

Who is Subject to Criminal Prosecution under HIPAA?

This article addresses 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 statute to still permit prosecutions of many individuals who are not covered entities under HIPAA, 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 plans (i.e., health insurance 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 permitted by law or where there is express authorization by the patient, covered entities are prohibited from disclosing a patient's protected health information or PHI, for any purpose other than treatment, payment, or health care operations.

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.

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.

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

The chain of trust imposed by the HIPAA Rules is very similar to the state statutory and common law tort system which protected patient medical information prior to the enactment of the HIPAA Rules, and where duties of confidentiality beginning in a relationship of trust between a patient and a doctor were held to extend downstream to others such as insurance payers as well.⁵ As such, it can be argued that the HIPAA Rules did not substantially alter the nature of the *duties* established under prior law. However, the *penalties* imposed under HIPAA are quite different. HIPAA does not provide for a private cause of action. Instead, violations of the HIPAA Rules are punished by the state, either through the imposition of civil monetary penalties,⁶ or through criminal prosecutions.

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 substitute for an agreement where the covered entity and the business associate are both a government entity, 42 C.F.R. § 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 For a discussion of the scope of state statutory and common law liability for wrongful downstream disclosures of PHI, see Peter 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.

Civil monetary penalties under HIPAA are imposed by the Office for Civil Rights of the Department of Health and Human Services ("OCR"), and are imposed in the context of an administrative proceeding where 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 yet to bring a single enforcement proceeding. On the other hand, HIPAA's criminal provisions are enforced by the Department of Justice, which has already brought at least one successful prosecution, 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.⁷

When one first reads Section 1320d-6, the HIPAA criminal statute, the first thing one notices is that the statute is not self-executing, but works in tandem with the HIPAA Rules. While Section 1320d-6 defines the offense, and provides the punishment for violations, the actual duties and prohibitions are found in the HIPAA Rules which form the basis of the criminal sanction. The legal effect is just as if all the details of the Rules had been incorporated into the congressional language.⁸ Neither the criminal statute nor the regulations are complete without the other; only together do they have effective force.

When lawyers turn to the actual text of the criminal statute, they find that the criminal statute itself is not exactly a model of clarity. Section 1320d-6 reads as follows:

A person who knowingly and in violation of this part —

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

⁷ 42 U.S.C. § 1320d-6

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; and
- (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 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.

⁸ U.S. v. Mersky,, 361 U.S. 431, 437-38 (1960)(Tariff Act case).

The first question which arises from a close reading of this statute, is: *how broadly does this language apply?* According to the language of the statute, criminal liability 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 the HIPAA Rules were promulgated. As we saw above, given the close relationship between the criminal statute and the regulations, in order to "obtain or disclose" individually identifiable health information "in violation of this part" one would first have to be subject to the HIPAA Rules. While a covered entity would by definition be subject to the HIPAA Rules and thus also subject to criminal prosecution, who, if anyone else, would?

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." The OLC 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." However, the OLC specifically *rejects* an interpretation of Section 1320d-6 which would make directly liable a person who obtains protected health information in a manner that *causes* a covered entity to violate the statute or regulations. In reaching this conclusion, the OLC Opinion interprets the scope of the criminal statute as having much the same scope as the scope of HHS' administrative enforcement powers.

⁹ A copy of the OLC Opinion can be found at: http://www.usdoj.gov/olc/hipaa_final.htm.

When it was issued in June of 2005, the OLC Opinion was immediately criticized by prominent legal academics and privacy advocates.¹⁰ Professor Peter Swire, a leading HIPAA expert, who while serving as the Chief Counselor for Privacy and the Office of Management and Budget was intimately involved in the formulation and drafting of the HIPAA Privacy Rules, described the OLC Opinion as “bad law and bad policy.”¹¹ As a matter of statutory interpretation, Professor Swire argues that the OLC’s statutory analysis is flawed for failing adequately to address why Congress prohibited wrongfully “obtaining” PHI, which seems to indicate that Congress wanted the statute to reach more than covered entities only. And as a matter of policy, Professor Swire notes that in the absence of any administrative enforcement proceedings, the OLC Opinion’s restriction on the scope of criminal enforcement threatens to transform the entire HIPAA regulatory apparatus into a system of mere voluntary standards.

In what follows, I argue that Professor Swire’s analysis may be unduly pessimistic. It is certainly true that 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, the OLC opinion carefully limits itself to discussing who can be prosecuted for *directly* violating Section 1320d-6, and leaves open the possibility that employees and business associates could still be prosecuted in other ways, stating, in particular, 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.” The OLC opinion specifically quotes language in 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.” The scope of such *indirect* criminal liability the OLC leaves open “for consideration [by courts] in the ordinary course of prosecutions.”

18 U.S.C. § 2 is a codification of the common law maxim *qui facit per alium facit per se*, or in English, “He who acts through another, acts himself.” As such, Section 2 is the traditional means by which the federal statutory criminal system currently holds responsible parties accountable for their conduct, even if they act through the agency of others.¹² Section 2(b) of the statute reads as follows:

¹⁰ See, Robert Pear, New York Times, June 7 (2005), *Ruling Limits Prosecutions of People who Violate Law on Medical Records*, (quoting Robert Gelman expressing his concerns about effect of OLC interpretation); Robert Ellis Smith, Privacy Journal, *Criminal Penalty in HIPAA Null?* (July 2005).

¹¹ Peter P. Swire, *Justice Department Opinion Undermines Protection of Medical Privacy*, Center for American Progress (June 7, 2005). <http://www.americanprogress.org/site/pp.asp?c=743281> Other privacy advocates have also criticized the OLC Opinion.

¹² 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 (2nd Cir. 1979),

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.

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).

As originally enacted in 1948, 18 U.S.C. § 2(b) lacked the phrase “or another.”¹³ This phrase Congress added to the statute in 1951. The Senate Report accompanying the 1951 amendment explained the purpose of the insertion of the phrase “or another” 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.

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.¹⁴

Thus, by adding the phrase “or another” to the statute in 1951, 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" as a direct matter.¹⁵

Turning to criminal prosecutions under HIPAA, one can see that, similar to the bank fraud statute discussed in the legislative history of Section 2(b), Section 1320d-6 is also a *capacity* statute--that is, a statute which generally limits direct liability to those types of entities specifically referenced by the statute, itself. However, in enacting Section 2(b) Congress ensured that the limits established by capacity statutes would not prevent the prosecution of agents for their deliberate misconduct when such agents derive their capacity to commit the crime from the agency relationship itself.

Applying the language of Section 2(b) in conjunction with Section 1320d-6, we get the following result. When an employee of a covered entity (who is not himself a covered entity) intentionally causes a wrongful disclosure of a patient's confidential health information, this action, if directly performed by another--that is, by the covered

¹³ The 1948 version of Section 2(b) reads "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)).

¹⁴ 1951 U.S. Code Cong. serv. 2578, 2583.

¹⁵ 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.

entity—it would constitute an offense against the United States. Accordingly, by operation of Section 2(b), the employee would still be punishable as a principal—that is, as if the covered entity, itself, had performed the act. In other words, it does not avail an employee of a covered entity who has engaged in misconduct to argue that because he is not within the category of persons to which the HIPAA directly applies, he therefore is not subject to prosecution for the HIPAA violation. So long as the underlying conduct would have constituted an offense *if it had been committed directly by the covered entity*, the employee of the covered entity who was responsible for the conduct is still subject to prosecution as a principal under Section 2(b).

Just as Section 2(b)'s original language prevents a principal from escaping liability by causing an innocent agent to commit the crime, the insertion of the “or another” language in 1951, allows for the prosecution of an agent for committing a crime where the principal is innocent of the wrongdoing. In such a case, Section 2(b) treats the agent, himself, as the principal. Under Section 2(b), it is not necessary that the employee's wrongful action cause the covered entity to commit any crime, or even render the covered entity vicariously liable for breach of confidentiality as a matter of civil tort law. The covered entity could be completely innocent of all civil or criminal responsibility. All that is necessary under the language of section 2(b) to render an employee subject to criminal prosecution is for that person to have committed an act which, if it had been directly committed by another—that is, a covered entity—would be an offense against the United States.

No court has yet decided a case involving Section 2(b) in the context of a Section 1320d-6 prosecution. However, under the case law, courts frequently permit prosecutors to use Section 2(b) to charge persons with crimes who, while lacking the capacity to violate the criminal statute *directly*, nevertheless have misused their agency relationships to violate statutes ostensibly applicable only to their principals. When this occurs, courts typically find that Section 2(b) permits the agents to be prosecuted as if they were principals with the requisite capacity to violate the law directly themselves. For example, in *United States v. Scannapieco*,¹⁶ the Fifth Circuit upheld the conviction of the employee of a firearms dealer for causing a violation of 18 U.S.C. § 922 in conjunction with Section 2(b). Section 922 on its face applies only to firearms *dealers*, and makes it a crime for such persons to knowingly sell or deliver a firearm to an unauthorized buyer. The employee's conviction was upheld despite the fact that the dealer or covered person was not present and was in no way responsible for the illegal sale and the consequent violation of the statute. The Court nevertheless found that 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. Even though the employee was not a licensed dealer himself and thus was not capable of *directly* violating the statute, Section 2(b) permitted him to be prosecuted as if he were the principal—that is, as if he were the dealer himself. The Fifth Circuit wrote, “[S]ince the 1951 amendment to 18 U.S.C. § 2(b), an accused

¹⁶ 611 F.2d 619 (5th Cir. 1980).

may be convicted as a causer even though not himself legally capable of personally committing the act forbidden by federal statute.”¹⁷

Likewise, the Ninth Circuit reached the same result on similar facts in *United States v. Armstrong*,¹⁸ 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 record, even though the gun dealer was innocent.¹⁹ 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*²⁰ a labor union official was charged with violating a federal statute²¹ 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.

In summary, 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.

¹⁷ *Scannapieco*, 611 F.2d at 620-21, citing *United States v. Lester*, 363 F.2d 68 (6th Cir. 1966), *cert. denied*, 385 U.S. 1002, 87 S.Ct. 705, 17 L.Ed.2d 542 (1967).

¹⁸ 898 F.2d 734, 740 (9th Cir. 1990).

¹⁹ 908 F.2d 1238, 1242-43 (9th Cir. 1990) ("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).

²⁰ 292 F.2d 374 (7th Cir. 1961).

²¹ 29 U.S.C.A. § 186(b).

The broad scope of potential liability under Section 2 comes with an important caveat. The astonishing breath of Section 2(b) does not allow prosecutions under Section 1320d-6 of anyone in the world who violates a capacity statute. Courts have at times 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."²² In *United States v. 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.²³ 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.²⁴

These cases would probably not apply in the context of a HIPAA criminal prosecution because, as a practical matter, the only persons who would ordinarily be in a position to cause violations of Section 1320d-6 would be employees of covered entities and other agents of covered entities such as business associates. In order to wrongfully disclose PHI, one would need to have access to PHI in the first place; and to get such access, one would usually need to be in the chain of trust. In fact, many of the reported cases involving the use of Section 2(b) to charge individuals who otherwise might not be directly liable under a capacity statute, appear to involve individuals standing in some close relationship to the entity with the capacity to commit the crime. The *Shear* limitations would only prevent the use of Section 2(b) to prosecute an employee or an agent of a covered entity only if Congress, when it enacted Section 1320d-6, intended that *only* covered entities be prosecuted under the statute and *no other types of persons*. This does not appear to be the case. There is little question that Congress enacted Section 1320d-6 to protect confidential patient information. Since few covered entities ever intentionally violate the privacy of their patients' medical records and since most egregious breaches are committed by their employees or by their business associates, the use of Section 2(b) to punish non-covered entities would not appear to stray from Congress' stated purpose for enacting Section 1320d-6. However, in light of the *Shear* admonition that the executive branch not use Section 2(b) to "legislate new crimes," prosecutors are likely to be careful not to stray far from Congress' original purpose in enacting Section 1320d-6, by adopting a conservative approach to their charging decisions. The persons most likely to be prosecuted are individuals within the chain of trust who knowingly violate their duties of confidentiality established under the HIPAA

²² *United States v. Shear*, 962 F.2d 488, 496 (5th Cir. 1992).

²³ *Id.*

²⁴ *See Gebardi v. United States*, 287 U.S. 112 (1932).

Privacy Rules. Unless the facts are particularly egregious, prosecutions will probably not go far beyond the scope of the chain of trust established by the HIPAA Privacy Rules.

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 also 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 in the context of well defined relationships of trust.

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