

PRIVACY LAW SHORT ON PRIVACY, BUT MAYBE SOMETHING CAN BE DONE

The medical records provisions of the Health Insurance Portability and Accountability Act (HIPAA) carry the misnomer of “the Privacy Rule.” Under this ostensible privacy law, patients’ confidential health information may be used and disclosed for “health care operations” without their informed consent. (1) Few patients or providers realize this, and fewer understand its implications.

The Program in Psychiatry and the Law, Department of Psychiatry, Beth Israel Deaconess Medical Center, Harvard Medical School (the Program), originally founded twenty-five years ago at the Massachusetts Mental Health Center, meets weekly to review cases, discuss forensic dilemmas and develop empirical studies of issues at the interface of psychiatry and law. As a “think tank” with expertise in forensic research, confidentiality and medicolegal consultation, the Program was asked to help with the process of restoring patient privacy and correcting this serious violation of medical ethics.

The Program filed two amicus briefs in support of the constitutional challenge to HIPAA, one at the Third Circuit and one at the U.S. Supreme Court. An amicus curiae brief is an advisory statement, typically drafted by an individual or entity with special expertise, that helps the court by providing education that the court might not otherwise receive. The current brief contributes to an effort to restore the informed consent provision to the law and thus to restore control of private health information to patients.

The Program was asked to provide briefs because of its expertise in patient care, confidentiality and privacy protection. The Third Circuit brief drew on the collective skills of Program members, especially a group of law interns coordinated by Richard Sobel, Ed.D. The brief argued for the importance of an informed consent provision to HIPAA to restore patients’

control of their health information. It was developed from Program input by the Philadelphia law firm of Pepper Hamilton, which donated its time and service to this important cause. Using the in-house talent of mental health attorney/psychotherapist Gary Zalkind, the Program developed a second brief identifying the unconsented social, administrative and medical experiment of using confidential patient information without the patients' informed consent as a violation of both the Hippocratic oath and the Nuremberg principles. The new brief draws especially from an article (2) by Program founding members Harold J. Bursztajn, MD, and Archie Brodsky, BA; that article identifies the special duties of clinicians and administrators to enhance the informed consent process in medical-social settings where patients' capacity for choice is actually or virtually reduced, and there is uncertainty as to the efficacy of administrative or clinical interventions, compared to alternatives.

The outcome of the case is uncertain, but Program members felt the principle of privacy deserved its attention. Even if judicial relief is not granted, the Program members hope the brief will serve as resource for a public policy dialog, building support for eventual legislative relief.

Social scientist Richard Sobel remarked: "The Program's special expertise in the essential roles of confidentiality and consent for quality psychotherapy provided a significant basis for informing the court and the public why patient consent needs to be returned to the HIPAA regulations." Harold J. Bursztajn, MD, commented: "The issue is not simply that informed consent protections for medical privacy are vital only in psychiatry or in classic clinical trial experimentation; rather, they are fundamental across the spectrum of the many unproven administrative, clinical and health care practices. For example, it is as important to protect, via informed consent requirements, the privacy of patients' behavioral genetic data as it is to protect the privacy of psychotherapy notes."

Thomas G. Gutheil, MD, notes: “Calling a piece of legislation a privacy bill does not protect patients’ privacy; giving patients control over the use of their health care information does do so. We in the Program hope this litigation will call attention to the problem and empower patients generally.”

Mental health attorney/psychotherapist Gary Zalkind notes: “It is unfortunate that in its current state, HIPAA will likely discourage those who most need psychiatric treatment from seeking it. HIPAA can also affect everyone who receives any sort of medical care by allowing disclosure of general medical records.”

Readers interested in reading Program amicus briefs are invited to consult our website at pipatl.org and click on “amicus briefs.” (3)

1. Sobel R: Maintaining informed consent for doctor-patient confidentiality: more serious failings in the HHS medical records regulation. *J Biolaw and Business* 6 (2): 61-65, Spring 2003.

2. Bursztajn HJ, Brodsky A: Clinical dilemmas and interventions in caring for patients in managed health care. *Gen Hosp Psychiatry* 21:239-248, 1999. Also at: [http://www.forensic-
psych.com/articles/artCaptive2.html](http://www.forensic-psych.com/articles/artCaptive2.html)

3. Program in Psychiatry and the Law, Amicus Curiae brief filed with the Supreme Court in support of *Citizens for Health v. Levitt*, June 14, 2006.

[Www.pipatl.org/library/17158%20pdf%20Zalkin.pdf](http://www.pipatl.org/library/17158%20pdf%20Zalkin.pdf)

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