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MEDICAL PRIVACY LITIGATION: WHAT YOU DON'T KNOW ABOUT THIS NEW TREND COULD BURN YOU

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MEDICAL PRIVACY LITIGATION is growing rapidly across the country. Ohio is no exception. Doctors and hospitals are not the only groups affected. In fact, Ohio attorneys are increasingly vulnerable as potential defendants in this expanding liability.

This trend is being fueled and mirrored by four factors: (1) an increased national awareness of the fragility of information privacy; (2) the passage of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") which took effect on April 14, 2003; (3) watershed cases from around the country creating new torts for "violation of medical privacy"; and (4) the move toward electronic health records.

Increased national awareness

A high profile example of this increased national awareness was reported in the *Wall Street Journal* on March 17, 2008. The *Journal* reported that actress Britney Spears was the victim of medical privacy violations during her admission to the psychiatric wing of UCLA Medical Center. UCLA was attempting to fire or suspend more than ten employees who inappropriately snooped into Ms. Spears' electronic medical records during this admission – curiosity apparently being too much to resist for certain individuals, despite proactive hospital policies.

HIPAA

The federal HIPAA privacy rules (remember, it's not "HIPPA"!) provide a number of requirements whereby "covered entities" (entities that routinely handle protected health information) must take certain steps to avoid improperly disclosing confidential information. See 45 C.F.R. Parts 160 and 164, *et seq*. These HIPAA regulations include requirements that covered entities safeguard protected health information ("PHI") (such as medical records), give patients notice of their privacy practices, enter "business associate agreements" with their vendors (such as law firms), and obtain particular authorizations when applicable. Furthermore, covered entities must limit disclosure of confidential information to certain designated activities such as patient treatment, payment and health care operations. Note that "health care operations" can include litigation.

Groundbreaking case law

Reading the bland HIPAA rules tends to induce a stuporous quasi-slumber in the unwitting attorney. However, the litigation that arises from these rules does not. In fact, many so-called "HIPAA cases" could easily provide fodder for riveting soap opera episodes or romance novels. Medical providers and other businesses that handle PHI (including law firms) are seeing an increasing number of these lawsuits alleging improper disclosures.

The two watershed Ohio Supreme Court cases in this area are *Biddle v. Warren General Hosp.* (1999), 86 Ohio St.3d 395 and *Hageman v. Southwest Gen. Health Ctr.* (2008), 119 Ohio St.3d 185. Lawyers take note that members of the Ohio Bar were inculpated in both of these cases!

Biddle

The 1999 *Biddle* case recognized a new and independent tort under Ohio law for the unauthorized disclosure of medical information. The Ohio Supreme Court specifically acknowledged that in *Biddle* they were creating a new tort to replace the patchwork of previously-utilized theories such as "invasion of privacy" and "tortious [not tortuous] breach of confidence."

The defendant-hospital in *Biddle* had given patient registration information to its own law firm, apparently without the patients' specific written consent. The law firm then used the information to contact patients and offer to assist with obtaining social security benefits. The *Biddle* court found this conduct actionable under the new tort of "unauthorized, unprivileged disclosure of nonpublic medical information that a physician or hospital learned within a physician-patient relationship." *Biddle* was a purported class action.

Of particular interest to lawyers, the *Biddle* court also held that a third party (like the law firm) could also be liable for *inducing* such a breach. This ominous precedent would be sharpened by the Court nine years later.

Hageman

The 2008 *Hageman* decision by the Ohio Supreme Court held that an attorney can be held civilly liable for the unauthorized *disclosure* of medical information that was otherwise properly obtained by the attorney during litigation.

In *Hageman*, the attorney representing Mrs. Hageman in divorce proceedings against Mr. Hageman obtained his mental-health records from Mr. Hageman's psychiatrist. Mrs. Hageman's divorce attorney shared the medical records with the prosecutor who was pursuing a separate criminal matter against Mr. Hageman.

As a result, Mr. Hageman sued for damages for the unauthorized release of his medical records, naming his physician, the hospital where his physician worked, Hageman's ex-wife and her divorce attorney. The claim against each defendant was dismissed pursuant to summary judgment by the Cuyahoga County Court of Common Pleas. The Eighth District Court of Appeals upheld the decision of the lower court, except as to Mrs. Hageman's attorney, finding that she "over-

stepped her bounds" by disseminating Mr. Hageman's confidential medical records obtained in the divorce case to the prosecutor in a criminal case. The attorney then sought and was granted Ohio Supreme Court review.

In affirming the appellate court's decision, the Ohio Supreme Court relied heavily on its landmark decision in *Biddle*. It found that "when the cloak of confidentiality that applies to medical records is waived for the purposes of litigation, the waiver is limited to that case." The Court acknowledged that an attorney can use medical records obtained lawfully through the discovery process *for that case* by submitting them to expert witnesses or for introduction at trial, but noted that further disclosures beyond that litigation could be actionable. The Court ultimately held that: "[A]s in our decision in *Biddle*, we conclude that an independent tort exists to provide an injured individual with a remedy for such an action."

A Cuyahoga County HIPAA verdict

A less-publicized but interesting local precedent was set by *Gomcsak v. Dawson*, Cuyahoga County, Ohio Court of Common Pleas, Case No. 481082, filed September 9, 2002. In *Gomcsak*, plaintiff's medical records were subpoenaed by her husband's attorney during their divorce proceedings. Without plaintiff's authorization, a report was provided by her social worker and medical records were released by her gynecologist pursuant to the subpoena. Thereafter, plaintiff filed her complaint asserting that defendants (the social worker and her gynecologist) breached their duty of confidentiality. Although the social worker settled with plaintiff on the first day of trial, a jury rendered a verdict against the gynecologist for $80,000. Jury verdict research in the Westlaw® database and Ohio's Department of Insurance *Closed Claim Reports* indicates that this verdict is actually on the low side of "HIPAA-case" verdicts from Ohio and around the country. However, the individual case facts and reported jury verdicts vary wildly, ranging between low four-digit and high six-digit figures.

Traps and tips for the unwary

As the *Gomcsak* case demonstrates, the growing field of medical privacy can be a litigation trap for the unwary medical provider. Non-party covered entities must be careful when releasing PHI to third parties involved in litigation. In this situation, an attorney-issued subpoena alone will usually not suffice to release PHI. PHI can generally only be released when the patient has expressly or impliedly authorized the release, or pursuant to a court order. See *Pacheco v. Ortiz* (1983), 11 Ohio Misc. 2d 1.

In order to minimize such medical privacy lawsuits, covered entities must be aware of the basic requirements of HIPAA, including: (1) notifying patients about their privacy rights and how their information can be used; (2) adopting and implementing privacy procedures such as the use of consent forms; (3) training and retraining employees so that they understand the privacy policies and procedures; (4) designating an individual to be responsible for seeing that the privacy procedures are adopted and followed; and (5) securing patient records containing PHI so that these records are not readily available to employees who do not require access.

Employees should be advised that seemingly easy access to electronic health records often leaves an electronic "footprint" that can be traced back to the employee – making electronic health records a new source of potential evidence in medical privacy litigation.

Medical privacy litigation can also arise from acts of vendors and related businesses, including law firms. *Biddle* and *Hageman* attest to this. HIPAA addresses the relationship between covered entities and their "business associates" – contractors or other non-employee affiliates hired to do the work of, or for, a covered entity that involves the use or disclosure of PHI. Covered entities are required to include specific provisions in agreements with business associates to safeguard PHI, but they are not required to oversee the means by which their business associates carry out privacy safeguards or the extent to which they abide by the privacy requirement of the contract. However, if a covered entity discovers a material breach or violation of the contract by the business associate, it must take reasonable steps to cure the breach or end the violation, and, if unsuccessful, potentially terminate the contract with the business associate.

Another area of concern in medical privacy litigation arises when a covered entity becomes involved in a legal proceeding as either the plaintiff or defendant. In such a scenario, the covered entity may generally use or disclose PHI for purposes of the litigation. The covered entity, however, must make reasonable efforts to limit such uses and disclosures to the minimum necessary to accomplish its intended purpose.

Finally, medical privacy litigants should be aware that HIPAA has been consistently interpreted to prohibit a private right of action. See *Johnson v. Quander*, 370 F. Supp. 2d 79, 99 (D. D.C. 2005); *O'Donnell v. Blue Cross Blue Shield of Wyo.*, 173 F. Supp. 2d 1176, 1179-81 (D. Wyo. 2001). Therefore, although HIPAA regulations can be used as standards for certain types of conduct (if properly introduced), these regulations cannot generally serve as a basis for removal to federal court based on federal question jurisdiction. The statute does, however, permit a plaintiff to file a complaint with the Department of Health and Human Services, Office of Civil Rights (the government agency responsible for enforcing HIPAA). Such complaints can potentially lead to civil and criminal penalties against the violator. ■

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