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PERSONAL & CONFIDENTIAL

Mark S. Zemelman General Counsel

Hospital Foundation Health Plan 1 Hospital Plaza

Oakland, CA 94612

Re: Maliq DOE

Medical Record No. 10074933 Dear Mr. Zemelman:

This letter serves as a demand on DOE’s behalf for the claimed violation of his privacy rights by Hospital’s unconsented release of his medical records to a casualty carrier that contained highly confidential, and privileged, information.[1](#_bookmark0)

This letter summarizes the facts of this claim as I understand them, provides a summary of the applicable law, and offers a proposal for resolving this matter. I do hope that we can resolve this matter quickly without going beyond informal and confidential discussions.

1. FACTUAL BACKGROUND

Mr. DOE is a 40-year-old African American gay man. He is a patient of Hospital ABC and has received most of his care, since at least January 9, 2018, from Dr. John Smith as well as a number of nurse practitioners.

He has been a victim of the HIV/AIDS virus since at least 2013 when the disease was first discovered. Mr. DOE was born and raised in North Carolina to a military family. Because of this background he is extremely reluctant, and fearful, to disclose his HIV status to any member of his family, particularly his parents who are practicing Christians in the African American tradition.

1 Mr. DOE’s situation is remarkably similar to that involving Hospital entities in *Jeffrey H. v. Imai, Tadlock & Kenny, et al.,* 85 Cal.App.4th 345 (2000)

Because of his background, Mr. DOE is also painfully aware of the stigma that is tragically and hurtfully imposed on black gay men, particularly those affected with HIV. As a consequence, Mr. DOE has carefully managed this highly personal information.

Yet, from something as minor as an automobile accident Hospital has stripped from him this freedom by sharing his most guarded personal information with strangers.

On October 15, 2019, a texting-driver rear ended Mr. DOE at the toll plaza of the Bay Bridge. On that same day, he visited the Hospital Oakland Clinic with complaints of “some lower back discomfort radiating to his hamstring and neck tenderness.” For the next few weeks, Mr.

DOE received conservative treatment for these injuries at Hospital.

However, the inevitable struggle with the driver’s insurance carrier, Insurance Company Insurance, ensued. To further his claim, Mr. DOE authorized Hospital (using Hospital’s form) to release the following medical records to Insurance Company:

* Records that included the range of October 15, 2019 – December 15; 2019; and,
* Records that included “only results dealing w/vehicle injuries.”[2](#_bookmark1)

Mr. DOE did NOT check the box “HIV Test Results”; he felt assured that “this information would be excluded” from the records sent to the carrier.

Instead, Mr. DOE later discovered that Hospital “gave my life to Insurance Company”, the collision carrier, by providing the following:

* More than 300 pages of his medical records;
* A few pages of records that ranged from October 15, 2019 to December 8, 2019, contained a reference to his motor vehicle accident and the treatment provided;
* Records that included only the dozen or so references to the accident but also information about:
	+ His HIV status;
	+ His ongoing struggles with diabetes;
	+ Sexually transmitted diseases he has had;

2 See attached Authorization for Use or Disclosure of Patient Health Information

* + Mr. DOE’s sexual practices and preferences; and
	+ Extremely sensitive information about his economic situation and stresses.

While a Hospital patient Mr. DOE was confident that Hospital would respect and honor the confidentiality of this highly personal information. Indeed, he relied upon these reassurances from Hospital regarding his medical information:

ABOUT OUR RESPONSIBILITY TO PROTECT YOUR PHI

By law, we must

1. protect the privacy of your PHI;
2. tell you about your rights and our legal duties with respect to your PHI;
3. notify you if there is a breach of your unsecured PHI; and
4. tell you about our privacy practices and follow our notice currently in effect.

We take these responsibilities seriously and, have put in place administrative safeguards (such as security awareness training and policies and procedures), technical safeguards (such as encryption and passwords), and physical safeguards (such as locked areas and requiring badges) to protect your PHI and, as in the past, we will continue to take appropriate steps to safeguard the privacy of your PHI.[3](#_bookmark2)

Further:

We work to foster a culture of compliance that protects information, including that of members, patients, employees, physicians, and other information confidential to our business. Specifically around member and patient information protection, we conduct education, training and awareness programs that are required for our employees and physicians, so they understand the imperative of following the law, and the potential impact that failing to do so can have on patients, and on their employment.[4](#_bookmark3)

3 Hospital ABC, Notice of Privacy Practices, [https://healthy.HospitalABC.org/health/care/consumer/center](https://healthy.kaiserpermanente.org/health/care/consumer/center) (Viewed January 25, 2021)

4 Report: Hospital ABC Among Top Violators of HIPPA - A report by the nonprofit ProPublica shows the health provider received little consequences for repeated violations. https://patch.com/california/redlands/report-Hospital- [ABC-among-top-violators-hippa](https://patch.com/california/redlands/report-kaiser-permanente-among-top-violators-hippa)

While Insurance Company has reassured Mr. DOE that it will redact certain information, it is difficult to imagine that it will take any steps to “unring the bell” in their negotiations with him over the accident.

Apart from the impact on his claim against the carrier, this illegal disclosure was emotionally devastating to Mr. DOE. If he cannot trust his healthcare provider to shield his medical history and conditions, how can he trust the care it provides? He persuasively feels that has been betrayed by those he has entrusted with his care and fears that in the dealing with the carrier he will be ridiculed, abused and taken advantage of. Strangers, who he knows nothing about, are now the untrusted custodians of the most intimate aspects of his life.

The law, however, does provide Mr. DOE with a remedy for these violations which are now detailed.

1. PRESENT PROTECTIONS FOR CONFIDENTIALITY OF MEDICAL RECORDS AND HIV-RELATED INFORMATION[5](#_bookmark4)

[T]here are few matters of a more personal nature, and there are few decisions over which a person could have a greater desire to exercise control, than the manner in which he reveals [an AIDS] diagnosis to others. *Doe v. Coughlin*, 697 F. Supp. 1234, 1237 (N.D.N.Y. 1988).

Given the most publicized aspect of the AIDS disease, namely that it is related more closely than most diseases to sexual activity and intravenous drug use, it is difficult to argue that information about this disease is not information of the most personal kind, or that an individual would not have an interest in protecting against the dissemination of such information. *Woods v. White*, 689 F. Supp. 874, 876 (W.D. Wis. 1988)

The illegal disclosure of Mr. DOE’s medical records involves the broad release of his medical history as well as HIV-related information. Such information is protected by an array of ethical, statutory and common law principles.

5 This section is based on the article, California Law Review entitled *The Confidentiality Of HIV-Related Information: Responding To The Resurgence Of Aggressive Public Health Interventions In The Aids Epidemic*, January, 1994, Calif Law Rev 1994 Jan;82(1):111-84.

* 1. Ethical Obligations To Ensure Patient Privacy

The AMA has adopted a variety of policies and obligations to ensure that health care practitioners take every step to make sure that a patient’s privacy is protected:

*Ethical obligation.* The obligation of health care professionals to protect the privacy of their patients has a long history dating back to the Hippocratic Oath. More recently, the confidentiality obligation has been enshrined in the codes of ethics and policy pronouncements of the medical profession, including those of the American Medical Association, the American Academy of Pediatrics, the Society for Adolescent Medicine, and numerous other organizations.[6](#_bookmark5)

This mandate correctly recognizes that physicians, as should all health care providers, have an ethical obligation to ensure that the medical information about their patients is sacrosanct and must be protected from all forms of improper and unnecessary disclosures.

* 1. Federal and State Protections for Patient Confidentiality

As the overall protection of a patient’s health care, regardless of condition, the federal and state protections are clear and undisputed.

As to information about patients with HIV/AIDS, there are three interrelated levels of legal protection that safeguard the confidentiality of HIV-related information. The first in California is a state statute enacted to prevent unauthorized disclosure of HIV-related information. Second, both federal and state statutes provide broad protection against the improper disclosure about HIV-related information. State and federal constitutional privacy protections finally provide the most sweeping protections against unauthorized disclosure of HIV-related information. Finally, certain common law privacy doctrines offer possible recourse for victims of illegal disclosures made by private parties such as those made here.

1. Statutory Protection for Confidentiality of Medical Information

The Health Insurance Portability and Accountability Act protects the privacy of health information by establishing national health privacy and security standards. HIPAA requires that individually identifiable health information must be protected from unlawful access or

6 *Privacy Protection in Billing and Health Insurance Communications*, AMA journal of Ethics (Policy Forum, March 2016) (https://journalofethics.ama-assn.org/article/privacy-protection-billing-and-health-insurance- communications/2016-03) citing to Morreale MC, Stinnett AJ, Dowling EC, eds. *Policy Compendium on Confidential Health Services for Adolescents.* 2nd ed. Chapel Hill, NC: Center for Adolescent Health and the Law; 2005. [http://www.cahl.org/policy-compendium-2nd-200](http://www.cahl.org/policy-compendium-2nd-2005/)

disclosure.[7](#_bookmark6) The constraints of HIPAA are well known to Hospital but nevertheless some key points are reiterated here:

The Privacy Rule standards address the use and disclosure of individuals’ health information (known as “protected health information”) by entities subject to the Privacy Rule. These individuals and organizations are called “covered entities.” The Privacy Rule also contains standards for individuals’ rights to understand and control how their health information is used. A major goal of the Privacy Rule is to ensure that individuals’ health information is properly protected while allowing the flow of health information needed to provide and promote high quality health care and to protect the public’s health and well-being. The Privacy Rule strikes a balance that permits important uses of information while protecting the privacy of people who seek care and healing.

Further:

While the HIPAA Privacy Rule safeguards protected health information (PHI), the Security Rule protects a subset of information covered by the Privacy Rule. This subset is all individually identifiable health information a covered entity creates, receives, maintains, or transmits in electronic form. This information is called “electronic protected health information” (e-PHI). The Security Rule does not apply to PHI transmitted orally or in writing.[8](#_bookmark7)

To comply with the HIPAA Security Rule, all covered entities must do the following:

* Ensure the confidentiality, integrity, and availability of all electronic protected health information.
* Detect and safeguard against anticipated threats to the security of the information.
* Protect against anticipated impermissible uses or disclosures.
* Certify compliance by their workforce.

Clearly, the disclosure of more than 300 pages of Mr. DOE’s medical record to an insurance company is hardly in compliance with the strictures of HIPAA.

California also has enacted the Confidentiality of Medical Information Act (CMIA), designed to ensure confidential treatment of all medical information. California Civil Code Section 56 et seq. The Act covers all “medical information,” defined as “any individually

7 The law applies to health plans, health care clearinghouses, and to any health care provider who electronically transmits health information. 45 C.F.R. § 160.102, 160.103.

8 From the CDC website: <https://www.cdc.gov/phlp/publications/topic/hipaa.html>(visited January 25, 2021)

identifiable information in possession of or derived from a provider of health care regarding a patient’s medical history, mental or physical condition, or treatment.”

CMIA prohibits disclosure of any medical information without authorization from the patient. The Act also contains a number of explicit exceptions to that prohibition.

For example, a healthcare provider has discretion under certain circumstances to release medical information about a patient to other health care providers, employers, insurers, and others. Disclosure to another healthcare provider is permitted when done “for purposes of diagnosis or treatment of the patient.” A healthcare provider may pass on information to an entity responsible for making payment for health services-including insurers, employers, or government agencies-in order to determine whether payment will be made.

None of these exceptions apply here.

CMIA gives clear statutory expression to the public policy favoring confidentiality and provides a specific cause of action for unauthorized disclosure of a patient’s confidential information, outside of the specified cases of mandatory and permissive disclosure.

More generally, any recipient of medical information who makes an unauthorized disclosure may be held liable for compensatory and punitive damages of up to $3,000, attorneys’ fees of up to $1,000, and costs.

1. Statutory and Common Law Protections for HIV Status
	1. The Stigma of HIV/AIDS

HIV-specific safeguards constitute a specialized subset of more general protections for medical confidentiality. As mentioned, at both the federal and state levels, various statutes protect the confidentiality of medical information, including HIV-related information that include HIPAA and CIMA.

To understand the goals of HIV privacy and confidentiality laws, it is important to understand the societal context in which they were passed. From the very beginning of the HIV/AIDS epidemic, stigma and discrimination was rampant, based largely on the perceived infectiousness of people with this condition and pre-existing stigma against the groups most affected at the time. Individuals living with HIV have been detrimentally affected in every aspect of life, including experiencing denial and termination of employment, denial of needed medical care, loss of insurance coverage, erosion of social support networks, eviction from

homes, disruption of family relationships, social isolation, depression, unwarranted criminal prosecution, and excessive criminal sentences. [9](#_bookmark8)

At the onset of the HIV/AIDS epidemic, the stigma against people living with HIV was widespread. In 1983, Pat Buchanan—an advisor to President Nixon and a candidate for the Republican presidential nomination in 1992 and 2000—declared that “the poor homosexuals . . . have declared war upon nature, and now nature is exacting an awful retribution.” [10](#_bookmark9) Buchanan alleged that there was a liberal conspiracy of silence among doctors regarding the level of threat posed to the American public through “AIDS-carrying homosexuals.” (*Ibid.*) Conservative commentator William F. Buckley famously called for all newly diagnosed patients to be tattooed as HIV-positive, and countless other leaders called for public health departments to institute quarantine procedures and to criminalize people living with HIV who they viewed as a threat to the health of others. [11](#_bookmark10)

In 1986, political conspiracy theorist Lyndon LaRouche succeeded in adding Proposition 64, also known as the Acquired Immune Deficiency Syndromes (AIDS) Initiative, to the November ballot in California. The Proposition would have required anyone living with HIV to be reported to state authorities, barred from schools, and, if state officials deemed it appropriate, quarantined.

As recently as 2017, Georgia state representative Betty Price, the wife of former Secretary of Health and Human Services Tom Price, sought to quarantine people living with HIV, arguing that doing so now is necessary because, “in the past, [people living with HIV] died more readily, and then at that point, they are not posing a risk.” [12](#_bookmark11)

Public health officials and others working in the field understand that HIV-related stigma continues to be a key driver of the HIV/AIDS epidemic.[13](#_bookmark12) According to the National HIV/AIDS Strategy for the United States, “HIV- related stigma and discrimination are often barriers to people learning their HIV status, disclosing their status (even to family members and sexual

**9** Ending Stigma and Discrimination Against People Living with HIV (May 20, 2017) HIV.gov

<h[ttps://www.hiv.go](http://www.hiv.gov/federal-response/federal-)v/f[ederal](http://www.hiv.gov/federal-response/federal-)-[response](http://www.hiv.gov/federal-response/federal-)/f[ederal-](http://www.hiv.gov/federal-response/federal-) activities-agencies/activities-combating-hiv-stigma-and- discrimination#gref>

10 Buchanan, *Homosexuals and Retribution*, N.Y. Post (May 24, 1983).

11 Herek & Glunt, *An Epidemic of Stigma: Public Reaction to AIDS* (1988) 43 Am. Psychol. 886.

12 Tinker, *Georgia lawmaker: Can people with HIV be ‘legally’ quarantined?* CNN (Oct. 22, 2017)

<http[s://www.cnn.com/2017/](http://www.cnn.com/2017/10/20/)10/2[0/](http://www.cnn.com/2017/10/20/) health/betty-price-hiv-aids-quarantine/index.html>

13 See*, e.g.,* Vanable et al., *Impact of HIV-Related Stigma on Health Behaviors and Psychological Adjustment Among HIV-Positive Men and Women* (Sept. 2006) 10(5) AIDS Behavior 473

partners), and/or accessing medical care and treatment, which weakens their ability to protect themselves from getting or transmitting HIV and to stay healthy.”[14](#_bookmark13)

As individuals living with HIV are targeted for cultural judgments, external stigmatizing experiences foster internalized stigma and increase levels of depression, anxiety and hopelessness. [15](#_bookmark14)A study examining the impact of stigma-related experiences on people living with HIV confirmed that stigma contributes to psychological adjustment difficulties among individuals living with HIV. [16](#_bookmark15)

In the years since HIV privacy statutes were first enacted, new HIV cases have become even more concentrated in certain communities, namely members of the GBT[17](#_bookmark16) community, people of color, people who inject drugs, and lower-income people. [18](#_bookmark17)

As scientific understanding of HIV and its transmission have evolved and means of preventing transmission have become commonly understood and more readily available, shaming for acquiring a preventable disease has emerged as a new manifestation of stigma.[19](#_bookmark18)

As a Southern born African American reared by a Black Christian family, Mr. DOE is particularly vulnerable to such a stigma. His dignity as a human being has been harmed by this

14 National HIV/AIDS Strategy for the United States, *supra*; see also Vanable, *supra*.

15 Lee et al., *Internalized Stigma Among People Living with HIVAIDS* (2002) 6(4) AIDS & Behavior 309; see also Wait et al. *Literacy, Social Stigma, and HIV Medication Adherence* (2008) 23(9) J. Gen. Internal Med. 1367, 1367.

16 (Vanable, *supra*.)

17 HIV prevalence is disproportionately high in the gay, bisexual, and transgender communities. (*HIV and Gay and Bisexual Men*, CDC (Sept. 26, 2018) <https:/[/www.cdc.gov/hiv/group/msm/index.html>](http://www.cdc.gov/hiv/group/msm/index.html) [as of Oct. 1, 2018]; *HIV Among Transgender People*, CDC (Apr. 23, 2018) [<https://w](http://www.cdc.gov/hiv/group/gender/transgender/index.html)ww.cdc.[gov/hiv/group/gender/transgender/index.ht](http://www.cdc.gov/hiv/group/gender/transgender/index.html)m[l](http://www.cdc.gov/hiv/group/gender/transgender/index.html)> [as of Oct. 1, 2018].)

18 Rhodes et. al*.*, Innovations in HIV Prevention Research and Practice through Community Engagement (July 15, 2014) pp 135-160 <https://doi.org/10.1007/978-1-4939-0900-1\_7> [as of Oct. 1, 2018].) Despite its prevalence in minority communities, HIV- stigma within those communities is also prevalent. (See, *e.g.*, Smit, *HIV- related stigma within communities of gay men: A literature review* (Nov.2011) 24(4) AIDS Care. 405

<https://dx.doi.org/10.1080%2F09540121.2011.613910> [There is a “growing division between HIV-positive and HIV-negative gay men, and a fragmentation of gay communities based along lines of perceived or actual HIV status.”]; see also Rao, *Assessing Stigma among African Americans Living with HIV* (2016) 1(3) Stigma & Health 146 <https://dx.doi.org/10.1037/sah0000027> [as of Oct. 1, 2018] [noting that although “African Americans have the greatest HIV burden of all groups in the United States,” stigma among people living with HIV “[has] been shown to be higher for African Americans.”].)

19 . See, e.g., Ho & Goh, *How HIV patients construct livable identities in a shame-based culture: the case of Singapore* (2017) 12 Int. J. of Qual. Stud. on Health and Well-Being 1

<https://doi.org/10.1080/17482631.2017.1333899> [as of Oct. 1, 2018] [study in which participants stated that they would rather be diagnosed with cancer than HIV, because unlike cancer, “[HIV] is acquired”].)

violation of his rights to privacy and confidentiality. In his view this is comparable to a rape where he has been stripped of something that he has, and for which there no longer exists any boundaries. He feels that he has been forced to endure an assault on his person and his rights affecting his well-being.

A professional consultant has explained the mores of the African American community, in general, to those afflicted with HIV/AIDS: in many instances someone who has committed a homicide is embraced and welcomed home after he has completed a prison sentence. But if an African American man comes to his family with the narrative that he is gay AND infected with the AIDS virus he becomes a pariah for which there is no forgiveness. He becomes less than a person in a way that his ancestors were once considered. Who is he to trust?

1. The Right to Privacy: Constitutional and Common Law Doctrines
	1. Federal Right to Privacy

Since the Supreme Court first recognized the existence of a constitutional right to privacy in the 1965 case of *Griswold v. Connecticut*, 381 U.S. 479 (1965), it has struggled to define the appropriate parameters. This remains true in the area of informational privacy, which is especially relevant in the HIV context.

In *Whalen v. Roe*, 479 U.S. 589 (1977)), patients receiving certain regulated prescription drugs challenged a New York law requiring the names of all patients receiving these drugs to be filed with the state Health Department on the ground that the law violated their right to privacy. While the U.S. Supreme Court upheld the law, it recognized that the plaintiffs had a valid privacy interest in the medical information. Specifically, the Court drew on prior decisions acknowledging a constitutional right to privacy and found two major dimensions to the right: an interest in avoiding disclosure of personal matters and an interest in maintaining autonomy in personal decision-making. Shortly after *Whalen*, the Court reiterated its finding of a right to informational privacy in *Nixon v. Administrator of General Services* 433 U.S. 425 (1977). In *Nixon*, the Court built on the *Whalen* analysis and also imported the “legitimate expectation of privacy” standard from Fourth Amendment search and seizure decisions into a case dealing with the violation of privacy interests through disclosure of personal information. Because the former President had a “legitimate expectation of privacy” in his documents and tapes of conversations, the Court found that his right to privacy was at issue. Although in succeeding years the Court has never unambiguously held that personal information enjoys explicit constitutional protection, numerous courts have interpreted *Whalen* in particular as carving out just such a protected area.

The factors that are to be considered in deciding whether an intrusion into an individual’s privacy is justified are the type of record requested, the information it does or might contain, the

potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access. Taking each of these into account, the unconsented disclosure of Mr. DOE’s status was a clear invasion of her privacy.

The courts have found that the right to privacy extends to the medical context generally and to medical information specifically. *Whalen v. Roe* itself concerned medical information. Although the Court upheld the statute, it did so only after acknowledging that the plaintiffs had a valid privacy interest in medical information.

Accordingly, case law governing privacy confirms that disclosures of HIV-related information, like the one made here, run afoul of federal constitutional protections.

* 1. The Right to Privacy in California

Unlike the Federal Constitution, the California Constitution contains an explicit recognition of the “inalienable right” to privacy, adopted by ballot initiative in 1972: “All people are by nature free and independent and have inalienable rights. Among these are ... pursuing and obtaining safety, happiness, and privacy.” California Constitution, Article I, Section 1.

California courts have interpreted this provision as extending further than the federal right to privacy and have applied it in a wide variety of contexts.

In defining the contours of the California right to privacy, courts have used the Fourth Amendment standard that a “reasonable expectation of privacy” will trigger privacy protections and have found that “improper use of information properly obtained” may conflict with such protections. Indeed, personal control of information about one’s own affairs was a central aspect of the ballot argument supporting passage of the privacy right.

Under this standard, even someone in rightful possession of information about a patient, like Hospital may violate the constitutional privacy provision if it unjustifiably discloses that information. Hospital hardly had a compelling reason to disclose Mr. DOE’s HIV status.

California doctrine, like federal doctrine, does not establish an absolute right to privacy even when the plaintiff can prove a reasonable expectation of privacy. In California, however, courts require a showing of a compelling state interest to overcome the individual’s privacy right. In the HIV context, the State will generally meet this burden, as courts give the Statewide latitude when it acts under the banner of public health. However, the courts impose on the State the additional hurdle of proving that the disclosure is “necessary” to achieve the claimed interest.

California courts have found that the right of privacy encompasses medical information in general and HIV-related information in particular. Disclosure of information contained in an individual’s medical records violates the right to privacy, unless justified by a compelling state interest. As noted in 7 Witkin, Summary 10th (2005) Const Law, § 582, p. 967; Chapter X. Constitutional Law, 3. [§ 582] Disclosure of HIV-Positive Status.

In *Urbaniak v. Newton* (1991) 226 C.A.3d 1128, 277 C.R. 354, plaintiff disclosed his positive HIV status to a nurse following a medical examination solely for the purpose of alerting her to the need to sterilize the medical equipment used in his examination. However, his HIV status was added to the report on his examination. The report was then disseminated to his counsel, insurance companies, and ultimately to the Workers’ Compensation Appeals Board.

Given these facts the Court held that the patient had a constitutionally right to privacy as to his HIV status:

1. Under appropriate circumstances, disclosure of HIV-positive status may be entitled to protection under Cal. Const., Art. I, §1. “The condition is ordinarily associated either with sexual preference or intravenous drug uses. It ought not to be, but quite commonly is, viewed with mistrust or opprobrium. Under the test of tortious invasion of privacy, it is clearly a ‘private fact’ of which the disclosure may ‘be offensive and objectionable to a reasonable [person] of ordinary sensibilities.’ ... In the field of constitutional law, federal decisions concerning the right of privacy accorded to sexual practices, and California precedents dealing with the privacy attaching to medical records and the psychotherapist-patient relationship, provide judicial recognition of privacy interests in closely related areas of life.” (226 C.A.3d 1140.)

The court continued:

1. “The circumstances under which disclosure of HIV-positive status may give rise to a cause of action pursuant to article I, section 1, are governed by the concept of ‘improper use of information properly obtained.’ ... In the field of health care, disclosure of information about a patient constitutes ‘improper use’ when it will subvert a public interest favoring communication of confidential information by violating the patient’s reasonable expectations of privacy. We find such a public interest here in a patient’s disclosure of HIV-positive status for the purpose of alerting a health care worker to the need for safety precautions The evidence here would support the inference

that Urbaniak reasonably anticipated privacy. By enforcing such reasonable expectations of privacy, the courts will simultaneously foster needed disclosures of HIV-positive status and protect against their abuse.” (226 C.A.3d 1140.) (See *Jeffrey H. v. Imai, Tadlock & Keeney* (2000) 85 C.A.4th 345, 353, 101 C.R.2d 916 [plaintiff adequately pleaded violation of right to

privacy by alleging defendant’s disclosure of documents showing plaintiff’s HIV status in disregard for their confidentiality and use of documents in proceeding to which they had no relevance; Health & Saf.C. 120980 applies only to “health care providers responsible for receiving and keeping custody of test results in the course of medical diagnosis or treatment”]; 29 Cal.

Western L. Rev. 471 [protecting HIV confidentiality after *Urbaniak*]; 12

A.L.R. 5th 149 [state statutes or regulations expressly governing disclosure of fact that person has tested positive for HIV or AIDS]; on Health & Saf.C. 120980, imposing liability for wrongful disclosure of AIDS test results, see 5 Summary (10th), Torts, §153.)

Neither compelling state interest nor justifiable reason for the unauthorized disclosure was present in this case. A collision insurance carrier needed information to evaluate Mr.

DOE’s claim that an automobile accident injured his back.

The is no justifiable reason for Hospital to revealed three months of medical care and treatment for conditions other than for the injury particularly when such sensitive information as Mr. DOE’s HIV/AIDS status was disclosed.

1. Common Law Privacy Causes of Action

Disclosure of HIV-related information is also actionable under common law contract and tort theories. Most common law actions for violation of privacy concern disclosure of private information to the public, often through the media. Since disclosures of medical information often lack a public dimension, courts have developed specific bases for common law privacy actions in the medical context.

For example, courts have found that unauthorized disclosure of medical information by a physician may violate the physician’s duty of confidentiality or the implied contract of confidentiality between the physician and the patient. The California Supreme Court has held that the constitutional right to privacy protects individuals like Mr. DOE from the improper use of information which has been properly obtained for a specific purpose. *White v. Davis*, 13 Cal. 3d 757, 775, 120 Cal. Rptr. 94 (1975). Dr. Hospital owed Mr. DOE a duty of confidentiality.

On a more general level, disclosure of HIV-related information may give rise to a tort claim based on invasion of privacy. Four basic causes of action come under the invasion of privacy rubric, the most relevant here being public disclosure of private facts. The Restatement (Second) of Torts defines this claim as publicizing “the private life of another” in a way that “(a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.” In a leading case, the Alabama Supreme Court found such a tortious invasion of privacy when a physician disclosed information obtained during treatment to the patient’s employer.

Intrusion into an individual’s private affairs might also give rise to a tort claim. Injury to an individual’s interests in “solitude or seclusion” may be grounds for a suit when such intrusion would be “highly offensive to a reasonable person.” An HIV-related intrusion would be actionable if the defendant physically invaded part of the plaintiff’s personal realm – such as personal records, personal mail, or medical files – without authority or authorization to do so.

Unlike the “publicity” privacy tort, an “intrusion” claim does not depend on publicity; the invasion itself provides grounds for a claim. Even under common law standards, Hospital invaded part of Mr. DOE’s personal realm by disclosing his medical information without his consent.

1. Summary

What follows is a sampling of recent verdicts for the invasion of privacy such as occurred including recent Hospital privacy violations. It must be kept in mind that “none of these is able to restore the value of something that has been lost by a breach of confidentiality: the individual’s privacy” and the devastating effect on the individual. Below are some examples of settlements and verdicts resulting from the unlawful disclosure of a person’s HIV/AIDS status.

|  |  |  |
| --- | --- | --- |
| CASE | FACTS | VERDICT |
| *Doe v. Roe*, 155 Misc.2d 392(1992) | Physician disclosed patient’s HIV Status to Workers Compensation Board without patient’s consent. | Plaintiff stated claim for breach of confidentiality, invasion of privacy. General written release without more is not a release of information about HIV based upon state law. |
| *Doe v. State of California*, 1995 | Disclosure of HIV positivity by employee’s supervisor actionable. | $950,000 |
| *Dhi v. State of California* | Civil engineer’s HIV status disclosed by supervisor. | $1,333,399 |
| *Doe v. Marselle*, Connecticut | Nursing assistant who learned about plaintiff’s HIV status from her chart disclosed infection to family. | Actionable disclosure requires only intent to disclose confidential information and did not require proof of intent to cause injury |
| *Doe v. Chand*, Illinois, 99-L- 738-A | Physician disclosed patient’s HIV status without patient’s consent. | $900,000 |

|  |  |  |
| --- | --- | --- |
| *Doe v. Medlandtic Healthcare Group, Inc*, DC, 1999 | Hospital employee disclosed co-worker’s AIDS status obtained from hospital’s medical records. | $250,000 |
| *Long v. Infectious Disease Associates,* Delaware, 2013 | Staff of Infectious Disease Associates faxed plaintiff’s HIV status to plaintiff’s place of employment | $1,136,527 |
| *Winkfield v. Mt. Carmel Health,* Ohio, 2011 | Hospital worker who was Plaintiff’s ex-wife had access to Plaintiff’s hospital HIV status records and the ex-wife disclosed to another former ex-wife of Plaintiff as well as his children | $75,000 |
| *Devilla, Estate of v. Schriver,*New York, 1997 | Defendants’ comments of Plaintiff’s HIV status were overheard by inmates and guards who harassed and demeaned Plaintiff while incarcerated | $30,000, including $25,000 punitive damages |
| *Doe v. Brookpark Family Physicians, Inc.,* Ohio, 1999 | Hospital revealed HIV test result to Plaintiff’s brother | $3,650 |
| *Doe v. The Ohio State Univ. College of Dentistry,* Ohio, 2015 | Two physicians insistently inquired of the plaintiff’s HIV status and treatments when Plaintiff’s adult sister and two minor children were present | $15,000 |

Hospital is well aware of its obligations with respect to its duties to maintain patient confidentiality:

We work to foster a culture of compliance that protects information, including that of members, patients, employees, physicians, and other information confidential to our business. Specifically around member and patient information protection, we conduct education, training and awareness programs that are required for our employees and physicians, so they understand the imperative of following the law, and the potential impact that failing to do so can have on patients, and on their employment.[20](#_bookmark19)

20 Report: Hospital ABC Among Top Violators of HIPPA - A report by the nonprofit ProPublica shows the health provider received little consequences for repeated violations. https://patch.com/california/redlands/report- Hospital-ABC-among-top-violators-hippa

Unfortunately, the violation of Mr. DOE’s privacy rights is all too common for Hospital’s patients.

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| REPORT | FACTS | VERDICT |
| Report: Hospital ABC Among Top Violators of HIPPA, January 2, 2014 | Deemed among companies to have the most privacy complaints resulting in corrective-action plans or “technical assistance” being provided by the Office for Civil Rights from 2011 to 2014. | n/a |
| Hospital ABC Reports Two Security Incidents Impacting 5,000 Members,HIPAA Journal Jan 4, 2018 | An unauthorized individual gained access to a physician’s e-mail account which contained, among other information, plan members’ names, medical record numbers, and medical information. The second breach involved protected health information mailed to incorrect plan members. | Pending. |
| Breach of Medical Information Submitted to the U.S. Department of Health and Human Services, Office for Civil Rights, January 29, 2015 (Report MD019) | Due to a printing error, patients received appointment reminders containing other patients protected health information (PHI). The breach affected approximately 630 individuals. The PHI involved in the breach included names, medical record numbers, types of appointments to be scheduled, and providers' names and departments. | The CE implemented additional safeguards. OCR reviewed the CE's policies and procedures to ensure compliance with the Privacy and Security Rules. |
| Patients File Class Suit V. Hospital For Data Breach Damages, September 25, 2014; *Ginger Buck, et**al. v. Hospital ABC International,* Case No. BC531253 | A flash drive with protected health information went missing, compromising patient names and medical record numbers, in violation of California’s Confidentiality of Medical Information Act (CMIA) | Class members sought monetary damages of $1,000 per violation. |

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| Hospital Hospital Fined$250,000 for Privacy Breach in Octuplet Case, May 15, 2009 | Hospital ABC Bellflower Hospital failed to keep unauthorized employees from wrongfully accessing medical records. The violations continued even after notice of breach to the state Department of Public Health. | In addition to the $250,000 penalty, 15 employees were either terminated or resigned, 8 employees faced other disciplinary actions, and the breaching doctors were disciplined (though not terminated). |

SETTLEMENT PROPOSAL

Mr. DOE agrees to release Hospital ABC, as well as its employees and contractors, from all past and future claims for the payment of $50,000. I would also ask that Hospital ABC contract with the AIDS Legal Referral Panel so that the Hospital ABC staff can be educated about the rights of those living with HIV.

Thank you for your prompt attention to this matter.

Very truly yours,

James M. Wood

Encl:

Hospital ABC Release of Information

cc: JOHN DOE Client file