with that entity. In order to wrongfully disclose protected health information, one would need to have access to that information in the first place, and to get access to that information one usually would need to be in the chain of trust under HIPAA. Thus, liability under Section 2(b) usually extends to agents.

Section 2(b) extends the capacity of the principal to commit a crime downstream to the agent. If the employee caused an act to take place which violated Section 1320d-6, the employee would assume the capacity of the covered entity to be prosecuted under Section 1320d-6.

While no court has yet decided a case involving Section 2(b) in the context of a Section 1320d-6 prosecution, case law involving similar capacity statutes shows that courts frequently have permitted prosecutors to use Section 2(b) to prosecute persons who, while lacking the capacity to violate a criminal a statute *directly,* nevertheless have misused their agency relationships with persons with the requisite capacity to violate statutes ostensibly applicable only to their principals. When this occurs, Section 2(b) has permitted the agents to be prosecuted as if they were principals with the requisite capacity to violate the law directly themselves.

An example of a successful use of the "or another" prong of Section 2(b) may be found in *United States v. Scannapieco.*[13] In this case the Fifth Circuit upheld the conviction of a firearms dealer's *employee* under 18 U.S.C. § 2(b) for causing a violation of 18 U.S.C. § 922 which prohibits a firearms *dealer* from selling and delivering a firearm to a buyer who was not an authorized person under the statute. The conviction was upheld despite the fact that the *dealer* was not present and was in no way responsible for the illegal sale and the consequent violation of the law. Section 2(b) permitted the prosecution of the employee for having knowingly "caused an act to be done"–the sale of firearms to an unauthorized person–which "if directly performed by another" (*i.e.*, the dealer) would be a violation of 18 U.S.C. § 922. Thus, even though the employee was not a licensed dealer himself and was therefore not himself capable of directly committing the act forbidden by the statute which applied only to *dealers,* Section 2(b) permitted the employee to be prosecuted as if he were the dealer–that is, the principal. The Fifth Circuit wrote as follows:

> [S]ince the 1951 amendment to 18 U.S.C. § 2(b), an accused may be convicted as a causer even though not himself legally capable of personally committing the act forbidden by federal statute.[14]

Likewise, the Ninth Circuit reached the same result on similar facts in *United States v. Armstrong,*[15] a case in which the defendant presented false information to a gun dealer in connection with his purchases of handguns who was ultimately charged with causing false entries to be made on a federal firearms transaction

[13] 611 F.2d 619 (5th Cir. 1980).

[14] *Scannapieco*, 611 F.2d at 620-21, citing *United States v. Lester*, 363 F.2d 68 (6th Cir. 1966).

[15] 898 F.2d 734, 740 (9th Cir. 1990).

record, even though the gun dealer was innocent.[16] In the context of this case, the principles underlying Section 2(b) were so little questioned that liability under Section 2(b) was not litigated. Rather, the litigation dealt only with the question of whether Section 2(b) needed to be specifically alleged in the indictment. The Ninth Circuit ruled that Section 2(b) was implied in every indictment and did not have to be specifically alleged.

Section 2(b) has also been successfully used in the context of cases involving illegal payments by employer to members of Unions. In *United States v Inciso,*[17] a labor union official was charged with violating a federal statute[18] which made it a crime for any "representative" of employees to receive any money or other thing of value from the employer of such employees. The court held that the word "representative" included the labor union, but not the employee of the Union. Nevertheless, the court determined that the union employee could be prosecuted under Section 2(b) because he caused the labor union to receive unlawful funds from the employer.

Thus, Section 2(b) appears to permit an agent to be prosecuted for "causing" an act which does not *directly* violate the law, as long as it would be a crime if another (*i.e.*, the agent's principal) had directly committed the offense. This is true even though the principal may have been entirely innocent of any misconduct. Where there is a capacity statute, Section 2(b) downstreams to the agent the principal's capacity to commit a crime. Even if the agent could not otherwise be prosecuted as a direct matter under Section 1320a-7, if a covered entity has the legal capacity to violate the criminal statute, Section 2(b) permits the agents and employees of the covered entity to be charged as well.

It must be said that the broad scope of Section 2 comes with a caveat. In the context of Section 2 prosecutions, courts have sometimes rejected as "unseemly and unwise" what they believe to be attempts by the executive branch "to bring in through the back door a criminal liability so plainly and facially eschewed in the statute creating the offense."[19] In *United States Shear*, the government brought a criminal prosecution of both the employer and an employee for an OSHA violation which resulted in the death of another employee.[20] The underlying OSHA statute applied expressly only to *employers.* While upholding the conviction of the employer, the court overturned the conviction of the employee, finding that the express purpose of the statute was to protect employees by holding *only* employers liable. Under these circumstances, the court held that prosecution of a person in the class of victims was inappropriate and analogous to the prosecution of a willing "victim" for aiding and abetting a violation of the Mann Act.[21]

In the context of a potential Section 1320d-6 prosecution, the question whether the *Shear* limitations would prohibit the use of Section 2(b) to prosecute an employee or an agent of a covered entity comes down to the question of whether, when it enacted Section 1320d-6, Congress intended that *only* covered entities be prosecuted under the statute and *no other types of persons.* Even the OLC opinion does not go this far. However, in light of the *Shear* admonition that the executive branch may not use the broad scope of Section 2(b) to "legislate new crimes," prosecutors should be very careful not to stray from Congress' purpose in enacting Section 1320d-6 when charging persons other than the covered entities themselves.

There is little question that Congress enacted Section 1320d-6 to protect confidential patient information. Few covered entities have ever intentionally engaged in breaches of patient confidentiality. Most egregious breaches have been committed by employees of covered entities,

[16] *Id.* at 739. ("Section 2 does not define a substantive offense, but rather 'describes the kinds of individuals who can be held responsible for a crime; it defines the degree of criminal responsibility which will be attributed to a particular individual. The nature of the crime itself must be determined by reference to some other statute.'")(citing *United States v. Grubb*, 469 F. Supp. 991, 996 (E.D.Pa.1979)); *accord United States v. Kegler*, 724 F.2d 190, 200-01 (D.C.Cir.1984).

[17] 292 F.2d 374 (7th Cir. 1961).

[18] 29 U.S.C.A. § 186(b).

[19] *United States v. Shear*, 962 F.2d 488, 496 (5th Cir. 1992).

[20] *Id.*

[21] *See Gebardi v. United States*, 287 U.S. 112 (1932).

business associates, or outsiders who have hacked into computer systems or stolen paper records. Thus, it would appear that use of Section 2(b) to punish non-covered entities would not stray from Congress' stated purpose for enacting Section 1320d-6. However, a more conservative approach would be to restrict the scope of prosecution to individuals within the chain of trust, who knowingly violate their duties of confidentiality established under the HIPAA Privacy Rules. Under this more conservative approach, unless the facts were particularly egregious, prosecutions would not ordinarily go beyond the scope of the chain of trust established by the HIPAA Privacy Rules and the common law.

In conclusion, while the OLC Opinion appears to restrict the scope of Section 1320d-6 prosecutions to covered entities, this holding is limited to *direct* prosecutions only. Because the government can bring prosecutions under *indirect* liability theories, the scope of criminal liability for the wrongful disclosure of PHI will ultimately be determined by how another criminal statute, 18 U.S.C. § 2(b), interacts with Section 1320d-6. From the review of existing case law under Section 2(b), prosecutions of employees and business associates of covered entities appear to remain viable, at least to the extent that prosecutors are careful to stay within the original Congressional purpose in enacting Section 1320d-6–to protect the privacy of patient health information–particularly when this information is subject to traditional common law duties of confidentiality as codified by the HIPAA Rules.❖

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