

New York Physician Fined \$100,000 for HIPAA Violation and Failure to Cooperate in OCR's Investigation

In 2019, the US Department of Health & Human Services (HHS) Office for Civil Rights (OCR) announced an initiative to enforce a patient's right of access to their own health information in a timely, reasonable manner under HIPAA. To date, OCR has settled 25 Right of Access investigations for over \$1 million, most recently [announcing five separate settlements on November 30, 2021](#).

One of the recent investigations involved Dr. Rⁱ, a solo practitioner in New York State. In November 2017, a former patient filed a complaint with OCR that Dr. R failed to respond to several written and verbal requests for access to his medical records from 2013 to 2014. OCR closed the complaint in December 2017 after writing to Dr. R and encouraging him to comply with his HIPAA obligations. In March 2018, OCR received a second complaint from the same patient alleging that Dr. R still had not provided the requested medical records, accompanied by copies of three separate written requests. On August 15, 2018, OCR notified Dr. R that it was initiating an investigation and requested 1) a written response to the allegations, 2) a copy of his office policies and procedures with respect to patient access to their personal health information (PHI), 3) a copy of his notice of privacy practices, and 4) documentary assurance that workforce members were provided with training on his policies and procedures regarding patient access to PHI.

Dr. R did not respond to OCR's requests for information. OCR followed up and contacted Dr. R four separate times, including by telephone, fax, and regular mail, reminding him of his obligation to respond and requesting the information in the original notification. In April 2019, OCR again sent its original data request and asked for additional financial information on Dr. R's practice: copies of his most recent quarterly balance sheet, income statement, and cash flows; his most recent full-year audited financial statements (including notes) prepared, reviewed, or audited by an independent accounting firm; a copy of his most recent federal tax return; and any additional information the physician would like OCR to consider. Again, Dr. R did not respond.

On September 13, 2019, OCR notified Dr. R it had concluded its investigation, finding that Dr. R had denied the patient access to his medical records and failed to cooperate in OCR's investigation. OCR sent a proposed Resolution Agreement (RA) and Corrective Action Plan (CAP) and gave Dr. R 10 days to return the signed RA and CAP. There was a follow-up telephone call with Dr. R's office manager regarding signing and returning the agreement.

Dr. R did not respond to this letter and did not sign the agreement. Faced with the physician's failure to comply, in November 2019, OCR issued a Letter of Opportunity, which allowed Dr. R to submit evidence of mitigating factors and/or evidence to support a waiver of Civil Monetary Penalties (CMPs), which were imposed for his failure to adhere to the HIPAA Privacy Rule and his failure to cooperate. Once again, Dr. R did not respond. Therefore, in October 2020, OCR issued a Notice of Proposed Determination to impose a CMP upon Dr. R in the amount of \$100,000, finding that his continuing failure amounted to "willful neglect."

The severity of the penalties that can be imposed for noncompliance increases in accordance with the culpability of the covered entity. In Dr. R's case, the finding of "willful neglect" increased the penalty to the maximum amount allowed under the statute, which is a minimum of \$50,000 for each violation left uncorrected for 30 days (adjusted upward in 2021 for inflation) with a cap of \$1.5 million in a calendar year for all violations of an identical requirement.

In imposing the CMP, OCR considered Dr. R's failure to comply with the patient's request over the course of several years, the fact that the patient made two complaints to OCR, and Dr. R's failure to cooperate with the investigation. Because the failure to provide access was ongoing, OCR proposed a penalty of \$59,522 *per day* from February 2018 to October 2020, which was the *minimum* amount allowed for willful neglect. However, OCR did note that due to Dr. R's failure to respond, it had no information regarding his financial ability to pay the CMP or what the impact might be on his practice. Considering his status as a solo practitioner, OCR found "the imposition of the maximum CMP would likely impact the ability of [Dr. R] to provide care to his community." Therefore, in the Notice of Final Determination, the penalty was reduced to \$100,000.

Dr. R waived his right to a hearing and did not contest the findings. Accordingly, OCR closed this case by issuing a CMP of \$100,000. As a reminder, this severe penalty stemmed from ignoring a record request from only one patient, aggravated by a pattern of ignoring enforcement communications from the government. All things considered, OCR may have been generous in limiting the penalty to an amount that might be affordable instead of imposing an amount that would result in the closure of the doctor's practice and possibly a declaration of bankruptcy.

Dr. R's troubles may not be over. OCR issued a [press release](#) that is now published and therefore available to the Office of Professional Medical Conduct (OPMC). Based upon the facts in the Final Determination, OPMC could decide to commence a professional misconduct action, as there is no statute of limitations that would bar a disciplinary proceeding at this late date. The failure to provide access to a patient's medical record is itself a definition of professional misconductⁱⁱ and additional definitions include "having been found guilty in an adjudicatory proceeding of violating a state or federal statute or regulation, pursuant to a final decision or determination, and when no appeal is pending, or after resolution of the proceeding by stipulation or agreement, and when the violation would constitute professional misconduct"ⁱⁱⁱ or "willful or grossly negligent failure to comply with substantial provisions of federal, state, or local laws, rules, or regulations governing the practice of medicine."^{iv} Because the facts are uncontested, there might be little the physician could do to mount a defense against any disciplinary proceeding.

If you have any questions regarding the content of this article, please contact Fran Ciardullo, special counsel, at fciardullo@barclaydamon.com, or another member of Barclay Damon's Health & Human Services Providers Team.

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As special counsel at Barclay Damon LLP, Fran concentrates her legal practice on health care and risk-management issues. She counsels physicians, physician groups, dentists, hospitals and health systems, nursing homes, and other health care providers on matters involving professional misconduct, professional liability, medical-staff issues, scope of practice, mandated reporting, peer review, and regulatory compliance. Fran also handles consent for treatment and surrogate decision making, patient care, EMTALA, and health-information privacy issues.

A former Town of Schroepfel town justice, Fran is also trained in alternative dispute resolution and has mediated and arbitrated a variety of civil actions and disputes. She routinely publishes industry articles and presents educational programs on legal matters to hospitals, medical and dental practices, and trade associations.

ⁱ Not his real name.

ⁱⁱ See New York State Education Law § 6530 40.

ⁱⁱⁱ See New York State Education Law § 6530 9(c).

^{iv} See New York State Education Law § 6530 16.