

## Health Information Compliance Alert

### **HIPAA LITIGATION: HHS STRIKES BACK AGAINST PRIVACY RULE LAWSUIT**

Last August, the Association of American Physicians and Surgeons filed suit in U.S. District Court in Houston challenging the constitutionality of the Health Insurance Portability and Accountability Act's privacy rule. This month, the Department of Health and Human Services fought back with a motion to dismiss the suit.

The AAPS lawsuit, which was joined by Rep. Ron Paul (R-TX), alleges the privacy rule violates the First, Fourth and Tenth Amendments.

Claims under the Fourth Amendment, stemmed from the provision that allows government access to medical records without a warrant. "Far from protecting privacy, these rules give government officials and certain private interests a new federal right to access medical records without consent," says Paul in a press statement.

In its motion to dismiss, HHS counters that any claims of unconstitutionality are premature because enforcement of the privacy rule will begin until April, 2003. "Plaintiffs' claims may change or be mooted by events that occur prior to that time," the 56-page motion states. "The Department has already issued extensive policy guidance on the practical application of the Privacy Rule, and is likely to issue additional guidance before the 2003 compliance date."

HHS officials also argue the AAPS allegations that the privacy rule violated the First Amendment by fostering a "chilling effect" on the management and disclosures of protected health information are "unripe" for many of the same reasons. "The Supreme Court has long held that subjective allegations of 'chill' must be accompanied by real injury in order to create a justiciable case or controversy."

As for the Tenth Amendment claims, the plaintiffs lack standing to bring such claims because the Tenth amendment exists to protect states, and "only states may properly bring a claim under that amendment."