

HIPAA: ITS IMPACT ON EX PARTE DISCLOSURES WITH AN ADVERSE PARTY'S TREATING PHYSICIAN

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INTRODUCTION

In all personal injury actions, the testimony of the plaintiff's treating physician is critical. The plaintiff's treating physician often stands in the best position to speak about the effect that the injury has had on the plaintiff, explain how the plaintiff's future will be impacted by the injury, and discuss the past and future treatment required by the plaintiff.¹ These reasons, among others, make it a matter of course for both plaintiffs' and defendants' counsel to seek detailed information from the treating physician in the form of testimony or reports. The success of the plaintiff's action may rise and fall on the information provided by the treating physician.²

The plaintiff's attorney has easy access to the treating physician and his or her records because the client will often give his attorney all of the authorizations and waivers required to prosecute his or her claim.³ The defendant's attorney, however, does not have the same ready access to the plaintiff's treating physician.⁴ In an effort to overcome this disparity of access, many defense attorneys rely on the use of ex parte⁵ interviews of the plaintiff's treating physician to obtain this information.⁶

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¹ See Christopher W. Dyer, Note, *Treating Physicians: Fact Witnesses or Retained Expert Witnesses in Disguise?: Finding a Place for Treating Physician Opinions in the Iowa Discovery Rules*, 48 DRAKE L. REV. 719, 720 (2000).

² See *id.* at 719–20.

³ See Barbara Podlucky Berens, Note, *Defendants' Right to Conduct Ex Parte Interviews with Treating Physicians in Drug or Medical Device Cases*, 73 MINN. L. REV. 1451, 1453 (1989).

⁴ See John Jennings, Note, *The Physician-Patient Relationship: The Permissibility of Ex Parte Communications Between Plaintiff's Treating Physicians and Defense Counsel*, 59 MO. L. REV. 441, 454–59 (1994).

⁵ Ex parte interviews, in this context, are where an attorney will conduct an interview with a witness (usually the treating physician) outside of usual discovery methods. See Berens, *supra* note 3, at 1451–52. In the context of this Comment, it will refer to situations where defense counsel has an informal interview with a health professional relating to the
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The Health Insurance Portability and Accountability Act of 1996⁷ (HIPAA) has a significant impact upon defense counsel's ability to conduct ex parte interviews of the plaintiff's treating physician.⁸ Although HIPAA was not primarily enacted by Congress to be a federal medical privacy act,⁹ the privacy aspect may be the most far-reaching and broadly impacting part of this legislation. In fact, the regulations promulgated by the Department of Health and Human Services (DHHS), not the legislation itself, are the source of nearly all the federal patient privacy protections now given to a patient's health information.¹⁰ These regulations set forth a comprehensive scheme for the disclosure of patient health information, including the use of such information in a judicial proceeding.¹¹ The impact of these regulations is extremely far-reaching because the regulations are implicated any time evidence of a plaintiff's medical condition is at issue,¹² such that the regulations must be taken into account in both state and federal court proceedings.¹³

In the case of the defendant's counsel, the impact that these regulations have on the continued propriety of ex parte interviews is an important consideration. This Comment concludes that ex parte interviews are no longer a proper means of obtaining a plaintiff's health information from the treating physician, and the failure to discontinue the use of ex parte interviews may result in both criminal and civil sanctions.

Part I will briefly discuss how states have addressed the appropriateness of ex parte interviews, and will also discuss some of the methods that the states have used to protect a patient's privacy. Part II will then analyze HIPAA and its supporting regulations, specifically as they relate to ex parte interviews, as well as discuss the few cases that have addressed this issue. Part III will discuss remedies available to a plaintiff

plaintiff's health information, and such an interview is done without knowledge of or notice given to the plaintiff.

⁶ See Jennings, *supra* note 4, at 454–59.

⁷ Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 26, 29, and 42 U.S.C.).

⁸ See discussion *infra* Parts II–III.

⁹ See Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82463–64 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160, 164).

¹⁰ See generally 45 C.F.R. §§ 160, 164 (2005).

¹¹ See, e.g., *id.* § 164.512(e).

¹² See *id.*

¹³ See *id.* § 160.203.

for a violation of HIPAA, as well as examine HIPAA's impact on the law of privileges.

I. STATE RULES BEFORE HIPAA

A. Introduction

An examination of the states' rules governing ex parte interviews is still advisable for a defendant's attorney. HIPAA's preemption is limited in that the rules are a minimum standard that must be observed in all states—i.e., more stringent state rules remain effective.¹⁴ A defense attorney must be sure that his or her actions are not only compliant with HIPAA but also with any more stringent state law.¹⁵ For example, HIPAA may permit a practice that state law forbids, and under HIPAA's limited conflict preemption provision, counsel must obey the state law.

Reviewing potentially applicable state laws has three purposes: (1) to determine if the law has been preempted or if it should still be obeyed; (2) to determine the scope of waiver of privilege; and (3) to determine any possible state causes of actions for breach of patient confidentiality. Because the possibility exists that a state law may be more stringent than HIPAA regarding ex parte interviews, a brief examination of the state laws regarding ex parte interviews is necessary.

B. Introduction to State Laws Regarding Ex Parte Interviews

Before HIPAA and its supporting regulations, there was no uniform national approach to the protection of health information.¹⁶ Each state crafted protections in a variety of ways, but in almost all cases, the protections to a patient's health information evolved slowly.¹⁷ Within a given state, the laws were subject to both change and varying interpretations.¹⁸ Naturally, the scope of protection varied greatly from state to state, with certain aspects of patient privacy being given more protection than others.¹⁹ One area of patient privacy that has recently been

¹⁴ See *id.* § 160.203(b).

¹⁵ See *id.*

¹⁶ See Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82463–64 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160, 164).

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ See Jennings, *supra* note 4, at 441–54.

litigated throughout many states is the question of the appropriateness of a defense attorney's ex parte interview of the plaintiff's treating physicians.²⁰

In many personal injury lawsuits, the defendant's attorney will want to conduct ex parte interviews with the plaintiff's treating physicians.²¹ Due in part to its informal process, defense attorneys believe that ex parte interviews are a necessary and cost-effective means of defending their client's interests.²² Plaintiffs' attorneys, on the other hand, contend that these interviews constitute a violation of the physician-patient confidential relationship.²³ Plaintiffs' attorneys dislike these interviews because they are conducted without the advance knowledge of the plaintiff and are outside of the usual discovery process with its applicable rules.²⁴

Because there are compelling arguments on both sides, many states that have grappled with the appropriateness of these interviews have differing views.²⁵ Many states have some form of protection for patient health information; the question in litigation is therefore whether the scope of the protections offered by the state permits ex parte interviews.²⁶ The traditional basis for protecting patient information is rooted in either privilege or confidentiality.²⁷ Naturally, those are the areas of the law most often used in an attempt to judge the appropriateness of ex parte interviews.²⁸ Other areas of consideration include the rules of civil procedure, professional codes of conduct, and statutes.²⁹

The drafters of HIPAA's regulations recognized that the states have long been protecting the privacy interests of its citizens.³⁰ In the minds of the drafters, however, these protections of privacy were found insufficient to protect health information when it is transmitted, stored, and accessed

²⁰ See J. Christopher Smith, Note, *Recognizing the Split: The Jurisdictional Treatment of Defense Counsel's Ex Parte Contact with Plaintiff's Treating Physician*, 23 J. LEGAL PROF. 247, 252-55 (1999).

²¹ See Jennings, *supra* note 4, at 441, 458.

²² See *id.*

²³ See *id.* at 456-58.

²⁴ See Smith, *supra* note 20, at 251.

²⁵ See *id.* at 252-55. Prior to HIPAA's passage, approximately twenty states permitted ex parte interviews and approximately nineteen did not. See *id.* at 253-55.

²⁶ See Jennings, *supra* note 4, at 451-54.

²⁷ See *id.* at 444-54.

²⁸ See *id.* at 454-62.

²⁹ See Smith, *supra* note 20, at 253-54.

³⁰ See Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82463-64 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160, 164).

electronically.³¹ Under HIPAA, all state protections grounded in confidentiality may be preempted,³² but the drafters explicitly intended to leave the law of privileges untouched.³³ As a result, it is arguable that HIPAA's preemption may be divided between privilege and confidentiality, preempting the latter but not the former.³⁴ While this is true in both theory and limited practice, the impact of HIPAA's procedural requirements is to preempt less stringent state procedural methods relating to disclosure of protected health information, including procedures permitting disclosure under a waiver of privilege theory.³⁵

Although the stated intent was not to modify privileges, and HIPAA does little to change the nature of physician-patient testimonial privilege, HIPAA does impact the manner and extent of disclosure of "protected health information."³⁶ In most instances, "protected health information" will also be privileged information. This occurs because HIPAA will affect some of the "procedural" aspects of disclosure of such information pretrial even though HIPAA will not impact the substantive nature of privileges.³⁷

The key determination in evaluating state laws protecting patient privacy is that more stringent laws are not preempted.³⁸ In comparing state laws, whether rooted in privilege or confidentiality, defense counsel should take special care to evaluate which law is more stringent, and, therefore, should be followed. Keeping in mind that HIPAA establishes a minimum floor, this comparison should focus on whether the state laws offer more protection than HIPAA.

³¹ See *id.* at 82463, 82465–66.

³² See discussion *supra* Part I.A.

³³ See Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82596 (stating that the intent was to leave the operation of the Federal Rules of Evidence and states' rules of evidence creating privileges untouched).

³⁴ See *id.*

³⁵ See 45 C.F.R. § 160.203 (2005).

³⁶ See *id.* §§ 160.103, 164.512(e).

³⁷ See *id.* HIPAA does not create a nationwide physician-patient testimonial privilege, so state laws of privilege will determine whether a given physician can give testimony and what the scope of the subject matter will be. See *supra* note 33. HIPAA, however, will govern the pretrial discovery processes, as well as the handling of certain documents that do not become public record. See 45 C.F.R. § 164.512(e). For example, a physician can still be called by the defendant to testify about the plaintiff's conditions under a waiver of privilege statute, but the manner in which he is subpoenaed must conform to HIPAA. See *id.* § 164.512(e)(1)(ii).

³⁸ See discussion *infra* Part II.D.

II. HIPAA

A. Introduction

At its core, HIPAA is not a privacy statute; rather, its primary purpose is to “improve the . . . efficiency and effectiveness of the health care system, by encouraging the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information.”³⁹ In order to achieve those ends, Congress required that the DHHS develop and promulgate regulations relating to the standards and protections of health information.⁴⁰ Although it was not Congress’s sole, or even primary, intent to protect the privacy of certain health information, it was recognized that administrative simplification also required such patient privacy protections.⁴¹

When the drafters examined the existing protections and rights under state law, they found these laws lacking in both a patient’s right to access their own information and comprehensive protections of their medical records.⁴² As a result, the intent behind many of the regulations relating to HIPAA was to establish “a set of basic national privacy standards and fair information practices” that balance the individual’s need to privacy with society’s need for disclosure.⁴³

There were several reasons why the drafters believed this to be the proper focus. First, the drafters recognized that privacy is important; there was growing public concern about the loss of privacy, especially where it concerned the loss of privacy of medical information.⁴⁴ This concern over the loss of privacy relating to health information has taken on a new importance with the wide use of electronic transmission systems, which make it easier than ever for a patient’s privacy to be violated.⁴⁵ The drafters believed that only after the fears of the public about the possible loss of privacy due to electronic transmission of their health information

³⁹ Health Insurance Portability and Accountability Act of 1996 § 261, 42 U.S.C. § 1320d note (2000).

⁴⁰ *See, e.g.*, 42 U.S.C. § 1320d-2(f).

⁴¹ *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82463–64 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160, 164).

⁴² *See id.*

⁴³ *Id.* at 82464.

⁴⁴ *See id.* at 82463–66.

⁴⁵ *See id.* at 82465–66.

were addressed could electronic health information systems flourish.⁴⁶ The drafters also recognized that the ability to provide healthcare in general would be undermined without sufficient privacy protections.⁴⁷ Finally, the drafters noted that the improper release of health information affects more than a patient's health status—it can also affect things such as their employment or personal relationships.⁴⁸

The statutory background of HIPAA supports the intent and understanding of the drafters of the accompanying regulations. In addition to the recognition that to increase the effectiveness of electronic transmissions patient privacy needed to be protected, Congress specifically directed DHHS to address what rights a patient should have relating to his or her individual health information, the procedures necessary to establish those rights, and “the uses and disclosures of such information that should be authorized or required.”⁴⁹ The regulations proposed by DHHS became law when, as provided by HIPAA, the regulations were submitted to Congress and it failed to amend them.⁵⁰

As a result, the statutory and administrative aspects of HIPAA create a national uniform standard of handling, transmitting, and processing health information, and they require a patient's privacy to be protected during most transactions.⁵¹ The goal of protection of patient privacy was so important that HIPAA's preemptive effect was curbed significantly.⁵² The privacy regulations were not intended to be “best practices” or even to be the sole source of patient privacy protection; instead, the drafters intended these privacy regulations to act as a floor under which no state protection can fall.⁵³ Disclosure of a patient's health information was a subject of great attention by HIPAA's accompanying regulations.

HIPAA's regulations relating to the disclosure of protected health information are a comprehensive scheme. Although the regulations do not directly address the issue of ex parte interviews, it is implicit in the operation of the regulations that ex parte interviews are no longer

⁴⁶ *See id.* at 82466.

⁴⁷ *See id.* at 82467–68.

⁴⁸ *See id.* at 82468.

⁴⁹ Health Insurance Portability and Accountability Act of 1996 § 264(a)–(b), 42 U.S.C. § 1320d-2 note (2000).

⁵⁰ *See id.* § 264(c)(1).

⁵¹ *See generally* 45 C.F.R. §§ 160, 164 (2005).

⁵² *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82471.

⁵³ *Id.*

permitted under HIPAA.⁵⁴ The steps necessary to comply with HIPAA's regulations (such as obtaining authorization, getting a court order, and giving notice)⁵⁵ leave little doubt that *ex parte* interviews are no longer a legitimate tool for gathering information about a plaintiff's medical condition.

Under HIPAA, there are three basic determinations that an attorney seeking to conduct an *ex parte* interview must make. First, it must be determined if the information sought from the physician is within the scope of HIPAA. Second, the attorney must determine if he or she can conduct the *ex parte* interview without violating HIPAA. Finally, the attorney needs to determine the extent that HIPAA preempts any existing state laws or procedures relating to *ex parte* interviews. These will be addressed in turn.

B. The Scope of HIPAA's Protection of Patient Health Information

The substantive regulatory provisions relative to privacy set forth the general rule that "protected health information" may not be disclosed except as provided by HIPAA.⁵⁶ Under these regulations, the scope of coverage is essentially a three-step inquiry. The first step, which is the threshold question, is to determine if the person or entity disclosing is a "covered entity."⁵⁷ Second, it must be determined whether the information sought is "health information,"⁵⁸ as defined by regulation.⁵⁹ The final determination is whether the information is "protected health information."⁶⁰

⁵⁴ This conclusion will be discussed more fully *infra*.

⁵⁵ See 45 C.F.R. § 164.512(e)(1).

⁵⁶ *Id.* §§ 164.500(a), 164.502(a). The regulations state, "A covered entity may not use or disclose protected health information, except as permitted or required by this subpart . . ." *Id.* § 164.502(a). Also, this regulation allows information to be released as provided in "subpart C of part 160," *id.*, which relates to the release of information to the federal government to allow it to monitor compliance with HIPAA and to enforce its provisions, which would not apply when evaluating *ex parte* interviews. See *id.* §§ 160.300–312.

⁵⁷ *Id.* §§ 160.103, 164.500(a). "Covered entity means: (1) A health plan. (2) A health care clearinghouse. (3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter." *Id.* § 160.103.

⁵⁸ See *id.* § 164.500(a).

⁵⁹ *Id.* § 160.103.

⁶⁰ See *id.* §§ 160.103, 164.500(a).

1. *Who Is a Covered Entity?*

Determining who is covered under the regulations is a two-step process.⁶¹ The first consideration is essentially who or what is an “entity” for purposes of the regulations. The second step is a “transactional” requirement, meaning that the “entity” must participate in at least one of the specified transaction types. In making the first determination of whether the plaintiff’s treating physician is an “entity,” the regulations sweep broadly, including “health plan[s],” “health care clearinghouse[s],” and “health care provider[s],” all of which are defined by the regulations.⁶² For purposes of evaluating the effects of HIPAA on ex parte communications with a plaintiff’s treating physician, the only relevant definition is the one defining “health care provider.”⁶³

“Health care provider” is defined in three ways.⁶⁴ Of the three definitions, the plaintiff’s treating physician will ordinarily meet the definition of “health care provider” in one of two ways. First, the physician will qualify as a provider of medical or healthcare services.⁶⁵ Second, the physician would fall under the “catch-all clause,” which includes any person who is paid for health care services in the normal course of business.⁶⁶ By being a “health care provider,” the physician is an “entity” under the regulations.⁶⁷ However, qualifying as only an “entity” is insufficient. In order to be a “covered entity,” the plaintiff’s treating physician must additionally satisfy the “transactional” element.⁶⁸

⁶¹ This Comment divides this part of the regulations into two requirements: “entity” and “transactional.” The regulations are not actually divided in this manner, but for the sake of clarity, these two elements encompass the breadth of the regulations.

⁶² § 160.103.

⁶³ *Health care provider* means a provider of services (as defined in section 1861(u) of the Act, 42 U.S.C. 1395x(u)), a provider of medical or health services (as defined in section 1861(s) of the Act, 42 U.S.C. 1395x(s)), and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business.

Id.

⁶⁴ *See id.*

⁶⁵ *Id.*

⁶⁶ *See id.*

⁶⁷ *See id.*

⁶⁸ *See id.*

The second part of the definition of “covered entity” contemplates a physician who transmits electronic information⁶⁹ in connection with a transaction covered by the regulations.⁷⁰ The regulation defines “transaction” broadly, and gives examples of specific types of covered transactions.⁷¹ The definitions include the transmission of referrals, payments, claims, and eligibility,⁷² all of which are routine events in most medical offices. As such, the reality is that only the few physicians (if any) that are using exclusively the mail as a means of communication would be exempt from HIPAA’s regulations.⁷³ With the inclusive nature of the regulations, a plaintiff’s treating physician will nearly always satisfy both elements, such that the physician is a “covered entity.”

2. *What Is Health Information?*

The second inquiry is whether the type of information sought by the defendant’s attorney is “health information.”⁷⁴ Like the rest of HIPAA’s regulatory definitions, this definition is broad and inclusive. The result is that any physician who transmits information electronically to any insurance company will be transmitting “health information.” First, the physician will often be the person to “create” information about a patient, as observing a patient’s symptoms and rendering a diagnosis appropriately fall within the scope of this definition. Second, almost any information

⁶⁹ *See id.* Presumably, only covered entities that transmit covered information in electronic form implicate interstate commerce and permit Congress to take this action under that power.

⁷⁰ *Id.*

⁷¹ *See id.*

⁷² *Id.*

⁷³ *See id.* (including as covered entities only health care providers who transmit health information in electronic form).

⁷⁴ *See id.* § 164.502(a).

Health information means any information, whether oral or recorded in any form or medium, that:

(1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and

(2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

Id. § 160.103.

that a physician “creates” is going to relate to the patient. Obviously, a diagnosis would fall within the definition because it directly relates to a patient, but the definition also covers all payments “for the provision of health care to an individual.”⁷⁵ As such, most information that a physician transmits and maintains is “health information,” as defined by HIPAA. Again, nearly all physicians would fall within the scope of HIPAA’s regulations, unless they accept no insurance and run a cash-only business.

3. *Defining Protected Health Information*

The final, and most critical consideration when evaluating the propriety of an ex parte interview, is whether the information sought by the defendant’s attorney is “protected health information.”⁷⁶ Falling within the purview of the definition of “protected health information” is critical, because if the information sought is protected under HIPAA, then the defendant’s attorney *must* adhere to HIPAA’s procedural requirements for obtaining that type of information.⁷⁷ The definition of “protected health information” not only expressly incorporates the definition for “health information”⁷⁸ but also includes another element—that the information specifically identifies an individual.⁷⁹ The regulation thus covers both the actual identification of an individual and any information from which a reasonable person could identify an individual.⁸⁰

In practice, any information that a defendant’s attorney will want to obtain will be individually identifiable because the very purpose is to obtain information regarding the injured plaintiff. There is no realistic way in which a defendant’s attorney could conduct a meaningful interview and somehow not obtain individually identifying information. For example, when a plaintiff sues his uninsured motor vehicle insurance carrier due to a car accident in which he was injured, the insurance company’s counsel may wish to obtain information from the physician before formal discovery

⁷⁵ *Id.* § 160.103.

⁷⁶ *See id.* § 164.502(a).

⁷⁷ *See id.* This is, of course, provided that HIPAA does not preempt a “more stringent” law. *Id.* § 160.203(a)–(b).

⁷⁸ *See id.* § 160.103. The regulation states, in part, “[I]dentifiable health information is information that is a subset of health information. . . .” *Id.*

⁷⁹ *Id.* (“Individually identifiable health information [also must be of the kind] (i) That identifies the individual; or (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.”).

⁸⁰ *See id.* For clarity, this Comment will use the term “protected health information” to describe both.

is undertaken. In such a case, the information sought would relate to the plaintiff. The type of information that the attorney would want would also relate to his physical health before and after the accident, and the attorney would want the plaintiff's specific information, which of course would actually identify him. In order to be useful, the scope of such an interview would necessarily fall within HIPAA's regulations.

In all cases, the kind of information ordinarily sought in an *ex parte* interview will be "created" by the physician, relate to the health of an individual, and specifically identify the individual. Counsel will always be seeking the release of "protected health information" from a "covered entity," such that HIPAA will cover the information that a defendant's attorney would want to obtain from the plaintiff's physician. Because the information is covered under the scope of HIPAA's regulations, the next step should be to determine what requirements or restrictions HIPAA places on the attorney seeking the disclosure of such information.

C. Release of Health Information

HIPAA creates a comprehensive structure that governs the disclosure of an individual's protected health information. Generally, a covered entity may not disclose protected health information, but the regulations set forth six exceptions to the general rule prohibiting disclosure.⁸¹ It is only through the operation of these exceptions, and their relevant cross-referenced sections, that disclosure of protected health information via an *ex parte* interview is proper. Such interviews, however, are not appropriate vehicles for a covered entity to disclose protected health information to defense counsel, and therefore they are inappropriate under HIPAA.

An attorney wishing to conduct an *ex parte* interview would want to know if there is any authority under HIPAA to conduct *ex parte* interviews of the plaintiff's physician. This inquiry is extremely important because HIPAA adopts a modified "conflict" theory of preemption.⁸²

The determination of whether HIPAA permits *ex parte* interviews is important. This determination becomes the starting point, or floor, where the defendant's counsel begins considering the extent of HIPAA's preemption.⁸³ For example, if counsel concludes, as this author believes that they should, that HIPAA does not permit disclosure of protected health

⁸¹ See *id.* § 164.502(a)(1)(i)–(vi).

⁸² See *id.* § 160.203(b); see generally ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 5.2.4 (2d ed. 2002) (explaining federal and state law conflict preemption).

⁸³ See discussion *supra* Part I.A.

information during an ex parte interview, then the attorney should then consider if HIPAA preempts a state law that might otherwise permit them to conduct such an interview. On the other hand, if the defendant's attorney concludes that they are permitted to conduct an ex parte interview with the covered treating physician, then they will, of course, have to consider the propriety of such an interview under state law.

Also, if the trial court were to determine that, as a matter of state law, ex parte interviews are improper, then a defense attorney would have to determine to what extent they must also adhere to the requirements of HIPAA.⁸⁴ It would be most prudent of defense counsel to also consider the extent and nature of preemption of HIPAA, regardless of their ultimate conclusion whether ex parte interviews are appropriate. Before undertaking a preemption analysis, the defendant's counsel should fully comprehend HIPAA's disclosure procedures.

HIPAA provides for only six exceptions to the general rule against disclosure of "protected health information."⁸⁵ Of these six exceptions, only two have any possible application to conducting ex parte interviews. The first exception relates to disclosure pursuant to a valid authorization,⁸⁶ and the second relates to disclosures for judicial or administrative proceedings.⁸⁷ Because HIPAA does not expressly invalidate the use of ex parte interviews, a proper understanding of the process to obtain a HIPAA-compliant disclosure is critical in understanding why ex parte interviews are no longer permitted under HIPAA.

1. *Valid Authorization*

A valid authorization would permit the covered physician to disclose protected health information to an attorney ex parte.⁸⁸ The regulations governing a valid authorization have four parts: core elements of a valid waiver, required statements, a plain language requirement, and a requirement that the patient obtains a copy of the authorization.⁸⁹ From the

⁸⁴ Because HIPAA expressly adopts a "conflict theory of preemption," only state laws contrary and more stringent are still in effect; the remaining sections of HIPAA not "contrary," and therefore not in conflict with the state law, are arguably still effective and the defendant's counsel would have to obey and follow them. See *infra* Part II.D for a discussion on procedural and substantive arguments of the scope of HIPAA's preemption.

⁸⁵ See § 164.502(a)(1)(i)–(vi).

⁸⁶ *Id.* § 164.502(a)(1)(iv).

⁸⁷ *Id.* § 164.502(a)(1)(vi) (cross-referencing § 164.512).

⁸⁸ See *id.*

⁸⁹ See *id.* § 164.508(c)(1)–(4).

language of the regulations, a defect in any of these four areas would be enough to invalidate the entire waiver.⁹⁰ If defense counsel is drafting the waiver, they will have to be mindful to ensure that the waiver is drafted validly or run the risk of being sanctioned for obtaining protected health information with a defective authorization.⁹¹ In addition, if the attorney intends to rely on an authorization drafted by a third party (like the covered entity), the defendant's attorney will have to be sure that the authorization is valid under the regulations.

A detailed analysis of the proper construction of a valid authorization is beyond the scope of this Comment;⁹² however, an authorization is one of the few HIPAA-provided mechanisms by which a defendant's attorney can hope to continue the practice of ex parte interviews.

First, there is a practical consideration when a defendant's attorney attempts to obtain information ex parte and with authorization from the plaintiff's physician—the physician is likely to be reluctant to release such information. Physicians are likely to be wary of releasing any information based on the mere production of an authorization by an attorney, due to the potential liability to which they would be exposed for an improper disclosure. It is also quite likely that the physician's malpractice insurance carrier will advise its clients not to disclose information to defense counsel based on the production of a waiver. HIPAA puts no requirements on the physician to actually comply with the waiver, and the safer course would be to wait to release information pursuant to a court order or a formal discovery request, or release the information only after contacting the plaintiff's counsel.⁹³

Second, a crafty physician or the malpractice carrier might consider making all patients sign a waiver that facially complies with HIPAA, and that appears to give the physician the ability to disclose information to a defendant or a defendant's attorney relating to a claim for damages made by the plaintiff.⁹⁴ While it might be advisable for insurance carriers and

⁹⁰ See *id.* § 164.508(c) (“A valid authorization under this section must contain [these] elements.”).

⁹¹ See *infra* Part III.C (discussing sanctions for obtaining or disclosing protected health information).

⁹² This Comment's analysis of the regulations' exceptions will be limited to the special consideration of how to achieve an ex parte interview by an authorization.

⁹³ § 164.508.

⁹⁴ This would appear to fall into the kind of “global consent” that the drafters of the regulations sought to prevent. See Standards for Privacy of Individually Identifiable Health

(continued)

the physicians to attempt to obtain these waivers from patients, they would likely be unenforceable because the regulations governing an effective waiver require that the waiver include a specific identification of a person or class of persons to whom the protected health information can be disclosed.⁹⁵

Certainly, the physician will not know the name of a defendant's counsel before litigation begins or a demand letter is sent by the plaintiff's counsel, so they could not draft a proper authorization ahead of time. The physician, however, may argue that he or she could draft an authorization permitting disclosure to a "class of persons," which in this case would be the defendant and his or her counsel. This would run afoul of the drafter's intent to forbid those types of authorizations,⁹⁶ and would be a strained interpretation of the language of the regulations. This issue has yet to be litigated. In any event, wise counsel for the plaintiff would give notice to any of the plaintiff's physicians of his or her revocation of any prior authorization given to the physician. Making such a revocation before defendant's counsel can conduct an ex parte interview would render any such authorization permitting disclosure void.⁹⁷

A few courts have already addressed the appropriateness of authorizations being used to conduct ex parte interviews.⁹⁸ *Croskey v. BMW of North America, Inc.* acknowledged that "informal discovery" such as ex parte interviews are no longer permitted under HIPAA.⁹⁹ The court went on to hold that a valid authorization and notice to plaintiff's counsel were required before a valid ex parte interview could be undertaken.¹⁰⁰ Two New York cases are interesting because in both the trial court appeared to order the plaintiff to produce a HIPAA compliant authorization permitting the defendants to conduct an ex parte interview with the

Information, 65 Fed. Reg. 82462, 82474 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160, 164).

⁹⁵ § 164.508(c)(1)(ii).

⁹⁶ See Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82474.

⁹⁷ See 45 C.F.R. § 164.508(b)(5).

⁹⁸ See, e.g., *Croskey v. BMW of N. Am., Inc.*, No. 02-CV-73747-DT, 2005 U.S. Dist. LEXIS 3673 (E.D. Mich. Feb. 14, 2005); *Belote v. Strange*, No. 262591, 2005 Mich. App. LEXIS 2642 (Mich. Ct. App. Oct. 25, 2005); *Hitchcock v. Suddaby*, No. 00219/02, 2005 N.Y. Misc. LEXIS 1019 (N.Y. Sup. Ct. May 11, 2005); *Smith v. Rafalin*, No. 117182/03, 2005 N.Y. Misc. LEXIS 546 (N.Y. Sup. Ct. Mar. 24, 2005).

⁹⁹ See *Croskey*, 2005 U.S. Dist. LEXIS 3673, at *15-*16.

¹⁰⁰ *Id.* at *29.

physicians.¹⁰¹ The courts' reasoning is not clear, but they seemed to conclude that waiver of privilege by the plaintiff in filing suit also requires the plaintiff to make such an authorization.¹⁰² Although both courts concluded that HIPAA did not change the permissibility of ex parte interviews, they both concluded that HIPAA established a new procedure that the defendants had to follow.¹⁰³ Both courts were correct in concluding that HIPAA did not, per se, prohibit such disclosures and that any disclosure of protected health information must conform to HIPAA. However, this author doubts that the proper action was to mandate that plaintiffs authorize such disclosures. Instead, the proper remedy would have been to issue a protective order.¹⁰⁴

Authorization does not function like a subpoena; rather, it is an authorization allowing the covered entity to disclose protected health information.¹⁰⁵ It is important to remember that an authorization permits, but does not require, a covered physician to disclose the information.¹⁰⁶ In most cases, it will be unusual for a defendant's attorney to be able to obtain a valid authorization from represented plaintiffs. In the usual case, the only possible provision allowing access to the plaintiff's medical information are the regulations that refer to disclosures in the context of lawsuits.¹⁰⁷

2. Pursuant to a Court Order or Other Similar Actions

Pursuant to the regulations, a covered physician may release protected health information without the patient's authorization only in the following situations: (1) pursuant to a court order,¹⁰⁸ or (2) pursuant to a "subpoena, discovery request, or other lawful process," but only when accompanied by "satisfactory assurance[s]" that the requesting party has either (a) made reasonable efforts to advise the patient of the request, or (b) made reasonable efforts to obtain a qualified protective order.¹⁰⁹ If there is no

¹⁰¹ See *Hitchcock*, 2005 N.Y. Misc. LEXIS 1019, at *7; *Smith*, 2005 N.Y. Misc. LEXIS 546, at *7.

¹⁰² See *Hitchcock*, 2005 N.Y. Misc. LEXIS 1019, at *1-*2; *Smith*, 2005 N.Y. Misc. LEXIS 546, at *4-*6.

¹⁰³ See *Hitchcock*, 2005 N.Y. Misc. LEXIS 1019, at *1-*2; *Smith*, 2005 N.Y. Misc. LEXIS 546.

¹⁰⁴ See, e.g., *Bayne v. Provost*, 359 F. Supp. 2d 234, 243 (N.D.N.Y. 2005).

¹⁰⁵ See 45 C.F.R. §§ 164.502, 164.508 (2005).

¹⁰⁶ See *id.* § 164.508(a).

¹⁰⁷ See *id.* § 164.512(e).

¹⁰⁸ *Id.* § 164.512(e)(1)(i).

¹⁰⁹ *Id.* § 164.512(e)(1)(ii).

court order or subpoena in a given case, any disclosure of the plaintiff's medical information in the context of the ex parte interview violates federal law.¹¹⁰

While none of these regulations expressly prohibit ex parte interviews, the practical effect is to end the practice.¹¹¹ Defense attorneys like to use ex parte interviews because of their perceived cost-effectiveness, the informality of such interviews, their quickness, and the perceived fairness in having the same ease of access of medical information as the plaintiff's attorney.¹¹² Plaintiffs, of course, believe that defense counsel will attempt to use ex parte interviews to obtain information beyond the scope of discovery.¹¹³ Nearly all of the reasons that a defendant's attorney would wish to undertake an ex parte interview have been obliterated by the regulations. The effect that requiring either a court order or a subpoena with "satisfactory assurances" has on the permissibility of ex parte interviews will be discussed below.

a. Disclosure by Court Order

With respect to the disclosure of information by court order, the very fact that a court order is required destroys the very thing that made defense counsel's actions ex parte. In order to act pursuant to a court order, notice to the adverse party and an opportunity to object must be provided.¹¹⁴ As a result, the regulations implicitly require that defense counsel file a motion in court seeking an order to obtain disclosure.¹¹⁵ This has two effects. First, courts are generally going to be reluctant to permit discovery ex parte via court order when discovery devices such as depositions exist. Second, the quick and cost-efficient nature of ex parte interviews is gone. When plaintiff's counsel obtains notice that the defendant's attorney is moving the court to conduct an ex parte interview, they will surely object and file a memorandum in opposition.

¹¹⁰ See *id.* § 164.512(e).

¹¹¹ The regulations arguably permit a modified form of ex parte interviews, but HIPAA compliant procedures will not allow the more familiar form of ex parte interviews to be undertaken. It was the drafters' intent for HIPAA's procedures, as well as accompanying substantive rights, to be the minimum floor above which disclosure could be properly made. See *id.* § 160.203(b).

¹¹² See Jennings, *supra* note 4, at 458–59.

¹¹³ See *id.* at 457.

¹¹⁴ See § 164.512(e)(1)(iii)(A)–(B).

¹¹⁵ See § 164.512(e)(1).

While it is entirely possible that courts may develop case law to govern the granting of, and the defendant's use of, *ex parte* interviews, the far more likely course is that they will simply hold that *ex parte* interviews are improper under HIPAA, and will require that any disclosures of protected health information made by the covered physician be done via an ordinary discovery device.¹¹⁶

b. Methods of Obtaining Disclosure Without a Court Order

Under 45 C.F.R. § 164.512(e)(1)(ii), the defendant's counsel could seek to obtain the protected health information by "subpoena, discovery request or other lawful process."¹¹⁷ This contemplates a broad set of actions that defendant's counsel could take; however, the attorney is not unfettered in obtaining the protected health information under this provision.¹¹⁸ To obtain proper disclosure of the protected health information, by any of these methods, the attorney must provide the covered entity with "satisfactory assurance."¹¹⁹

Satisfactory assurance takes two forms under the regulations, depending on which method the defendant's counsel chooses to use when requesting disclosure from the covered entity. The first method is to give satisfactory assurances that the patient has been given notice of the

¹¹⁶ See *Croskey v. BMW of N. Am., Inc.*, No. 02-CV-73747-DT, 2005 U.S. Dist. LEXIS 3673, at *34 (E.D. Mich. Feb. 14, 2005) (treating the defendant's motion as one for a protective order rather than a motion for a court order pursuant to 45 C.F.R. § 164.512(e)(1)(ii)(B)); *Bayne v. Provost*, 359 F. Supp. 2d 234, 243 (N.D.N.Y. 2005) (treating the proceedings as an effort to secure a protective order).

¹¹⁷ § 164.512(e)(1)(ii). It might be argued that the term "other lawful process" permits *ex parte* interviews when the state courts have adopted such a practice as "lawful." While this may in fact be accurate, for purposes of this Comment, *ex parte* interviews will be evaluated as a discovery request. This is for clarity and because there is no meaningful distinction between evaluating *ex parte* interviews as a "lawful process" as opposed to a "discovery request." This is, in part, because HIPAA's overall intent, and also because its default standard is against disclosure, that either a "discovery request" or "other lawful process" reflects the regulations' underlying policy. In that way, "other lawful process" was not intended to be a broad term, capable of being stretched to achieve disclosure; rather, its intent was to encompass actions like medical exams, which are not properly considered subpoenas or discovery requests.

¹¹⁸ In fact, the drafters intended these procedures to work hand-in-hand with the applicable rules of civil procedure. See *Standards for Privacy of Individually Identifiable Health Information*, 65 Fed. Reg. 82462, 82529 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160, 164).

¹¹⁹ See § 165.512(e)(1)(ii).

defendant's request for disclosure.¹²⁰ The second method is to give the disclosing covered entity satisfactory assurances that reasonable efforts have been made by the party to obtain a "qualified protective order."¹²¹ Whether the defendant's counsel is using the notice or the protective order method determines what actions must be taken to meet the regulatory definition of "satisfactory assurances."¹²²

Under the notice method of obtaining protected health information, there are four requirements that must be met for the covered entity to have satisfactory assurances and for the release to be proper.¹²³ The first requirement is that the defendant's counsel must make a good faith effort to provide the plaintiff with notice of the attempt to obtain the "protected health information."¹²⁴ Second, the notice must include "sufficient" information about the proceeding for which the protected health information is being requested, so that the individual may object.¹²⁵ In the context of the defendant seeking an ex parte interview, this provision has some importance because the individual is granted the opportunity to object, and the defendant's notice must be timely enough so that an objection may be raised.¹²⁶ This provision implicitly requires the creation of a procedure to hear objections to ex parte interviews and prevents a defendant's counsel from sending the notice at a point when the plaintiff can no longer object to the interview going forward.

The next requirement is that the time to object has passed.¹²⁷ This provision creates an interesting situation if read plainly. Under usual circumstances, the plaintiff will have until nearly the close of the discovery process to object to the defendant's intent to conduct an ex parte interview.¹²⁸ If this view were to be adopted by the courts, the plaintiff could do nothing for months and then, just at the end of the discovery period file an objection. In most cases, this would likely force the

¹²⁰ *Id.* § 165.512(e)(1)(ii)(A).

¹²¹ *Id.* § 165.512(e)(1)(ii)(B).

¹²² Under either method the patient receives some "notice." The drafters intended this very effect in order to give the patient an opportunity to object in the course of the proceedings. *See Standards for Privacy of Individually Identifiable Health Information*, 65 Fed. Reg. at 82530.

¹²³ *See* § 165.512 (e)(1)(iii).

¹²⁴ *Id.* § 165.512(e)(1)(iii)(A).

¹²⁵ *Id.* § 164.512(e)(1)(iii)(B).

¹²⁶ *See id.*

¹²⁷ *Id.* § 164.512(e)(1)(iii)(C).

¹²⁸ *See Berens, supra* note 3, at 1467.

defendant's counsel to conduct a deposition rather than risk not having the treating physician's information before trial. The final requirement is that, after the close of the time in which the plaintiff could object, there exists no objection or all the objections have been ruled on, such that the defendant can proceed with the interview.¹²⁹

This procedure, like obtaining a court order, does away with all the reasons why a defendant's counsel would want to conduct an ex parte interview. It is no longer quick, cheap, or unopposed. To comply with the notice procedures of HIPAA, such that counsel can give satisfactory assurances, a request to do an ex parte interview becomes no different than a more typical discovery request. In fact, the procedure for seeking to conduct an ex parte interview is much like giving notice for a deposition. The only difference is that the defendant's counsel would be able to conduct the interview without the presence of the plaintiff and a court reporter.¹³⁰ Furthermore, defense counsel could be stymied until late in the discovery process, when the time to object has passed. Given this similarity to the deposition, it seems unlikely that courts will routinely permit these interviews over the more familiar deposition.

The second method of giving satisfactory assurances to a disclosing covered entity is to make reasonable efforts to obtain a qualified protective order.¹³¹ In such a case, the defendant's counsel would have to provide the covered entity with documentation showing that either the parties have agreed to the proposed order and submitted it to the court¹³² or that defense counsel has submitted the qualified protective order to the court.¹³³ In the latter situation, it does not appear that the regulations require that the order be granted by the court before the covered entity may disclose the requested information.¹³⁴ Because the defendant's counsel may not have to wait for the order to be granted, this is likely to be the preferred method of giving "satisfactory assurances" to the covered entity to obtain disclosure

¹²⁹ § 164.512(e)(1)(iii)(C)(1)–(2).

¹³⁰ Compare *id.* § 154.512 (failing to mention any requirement that plaintiff or a court report be present), with FED. R. CIV. P. 30(b) (setting forth the requirements for giving notice of a deposition).

¹³¹ § 164.512(e)(1)(ii)(B).

¹³² *Id.* § 164.512(e)(1)(iv)(A).

¹³³ *Id.* § 164.512(e)(1)(iv)(B).

¹³⁴ See *id.*

of protected health information. This also more closely approximates the current practice of ex parte interviews.¹³⁵

A defendant's counsel could file a qualified protective order with the court, which, of course, would require notice to the plaintiff.¹³⁶ Because the motion does not need to be granted before the disclosure takes place, it would be reasonable for counsel to file the motion and to then quickly conduct the interview. At best, the plaintiff could move the court for some sort of injunction, preventing counsel from conducting the interview until the motion is ruled on, but, if defense counsel acts with speed, it may be too late. One of the risks that the defendant's counsel runs is the later suppression of the information gained in the interview, to the extent it was not obtained elsewhere. The practical benefit for counsel, however, is to get information to which they might not otherwise be entitled, which, in turn, could lead to a better settlement, better cross-examination, or the uncovering of other helpful evidence.

The key to the defendant's counsel being able to seek disclosure by this method is to provide both the court and the covered entity with a proper "qualified protective order." A qualified protective order has two requirements: first, that the information will be strictly limited for use in the proceeding and cannot otherwise be disclosed,¹³⁷ and second, that all documents relating to the protected health information be returned or destroyed at the end of the proceeding.¹³⁸ These requirements should be easy to satisfy, but counsel must be sure that the proposed order submitted to the court meets these requirements.

The final consideration is the meaning of "reasonable efforts."¹³⁹ It is left undefined by the regulations, and as such will be developed by case law. A plaintiff's attorney can make a good argument that reasonable efforts include waiting on a ruling on the protective order before seeking disclosure. It seems that if "reasonable efforts" means anything at all, it must mean something beyond drafting a protective order and submitting it to the court. In all likelihood, courts are going to require that a defendant

¹³⁵ See, e.g., *Smith v. Am. Home Prods. Corp. Wyeth-Ayerst Pharm.*, 855 A.2d 608, 612 (N.J. Super. Ct. Law Div. 2003).

¹³⁶ § 164.512(e)(1)(iv).

¹³⁷ *Id.* § 164.512(e)(1)(v)(A).

¹³⁸ *Id.* § 164.512(e)(1)(v)(B).

¹³⁹ *Id.* § 164.512(e)(1)(ii)(B).

wait until the motion is ruled on before seeking disclosure, unless there is some compelling reason the defendant's counsel cannot wait.¹⁴⁰

In practice, it seems likely that the only way that most covered entities are going to disclose protected health information is when they receive a valid authorization pursuant to a court order or when they receive satisfactory assurance from defendant's counsel that reasonable efforts have been made to obtain a protective order. To release the information in any other circumstance would subject the covered entity to possible liability for improperly disclosing protected health information.¹⁴¹

As stated, most state courts examining this issue have held that ex parte interviews are not per se invalid, but they also held that HIPAA procedures must be followed to conduct them.¹⁴² In *Smith v. American Home Products Corp. Wyeth-Ayerst Pharmaceutical*,¹⁴³ the trial court addressed the issue of whether ex parte interviews continued to be permissible with the passage of HIPAA¹⁴⁴—New Jersey permitted ex parte interviews of treating physicians, calling them *Stempler* interviews.¹⁴⁵ The defendants contended that they were allowed to conduct these interviews,¹⁴⁶ but the plaintiffs argued that they were now preempted by HIPAA.¹⁴⁷ Although the court concluded that there is “no express preemption,” it ultimately found that *Stempler* interviews must be made to conform to HIPAA.¹⁴⁸

Importantly, existing New Jersey law did not permit a defendant's counsel unfettered ability to conduct an ex parte interview.¹⁴⁹ *Stempler* interviews required notice to plaintiffs, notice to the physicians of the scope of the interview, and notice to the physician that the participation in the interview is voluntary.¹⁵⁰ New Jersey, unlike other states permitting ex

¹⁴⁰ Some examples might be the covered entity leaving the jurisdiction, the impending death of the covered entity, or other such circumstances.

¹⁴¹ This includes actions by either the Department of Health and Human Services, see §§ 160.300–160.570, or a civil action by the plaintiff.

¹⁴² See cases cited *supra* note 98.

¹⁴³ 855 A.2d 608 (N.J. Super. Ct. Law Div. 2003).

¹⁴⁴ *Id.* at 610.

¹⁴⁵ See *Stempler v. Speidell*, 495 A.2d 857, 864–65 (N.J. 1985); see also *Smith*, 855 A.2d at 612.

¹⁴⁶ *Smith*, 855 A.2d at 612–15.

¹⁴⁷ *Id.* at 615–18.

¹⁴⁸ *Id.* at 626–27. This author believes the court misstated the fact that there is no preemption. See discussion *infra* notes 156–60.

¹⁴⁹ *Smith*, 855 A.2d at 612.

¹⁵⁰ *Id.*

parte interviews, was unique in requiring notice to the plaintiff,¹⁵¹ which is closely in accord with HIPAA's requirements, such that the court found that *Stempler* interviews were consistent with HIPAA.¹⁵² The court, however, found that some modifications were needed to bring the *Stempler* interviews in accord with HIPAA: the authorization permitting the use and disclosure of protected health information "must be limited in scope and . . . time of use,"¹⁵³ the authorization must conform to HIPAA,¹⁵⁴ and HIPAA safeguards must be observed.¹⁵⁵ The end result of the court's decision is to adopt the HIPAA framework in all but name.

Other cases, however, have been more straightforward in adopting HIPAA's regulations and finding that ex parte interviews are no longer permitted. In *Crenshaw v. Mony Life Insurance Co.*,¹⁵⁶ the district court held that the stipulated protective order did not meet HIPAA's requirements and was therefore improper.¹⁵⁷ The court went on to hold that HIPAA does not permit ex parte interviews, even though they had been previously permitted under state law, and that only formal discovery methods would satisfy HIPAA.¹⁵⁸ Another court, in *Law v. Zuckerman*,¹⁵⁹ came to the same conclusion, i.e., that an ex parte interview may be permitted under state law but that HIPAA is more restrictive and prohibits disclosure of protected health information in such a manner.¹⁶⁰

Both cases expressly found that informal methods of discovery, like ex parte interviews, are not permitted unless they conform to the requirements of HIPAA.¹⁶¹ This leaves little doubt that the terms "discovery request" and "other lawful processes"¹⁶² cannot be expanded to include ex parte interviews.

¹⁵¹ *Id.* at 620.

¹⁵² *Id.* at 625.

¹⁵³ *Id.* at 623.

¹⁵⁴ *Id.* at 624.

¹⁵⁵ *See id.* at 626.

¹⁵⁶ 318 F. Supp. 2d 1015 (S.D. Cal. 2004).

¹⁵⁷ *Id.* at 1029.

¹⁵⁸ *Id.*

¹⁵⁹ 307 F. Supp. 2d 705 (D. Md. 2004).

¹⁶⁰ *Id.* at 708.

¹⁶¹ *Crenshaw*, 318 F. Supp. 2d at 1029; *Law*, 307 F. Supp. 2d at 709; *see also* *Croskey v. BMW of N. Am., Inc.*, No. 02-CV-73747-DT, 2005 U.S. Dist. LEXIS 3673, at *15-*16, *29 (E.D. Mich. Feb. 14, 2005); *EEOC v. Boston Mkt. Corp.*, No. CV 03-4227, 2004 U.S. Dist. LEXIS 27338, at *18 (E.D.N.Y. Dec. 16, 2004); *Belote v. Strange*, No. 262591, 2005 Mich. App. LEXIS 2642, at *15 (Mich. Ct. App. Oct. 25, 2005).

¹⁶² 45 C.F.R. § 164.512(e)(1)(ii) (2005).

3. *Disclosure by Treating Physician*

The final way in which the defendant's counsel could hope to obtain the protected health information is by voluntary disclosure of the covered entity.¹⁶³ Although the regulation does allow a health care provider to release information pursuant to a subpoena without receiving the required "satisfactory assurance" from the party requesting the information, it only permits such a disclosure when the health care provider itself attempts to notify the patient or obtain a qualified protective order.¹⁶⁴

First, the covered entity must be making the disclosure in response to a lawful process described in 45 C.F.R. § 164.512(e)(1)(ii).¹⁶⁵ Then, instead of the defendant's counsel giving satisfactory assurances that the patient has been given proper notice or that a qualified protective order has been sought, the covered entity either notifies the patient or seeks a qualified protective order.¹⁶⁶ This provision may have its application, but it is practically useless for the purposes of conducting an *ex parte* interview. Few covered entities are going to want to undertake the time and expense or subject themselves to potential liability by essentially performing the defense counsel's job. In nearly all cases, covered entities are going to expect and require that defendant's counsel give notice or obtain a qualified protective order before they will disclose protected health information.¹⁶⁷

4. *Conclusion*

HIPAA precludes the plaintiff's treating physicians from disclosing medical information to the defendant's attorney in any context without authorization, court order, or discovery request accompanied by "satisfactory assurances," and, likewise, precludes the physician from

¹⁶³ *Id.* § 164.512(e)(1)(vi).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Another consideration is the requirement that the covered entity disclose only the "minimum necessary" information. §§ 164.502(b), 164.514(d). In order to be HIPAA compliant, these entities must either accept possible liability based on a disclosure-by-disclosure review of their actions, or implement compliant "policies and procedures" governing disclosures. § 164.514(d)(1). In either event, the administrative costs, or the potential liability will likely cause most entities to wait for a court order or discovery request with satisfactory assurances in order to be sure that no more than the "minimum necessary" is disclosed.

disclosing such information.¹⁶⁸ It is, of course, arguable that ex parte interviews survive HIPAA's regulations, but the nature of obtaining the legal right to conduct ex parte interviews has dramatically changed so that they can hardly be thought of as ex parte. Instead of being ex parte interviews, they might be thought of as informal discovery interviews¹⁶⁹ that conform to HIPAA's regulations. As such, the previous way in which ex parte¹⁷⁰ interviews were conducted is now improper under HIPAA.

It is also unlikely that defense counsel is going to get authorization from a represented plaintiff in order to facilitate disclosure of protected health information from a covered entity. Similarly, it is unlikely that HIPAA's notice requirement will permit counsel to conduct these interviews as the value of the interviews is lost by the very giving of notice and the almost sure to follow motions and hearings on the matter. Defendant's counsel's best chance of conducting an interview, which retains the perceived advantages of the previous form of ex parte interviews, is to submit a qualifying protective order and then quickly conduct the interview.

As case law develops in this area, however, defense counsel may find that this door has also shut, especially when considering "reasonable efforts" might only be reasonable if the defendant's counsel waits for the court to rule on the motion before conducting the interview. Courts might, for prudential reasons, restrict defense counsel from conducting an interview until the court has ruled on the protective order. For both practical and legal reasons, HIPAA's regulations prevent ex parte interviews.

D. Preemption

After determining that HIPAA's regulations fundamentally alter the manner in which ex parte interviews can be conducted to the point where their value is destroyed, the next obvious question when examining a federal law is whether it preempts state law.¹⁷¹ Congress enacted HIPAA to address many issues, including the privacy of medical information.¹⁷² Congress mandated the promulgation of regulations protecting private

¹⁶⁸ See discussion *supra* Part II.C.2.

¹⁶⁹ To the extent that informal interviews have continued viability under HIPAA.

¹⁷⁰ For the remainder of this article, the use of the term "ex parte interview" will refer to the non-HIPAA compliant form of the interviews.

¹⁷¹ See CHEMERINSKY, *supra* note 82, § 5.2.4.

¹⁷² The statutory provisions relative to privacy are found at 42 U.S.C. §§ 1320d to 1320d-8.

health data,¹⁷³ and, importantly, expressly provided that the federal regulations “shall supersede any contrary provision of State law.”¹⁷⁴

The promulgated regulations expound on the preemptive effect of HIPAA.¹⁷⁵ These regulations, however, also provide that a state law that affords *more* protection than the federal regulations, i.e., is “more stringent,” remains valid and is not preempted.¹⁷⁶ Thus, whichever law is “more stringent” controls.¹⁷⁷

The regulations demonstrate a clear and unambiguous policy for finding that there is preemption of “contrary” and “less stringent” state laws.¹⁷⁸ Similarly, a contrary state law will not be preempted if it is “more stringent” than HIPAA.¹⁷⁹ For defense counsel, the preemption inquiry is obviously important to avoid inappropriately obtaining protected health information from a plaintiff’s physician.

The primary conclusion, therefore, that defense counsel should reach is that HIPAA’s regulations foreclose the use of ex parte interviews to gain protected health information from the plaintiff’s treating physician.¹⁸⁰ This conclusion is extremely important because HIPAA adopts a modified “conflict” theory of preemption.¹⁸¹ It is only because HIPAA’s procedures prevent the use of ex parte interviews, that there is the possibility of “contrary” state laws that permit ex parte interviews. Whenever defense counsel encounters a “contrary” state law allowing ex parte interviews, the

¹⁷³ 45 C.F.R. § 264 (2005).

¹⁷⁴ 42 U.S.C. § 1320d-7 (2000).

¹⁷⁵ See, e.g., 45 C.F.R. § 160.203 (“A standard, requirement, or implementation specification adopted under this subchapter that is contrary to a provision of State law preempts the provision of State law.”).

¹⁷⁶ *Id.* § 160.203(b) (“This general rule [of preemption] applies, except if . . . [t]he provision of State law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter.”).

¹⁷⁷ See *id.* The term “more stringent” is defined in § 160.202.

¹⁷⁸ The preventive effect of HIPAA is quite interesting and perhaps unique. HIPAA essentially operates as a “field preemption” type statute. This is because it seeks to regulate the entire field of the handling of the health information by covered entities. However, HIPAA declines to preempt certain state laws that would offer more protection than the regulations. § 160.203(b). Furthermore, it arguably leaves in place all non-conflicting state laws, which would make it necessary to comply with both state and federal laws simultaneously.

¹⁷⁹ See § 160.203(b).

¹⁸⁰ See discussion *supra* Part II.C.4.

¹⁸¹ See CHEMERINSKY, *supra* note 82, § 5.2.4.

next inquiry is which law, the state law or HIPAA, is “more stringent.”¹⁸² The determination of which law is “more stringent” will govern the appropriateness of defense counsel’s action.

The following section will examine the process of determining if a state law, either by permitting ex parte interviews or by prohibiting some but not all forms of them, is “contrary” to HIPAA. It will detail the process for determining which of the two laws “more stringent” and should therefore be obeyed.

1. Contrary State Laws

The regulations define “contrary” in a straightforward way. The first definition is viewed from the perspective of the covered entity.¹⁸³ If it is impossible for the covered entity to comply with both sets of laws then the laws are “contrary” to each other, and whichever is “more stringent” will prevail.¹⁸⁴ The second type of “conflict” will occur if the state law obstructs the broad grant of authority that the DHHS was given to protect an individual’s private health information.¹⁸⁵ For purposes of this Comment, it will be enough to consider what is a “contrary” law from the perspective of the covered entity, who cannot comply with both sets of laws.

The most obvious example of “contrary” laws would be when, under state law, an attorney would be permitted to undertake ex parte interviews. The covered entity (the physician) would be unable to comply with the state law allowing for disclosures and the federal law prohibiting such disclosures. In this situation, the defense attorney would have to determine which law is “more stringent.”¹⁸⁶ This type of analysis is straightforward and uncomplicated. The determination of “contrary laws,” however, becomes muddled if both HIPAA and the state law prohibit the use of ex parte interviews.

Under this circumstance, defense counsel’s inquiry must be more careful because, although the state law and HIPAA are “contrary,” defense counsel may have to adhere to portions of both. Because the inquiry is focused on the extent to which the two laws are contrary, it is impossible for the covered entity to comply with certain aspects of the two laws. For

¹⁸² See § 160.203(b).

¹⁸³ *Id.* § 160.202(1).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* § 160.202(2); see also Health Insurance Portability and Accountability Act of 1996 § 264, 42 U.S.C. § 1320d-2 (note) (2000).

¹⁸⁶ See 45 C.F.R. § 160.203.

example, although HIPAA and the relevant state law agree that ex parte interviews are improper, they might be “contrary” in permitting or prohibiting the physician to make certain disclosures.

In situations where HIPAA and the state law agree that ex parte interviews are improper, there are two areas that the defense attorney should examine carefully: (1) the extent of the procedural protections relating to the disclosure of protected health information that the state law provides and (2) the scope of protection provided to the patient’s health information.¹⁸⁷ These are the two areas in which there is no apparent conflict between the state law and HIPAA, but, nevertheless, the laws are “contrary.”

Congress’s grant of regulatory power includes the preemption of procedures that relate to the use and disclosure of an individual’s health information.¹⁸⁸ There could be a situation in which the state has a general prohibition on ex parte interviews but provides for several exceptions. For example, under a state law that requires only that the attorney notify the plaintiff of his intent to conduct an interview with the treating physician, the attorney may then, under state law, lawfully conduct the interview; this state law exception would not be recognized under HIPAA’s procedures for the disclosure of protected health information.¹⁸⁹ In such a case, Congress’s grant of preemptive power to the DHHS to proscribe less stringent state laws, including their procedures, would make defense counsel’s conduct a violation of HIPAA.¹⁹⁰

An interesting example of a “contrary” procedure is a discovery request made under the applicable rules of civil procedure. In both the federal and state systems of discovery, HIPAA preempts (or in the case of federal discovery requests, statutorily amends the rules) the normal

¹⁸⁷ The scope of HIPAA’s protection of a patient’s health information is discussed *infra* Part III.B. This analysis should guide defense counsel in determining if the scope of the state’s protection is “contrary” to HIPAA’s scope.

¹⁸⁸ See Health Insurance Portability and Accountability Act of 1996 §§ 262(a), 264(b)(2); 45 C.F.R. § 160.203.

¹⁸⁹ This is the situation that the *Smith* court examined. *Smith v. Am. Home Prods. Corp. Wyeth-Ayerst Pharm.*, 855 A.2d 608, 612 (N.J. Super. Ct. Law Div. 2003). New Jersey permitted ex parte interviews, but only if the defendant’s counsel adhered to some basic procedures, such as giving notice to the plaintiff. *Id.* Although the court did not recognize it as such, New Jersey’s law and HIPAA were “contrary” to each other. *Id.* at 626. The court, however, implicitly recognized that a covered physician could not obey both the New Jersey and federal process for disclosing a patient’s information, and the court required the defendants to adhere to HIPAA’s standards. *Id.*

¹⁹⁰ See 45 C.F.R. § 160.203.

operation of the discovery process. This is due to the fact that any disclosure of protected health information, even through a valid discovery device such as a deposition or request for production, will have to include “satisfactory assurances.”¹⁹¹ A physician could be faced with contrary rules of discovery under state law that do not require satisfactory assurances and HIPAA, on the other hand, which requires such assurances.

Once defense counsel realizes that there are “contrary” state laws, counsel must also determine which of the two is “more stringent.”¹⁹² This determination will govern which law, and its related procedures, will govern the disclosure of the individual’s protected health information.¹⁹³ In the case where both HIPAA and the state law prohibit ex parte interviews, the question of which is “more stringent” will turn on whether the procedures the state uses provides for greater protection than the “reasonable assurances” provided for under the federal rules. In such a case, counsel would have to evaluate the state’s procedure under HIPAA’s definition of “more stringent” to determine if it is preempted.

2. *More Stringent State Laws*

The language of the regulation requires that a “contrary” state law must meet one of six criteria, in order to be considered “more stringent.”¹⁹⁴ If a state law cannot meet one of the six criteria, then, by implication, HIPAA would be considered “more stringent.”¹⁹⁵ Of these six provisions, only three would have any relevance to determining the appropriateness of ex parte interviews.¹⁹⁶

The first criterion provides for the continuing effectiveness of state laws that prohibit or restrict the disclosure of information that is permitted under HIPAA.¹⁹⁷ This is likely to be the criterion that will most often

¹⁹¹ *Id.* § 164.512(e)(1)(ii)(B).

¹⁹² *Id.* § 160.202.

¹⁹³ *Id.* § 160.203(b).

¹⁹⁴ *Id.* § 160.202. At least one court has adopted a much simpler test for determining if the law is more stringent: “laws that afford patients *more* control over their medical records.” *Law v. Zuckerman*, 307 F. Supp. 2d 705, 709 (D. Md. 2004).

¹⁹⁵ *See* § 160.202.

¹⁹⁶ *See id.* Under the second definition heading, paragraphs (2) & (3) allow for the continued effectiveness of state laws that allow the individual more access to their own information, and paragraph (5) provides for the continued operation of state laws that require the record keeper to keep more detailed records for longer periods of time relating to the accounting of disclosures. *Id.* The remaining three paragraphs have relevance. *See id.*

¹⁹⁷ *Id.*

determine which law is “more stringent” because a state that permits *ex parte* interviews is allowing a physician to disclose information and an attorney to use the information, and HIPAA would prevent both. In such a case, there can be no showing that the state law is prohibiting something that HIPAA permits because the opposite is true. In the case of state procedural rules that may allow a physician to disclose information (or even for an attorney to introduce them in later proceedings), that law will have to be compared to HIPAA’s procedural process that permits the disclosure of protected health information.¹⁹⁸

In this way, HIPAA acts as a procedural floor, leaving states free to set a higher ceiling but in all cases preventing any state from having less protective laws.¹⁹⁹ In any event, a state’s procedural process (like a discovery request) for permitting disclosure will only be considered “more stringent” under this criterion if the state’s procedure prevents a disclosure that HIPAA’s disclosure procedure permits.²⁰⁰ This would mean that, unless or until states have “more stringent” discovery processes than HIPAA’s, which requires “satisfactory assurances,” every jurisdiction will have to address the interplay of their civil rules and HIPAA’s procedural requirements.

The second criterion relates to a patient authorizing disclosures of his or her health information.²⁰¹ The most essential element of this definition is the requirement that the state law relating to the “form, substance, or . . . need” of disclosure be express.²⁰² A state law cannot permit an implied form of legal permission from the individual and still be considered “more stringent” under these criteria.²⁰³ This express requirement will also have a significant impact on how a state’s discovery rules will be forced to incorporate some of HIPAA’s standards.²⁰⁴

¹⁹⁸ *See id.*

¹⁹⁹ For a further explanation of HIPAA’s disclosure procedures, see discussion *supra* Part II.C.

²⁰⁰ *See* § 160.202.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *See id.* The requirement is that the permission for disclosure is expressly given and Congress’s intent to regulate the procedures for disclosure of health information has significant impact on any argument that waiver of privilege permits *ex parte* interviews.

²⁰⁴ This would arguably modify many “automatic waiver of privilege” statutes, or other previously valid forms of implied waiver, which permit defendant’s counsel to obtain protected health information.

Additionally, any state law that purports to be “more stringent” in its governing of express permission given by the patient must offer greater protection of the information in one of three ways: it must “narrow the scope or duration” of permission, “increase the privacy protections afforded,” or “reduce [any] coercive . . . circumstances” that gave rise to the permission.²⁰⁵ Supposing that a defendant was able to obtain an authorization that is valid under state law from a plaintiff (which, in most cases, would be an unrepresented or poorly represented plaintiff) to speak to his or her physician *ex parte*, such a waiver would be unenforceable unless it was “more stringent” than HIPAA’s requirements for a valid authorization.²⁰⁶ In such a situation, the state law would only be “more stringent” if, when considered in light of the three factors above, it provided more protection to the patient’s information.²⁰⁷

HIPAA has a detailed procedure for obtaining an individual’s permission to obtain disclosure of his or her protected health information,²⁰⁸ and in most cases, it would likely be followed as the “more stringent” procedure for obtaining disclosure. Any state’s contrary criteria relating to a plaintiff giving permission to his physician to disclose information to defense counsel would, therefore, have to deny something that HIPAA permits.²⁰⁹ In other words, a valid waiver would, at a minimum, have to be obtained under HIPAA’s procedures, and if the state law would still invalidate the waiver, then defense counsel would have to adhere to the state procedure.²¹⁰

The final criterion for determining if the contrary state law is “more stringent” is that the state law must offer greater privacy protection than HIPAA to the person about whom the protected health information is sought.²¹¹ This criterion appears to be meant as a “catch-all” clause by which courts can determine whether state law is more protective of the individual’s privacy.²¹² This further demonstrates the intent of the drafters to give the individual, who is the subject of disclosure, the most protection possible.

²⁰⁵ § 160.202.

²⁰⁶ *Id.* § 160.203.

²⁰⁷ *Id.* § 160.202.

²⁰⁸ *See id.* §§ 164.506(b), 164.508(c).

²⁰⁹ *Id.* § 160.202.

²¹⁰ *See supra* Part II.D.

²¹¹ § 160.702.

²¹² *See id.*

At least two courts have undertaken a detailed analysis of HIPAA's "more stringent" test for preemption as it relates to ex parte interviews.²¹³ *EEOC v. Boston Market Corp.* addressed whether in federal question cases HIPAA requires the application of the state law if it is "more stringent" than HIPAA's baseline rules.²¹⁴ The court held that it does not.²¹⁵ In federal question cases, the state law need not be considered, even if it is arguably more stringent, because HIPAA is the sole source of privacy protection in those cases.²¹⁶

In what was apparently a diversity case, another trial court determined that HIPAA preempted state laws governing ex parte disclosures.²¹⁷ The court considered whether Michigan's laws were more stringent than HIPAA's and found that they were not.²¹⁸ The court reviewed Michigan's procedure for ex parte disclosures, which required only that the party give the physician the option to decline the request.²¹⁹ The court noted that this "informal discovery" method was in contrast to HIPAA's disclosure process and was ultimately less protective than HIPAA.²²⁰ As such, Michigan's laws were preempted and the defendant was required to adhere to HIPAA's disclosure requirements.²²¹

The New Jersey trial court in *Smith v. American Home Products Corp. Wyeth-Ayerst Pharmaceutical*²²² also addressed the question of preemption. The court held that there was no preemption because HIPAA was silent about informal processes such as *Stempler* interviews such that Congress intended to leave those processes untouched.²²³ This conclusion is wrong for several reasons. First and most obvious is the fact that Congress clearly intended the regulations to be a comprehensive scheme protecting a patient's privacy.²²⁴ The drafters of the regulations expressed

²¹³ *Croskey v. BMW of N. Am., Inc.*, No. 02-CV-73747-DT, 2005 U.S. Dist. LEXIS 3673, at *8-*20 (E.D. Mich. Feb. 14, 2005); *EEOC v. Boston Mkt. Corp.*, No. CV 03-4227, 2004 U.S. Dist. LEXIS 27338, at *9-*14 (E.D.N.Y. Dec. 16, 2004).

²¹⁴ *See Boston Mkt. Corp.*, 2004 U.S. Dist. LEXIS 27338, at *11.

²¹⁵ *Id.* at *13.

²¹⁶ *Id.* at *12-*13.

²¹⁷ *Croskey*, 2005 U.S. Dist. LEXIS 3673, at *20.

²¹⁸ *Id.* at *10, *20.

²¹⁹ *Id.* at *14.

²²⁰ *Id.* at *14-*20.

²²¹ *Id.* at *20.

²²² 855 A.2d 608 (N.J. Super. Ct. Law Div. 2003).

²²³ *Id.* at 622. *But see Croskey*, 2005 U.S. Dist. LEXIS 3673, at *20 n.9 (noting its disagreement with *Smith*).

²²⁴ *See supra* note 31 and accompanying text.

a clear intent to protect patient privacy to the fullest extent possible, even at the expense of federalism.²²⁵ Second, HIPAA adopts a clear preference for preemption unless the law is “more stringent.”²²⁶ In the *Smith* case, the *Stempler* procedure was not “more stringent” than the HIPAA procedure for obtaining disclosure, and, as such, it was expressly preempted.²²⁷ Third, the *Smith* court mistakenly concluded that “informal discovery” is not included in the scope of the regulations.²²⁸

Informal discovery processes, such as *Stempler* or ex parte interviews, are either a “discovery request” or “other lawful process” under the regulations.²²⁹ In either category, the regulations, by their plain language, cover such interviews. In such a case, where the state law governing the procedure for disclosure of protected health information is less stringent, and the method with which the state court is confronted is within the scope of the HIPAA regulations, the only possible result is that HIPAA preempts the state law.²³⁰ Although the *Smith* court incorrectly stated there was no preemption,²³¹ it saw a need to conform state practices to HIPAA,²³² which implicitly admits that HIPAA applies.

In conclusion, a defendant’s attorney should look at HIPAA as setting forth the minimum standards governing any prospective action, due to its preemptive effect. Defense counsel, however, should also determine if there are any state laws or procedures to the contrary. If such contrary laws exist, counsel will have to follow them if they are more stringent than the standards provided by HIPAA. The safest course of action for the defendant’s attorney is to comply as fully as possible with both the state and federal laws.

²²⁵ See discussion *supra* Part II.D.

²²⁶ See 45 C.F.R. § 160.203 (2005).

²²⁷ See *Smith*, 855 A.2d at 626.

²²⁸ *Id.* at 623.

²²⁹ § 164.512(e)(1)(ii).

²³⁰ See § 160.203(b).

²³¹ *Smith*, 855 A.2d at 626. For cases finding express preemption of state law see, e.g., *Crenshaw v. Mony Life Insurance Co.*, 318 F. Supp. 2d 1015, 1029 (S.D. Cal. 2004); *Law v. Zuckerman*, 307 F. Supp. 2d 705, 711 (D. Md. 2004); *Keshecki v. St. Vincent’s Medical Center*, 785 N.Y.S.2d 300, 305 (Sup. Ct. 2004).

²³² See *Smith*, 855 A.2d at 626, 627.

III. HIPAA'S REMEDIES AND ITS INTERPLAY WITH STATE LAWS

A. Introduction

The most important detail that should be examined when HIPAA is involved is the exposure of liability that a person obtaining or disclosing protected health information could have. The severity of the possible liability might dissuade a covered entity from making or defendant's counsel from receiving a disclosure via an ex parte interview when there is even a slight possibility that their actions are improper under HIPAA.²³³

HIPAA provides its own enforcement mechanism,²³⁴ but it is unlikely that the statutory penalties will be the exclusive source of remedies a plaintiff could have. Because HIPAA is a new set of laws, however, there has been little case law to suggest what form these other remedies might take. This section will discuss the statutory enforcement mechanisms as well as suggest some other possible remedies that are likely to be examined in coming years.

B. Sanctions Provided by HIPAA

There are at least two ways by which the federal government may enforce the provisions of HIPAA. The first set of provisions permit the Secretary of Health and Human Services to investigate²³⁵ and fine²³⁶ persons or entities violating HIPAA. The Secretary has the general power to fine a person or entity one hundred dollars per violation, up to twenty-five thousand dollars per year.²³⁷ In some other cases, the Secretary may also impose a "civil money penalty."²³⁸ While these penalties are significant, HIPAA also includes criminal penalties relating to improperly obtaining or disclosing "individually identifiable health information."²³⁹

The criminal offense includes both the action of disclosing and the action of obtaining individually identifiable health information.²⁴⁰ In the

²³³ These penalties or other forms of liability would exist even if there was an attempt to conform to HIPAA, but that attempt was actually improper. In that way, these remedies would apply to both the non-HIPAA compliant and compliant forms of ex parte interviews.

²³⁴ § 160.306.

²³⁵ § 160.306(c).

²³⁶ 42 U.S.C. § 1320d-5(a)(1) (2000).

²³⁷ *Id.*

²³⁸ *Id.* § 1320d-5(a)(2).

²³⁹ § 1320d-6(a)(2)–(3). As discussed *supra* Part II.B.3, protected health information is a subset of individually identifiable health information.

²⁴⁰ *Id.*

context of an ex parte interview, this is particularly applicable because both the covered entity and the defendant's counsel can be committing a crime under HIPAA.²⁴¹ The statute requires that the person knowingly disclose or obtain the information in order for the act to be criminal.²⁴² In nearly all cases, when the defendant's attorney conducts an ex parte interview with the covered physician, both parties will be acting knowingly and, therefore, subject to the first level of criminal punishment.

The statute provides three levels of punishment depending on the attending circumstances.²⁴³ The first level of punishment, for knowingly disclosing or obtaining individually identifiable health information, is a fine not exceeding fifty thousand dollars, imprisonment of not more than one year, or both.²⁴⁴ "[I]f the offense is committed under false pretenses," then the fine may be up to one hundred thousand dollars, imprisonment up to five years, or both.²⁴⁵ Finally, "if the offense is committed with intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm," then the fine may be up to two hundred fifty thousand dollars, imprisonment up to ten years, or both.²⁴⁶

It would be rare for the covered physician or defense counsel to disclose or obtain individually identifiable health information under false pretenses. Such an event could arise, however, when one party assures the other that it is all right to conduct the interview because they have undertaken the proper process under HIPAA to permit for a lawful disclosure when, in fact, they have not. While this scenario may exculpate the ignorant party, it would significantly increase the penalty to the other party, and it is possible that it may permit prosecution under other state or federal criminal laws.

The third level of penalty is the most severe²⁴⁷ and also the most frightening in the context of ex parte interviews and the defendant's attorney. Because the defendant's attorney will always be in the position of obtaining information with the intent to transfer information to his or her client, the attorney is always going to stand on the threshold of the most severe penalty. The issue that will have to be developed over time in case

²⁴¹ *See id.*

²⁴² *Id.*

²⁴³ *Id.* § 1320d-6(b).

²⁴⁴ *Id.* § 1320d-6(b)(1).

²⁴⁵ *Id.* § 1320d-6(b)(2).

²⁴⁶ *Id.* § 1320d-6(b)(3).

²⁴⁷ *See id.*

law is whether the fact that individually identifiable health information is obtained in the scope of the attorney's employment means that it was obtained for "commercial advantage" or "personal gain" under the statute.²⁴⁸ An argument certainly could be made that it does, and if that standard was adopted throughout the federal courts, then conducting an ex parte interview would be a federal crime with severe penalties.

On the other side of this the potential criminal liability is the liability of the client under HIPAA's criminal provision. Because it is only necessary to obtain individually identifiable health information to violate HIPAA, and not necessarily to obtain its disclosure,²⁴⁹ if counsel shares individually identifiable health information with his or her client then there is the possibility that the client too may now be subject to prosecution under HIPAA. While the "knowingly" element may be difficult in most cases, the client, like counsel, stands on the threshold of the third level penalty because they intended to obtain the "individually identifiable health information for . . . personal gain."²⁵⁰ While the penalties are significant, some attorneys will weigh their actions against the possibility of discovery and federal prosecution rather than the significance of the penalties. The possibility of prosecution, however, should be given significant weight in counsel's determination whether to conduct the interview.

The final issue to consider is whether there is an implied cause of action for individuals under HIPAA. It is the rule that private remedies and "private rights of action to enforce federal law must be created by Congress."²⁵¹ Congressional intent, and only congressional intent, determines if such a remedy and right is provided by the statute, even though the statute fails to create such a remedy or right in express terms.²⁵² Heavy weight is given to situations where Congress provides a method of enforcing a federal statute such that private rights and remedies are not favored.²⁵³ In the case of HIPAA, the government has provided administrative, civil, and criminal penalties for persons violating HIPAA.²⁵⁴ It is unlikely, therefore, that federal courts will begin

²⁴⁸ *See id.*

²⁴⁹ *See id.* § 1320d-6(a)(2).

²⁵⁰ *Id.* § 1320d-6(b)(3).

²⁵¹ *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

²⁵² *See id.*

²⁵³ *Id.* at 290.

²⁵⁴ *See supra* Part III.B.

recognizing private remedies and causes of actions from the text of HIPAA.

C. Procedural and State Substantive Remedies

Outside of any of the possible federal substantive remedies that an injured plaintiff may have, the plaintiff may seek procedural sanctions or bring an action under state common law. Presumably, a federal court would enjoy the wide range of sanctions available under Rule 37 of the Federal Rules of Civil Procedure.²⁵⁵ With respect to the possible procedural remedies, at least one court precluded a defendant from calling the physician as a witness.²⁵⁶ The court believed that this was proper in order to prevent the party from benefiting from its criminal act.²⁵⁷ This type of sanction can have damaging effects on the defendant's case.²⁵⁸ For example, if the plaintiff's treating physician was going to testify favorably to the defendant, the defendant would be unable to call him or her, and unlikely be granted the opportunity to conduct a cross-examination, given that the plaintiff would be not likely to call the physician.

Also, the defendant's attorney could find himself or herself disqualified for undertaking an improper ex parte interview.²⁵⁹ Federal district courts maintain the inherent power to disqualify attorneys who have acted in bad faith.²⁶⁰ It is real and possible, even if the attorney avoids personal criminal liability, that defense counsel could be disqualified.²⁶¹

Besides the procedural remedies examined above, the plaintiff may have a variety of actions that may be brought under state statutory or state common law. The first action that a plaintiff might consider is a tort related to the invasion of privacy. The Restatement (Second) of Torts recognizes four different causes of action based on an invasion of privacy.²⁶² Of these four, the torts of intrusion²⁶³ or unreasonable

²⁵⁵ *Croskey v. BMW of N. Am., Inc.*, No. 02-CV-73747-DT, 2005 U.S. Dist. LEXIS 3673, at *35 (E.D. Mich. Feb. 14, 2005).

²⁵⁶ *Keshecki v. St. Vincent's Med. Ctr.*, 785 N.Y.S.2d 300, 301 (Sup. Ct. 2004) (holding ex parte interviews were improper under HIPAA and the only adequate remedy for counsel's violation was to preclude any evidence obtained contrary to the safeguards provided by HIPAA).

²⁵⁷ *Id.* at 305.

²⁵⁸ *See id.*

²⁵⁹ *See, e.g., Inorganic Coatings, Inc. v. Falberg*, 926 F. Supp. 517 (E.D. Pa. 1995).

²⁶⁰ *E.g., Terrebonne, Ltd. of Ca. v. Murray*, 1 F. Supp. 2d 1050, 1054 (E.D. Cal. 1998).

²⁶¹ *See id.*

²⁶² RESTATEMENT (SECOND) OF TORTS § 652A (1977).

publicity²⁶⁴ are most likely to be utilized, depending on the state law. Another possibility would be for breach of contract where the patient was an intended third-party beneficiary of a physician's promise to an insurance company to maintain patient privacy. Further state actions may include a state version of RICO, an action under consumer protection acts, and some other types of common law actions.

D. HIPAA's Impact on State and Federal Privileges

Another important issue that has begun to be litigated is the extent of HIPAA's impact on state and federal privileges. The issue of privileges has significant importance because an ex parte interview may, in some states, be conducted based on a waiver of privilege theory.²⁶⁵ The drafters, however, intended to leave the law of privileges largely untouched.²⁶⁶ Recent decisions addressing both state and federal patient-physician privileges demonstrate, however, that HIPAA will have an impact on their operation as well.

*Crenshaw v. Mony Life Insurance Co.*²⁶⁷ addressed the issue of HIPAA's impact on the state law of privileges, which had been interpreted by the state courts to permit ex parte interviews.²⁶⁸ The court first noted that Federal Rule of Evidence 501 required the application of the state law of privilege.²⁶⁹ The court went on to say, however, that there might be a conflict between state and federal procedures, in which case the district court will have to determine which procedures should be applied to the case before it.²⁷⁰ The court held that there is a significant federal interest in protecting a patient's privacy that is greater than the state's interest in disclosure such that the disclosure procedures of HIPAA should be obeyed.²⁷¹ The result is that a state law waiver of privilege that is affected

²⁶³ *Id.* § 652B.

²⁶⁴ *Id.* § 652D.

²⁶⁵ Berens, *supra* note 3, at 1473–75.

²⁶⁶ Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82581 (Dec. 28, 2000). *But see* EEOC v. Boston Mkt. Corp., No. CV 03-4227, 2004 U.S. Dist. LEXIS 27338, at *7 (E.D.N.Y. Dec. 16, 2004) (holding that when federal rules of privilege apply, Congress intended for HIPAA to control the release of the covered information).

²⁶⁷ 318 F. Supp. 2d 1015 (S.D. Cal. 2004).

²⁶⁸ *Id.* at 1028–29.

²⁶⁹ *Id.* at 1028.

²⁷⁰ *Id.* at 1028–29.

²⁷¹ *See id.*

by a plaintiff filing litigation will not permit defense counsel to undertake an ex parte interview in violation of HIPAA's disclosure requirements.²⁷²

HIPAA's impact on federal privileges was also considered in *National Abortion Federation v. Ashcroft*,²⁷³ which held that HIPAA's disclosure procedures must be followed.²⁷⁴ The court found that whatever federal privilege may have existed, Congress's action in passing HIPAA abrogated the common law, such that HIPAA's regulations must be followed when disclosure of protected health information is sought.²⁷⁵ The court held that HIPAA alone controlled the enforceability of a subpoena.²⁷⁶

CONCLUSION

Under HIPAA, ex parte interviews are no longer permitted. The best that a defendant's attorney can hope for is to conduct an "informal HIPAA compliant" interview with the plaintiff's treating physician. Although it does not appear that Congress expressly considered ex parte interviews when enacting HIPAA, the regulations make clear that the disclosure of protected health information by means of ex parte interviews is exactly the kind of disclosure that HIPAA prevents. There can be little argument that HIPAA comprehends that kind of informal and "unprotected" information exchange, if not the very method of exchange itself, such that ex parte interviews are simply no longer proper vehicles for obtaining disclosure of protected health information.

HIPAA's regulations set forth a clear and exclusive method of obtaining protected health information, which does not include ex parte interviews. While some may argue that the regulations, on their face, do not eliminate ex parte interviews, HIPAA's detailed and comprehensive disclosure procedures leave little room for their continued viability. The requirement of obtaining either patient authorization or an express judicial order or giving "satisfactory assurances" makes it nearly impossible to conceive how defense counsel could conduct an ex parte interview of a represented patient's physician without violating HIPAA and subjecting

²⁷² Strictly speaking, this case only applies to federal courts sitting in diversity, and it does not apply to cases before a state court. However, with HIPAA's pre-emptive effect, ex parte interviews conducted during the course of state proceedings are improper if not done according to HIPAA's requirements. *See supra* Part II.D. Therefore, the end result is to modify the waiver of privilege basis for permitting ex parte interviews.

²⁷³ No. 03 Civ. 8695, 2004 U.S. Dist. LEXIS 4530 (S.D.N.Y. Mar. 19, 2004).

²⁷⁴ *Id.* at *20.

²⁷⁵ *Id.* at *19–*20.

²⁷⁶ *Id.* at *20.

themselves—and the physicians—to the imposition of both civil and criminal sanctions.

The plaintiff's counsel is unlikely to authorize the physician to speak *ex parte* and is almost certainly going to advise the physician of the potential criminal and civil penalties for participating in such an interview. In most cases, the patient's counsel would likely seek a protective order to enjoin the defense counsel from even attempting to conduct the *ex parte* interview. The defense counsel is reduced to hoping for an inactive lawyer acting on behalf of the patient and a physician bold enough to risk the potential penalties if he or she wishes to conduct an *ex parte* interview.

Even then, the defense counsel must act in accord with the regulations because the failure to obey HIPAA's disclosure regulations could result in jail, fines, civil liability, and other penalties. Even if the defense counsel could clear all the hurdles and conduct an "informal HIPAA compliant" interview, all the reasons for conducting an interview have vanished. Such interviews are no longer quick and efficient—the reality is that in some cases the defense counsel would have to bill far more hours to a client to conduct an *ex parte* interview than they might in simply giving notice of a deposition or even subpoenaing a non-treating physician.

Additionally, faced with the possible sanctions that a trial court may impose on defense counsel for conducting an *ex parte* interview, thereby violating HIPAA, it becomes more than a financial expense for the client—counsel, the client, and the physician all risk jail time, fines, and civil liability, among other penalties. HIPAA most certainly spells the end for *ex parte* interviews with the plaintiff's treating physicians.