

TO: Representative Maxine Grad, Chair, House Committee on Judiciary

FROM: Paul Harrington, Executive Vice President, Vermont Medical Society

RE: Section 1 of S.155, as introduced, creating a new private right of action and punitive damages for HIPAA non-compliance

DATE: April 14, 2016

On January 7th, the Senate Judiciary Committee voted unanimously to delete from S. 155, as introduced, language in section one creating a new private right of action for inappropriate HIPAA disclosures. This important vote was greatly facilitated by VMS members contacting their Senators over the holidays and the thoughtful testimony provided by VMS President James Herbert, MD.

Dr. Hebert, a general surgeon at the University of Vermont Medical Center, described being in crowded rooms with patients and their relatives and opening up a computer to review medical records. "It is hard to find a nook where only you can see it," he told the Senate Judiciary Committee. "One of the unintended consequences of electronic medical records is that it makes privacy very difficult," Hebert said.

The VMS testified before the Senate Judiciary Committee several times in opposition to Section 1 of S.155. The section would have created a new state-based private right of action against physicians and other covered entities for HIPAA violations. This would enable patients who believe that their health information was disclosed inappropriately to file a law suit in Vermont Superior Court.

The bill provided for damages - including automatic damages and punitive damages - and for costs and attorney's fees for inappropriate disclosures. It authorized the court to award actual damages to patients or automatic damages of \$500.00 for the first violation and \$1000.00 for any subsequent violation, **whichever is greater**. With attorney's fees, punitive damages, and automatic damages, this bill created incentives for patients and lawyers to take cases for HIPAA violations to court, regardless of whether the violation is small or large or caused harm to the patient.

HIPAA is a federal law and the Office of Civil Rights (OCR) within HHS enforces it. Federal law includes significant penalties which increase dramatically when inappropriate disclosures are willful, intentional or made with the intent to sell the health care information. Also, State Attorneys General have the authority to enforce HIPAA rules by bringing civil actions on behalf of state residents in federal district court.

Vermont Attorney General Sorrell has been quoted as saying: “[W]e’re not at all reluctant to bring an enforcement.” And Assistant Attorney General Ryan Keriger confirmed to the VMS that they follow up on the HIPAA complaints they receive.

In addition, the Vermont Board of Medical Practice considers HIPAA to be a statute that can be the basis for a charge of unprofessional conduct under 26 V.S.A. Section 1354(a)(27) and it has issued orders based on HIPAA violations.

In its testimony before the Senate Judiciary Committee, VMS stated the current joint federal and state enforcement structure is sufficient and it feels working to obtain voluntary compliance before moving to penalties is the best way to enforce a highly complex and detailed law like HIPAA.

Vermont, unlike its neighbors does not have any meaningful tort reform, a factor seriously considered by physicians who are deciding whether to come to Vermont or whether to leave Vermont. Maine, New Hampshire and Massachusetts all have malpractice screening panels that reduce the time to resolve cases.

In addition, passing the private right of action could create great inconvenience for Vermont patients. As one family physician wrote: “[O]ne of the consequences will be patient care issues cannot be discussed over the phone. Patients would be informed this is no longer possible as information could be overheard by others. Patients will have to come to the office to discuss any issues in a room face to face only with the exam door closed.”

The VMS believes creating a new private right of action against physicians and other covered entities for HIPAA violations would add to an already stressful practice environment for physicians in Vermont and send exactly the wrong message as the state seeks to recruit and retain physicians to care for an aging population.

On behalf of the physician members of the Vermont Medical Society, I request that the House Committee on Judiciary not add to S.155 a new private right of action for HIPAA non-compliance.