



Weekly Auditing and Compliance Tip



National Alliance of Medical Auditing Specialists | 877-418-5564 | namas.co | namas@namas.co

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Case Law Update: Just Because HIPAA Does Not Provide a Private Right of Action, Doesn't Mean that Other Avenues Exist

Simply stated, the Health Information Portability and Accountability Act (HIPAA) does not provide a private cause of action^[1]. And, prior to the 2009 passage of the Health Information Technology for Economic and Clinical Health Act (HITECH Act)^[2] and the more robust chain of liability (e.g. covered entities, business associates and subcontractors) under the Breach Notification Rule, several courts had held this notion to be true.^[3]

Over the past decade, a shift has occurred where state and federal courts are holding that healthcare providers who breach HIPAA and other cybersecurity provisions may be pursued for a variety of common law claims including: negligence, emotional distress, breach of confidentiality, invasion of privacy, contract violations, and punitive damages.^[4] The premise for bringing a cause of action for privacy violations stems from the fundamental source of American jurisprudence - the United States Constitution.

In re Columbia Valley Regional Medical Center, 41 S.W.3d 797, 802 (2001) established that, "there is a constitutional right of privacy in this case. Apart from any statutory or evidentiary privileges that apply,



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the medical records of an individual have been held to be within the zone of privacy protected by the United States Constitution."

See *In re Xeller*, 6 S.W.3d 618, 625 (Tex. App. - Houston [14th.] 1999, orig. proceeding) (citing *Alpha Life Ins. Co. v. Gayle*, 796 S.W.2d 834, 836 (Tex. App. - Houston [14th Dist.] 1990 no writ).

Recent cases that uphold this motion include:

- *Byrne v. Avery Center for Obstetrics and Gynecology* SC 18904 (Nov. 11, 2014) - A patient advised her doctor not to provide any information to her significant other because of a paternity suit. The significant other's attorney issued a subpoena and the health center, instead of alerting the patient or fighting the subpoena, simply handed over the records. The Connecticut Supreme Court held that HIPAA does not preempt against negligence claims and may be utilized in establishing the applicable standard of care.
- *Acosta v. Byrum*, 638 S.E.2d 246 (N.C. Ct. App. 2006) - A patient was treated by a physician who gave his access code to a third party, who in turn, viewed his records. The North Carolina Court of Appeals held that a privacy violation based on HIPAA violations was not a malpractice claim, so no expert certification was necessary; and HIPAA may be utilized in establishing the applicable standard of care.
- *John Smith v. Arvind R. Datla, et al.*, Case No. A-1339-16T3 (Superior Court of New Jersey Appellate Division (Jul 12, 2017) - The judge kept alive a suit accusing a physician for disclosing a patient's HIV status without the patient's consent to an unauthorized third party.

These cases underscore the importance of compliance with HIPAA and the HITECH Act. Actions brought by the Federal Trade Commission, class action law suits and Securities and Exchange Commission requirements were not discussed. The take-away is that HIPAA, the HITECH Act, and other cybersecurity violations can and do form the basis of a wide variety of causes of action. Therefore, underscoring the need to be proactive instead of reactive.



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This Week's Audit Tip Written By:

Rachel V. Rose, JD, MBA
Rachel V. Rose, Attorney at Law, PLLC

Rachel V. Rose, JD, MBA, is a Houston, TX-based attorney advising on federal and state compliance and areas of liability associated with a variety of healthcare, legal and regulatory issues including: HIPAA, the HITECH Act, the False Claims Act, Medicare issues, women's health as well as corporate and security regulations.

Article Resources:

[1] 42 USC § 1320d (1996).

[2] Pub. L. 111-5, Sec. 13001 (Feb. 17, 2009).

[3] *Valentin-Munoz v. Island Fin. Corp.*, 364F. Supp. 2d 131, 136 (D. Puerto Rico 2005);

Univ. of Co. Hosp. Auth v. Denver Publ'g Co., 340F. Supp. 2d 1142, 1145-46 (D. Colo. 2004).

[4] *R.K. v. St. Mary's Medical Center*, 2012 WL 5834577 (WV S.Ct. (Nov. 15, 2012), cert. denied. See also, *Joseph Perea v. AvMed, Inc.*,

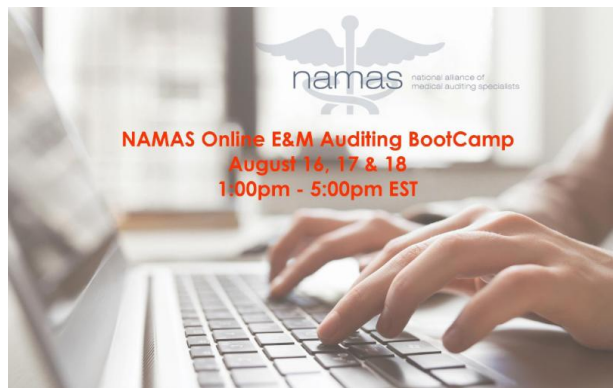
http://files.drinkerbiddle.com/Templates/media/files/pdfs/Perea_v_AvMed_IncComplaint.pdf (last visited Jul. 30, 2017).

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Conference Information

Pre-Conference: Tuesday, December 5

Conference: Wednesday, December 6 - Friday, December 8

Venue: Loews Sapphire Falls Resort
Orlando, FL

[Click Here to View the Conference Agenda](#)

Learn from the best in the industry, network with your peers and visit with our hand picked group of industry relevant exhibitors all in the gorgeous Caribbean inspired backdrop of the Loews Sapphire Falls Resort

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CERT: It's More Than Just a Mint
Speaker: Frank Cohen**

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- Registration to our EXCLUSIVE VIP Brunch & Session occurring the morning of Wednesday, December 6 before general session begins. This exclusive training will be presented by Frank Cohen
- Admission to our VIP ONLY EVENT - occurring the evening of Thursday, December 7. Enjoy a relaxing evening of entertainment, dancing, food and networking in the Caribbean inspired Sapphire Falls Resort
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Thursday, August 24
2pm EST

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NAMAS 9th Annual Auditing & Compliance Conference Speaker Spotlight



Speaker Spotlight



SEAN WEISS,
CHC, CEMA, CMCO, CPMA,
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Partner & Vice President of
Compliance,
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During the NAMAS 9th Annual Auditing & Compliance, Sean Weiss will be presenting the following sessions:

- Incident-to Smackdown
- Surviving a CIA
- Hospital-Physician Contracting & Focus Arrangements
- The Truth About ZPICs
- Becoming an IRO: When Will You Be Ready?

Each week, we will spotlight a conference speaker and the session(s) he/she will be presenting. Join us for this year's conference December 6-8, 2017 in Orlando, FL at the Loews Sapphire Falls Resort! Click the image above to learn more about conference



Upcoming Webinar Sessions

NAMAS is proud to offer the following webinars in August

Extrapolation Appeals

Speaker: Frank Cohen
August 15, 2017
2pm EST

This webinar is FREE for NAMAS Platinum, Gold, and Basic/Silver members who have selected the compliance webinar series. This webinar is also available for purchase for \$49.99

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Hands On: Auditing Inpatient Services

Speaker: Deb Santos
August 22, 2017
2pm EST

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How to Effectively Monitor Your Risk Adjustment Reporting

Speaker: Betty Stump
August 29, 2017
2pm EST

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