REID AND RIEGE P.C.
COUNSELLORS AT LAW
January 2018

HEALTH CARE PRACTICE CLIENT ALERT

PATIENTS NOW MAY SUE PHYSICIANS FOR BREACHING PHYSICIAN-PATIENT CONFIDENTIALITY

Connecticut physicians who breach the physician-patient duty of confidentiality by the unauthorized disclosure of protected health information (PHI) can be liable to their patients, according to a Connecticut Supreme Court decision issued in January. In *Byrne v. Avery Center for Obstetrics and Gynecology, P.C.*,[1] the Court held that patients can sue their physicians for negligence and for any emotional distress caused by the unauthorized disclosure, and that HIPAA and its implementing regulations may afford the applicable standard of care for determining whether the physician breached the duty of confidentiality.

In *Byrne*, the patient's OB/GYN received a subpoena demanding the production of her medical records in connection with a paternity proceeding. The practice mailed the records to the court without notifying its patient that it had been served with a subpoena, without obtaining her consent or a protective order, and without moving to quash the subpoena on the basis of HIPAA or its own privacy policy. The patient's ex-boyfriend reviewed the patient's medical records and allegedly harassed and threatened her after he viewed them. The patient then sued the medical practice asserting, among other causes of action, negligence and negligent infliction of emotional distress.

The Supreme Court did not hold that the practice committed negligence or breached its duty of confidentiality, but remanded the case to the trial court for further proceedings. In doing so, the Court held that in determining whether the practice breached its duty of confidentiality, "HIPAA and its implementing regulations may be utilized to inform the standard of care applicable to such claims arising from allegations of negligence in the disclosure of patients' medical records pursuant to a subpoena."[2] In other words, in determining whether a physician was negligent, a court or jury may analyze whether the physician followed the steps required by HIPAA prior to disclosing PHI.

The decision leaves several unanswered questions, such as whether merely violating HIPAA and/or the state physician confidentiality statute (Conn. Gen. Stat. § 52-146o) breaches the duty of confidentiality. The case also leaves open the question whether strict compliance with HIPAA and its regulations is sufficient to avoid liability. These and other questions may eventually be answered in new cases brought in the wake of *Byrne*.

While *Byrne* addressed only the physician-patient relationship, Connecticut courts likely will extend its holding to other health care providers, given that Connecticut statutes create a confidential relationship between patients and numerous kinds of practitioners. Thus, if you are a psychologist, psychiatrist, certified marital and family

[1] 350 Conn. 540 (2018).

[2] 350 Conn. at 570.

therapist, licensed social worker or any other practitioner maintaining a confidential relationship with a patient (*see* Conn. Gen. Stat. §§ 52-146c, *et seq*.), you should assume that you may be subject to liability for disclosing PHI in violation of HIPAA and/or state law.

Complying with HIPAA and other privacy laws when responding to subpoenas has always been a delicate task for providers, and the Supreme Court's decision in *Byrne* only raises the stakes. Providers now face potential liability for violating HIPAA not only from federal and state authorities but directly from patients themselves.

Subpoenas are a powerful discovery tool that providers should not ignore. However, a provider cannot disclose PHI in response to a subpoena without written authorization from its patient, a court order, or in certain other narrow circumstances. The decision in *Byrne* should motivate providers to develop and maintain clear protocols for responding to subpoenas seeking PHI that account for all applicable federal and state privacy laws.

The Reid and Riege Health Care Practice Client Alert is a publication of Reid and Riege, P.C. It is designed to provide clients and others with information on recent developments which may be of interest or helpful to them.

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