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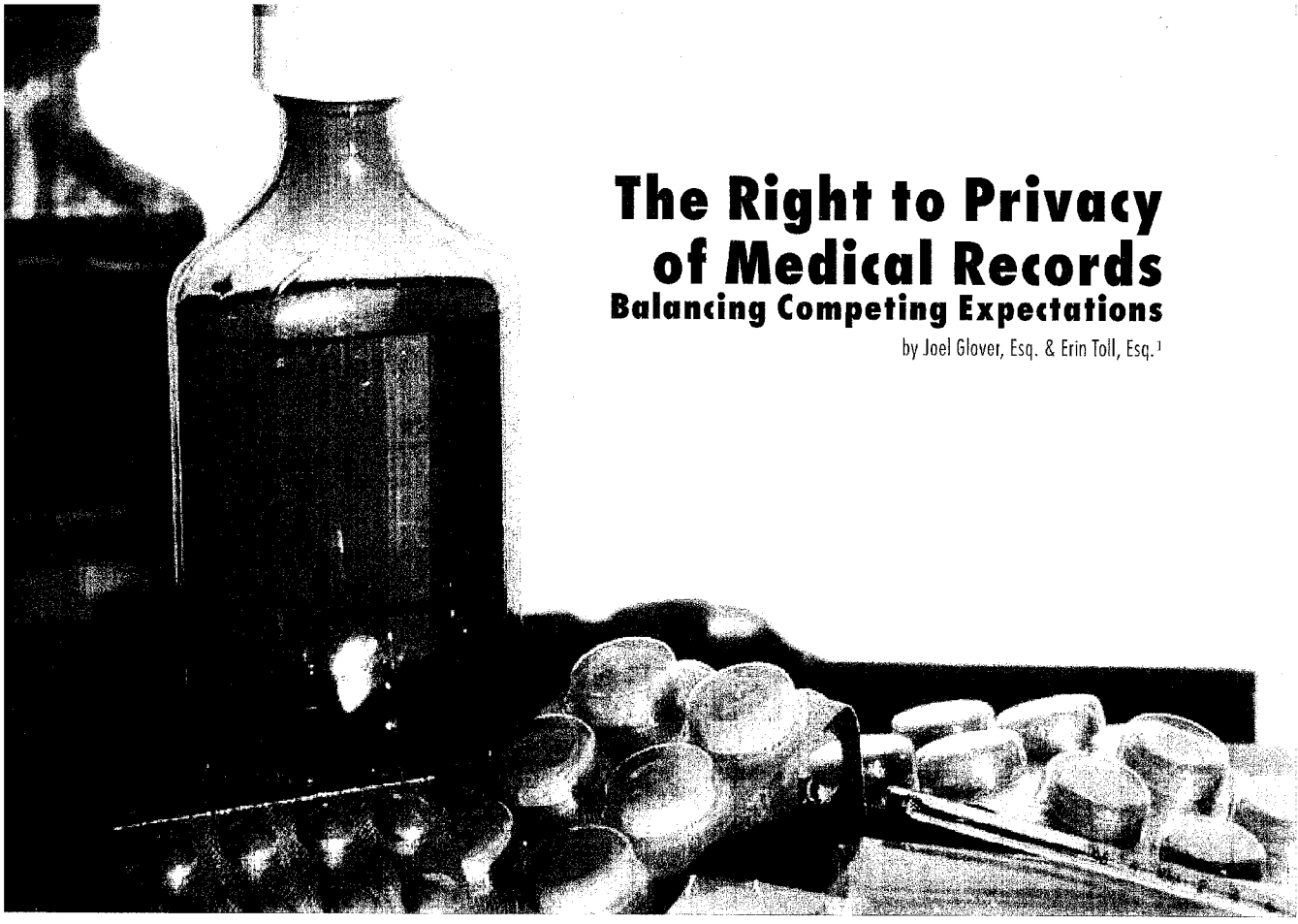


The Right to Privacy of Medical Records

Balancing Competing Expectations

by Joel Glover, Esq. & Erin Toll, Esq.[1]

Introduction

Today, the right to privacy of medical records is seldom contested. A recent decision by the United States Supreme Court recognized our "reasonable expectation" that medical records are private.[2] Courts permit tort claims for invasion of privacy where medical record information is disclosed. In addition, new federal regulations promulgated under the Health Insurance Portability and Accountability Act ("HIPAA") are being implemented on the presumption that medical records are private and entitled to protection.

This article examines the development of that right to privacy and the related balancing of expectations in the federal courts and the Colorado courts. Even where privacy rights have been recognized, those rights often fail in the balancing test when compared to society's legitimate interest in monitoring health care information. Finally, this article addresses the information that the HIPAA regulations consider to be private and subject to protection.[3]

The law recognizes our two competing expectations regarding medical records' privacy. First, we each expect our medical records to be private and confidential. Second, we understand that privacy will be regularly invaded as a

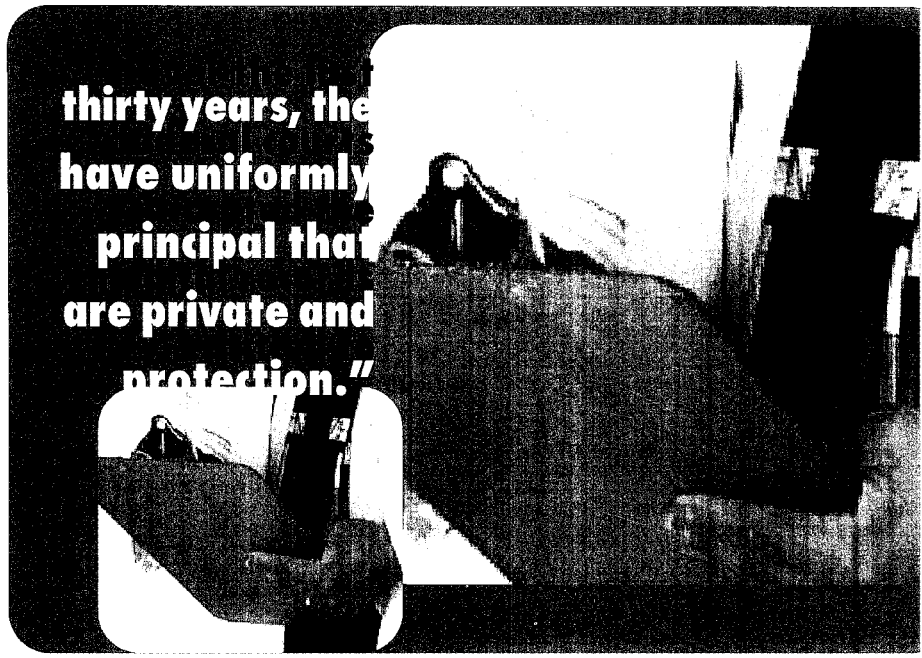
part of the health care system to support national priorities such as the protection of public health, health care research, health care quality monitoring, and the prevention of crime, including health care fraud.

These competing expectations are reflected in the balancing tests established in the federal and state cases and more recently, in the HIPAA regulations. First, medical records are private, consistent with our expectations. Second, our privacy expectation will be invaded as necessary to satisfy society's needs to utilize health care information of the population to promote the public welfare. While HIPAA, at least in part, appears to be based on an attempt to codify case law, even after the HIPAA regulations, a precise understanding of that balancing test can be elusive. As is evident from the case law, it often comes down to a case-by-case approach with the balance typically favoring a limited invasion of our privacy expectations when societal interests outweigh our privacy needs.

I. Development of the right to privacy in medical records.

A. The Whalen[4] *decision - an arguable right to privacy.*

Over the last thirty years, the federal courts have uniformly accepted the principal that medical records are private and entitled to protection. The existence of a right to privacy in medical records can be traced to the United States Supreme Court's decision in *Whalen v. Roe*.[5] In some ways, the *Whalen* decision is an unusual authority to serve as the basis for such an important privacy right. In answering the question before it, the Court ruled that there was no constitutional violation and expressly did not decide whether there was a right to privacy in medical records.[6] Nevertheless, it is repeatedly cited as precedent for that right.



The *Whalen* Court was presented with the question "whether the State of New York may record, in a centralized computer file, the names and addresses of all persons who have obtained, pursuant to a doctor's prescription, certain drugs for which there is both a lawful and an unlawful market."[7] The Court, in an opinion drafted by Justice Stevens, answered the question affirmatively and held that, "neither the immediate nor the threatened impact of the patient-identification requirements in the New York State Controlled Substances Act of 1972 on either the reputation or the independence of patients for whom Schedule II drugs are medically indicated is sufficient to constitute an invasion of any right or liberty protected by the Fourteenth Amendment."[8] However, in rejecting a constitutional violation, the Court created the framework by which future courts would develop the right to privacy in medical records.

In deciding that there was no privacy violation, the Court discussed two different types of individual privacy interests: (1) the interest in avoiding disclosure of personal matters; and (2) the interest in independence in making certain important kinds of decisions.[9] The program did not pose a sufficiently grievous threat to either interest.[10] The Court concluded that any privacy invasions would not be meaningfully distinguishable "from a host of other unpleasant invasions of privacy that are associated with many facets of health care."[11]

> Nevertheless, disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient. Requiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy.[12]

In essence, the Court balanced the two individual interests against the societal need to protect the public's health and to deter criminal activity. Although *Whalen*

held that the mandatory disclosure of prescriptions and patient identities was not a violation of privacy, the Court also explained that "[t]he right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures."[13] The Court then concluded that "in some circumstances that duty arguably has its roots in the Constitution."[14] Although clearly identified as an issue "not decided" by the Court, subsequent cases nevertheless relied on *Whalen*'s reasoning to develop what has become a generally accepted right to privacy in medical records.

Shortly after *Whalen*, two district courts implicitly adopted Justice Stevens' analysis that the right to privacy in medical records arguably has its roots in the Constitution, although in both cases the right to privacy did not prohibit disclosure. In one of the first district court decisions to rely on *Whalen*, an employer, du Pont, raised the right to privacy argument as a defense to a subpoena seeking employee health information.[15] The employer argued that the medical records of its employees were protected by a constitutional right of privacy and thus could not be disclosed.[16] Relying on *Whalen*, the district court implicitly accepted that a right to privacy in medical records existed.[17] Accordingly, the issue was "not whether a right of privacy exists respecting the information sought, but rather whether the record indicates that such right will be abridged."[18] Although the court upheld the subpoenas over the right to privacy claim, the court echoed Justice Stevens' concern in *Whalen* that unwarranted disclosure of the medical records could violate the Constitution.[19]

Just a year later, in *McKenna v. Fargo*,[20] a district court considered a program in which Jersey City required applicants for its fire department to undergo psychological testing. Even in the absence of public disclosure of the results, the district court determined that the "character and amount of information given to the Government alone is itself an intrusion on the privacy interest in nondisclosure of personal information to government employees recognized in *Whalen*."[21] As a result, the court required Jersey City to "justify the burden imposed on the constitutional right of privacy by the required psychological evaluations."[22] After confirming a right to privacy, the court determined that there was "sufficient support to conclude that the psychological evaluation and hiring procedure taken as a whole [was] useful and effective in identifying applicants whose emotional make-up makes them high risk candidates for the job of fire fighting."[23] As in *Whalen*, the court balanced the individual's privacy interests against society's interest in having a psychologically sound fire department.

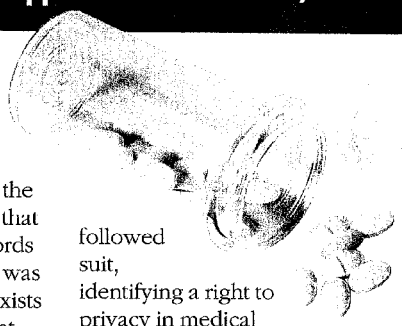
B. The Third Circuit accepts the right to privacy in medical records.

A federal appellate court soon followed suit, identifying a right to privacy in medical records though typically finding in favor of the invasion of that right. In one of the first decisions by a circuit court of appeals upholding a right to privacy in medical records, the Third Circuit Court of Appeals relied on the *Whalen* decision to conclude that there is a protected privacy right "not to have an individual's private affairs made public by the government."[24] The Third Circuit concluded that medical records fall within one of the zones of privacy entitled to protection:

> There can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection. Information about one's body and state of health is a matter which the individual is ordinarily entitled to retain within the "private enclave where he may lead a private life."[25]

As is evident from the quotation, *Westinghouse* was one of the first cases to accept explicitly Justice Stevens' "argument" that medical records may be subject to constitutional protection. While the court noted "there can be no question" of this right, there was also no previous judicial authority that could be cited for that proposition.[26] In the absence of judicial decisions for authority, the Third Circuit relied on a law review article and protections for medical records in the Federal Rules of Civil Procedure and the Freedom of Information Act.[27] Seven years later, relying on its own *Westinghouse* decision, the Third Circuit again recognized the right to privacy in medical records.[28] In 1995, the Third Circuit relied on the *Westinghouse* decision to conclude that records of prescription medications are private.[29] "An individual using prescription drugs has a right to expect that such information will customarily remain private."[30]

the Sixth Circuit Court of Appeals concluded that, "



C. A division among the circuits on the right to privacy in medical records.

Although the Third Circuit adopted Justice Stevens' argument, the Sixth Circuit did not follow suit. Without citation to *Westinghouse* or *Whalen*, the Sixth Circuit Court of Appeals concluded that, "[d]isclosure of plaintiff's medical records does not rise to the level of a breach of a right recognized as 'fundamental' under

the Constitution."[31]

This difference of opinion among the circuits was brought to the United States Supreme Court's attention by a decision of the Fourth Circuit Court of Appeals. In *Ferguson v. City of Charleston,*[32] the Fourth Circuit expressly noted the division among the circuits, as follows:

> Although the Supreme Court addressed a claim to a right of privacy in medical records in *Whalen*, it declined to decide whether such information merits constitutional privacy protection. See *Whalen*, 429 U.S. at 605-06. And, the circuit courts of appeals are divided on this issue.[33]

Although the United States Supreme Court reversed and remanded the Fourth Circuit's decision in *Ferguson*, the Court did not address the division of authority noted among the circuits. Instead, it acknowledged an "expectation of privacy" in medical records, as follows, "[t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent."[34] The Court did not indicate whether this expectation of privacy was protected by the Constitution, as had been "argued" by Stevens in *Whalen.*

D. No right to privacy in making medical decisions.

The *Westinghouse* line of authority and the *Ferguson* decision focus on the first type of privacy identified in *Whalen,* that is avoiding disclosure of personal matters.[35] The second type of privacy identified in *Whalen* is independence in making certain important kinds of decisions.[36] It has not received much, if any, support from the courts. For example, in *New York State Ophthalmological Society v. Bowen,*[37] the court determined that there was no right to privacy in medical determinations.[38] The plaintiffs were seeking to challenge a federal statute limiting Medicare payments for certain cataract services.[39] Plaintiffs maintained "that the right to privacy protects patients' interest in procuring the treatment of choice" and insisted that "all medical treatment decisions are protected from state interference because they are inherently private and peculiarly 'personal.'"[40] The court concluded that "[t]here is no basis under current privacy case law for extending such stringent protection to every decision bearing, however indirectly, on a person's health and physical well-being."[41]

II. Application of a balancing test to privacy rights in medical records.

Even in the cases where medical records were considered within a zone of privacy, that privacy was nearly always invaded after application of a balancing test to determine whether the "societal interest in disclosure outweighs the privacy interest on the specific facts of the case."[42] According to the Third Circuit, the factors to be considered in deciding whether an intrusion into an individual's privacy is justified are:

> [T]he type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.[43]

In *Westinghouse,* the court balanced the factors and concluded that complete employee medical records needed to be turned over to the government in response to a subpoena issued under the Occupational Safety and Health Act.[44] The court found that "the interest in occupational safety and health to the employees in the particular plant, employees in other plants, future employees and the public at large is substantial."[45] The court also relied on the security measures that would be taken to protect against the disclosure of the information.[46] Recognizing that there may still be privacy concerns, the Court permitted employees the opportunity to raise a personal claim of privacy.[47]

The Third Circuit has repeatedly utilized these *Westinghouse* factors to conclude that the balance favors invasion of the privacy right in medical records. For example, in *In re: Search Warrant,*[48] the Third Circuit concluded the balance favored disclosure of medical records where the patients were already known through insurance submissions and separate mechanisms existed to guard against disclosure and to maintain the confidentiality of the records.[49] As well, in *Fraternal Order of Police v. Philadelphia,*[50] the Third Circuit again concluded that the balance favored the government's need for the medical records.[51]

> Because the medical information requested is directly related to the interest of the police department in selecting officers who are physically and mentally capable of working in dangerous and highly stressful positions, sometimes over long periods of time, and because police officers have little reasonable expectations that such medical information will not be requested, we hold that questions 18 [physical

does not rise to the level of a breach of a right recognized as "fundamental" under the Constitution."

> defects], 19 [prescription drugs] and 20 [mental or psychiatric condition] do not unconstitutionally impinge upon the applicants' privacy interests.[52]

Finally, in *SEPTA*, the court concluded that the right to privacy in medical records was not absolute.[53] In that case, an employer learned that one employee suffered from an HIV-related illness when the employer reviewed medical records that gave each employee's name and listed the prescription drugs each employee purchased through a prescription drug program.[54] In its review, the court concluded that audits of drug information, in the aggregate, are essential to the public interest.[55] The review of the identity of the employee and his medication was not a violation of the employee's privacy largely because it was unintentional.[56] The employer did not ask for the employee's identity from the drug company.[57]

In concluding that the balance favors disclosure, other courts have relied on the purpose of the disclosure in order to override the privacy rights. For example, in 1985, the District Court for New Jersey concluded that the privacy interests in medical records were not absolute and needed to be balanced against the legitimate interests of the state in securing such information.[58] In *Shoemaker,* jockeys were required to disclose illnesses or conditions for which a particular drug had been prescribed or used.[59] However access to the information was limited.[60] In concluding that the balance favored the interests of the state, the court focused on the purpose, noting that "[s]uch information is gathered with 'rehabilitative' and not 'penal' purposes in mind."[61] Another example is *Patients of Dr. Barbara Solomon v. Board of Physician Quality Assurance.*[62] There, the court acknowledged a privacy interest in medical records but found in favor of the government's interest in reviewing that information.[63] In that case, patients were attempting to keep a regulatory body from reviewing the medical records maintained by their doctor.[64] The court focused on the purpose of the information and the safeguards, as follows:

> Given the Board's mission of identifying physicians who engage in immoral or unprofessional conduct, and the Board's goal of preventing future misconduct, courts in this Circuit would most likely find that the Board's activity furthers a compelling state interest. Moreover, because Maryland's statutory restrictions against disclosure of medical records are adequate to protect the Patients from widespread disclosure, courts in this Circuit would most likely find no constitutional violation.[65]

In *In Re: Subpoena Duces Tecum,*[66] the court considered challenges to four subpoenas issued arising from an investigation into federal health care offenses.[67] The doctor argued that his patients' privacy interests in their medical files outweigh the government's interest in those files.[68] The court rejected the argument because the government has a compelling interest in identifying illegal activity and in deterring future misconduct.[69] That interest outweighs the privacy rights of those whose records were turned over to the government, particularly in light of the protections associated with the subpoena.[70] The subpoena prohibited use of disclosed information except as directly related to receipt of health care, payment for health care, a fraudulent claim related to health care or as authorized by a court.[71]

III. The right to privacy in medical records in Colorado.

Various states, including Colorado, have adopted an approach to privacy based on the federal courts' approach. More than twenty years ago, in a case not specifically related to medical records, the Colorado Supreme Court adopted the *Whalen* privacy analysis, and performed a balancing test to invalidate a state agency's regulation.[72] Several life insurance agents brought suit to enjoin the Colorado Division of Insurance's enforcement of a regulation requiring them to notify a life insurer whose insurance was being replaced of the proposed replacement, even when the insured specifically requested that the transaction remain confidential.[73]

Acknowledging that the United States Constitution does not explicitly mention any right to privacy, the Colorado court, citing several United States Supreme Court cases, found that the right to privacy is implicit in various Constitutional amendments, including the First, Fourth, Fifth, Ninth, and Fourteenth Amendments and the Bill of Rights.[74] The Colorado court adopted the *Whalen* definition of two types of privacy interests: "1) the individual interest in avoiding disclosure of personal matters; and 2) the individual interest in making certain kinds of important decisions."[75] The court found that the insurance regulation clearly invaded the insured's interest in avoiding disclosure of personal matters.[76] The Colorado court enjoined enforcement of the regulation but noted that "a burdensome regulation may be validated by a sufficiently compelling state interest."[77] "A generalized concern for protecting the public from unscrupulous practices or misrepresentations by replacing insurers is outweighed by the insured's request for nondisclosure."[78]

Seven years later, without discussion of the constitutional aspects of the right, the Colorado Supreme Court implicitly recognized a right to privacy regarding medical information.[79] Respondents were recipients of donated blood infected with the AIDS virus.[80] They sought disclosure of the identities of each of the donors whose blood was used and production of all of the donors' records in order to pursue their claims.[81] The blood center asserted that compelling public policy grounds, including the maintenance of the supply of volunteer blood and the privacy interests of volunteer blood donors, prohibited disclosure of the donors' identities.[82]

The court performed a balancing test and determined that the blood donors had a "privacy interest in remaining anonymous and avoiding the embarrassment and potential humiliation of being identified as AIDS carriers."[83] The blood center, and society as a whole, had "an interest in maintaining the availability of an abundant supply of volunteer blood."[84] The petitioners had an interest in pursuing their claims.[85] Therefore, the court tailored a limited discovery procedure designed to provide the respondents with the information without risking the consequences of public disclosure of the donors' identities or infringing upon society's interests in a safe, adequate, voluntary blood supply.[86] While no constitutional authority was cited, the *Belle Bonfils* case indicated that Colorado courts would recognize a right to privacy concerning medical information, but that this right must be balanced by the societal interest in disclosing the information.

Although the Colorado courts have not explicitly applied the *Whalen* analysis to medical information, when considering privacy interests, the courts recognize a right to privacy regarding medical information, and balance the individual's privacy interests with society's interest in obtaining the information.[87] As with the federal cases, the emphasis in Colorado has been on the first interest expressed in *Whalen*, that of avoiding disclosure of personal matters, as opposed to the second interest of independence in making certain kinds of decisions.

IV. Privacy rights in medical records give rise to a tort claim for invasion of privacy.

The *Whalen* and *Westinghouse* decisions address medical records' right of privacy in the context of government actions. However, courts have also recognized that the private sector may be liable for claims for violating privacy with respect to medical records.[88] Even in cases where there was no liability, a court would not rule out the possibility that instances may exist where the collection of highly personal information irrelevant to any legitimate business purpose might constitute an invasion of privacy by unreasonable intrusion.[89]

The state law claim of invasion of privacy generally requires the plaintiff to establish: "1) an intrusion upon her seclusion or solitude or in her private affairs; 2) a public disclosure of embarrassing private facts; 3) publicity which places her in a false light in the public eye; or 4) an appropriation, for the defendant's advantage, of the plaintiff's name or likeness."[90] While medical records often trigger privacy interests, the communications may be considered privileged where the following elements are satisfied: "1) good faith; 2) an interest to be upheld; 3) a statement limited in its scope to this purpose; 4) a proper occasion; and 5) publication in a proper manner and to proper parties only."[91]

In *Ross*, an employee had complaints about working under fluorescent lights.[92] The employer required her to see the agency's doctor, a psychologist.[93] The employee authorized the doctor to forward a copy of the psychological evaluation to one individual, who then distributed the report to three others at the office.[94] Because there was a reasonable belief that the other individuals needed to review the report, the court ruled that the employer was not liable, even though the situation could "have been handled in a more sensitive way."[95]

Other cases have resulted in the employer's liability for invasion of privacy. For example, in *Levias*, the medical examiner for an employer (United Airlines) received a report from a flight attendant containing details of contemplated gynecological surgery.[96] The medical examiner disclosed most of that information to the flight attendant's male flight supervisor, who had no compelling reason to know it, and to the employee's husband.[97] The flight supervisor repeatedly contacted her to discuss the details of her medical condition and its effect on her employment.[98] The flight attendant had not authorized the medical examiner to disclose any of that information, and she considered it highly personal.[99] The court upheld a damages claim (for compensatory damages but not punitive damages) for the flight attendant, concluding that it was "doubtful that either the flight attendant's supervisors or her husband had a real need to know the disclosed data."[100]

As another example, in Colorado, in a case of first impression, the Colorado Supreme Court recognized a tort claim for invasion of privacy "in the nature of unreasonable publicity given to one's private life," in the context of medical information.[101] The court determined that disclosure of "disgraceful illnesses" are considered private in nature and disclosure of such facts constitutes an invasion of the individual's right of privacy.[102]

Though admittedly based on a different test, the court's recognition of a tort claim for invasion of privacy based on medical records generally appears to track the approach set forth in *Whalen* and *Westinghouse*.

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The courts recognize a privacy interest in medical records and then balance that interest against various legitimate purposes associated with disclosing that information.

V. The HIPAA regulations adopt and seek to implement the privacy interests and balancing tests developed in the various cases.

In 1996, Congress enacted the Health Insurance Portability and Accountability Act ("HIPAA").[103] Among other things, HIPAA required Congress to enact new safeguards to protect the security and confidentiality of health care information. Congress failed to do so, requiring the Department of Health and Human Services ("HHS") to promulgate regulations for such protections.[104] In November of 1999, HHS published proposed regulations and, during the comment period, received 52,000 communications from the public.[105] In December 2000, HHS issued the final rule that took effect on April 14, 2001.[106] However, most covered entities have until April 14, 2003 to comply with the final rule's provisions.[107] The HIPAA regulations are intended to establish a set of basic national privacy standards to serve as a floor of ground rules for health care providers, health plans and health care clearinghouses to follow.[108]

In promulgating the regulations, HHS considered the need for privacy of medical records to be great.[109] The HHS recognized a "growing concern" stemming from several trends, "including the growing use of interconnected electronic media for business and personal activities, our increasing ability to know an individual's genetic make-up, and, in health care, the increasing complexity of the system."[110] Unless those public concerns were allayed, the HHS believed we would be "unable to obtain the full benefits of electronic technologies. The absence of national standards for the confidentiality of health information has made the health care industry and the population in general uncomfortable about this primarily financially-driven expansion in the use of electronic data."[111] The HHS focused on one of the same concerns that was recognized by various courts, the consequences of sharing information without the knowledge of the patient involved.[112]

In concluding that "privacy is a fundamental right," HHS looked to judicial authority and, in particular, to the *Whalen* decision.[113] In several aspects, the HIPAA regulations have followed the guidance from the federal courts.[114] In relying on this federal authority, HHS did not specifically address the fact that the judicial authority it cited related to the right to privacy from the perspective of government actors rather than the private sector, which is not subject to the constitutional restrictions.[115]

There are several principles from the federal decisions that are reflected and expanded in the HIPAA regulations. First, the cases generally accept that there is an expectation of privacy in medical records, although the extent to which it reaches a constitutionally protected right may be debated.[116] In promulgating the regulations, HHS characterized privacy as a "fundamental right" and concluded that the "United States Supreme Court has upheld the constitutional protection of personal health information" in *Whalen*.[117] Second, the HIPAA regulations focus on the first type of individual privacy protection identified in *Whalen*, the protection for medical records.[118] The HIPAA regulations do not seek to protect medical decision-making, an interest also largely ignored by the courts.[119] Third, the HIPAA regulations acknowledge that the right to privacy "is not absolute" and must be balanced against legitimate

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California v. Ciraolo[24], the Court held that an overflight of the defendant's property by a police airplane did not amount to a search, on the unusual ground that the plane was in FAA approved air space. The Court's rationale for this rule was that no expectation of privacy could be reasonable, as "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed."[25] Here, the individual's fault is not conveying information to a third party, but failing to properly safeguard his property:

> That the area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible.[26]

In its most recent Fourth Amendment case, *Kyllo v. United States*,[27] the Court held that the use of thermal imaging technology to measure the heat coming off of a dwelling was a search subject to the requirements of the Fourth Amendment. The Court held that because the device provided details about the interior of a home that could not otherwise be obtained without trespassing into the home and because the device had not yet entered into general use, its use constituted a search.[28] The flip-side of this argument appears to be that had the device used by the police

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public uses of that information.[120] However, steps must be taken to ensure that the balancing does not result in unnecessary privacy breaches.[121]

Initially, the HIPAA regulations seek to implement these principles with its definitions. The regulations protect the defined term "protected health information" by generally limiting the use of that information to the individual or with the individual's consent.[122] That key phrase - protected health information - is based on another defined phrase, "individually identifiable health information."[123] In turn, "individually identifiable health information" is defined as a subset of health information, including demographic information collected from an individual that:

> (1) Is created or received by a health care provider, health plan, employer or health care clearinghouse; and
> (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present or future payment for the provision of health care to an individual; and
>
> > (i) That identifies the individual;
> > (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.[124]

However, health information that does not identify an individual or permit identification of the individual does not meet the definition of "identifiable health information."[125] In order to satisfy this exclusion, numerous identifiers must be removed, including identifiers such as names, dates, numbers, addresses and any unique identifying characteristics.[126]

Similar to the balancing test from judicial decisions, the regulations identify many situations where the "protected health information" may be disclosed, even without consent, so long as it is required by law and the use or disclosure complies with and is limited to the relevant requirements of law.[127] Similar to the federal case law, appropriate disclosures are determined based on their purposes and scope of disclosure.[128] Some examples[129] of permitted disclosures include:

> To a public health authority to prevent or control disease or injury;
>
> To a public health authority authorized by law to receive reports of child abuse or neglect;
>
> To a person who may have been exposed to a communicable disease or may otherwise be at risk of contracting or spreading a disease or condition;
>
> To a social service agency about a victim of abuse, neglect or domestic violence, if required by law and if the individual consents or if there is a belief that disclosure is necessary to prevent serious harm to individuals;
>
> To a health oversight agency for oversight activities authorized by law;
>
> To a law enforcement official's request for the purpose of identifying or locating a suspect, fugitive, material witness or missing person.[130]

This list focuses on many of the purposes identified in the federal case law as appropriate and necessary societal uses of medical records. As noted by Justice Stevens in *Whalen*, disclosures for these types of purposes are those "unpleasant invasions of privacy that are associated with many facets of health care."[131] The HIPAA regulations seek to implement the courts' case-by-case analysis by itemizing those instances where society's needs outweigh the individual's privacy rights. While the regulatory approach provides more specificity, it also lacks the flexibility that would be exercised by a court enforcing the existing case-by-case approach. However, that specificity may provide greater certainty and predictability, which are critical for the entities subject to HIPAA.

Conclusion

The right to privacy in medical records is balanced against society's expected invasions of privacy related to health care. Our expectation of privacy in those records has never been seriously contested. Federal courts have consistently reached that conclusion without the need for precedent. However, those rights often fail in the balancing test against society's interests. The extent to which the privacy expectation rises to a constitutional right has not yet been resolved and may never be resolved. The HIPAA regulations attempt to adopt the balance established by the courts, by protecting medical records and protecting society's legitimate uses of the health care information.