

## Report on Patient Privacy Volume 21, Number 11. November 11, 2021 Former Prosecutor: More Fraud Cases Have HIPAA Charges Tacked On

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By Nina Youngstrom

When a nurse at Roswell Park Comprehensive Cancer Center in Buffalo, New York, was caught stealing narcotics from a Pyxis machine and diluting them to cover her tracks, she was charged with illegally obtaining controlled substances by fraud and tampering with a consumer product. The nurse, Kelsey A. Mulvey, also was accused of a criminal HIPAA violation because she snooped in records to find patients being treated with controlled substances. The drug diversion allegedly caused patient harm when the water she used to dilute vials of Dilaudid led to bacterial infections, according to the U.S. Attorney's Office for the Western District of New York.<sup>[1]</sup>

Mulvey's case is an example of a recent trend of prosecutors adding HIPAA violations to health fraud, kickback and other allegations, said attorney Anthony Burba, a former prosecutor in the fraud unit of the Department of Justice (DOJ) Criminal Division.

"It's important for large organizations to pay attention to these types of cases," Burba said Sept. 21 at the Fraud and Compliance Forum sponsored by the American Health Law Association. "With an increase in ransomware and hacking, the weakest point of entry will be individuals who work in your organization. Make sure employees know they have skin in the game."

There are several reasons to tack on HIPAA allegations, said Burba, who is now with Barnes & Thornburg in Chicago. "When I charged cases, I wanted the indictment to tell the story of the theory I would bring to trial," he said. Adding a HIPAA criminal charge "adds value to the narrative." It shows that unauthorized access to patient health information "is not normal behavior in a health care setting. You need to be able to explain things to a jury, and DOJ is taking that approach to show the jury the underlying criminal conduct was driven by access to patient information." It's also easier for juries to understand a defendant accessing patient data than running a complex fraud scheme or proving intent in a kickback case, and "it gives you some flexibility in plea negotiations," Burba said.

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