Know the Hazards

A Landscape View of Privacy Protection Issues

By Shari Claire Lewis and Max Gershenoff

A statutory review and a look at recent cases where courts have considered the circumstances under which liability claims for improper disclosure of private medical information may be viable.

Most professional businesses, including law firms, insurance entities, accountants, and of course, all types of health-care practices, create or come to possess vast quantities of personal information about individuals, most critically, confidential medical information, and they can inadvertently improperly disclose it. The danger of improperly disclosing private information or receiving properly disclosed information and then improperly re-disclosing it to someone without authority to receive it is particularly acute for litigators and litigation support professionals, in part because of the generally public nature of the profession and because they may come to possess not only their clients' information but information belonging to adversaries. Nevertheless, all professionals are vulnerable.

Notably, the federal Health Insurance Portability and Accountability Act (HIPAA) governing medical information privacy does not create a private right of action on behalf of someone whose privacy has been violated. Typically, aggrieved plaintiffs resort to state law remedies, if they exist, which generally involve either a statutory action for wrongful disclosure or an action at common law for the tort of breach of privacy. Though HIPAA in many cases preempts state law, Congress created a carve-out for state privacy regulation under which state privacy law generally will survive preemption challenges. *See*, *e.g.*, 42 U.S.C.S. §1320d-7; 42 U.S.C.S. §1320d-2 (note); *Citizens for Health v. Leavitt*, 428 F.3d 167, 174 (3d Cir. 2005), *cert. denied*, 549 U.S. 941 (2006) (noting that federal law does not preempt state privacy rules when they are more stringent than HIPAA requirements).

Considering that both federal and state courts may exercise long-arm jurisdiction under certain circumstances as defined within by the state forum, a defendant in one state may be held to account under the laws of another state. Professionals, most especially litigation managers, therefore should develop a nationwide understanding of disclosure liability.

This article first will discuss the statutory and common law landscape of privacy laws that protect disclosure of medical

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information generally. It then will examine some cases—hazards on that landscape, if you will—that either directly or by implication consider the circumstances under which liability claims against professionals for improper disclosure of private medical information may be viable.

States with Statutes Permitting Actions Based on Disclosure of Medical Information

While many states have enacted statutes that specifically establish private rights of action for wrongful disclosure of medical information, the scope of these statutes varies.

State Statutes Imposing Very Broad Liability

The California, Maryland, Minnesota, Rhode Island, and Wisconsin statutes can be read to provide a private right of action against just about anyone who improperly discloses medical information or receives improperly disclosed medical information and then discloses it again to another. *See, e.g.*, Cal. Civ. Code §56, *et seq.*; Md. Code Ann., Health-Gen. §4-301, *et seq.*; Minn. Stat. §144.291, *et seq.*; R.I. Gen. Laws §5-37.3-1, *et seq.*; Wis. Stat. Ann. §146.81, *et seq.* Of these states, California, Minnesota, Rhode Island, and Wisconsin impose liability for both negligent and willful disclosure, whereas Maryland requires a knowing disclosure. *Id.* To impose liability these states generally require the information to have been contained within an actual medical record or the discloser to have derived the information from a health-care provider or an insurer. In other words, if someone tells a friend in confidence that he or she is ill, the friend normally will not become statutorily liable for spreading the unfortunate news. *See, e.g.*, Cal. Civ. Code §§56.05, 56.13; Md. Code Ann., Health-Gen. §§4-301, 4-302; Minn. Stat. §§144.291, 144.293; R.I. Gen. Laws §§5-37.3-3, 5-37.3-4; Wis. Stat. Ann. §146.81, 146.82.

Most states imposing broad-based liability on someone for improperly disclosing patient information place some limit on the damages available, apparently to attempt to forestall nuisance lawsuits based on disclosures that do not injure someone or only cause an inchoate, unquantifiable injury. For example, under Maryland law a plaintiff can recover "actual damages" only. Md. Code Ann., Health-Gen. §4-309. Rhode Island permits exemplary or punitive damages in an appropriate case involving malice amounting to criminality. *See, e.g.*, R.I. Gen. Laws §5-37.3-9; *Washburn v. Rite Aid Corp.*, 695 A.2d 495, 499 (R.I. 1997). Otherwise, in Rhode Island, a plaintiff can receive nothing more than actual damages and, at the discretion of a court, attorney's fees. *Id.*

While Wisconsin permits exemplary damages of up to $1,000 for negligent disclosure and damages of up to $25,000 for willful disclosure, as well as costs and attorney's fees, the Wisconsin statute otherwise limits damages to "actual damages." Wis. Stat. Ann. §146.84. In California, a plaintiff can receive compensatory damages, nominal damages of $1,000, or both, punitive damages not to exceed $3,000, attorney's fees not to exceed $1,000, and costs. Cal. Civ. Code §§56.35, 56.36.

State Statutes Imposing Limited Liability

Other state statutes permit a private right of action but place more restrictive limits on the circumstances where the right of action is available. For example, some states restrict statutory liability to various classes of employers, to health-care providers, to insurance entities, or to health-care providers and to insurance entities. Nevertheless, given the principal-agent relationship between an attorney and a client in most states, an attorney reasonably could anticipate that liability would extend to an attorney acting on behalf of a client when the client belongs to the defined class of potential defendants.

Other state statutes restrict statutory liability to disclosures concerning specific conditions—most usually HIV/AIDS or mental health conditions—or by foregoing the general negligence or willfulness standards to restrict liability to cases in which someone disclosed information for a specific, improper purpose such as marketing or financial gain. Because the discrete statutory schemes vary considerably among these states, it is worthwhile to consider these liability categories briefly in turn. Specifically to redress private medical information disclosure a scheme could establish a private right of action (1) against insurance entities; (2) against physicians, hospitals, or health-care providers; (3) against employers; (4) for disclosure of HIV/AIDS or other communicable disease information; (5) for disclosure of mental health information; (6) for disclosure of genetic testing information; or (7) against offending individuals or entities based on the common law of the invasion of privacy.

Private Right of Action Against Insurance Entities

Arizona, Connecticut, Georgia, Illinois, Montana, New Jersey, North Carolina, Ohio, Oregon, and Virginia each have established a private statutory right of action against an insurer for actual damages, costs, and reasonable attorney's fees when the insurer wrongfully discloses health-care information that it obtained in connection with an insurance transaction. Notably, all of these state statutes include an explicit provision to the effect that a plaintiff cannot recover monetary damages in excess of actual damages, and each includes a provision displacing a common law cause of action for improper insurer disclosure. Ariz. Rev. Stat. §20-2118; Conn. Gen. Stat. §38a-995; Ga. Code Ann. §33-39-21; 215 Ill. Comp. Stat 5/1021; Mont. Code Ann. §33-19-407; N.J. Stat. Ann. §17:23A-20; N.C. Gen. Stat. §58-39-105; Ohio Rev. Code §3904.21; Or. Rev. Stat. §746.680; Va. Code Ann. §38.2-617.

Private Right of Action Against Physicians, Hospitals, or Health-care Providers

Arizona law implies a private right of action for damages against health-care providers, contractors, or clinical laboratories for improper disclosure in that it contains a provision stating that such individuals or entities are *not* liable for damages in civil actions for improper disclosure when a discloser made the disclosure in good faith under circumstances in which the law would permit it. Ariz. Rev. Stat. §12-2296. Maine law establishes a private right of action against health-care providers for improper disclosure of health-care information but permits recovery of costs, civil penalties, and injunctive relief rather than damages. Me. Rev. Stat. Ann. tit. 22, §1711-C(7). Montana law provides a private right of action against a health-care

provider for equitable relief and pecuniary losses when a health-care provider wrongfully discloses a plaintiff's health-care information. Mont. Code Ann. §50-16-553. When a health-care provider willfully or grossly negligently discloses a plaintiff's health-care information, the plaintiff may recover up to $5,000 in exemplary damages as well. *Id.* New Hampshire law provides a private right of action against health-care providers and their business associates for special damages or general damages of not less than $1,000, plus costs and attorney's fees when a health-care provider discloses a plaintiff's health-care information without authorization for marketing. N.H. Rev. Stat. §332-I:6. In addition, New Hampshire law provides a private right of action for damages and equitable relief against a health-care facility that wrongfully discloses a plaintiff's health-care information, although the violation must proximately cause damages calculated as amounting to over $50 per violation per day. N.H. Rev. Stat. §151:30. Texas law permits a private right of action for injunctive relief and damages against hospitals and physicians based on the improper disclosure of a person's health-care records. Tex Health & Safety Code Ann. §241.156, Tex. Occ. Code Ann. §159.009. Washington law provides a private right of action against a health-care provider, its agents, and its employees for actual damages, costs, and reasonable attorney's when the health-care provider, its agents, or its employees wrongfully disclose a plaintiff's health-care information. Wash. Rev. Code Ann. §70.02.170. Wyoming law provides a private right of action against a hospital, its agents, and its employees for pecuniary damages, costs, and reasonable attorney's fees when the hospital, its agents, or its employees wrongfully disclose a plaintiff's health-care information. Wyo. Stat. Ann. §35-2-616.

Common law invasion of privacy, at least in the medical information context, requires disclosure to the public at large or in a way that makes it substantially certain that the disclosed information will become public knowledge.

Private Right of Action Against Employers

Florida law provides a private right of action against employers for failing to maintain the confidentiality of medical information. Fla. Stat. Ann. §760.50. If an employer negligently violated medical information confidentiality, a plaintiff potentially could recover liquidated damages of $1,000 or actual damages, whichever is greater. If an employer intentionally or recklessly committed a violation, a plaintiff could recover liquidated damages of $5,000 or actual damages, whichever is greater. *Id.* A plaintiff also can recover attorney's fees. *Id.*

Private Right of Action for Disclosure of HIV/AIDS or Other Communicable Disease Information

Connecticut, Delaware, Illinois, Iowa, Maine, Michigan, Missouri, Montana, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Texas, Vermont, Virginia, and West Virginia each provide a private right of action against virtually anyone who wrongfully discloses an individual's HIV/AIDS information. Conn. Gen. Stat. §§19a-583, 19a-590; Del. Code Ann. tit. 16, §§1203, 1205; 410 Ill. Comp. Stat 305/9, 305/10, 305/13; Iowa Code §§141A.9, 141A.11; Me. Rev. Stat. Ann. tit. 5, §§19201, *et seq.*; Mich. Comp. Laws §333.5131; Mo. Rev. Stat. §191.656; Mont. Code Ann. §50-16-1013; N.H. Rev. Stat. §141-F:8; N.J. Stat. Ann. §26:5C-14; N.Y. Pub. Health Law §§2782, 2783; Ohio Rev. Code §§3701.244; Okla. Stat. tit. 63, §1-502.2; Pa. Stat. Ann. tit. 35, §7610; (Tex. Health & Safety Code Ann. §§81.103, 81.104; (Vt. Stat. Ann. §1001; (Va. Code Ann. §32.1-36.1; W. Va. Code §16-3C-5. In many cases, these states permit a court to award attorneys' fees to a successful plaintiff and increase liability if the discloser disclosed this private information intentionally. Arizona law permits a private right of action against health-care providers that improperly disclose communicable disease information, including but not limited to HIV/AIDS information, and against third parties that obtain this information from health-care providers and then disclose it again. Ariz. Rev. Stat. §§36-664, 36-668. In addition to a private right of action for improperly disclosing HIV/AIDS data, Maine law provides a private right of action for wrongful disclosure of other communicable disease information. Me. Rev. Stat. Ann. tit. 22, §825. North Dakota provides a private right of action against any person who improperly discloses the results of a test for bloodborne pathogens, including HIV/AIDS and hepatitis. N.D. Cent. Code §§23-07.5-01, 23-07.5-06, 23-07.5-07. Washington law provides a private right of action for actual or liquidated damages, attorneys' fees, and injunctive relief based on an improper disclosure of a person's sexually transmitted disease information. Wash. Rev. Code Ann. §§70.24.084, 70.24.105.

Private Right of Action for Disclosure of Mental Health Information

Illinois, Texas, and Washington each provide a private right of action for improper disclosure of patient mental health information. 740 Ill. Comp. Stat. 110/15; Tex. Health & Safety Code Ann. §§611.002, 611.005; Wash. Rev. Code Ann. §§71.05.390, 71.05.440.

Private Right of Action for Disclosure of Genetic Testing Information

Delaware, Illinois, Louisiana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, South Carolina, and Vermont each provide a private right of action against virtually anyone who wrongfully discloses an individual's genetic testing information. Del. Code. Ann. tit. 16, §1227; 410 Ill. Comp. Stat 513/30, 513/35, 513/40; La. Rev. Stat. Ann. §22:1023; Nev. Rev. Stat. §629.201; N.H. Rev. Stat. §141-H:6; N.J. Stat. Ann. §§10:5-47, 10:5-49; N.M. Stat. Ann. §24-21-6; Or. Rev. Stat. §192.541; S.C. Code Ann. §§38-93-40, 38-93-90; Vt. Stat. Ann. §§9332, 9335. In some cases, the right of action includes a right to considerable liquidated damages, even when a plaintiff hasn't established that he or she suffered actual damages. Colorado law provides a private right of action against certain insurers for equitable relief and the greater

of $10,000 or actual damages plus attorney's fees and costs for an improper disclosure of genetic testing information. Colo. Rev. Stat. Ann. §10-3-1104.7.

Private Right of Action Based on the Common Law of Invasion of Privacy

Still other states approach the question from a different perspective and import the common law of the invasion of privacy into their statutory language. For example, Massachusetts has enacted a statute providing a private right of action for invasion of privacy, which implicitly encompasses improper disclosure of health-care records. *See* Mass. Gen. Laws ch. 214, §1B; *Commonwealth v. Brandwein*, 760 N.E.2d 724, 729, 435 Mass. 623, 630 (Mass. 2002). Along similar lines, Tennessee law provides that unauthorized disclosure of a patient's identifying information constitutes an invasion of privacy for which, presumably, a plaintiff can recover damages. *See* Tenn. Code Ann. §§63-2-101, 68-11-1503, 68-11-1504; *Givens v. Mullikin*, 75 S.W.3d 383, 412–413 (Tenn. 2002).

Availability of Common Law Actions Based on Disclosure

Several states that have not established statutory causes of action permit common law actions based on improper disclosure of health-care records. In some states, a plaintiff can predicate a common law action predicated on invasion of privacy. *See*, *e.g.*, *Horne v. Patton*, 287 So. 2d 824, 291 Ala. 701 (Ala. 1973); *Herman v. Kratche*, No. 86687, 2006 Ohio 5938 (Ohio Ct. App. 2006); *Urbaniak v. Newton*, 226 Cal. App. 3d 1128 (Cal. Ct. App. 1991); *Leger v. Spurlock*, 589 So. 2d 40, 42 (La. Ct. App. 1991).

In general, however, common law invasion of privacy, at least in the medical information context, requires disclosure to the public at large or in a way that makes it substantially certain that the disclosed information will become public knowledge. Disclosure to a single person, or even to a small group of people, typically would not sustain a cause of action.

For instance, a Connecticut court dismissed an invasion of privacy claim alleged by a woman who claimed that a hospital disclosed her HIV information to several people in a waiting room, finding that the limited level of publicity was insufficient to constitute invasion of privacy. *See Balzac v. Stamford Hosp.*, 1996 Conn. Super. Lexis 897, at *8 (Conn. Super. Ct. 1996). Along similar lines, a Missouri court affirmed a summary judgment to a hospital based on insufficient publicity, among other things, after a patient claimed that the hospital invaded his privacy by disclosing his medical records in response to a discovery request from his wife's divorce attorney. *See St. Anthony's Med. Ctr. v. H.S.H.*, 974 S.W.2d 606, 610–11 (Mo. Ct. App. 1998).

In contrast, a Minnesota court indicated that it would view disclosure of private medical information on a social networking site—or even a small circulation newspaper or magazine—sufficiently "public" to constitute invasion of privacy. *See Yath v. Fairview Clinics, N. P.*, 767 N.W.2d 34, 42–45 (Minn. Ct. App. 2009). Similarly, a District of Columbia court held that a plastic surgeon's presentation of "before" and "after" photographs of a patient on television violated the patient's right to privacy. *See Vassiliades v. Garfinckel's, Brooks Bros.*, 492 A.2d 580, 587–89 (D.C. 1985). Likewise, a Pennsylvania court held that a patient stated a claim for invasion of privacy based on a physician's disclosure of the patient's medical information to an audience of schoolchildren during a career day presentation, though the court did not specify the size of the audience. *See McKay v. Geadah*, 50 Pa. D. & C.3d 435, 445–446 (Pa. C.P. 1988).

More commonly states will recognize claims for disclosure of private medical information based on breach of the fiduciary duty of confidentiality owed by a physician to his or her patient. *See*, *e.g.*, *Gracey v. Eaker*, 837 So. 2d 348, 354 (Fl. 2002); *State ex rel. Crowden v. Dandurand*, 970 S.W.2d 340, 343 (Mo. 1998); *Fairfax Hosp. by & Through INOVA Health Sys. Hosps. v. Curtis*, 492 S.E.2d 642, 644, 254 Va. 437, 442 (Va. 1997); *Eckhardt v. Charter Hosp.*, 953 P.2d 722, 727, 124 N.M. 549, 554 (N.M. 1997); *Morris v. Consolidation Coal Co.*, 446 S.E.2d 648, 657, 191 W. Va. 426, 435 (W. Va. 1994); *Humphers v. First Interstate Bank*, 696 P.2d 527, 533, 298 Or. 706, 717 (Or. 1985); *Stempler v. Speidell*, 495 A.2d 857, 861, 100 N.J. 368, 376 (N.J. 1985); *Burton v Matteliano*, 916 N.Y.S.2d 438, 440, 81 A.D.3d 1272, 1274 (N.Y. App. Div. 2011); *Sorensen v. Barbuto*, 143 P.3d 295, 299, 2006 UT App 340, P. 11 (Utah Ct. App. 2006); *Fierstein v. DePaul Health Ctr.*, 949 S.W.2d 90, 92 (Mo. Ct. App. 1997); *Eckhardt v. Charter Hosp.*, 953 P.2d 722, 728, 124 N.M. 549, 554 (N.M. Ct. App. 1997); *Saur v. Probes*, 476 N.W.2d 496, 498, 190 Mich. App. 636, 637 (Mich Ct. App. 1991).

In states where the common law cause of action is based on breach of the fiduciary duty of confidentiality, some trust relationship between a patient and the individual or entity that improperly discloses a health-care record, for instance, a doctor-patient or therapist-patient relationship, typically is required. *See*, *e.g.*, *Gracey*, 837 So. 2d at 352 (noting the confidential relationship between therapist and patients in reversing dismissal of fiduciary duty claim against a psychotherapist based on improper disclosure); *Eckhardt*, 953 P.2d at 555 (observing that it is the trust relationship between a health-care provider and a patient that leads to the duty not to disclose); *Claimant V. v. State*, 566 N.Y.S.2d 987, 988, 150 Misc. 2d 156, 159 (N.Y. Ct. Cl. 1991) (disallowing a plaintiff-inmate's common law claim for breach of fiduciary duty of confidentiality against the state based on the state's alleged improper disclosure of the inmate's HIV status due to lack of allegations of any breach of a confidential relationship).

Accordingly, the first question that needs an answer in this context is whether, as a matter of law or fact, such a fiduciary duty between a plaintiff and the potential defendant exists. When, for example, a professional who does not have a fiduciary duty to a plaintiff makes the disclosure, such as a lawyer who has publicly filed private information regarding an adversary that the lawyer received in litigation, the plaintiff probably will not succeed with the *common law* claim.

Notably, however, an attorney's fiduciary responsibility to maintain the privacy of his or her client's confidential or secret information is well-established in the common law, the Model Rules of Professional Conduct, and other ethical canons.

We have a good example of the analysis in the case *Thiery v. Bye*, 228 Wis. 2d 231 (Wis. Ct. App. 1999), in which the plaintiff sued a law firm and one of its employees. The firm obtained the plaintiff's medical records while representing her in personal injury litigation. After the parties settled the case, the

firm requested in writing that the plaintiff agree to permit the firm to use her medical records in a course that a firm employee, a nurse, would teach in exchange for $500. The written request, as accepted by the plaintiff, stated that the plaintiff's name would be removed from the records. The plaintiff sued when she learned that her name was not fully removed from the records.

Attorneys in particular should take care so that they do not disclose medical information that might run afoul of statutory mandates, even if the disclosure does not meet common law liability requirements.

The court found that a cognizable claim for legal malpractice and breach of fiduciary duty existed in connection with the disclosure of the medical records since the firm had an ongoing obligation to protect the confidentiality of those records by assuring that the plaintiff's name was completely redacted. The court reasoned that

> an attorney has a duty to maintain the confidentiality of documents in his possession as a result of legal services rendered to a client. This duty exists notwithstanding that litigation may or may not be pending or that services are completed. To contend otherwise is inconsistent with an agent's duty to protect a principal's confidential information and would limit an attorney's obligation to his client to only that conduct performed while litigation is being prosecuted. It would remove any obligation for the reasonable care and handling of confidential documents in counsel's possession as a result of his legal representation of a client. Accordingly, [the defendant's] duty to protect the confidentiality of [plaintiff's] records arose as a result of his representation of [the plaintiff] in her personal injury action, which had not yet been completed. However, even had that litigation terminated, [the defendant's] duty to protect the confidentiality of [the plaintiff's] records would have continued.

Thiery, 228 Wis. 2d at 243.

Litigation Privilege vs. Privacy

As *Thiery* demonstrates, attorneys in particular should take care so that they do not disclose medical information that might run afoul of statutory mandates, even if the disclosure does not meet common law liability requirements. This is true even in the context of litigation activity that otherwise might enjoy immunity from liability under the *Noerr-Pennington* doctrine or litigation privilege. The courts have viewed, with mixed results, arguments that medical information disclosed publicly by lawyers in the course of general litigation conduct should have litigation immunity when plaintiffs' attorneys have argued that the disclosures violated the common law. Not surprisingly, many of the cases arise in federal litigation as the federal rules have represented the vanguard of both electronic filing and redaction. Nevertheless, a careful practitioner will view the rules of every venue to determine redaction and disclosure obligations.

For example, in *Good v. Khosworwhahi*, 296 F. App'x 676 (10th Cir. N.M. 2008), the plaintiff brought claims for professional negligence, constitutional rights violations, violation of the court's privacy policy under Federal Rule of Civil Procedure 5.2, and the common law tort of invasion of privacy. The claims arose from the filing without redaction, on a publicly available electronic docket, of the plaintiff's alien and family registration materials from Japan. The court dismissed the claims finding, among other things, that a private right of action for violation of Federal Rule of Civil Procedure 5.2 did not exist, and New Mexico state law, which governed the dispute, precluded the professional liability claim in the absence of privity.

In *Matthys v. Green Tree Serv., LLC (In re Matthys)*, 2010 Bankr. Lexis 1765 (Bankr. S.D. Ind. May 26, 2010), the debtors brought multiple tort and privacy claims against the creditors alleging that the failure to redact personal identifying information as required by Bankruptcy Rule 9037 and as ordered by the court dealing with the bankruptcy at that stage established that the creditors had breached a duty to do so. The U.S. bankruptcy judge hearing the tort and privacy claims concluded that whereas the debtors had pleaded sufficient facts to establish their claim for contempt under Bankruptcy Rule §105(a), no other cognizable legal theory justified recovery. Therefore the court dismissed all the other causes of action as a matter of law.

In *G.R. v. Intelligator*, 185 Cal. App. 4th 606 (Cal. Ct. App. 2010), the plaintiff sued his ex-spouse's attorney alleging that the attorney had filed documents containing the plaintiff's social security number in violation of California statutes. The court dismissed the claim on the ground that the state anti-SLAPP statute protected the attorney's acts, which the court also viewed as not of the criminal nature necessary to justify making an exception to the absolute litigation privilege.

Attorneys also should guard against liability for inducing some improper disclosure by a physician or a health-care provider. Several state courts have recognized third-party liability for inducing the unauthorized disclosure of confidential health-care information. *See, e.g., Biddle v. Warren Gen. Hosp.*, 715 N.E.2d 518, 528, 86 Ohio St. 3d 395, 408 (Ohio 1999); *Morris v. Consolidation Coal Co.*, 446 S.E.2d 648, 657, 191 W. Va. 426, 435 (W. Va. 1994); *Alberts v. Devine*, 479 N.E.2d 113, 121, 395 Mass. 59, 70–71 (Mass. 1985). These cases each recognize that a plaintiff can state a claim against a third-party for inducing improper disclosure of confidential health-care information if (1) the defendant knew or reasonably should have known of the existence of the physician-patient relationship; (2) the defendant intended to induce the physician to disclose information about the patient, or the defendant reasonably should have anticipated that his or her actions would induce the physician to disclose the information; and (3) the defendant did not reasonably believe that the physician could disclose that information to the defendant without violating the duty of confidentiality that the physician owed the patient. To avoid liability for inducement, litigators and insurance profession-

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als will want to ensure that the informal disclosure requests that they so often seek early in claims handling, adhere to proper procedural channels and that they obtain health-care data consistently through formal discovery demands and subpoenas accompanied by HIPAA and state law compliant authorizations.

Conclusion

Personal information and, most particularly, private health-care information can become a happy hunting ground for the plaintiffs' bar, especially when it involves the unauthorized release of an individual's personal medical records. Indeed, in some circumstances, a plaintiff's firm itself can become the prey. For example, some plaintiffs filed state and federal putative class actions against an attorney, law firm, and chiropractic clinics, alleging professional malpractice and negligence in connection with an alleged scheme among the defendants through which the clinics supplied the plaintiffs' private information to the law defendants before the plaintiffs retained the attorney and law firm, both of which became defendants in the class actions. *See Waithe v. Arrowhead Clinics, Inc.*, 2011 U.S. Dist. Lexis 3088 (S.D. Ga. Jan. 12, 2011); *John E. King and Associates v. Toler*, 296 Ga. App. 577, 675 S.E. 2d 492 (Ga. Ct. App. 2009). Ultimately, a U.S. district court dismissed the cases because the plaintiffs could not demonstrate that they had sustained actual damages but not before substantial litigation occurred and the bright light of judicial review illuminated some questionable referral practices by the defendants. *See Waithe*, 2012 U.S. Dist. LEXIS 30595 (S.D. Ga. Mar. 7, 2012). *See also Toler*, 296 Ga. App. 577, 675 S.E. 2d 492 (Ga. Ct. App. 2009). These cases warn attorneys that even they may stumble into dangerous minefields in the privacy landscape. FD