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And More!

Different Rules for Defense Counsel

By Madeleine (Maddi) Pfefferle

Navigating Discovery of Protected Health Information in Personal Injury Suits and Tips to Avoid Sanctions

When defending a suit that involves an injury, knowing the rules, and whether or not you can use a lifeline, such as "phoning a physician" or "asking the treater," is imperative to ethically representing clients.

"A lawsuit is not a parlor game; it is a solemn search for truth conducted by a court of law." *Cates v. Wilson*, 361 S.E.2d 734, 744 (N.C. 1987) (Mitchell, J., concurring). Lawsuits may not be games; but, like games, they have rules by which the players—the parties and their attorneys—must abide. Sometimes, the rules do not apply equally to all parties. One such instance is when an individual files suit claiming some sort of personal injury. In such cases, there are varying rules as to whether and how defense counsel may discover information from plaintiff's non-party treating healthcare providers. The same rules rarely apply to plaintiffs' attorneys. When defending a suit that involves an injury, knowing the rules, and whether or not you can use a lifeline, such as "phoning a physician" or "asking the treater," is imperative to ethically representing clients. Unlike a game, there can be severe consequences for violating the rules, even if in good faith, which can be detrimental to your case, your client's interests, or your legal career.

The Physician-Patient Privilege

Constraints imposed on defense counsel in personal injury claims are rooted in the physician-patient privilege, which is an expectation of a patient's privacy and the physician's legal obligation to maintain confidentiality subject to limited exceptions. The privilege is memorialized in many ways, including, at its most fundamental, in the Hippocratic Oath. In pertinent part, the Hippocratic Oath swears a physician to secrecy: "Whatever I see or hear in the lives of my patients, whether in connection with my professional practice or not, which ought not be spoken of outside, I will keep secret, as considering all such things to be private." Greek Medicine, National Library of Medicine, National Institutes of Health, History of Medicine Division, ***https://www.congress.gov/117/meeting/house/114995/documents/HHRG-117-IF02-20220719-SD007.pdf***.

In addition to the Hippocratic Oath, one of the Principles of Medical Ethics promulgated by the American Medical Association ("AMA") provides, "[a] physician shall respect the rights of patients, colleagues, and other health professionals, and shall safeguard patient confidences and privacy within the constraints of law." Code of Medical Ethics, American Medical Association, Principle IV, ***https://code-medical-ethics.ama-assn.org/principles***. Further, Opinion Statement 3.2.1 offers guidance to physicians who are disclosing health information. It advises that physicians "have an ethical obligation to preserve the confidentiality of information gathered in association with the care of the patient" to facilitate "full disclosure of sensitive personal information[.]" AMA Opinion 3.2.1, ***https://code-medical-ethics.ama-assn.org/ethics-opinions/confidentiality***. To the extent disclosures must be made, they must only provide the minimum necessary information and notify the patient when feasible. *Id*. Unless the disclosure is required by law or to prevent harm, physicians should obtain authorization to disclose. *Id*.

The privilege has also been recognized by courts in most jurisdictions. *See McCor-*

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mick v. England, 494 S.E.2d 431, 435 (S.C. Ct. App. 1997) (collecting cases recognizing the value in protecting the physician-patient privilege).

Furthermore, in 1996, the United States Congress enacted the Health Insurance Portability and Accountability Act ("HIPAA"), establishing standards of confidentiality to protect health information from being disclosed absent authorization (by patient, guardian, or order) or select emergency situations. *See* 42 U.S.C. § 1320d; 45 C.F.R. §§ 160-164 (2018). Generally, protected health information is information that "relates to the past, present, or future physical or mental health 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." 45 C.F.R 160.103; 42 U.S.C. § 1320d(4). To comply with HIPAA's provisions, covered entities must ensure confidentiality and protect against disclosures and reasonably anticipated threats to the security or integrity of such information. 45 C.F.R. § 164.306.

The Exceptions

The privacy of individually identifiable health information is governed by Subpart E. 45 C.F.R. §§ 164.500-164.535. There are two pertinent exceptions to the general prohibition of disclosing protected health information: an "authorization exception" and a "judicial or litigation exception." 45 C.F.R. §§ 164.502, 164.508, 164.512 (2018).

The "authorization exception" allows for a permissive disclosure by providers. 45 C.F.R. § 164.508(b)(1). It permits a provider to disclose otherwise protected health information if the patient authorizes its release. *Id.* To be valid, the authorization must include specific details as to the scope of the information that can be released, to whom, and by what means. *Id.* The "minimum necessary" rule does not apply to disclosures made pursuant to authorization; instead, the authorization dictates what can be disclosed. 45 C.F.R. § 164.502(b)(2)

(iii). Importantly, an authorization is subject to revocation at any time. 45 C.F.R. § 164.508(b)(5).

The "judicial or litigation exception" creates a permissive disclosure during judicial proceedings pursuant either to patient authorization or to a qualified protective order entered by the court (in the absence of specific patient authorization). 45 C.F.R. § 164.512(e). This exception recognizes what courts consistently found before HIPAA was enacted: that a patient who places his or her health condition at issue in litigation waives his or her physician-patient privilege. *See, e.g., Trans-World Investments v. Drobny*, 554 P.2d 1148 (Alaska 1976) *abrogated by Harrold-Jones v. Drury*, 422 P.3d 568, 572–73 (Alaska 2018); *Bain v. Superior Court*, 714 P.2d 824 (Ariz. 1986); *Nelson v. Lewis*, 534 A.2d 720 (N.H. 1987); *Scott v. Flynt*, 704 So.2d 998 (1996). The extent of the waiver varies by jurisdiction. *See, e.g., Cates v. Wilson*, 361 S.E.2d 734 (N.C. 1987) (finding patients waive privilege by calling a treating provider to testify, failing to object when the defense calls a treating provider to testify, testifying as to communications between the patient and physician, or voluntarily detailing the nature of injuries or treatment); *King v. Ahrens*, 798 F. Supp. 1371, 1378 (W.D. Ark. 1992), *aff'd*, 16 F.3d 265 (8th Cir. 1994) (noting that the commencement of a medical malpractice action in Arkansas results in a "limited waiver," the scope of which extends to "matters pertinent to the claims being litigated."); *Alcon v. Spicer*, 113 P.3d 735, 740–41 (Colo. 2005) (explaining that the plaintiff did not inject her physical condition into the case such that she waived her physician-patient privilege for all records for ten years before the injury; instead, plaintiff "waived the privilege for those records that relate to the cause and extent of the injuries and damages she claims[,]" limited to records pertaining to lower back pain, neck and shoulder pain, chipped tooth, and depression); *Goldstein v. Crane*, 688 S.W.3d 681 (Mo. 2024) (finding a defendant did not waive her physician-patient privilege when plaintiff attempted to place her medical condition at issue by alleging she was not medically capable of performing the surgery at issue).

These exceptions provide a foundation for how defense counsel should approach the investigation and discovery of health information in personal injury suits. Typically, counsel may investigate claims, including interviewing potential witnesses, complying with the Rules of Professional Conduct and without authorization from or notice to the claimant. Namely, Rule 4.2 prohibits counsel from communicating with a represented person absent consent or authorization. There is no similar prohibition applicable to unrepresented individuals. Further, Rule 3.4 provides that a lawyer shall not obstruct another party's access to evidence or request a non-party refrain from voluntarily giving relevant information to parties. However, in the setting of investigating or discovering health information, there are additional rules by which defense counsel must abide, and which allow a plaintiff to obstruct the defense's access to evidence. It is imperative that counsel have the appropriate authorization or order when seeking the production of records or discovery of information from health care witnesses.

Defense Counsel and Treating Providers

The analysis of whether and through what means defense counsel can communicate with treating providers assumes the privilege has been waived to the extent the jurisdiction permits. Discovery rules in most, though not all, jurisdictions do not explicitly address what procedures and or controls apply to the exchange of information between non-party treating providers and defense counsel. Instead, courts have weighed the interests in a patient's expectation of privacy and confidentiality against the general interest in fair access to non-party witnesses. Each jurisdiction sets its own rules, but generally, there are three categories: (1) *ex parte* contacts are permitted; (2) *ex parte* contacts are permitted subject to certain conditions; and (3) *ex parte* contacts are prohibited, so defense counsel is limited to utilizing formal discovery methods.

The Federal Rules of Evidence provide that courts should look to state law in determining issues of privilege. F.R.E. 501. Accordingly, counsel must review the local rules and case law before proceeding with discovery of protected health information. Regardless of the controls on the means of communication, providers must remain aware of their obligations and only disclose information to the extent the patient has waived the privilege through authorization or court order. It is often beneficial if a non-party treating provider is represented by counsel.

In formulating rules applicable in each jurisdiction, courts weigh the following factors:

Favoring *Ex Parte* Communications

- Decreased litigation costs;
- Potential for early elimination of non-essential witnesses;
- Ability for defense counsel to perform early evaluation of the case;
- Potential to negotiate settlement early;
- Ease in scheduling;
- Greater spontaneity and candor in an interview rather than deposition;
- Equity in access to non-party witnesses.

Opposing *Ex Parte* Communications

- Broad privacy interests;
- Duty of loyalty/Fiduciary Duty of providers;
- Non-party treating provider exposure to liability for breach of confidentiality;
- Risk of improper influence by defense counsel.

See, e.g., Doe v. Eli Lilly & Co., 99 F.R.D. 126 (D.D.C. 1983); *Loudon v. Mhyre*, 756 P.2d 138 (Wash. 1988); *Duquette v. Superior Court In and For Cnty. of Maricopa*, 778 P.2d 234 (Ariz. 1989); *Crist v. Moffatt,* 389 S.E.2d 41 (N.C. 1990); *Harrold-Jones v. Drury*, 422 P.3d 568, 572–73 (Alaska 2018); *Ex parte Freudenberger*, 315 So. 3d 573 (Ala. 2020).

Ex Parte Contacts Permitted

Jurisdictions that do not impose limitations on defense counsel's ability to communicate with non-party treating physicians find that the judicial exception and use of qualified protective order as dictated by HIPAA sufficiently protect patients' privacy rights while maintaining fair access to non-party witnesses.

For example, the Supreme Court of Alabama recently explained: "A physician's ability to disclose private health information in an *ex parte* correspondence is regulated by HIPAA, so disclosure of that information may be permitted pursuant to a qualified protective order that satisfies 45 C.R.F. 164.512(e)." *Ex parte Freudenberger*, 315 So. 3d 573, 579 (Ala. 2020). The trial court imposed additional conditions on defense counsel's ability to contact treating providers, including giving plaintiff ten days' notice of and an opportunity to attend *ex parte* interviews of those witnesses. *Id*. The Alabama Supreme Court held that the trial court exceeded its discretion in imposing such additional conditions, finding they were not justified by HIPAA or the Alabama Rules of Civil Procedure. *Id*.

Similarly, a Kentucky court explained, "there are no limitations on a defendant's ability **to request** an *ex parte* interview with the plaintiff's treating physician. But the physician's ability to disclose the plaintiff's protected health information in an *ex parte* correspondence is regulated by HIPAA, so disclosure may only be permitted by order of the trial court satisfying 45 C.F.R. § 164.512(e)(1)(i)." *Caldwell v. Chauvin*, 464 S.W.3d 139, 158 (Ky. 2015) (emphasis added). Accordingly, attorneys are not restricted in seeking discovery, but they are likewise not granted unfettered access as the providers must be mindful of their own ethical and legal obligations.

Jurisdictions that permit *ex parte* contacts with non-party treating physicians endorse that HIPAA requirements adequately regulate permitted disclosures. Accordingly, defense counsel may contact non-party treating providers. However, like all non-party witnesses, the providers have the option to refuse to speak with defense counsel. Given the consequences of inadvertent unauthorized disclosure, providers are likely to be even more reluctant than non-healthcare witnesses. If non-party treating providers refuse *ex parte* contact with defense counsel, formal discovery methods remain.

Conditional Contacts

Other jurisdictions, acknowledging the advantages of *ex parte* contacts while also recognizing the importance of the physician-patient privilege, opt to permit *ex parte* contacts subject to certain limitations or conditions. There is a wide variety of restrictions and procedures across the jurisdictions that have elected to establish hybrid discovery procedures.

For example, Virginia's Rules of Evidence addressing the privilege address when and for what purposes a defense attorney may contact a non-party treating physician outside of formal discovery:

> Contact between a lawyer or his agent and a nonphysician employee or agent of a practitioner of healing arts for any of the following purposes: (i) scheduling appearances, (ii) requesting a written recitation by the practitioner of handwritten records obtained by the lawyer or his agent from the practitioner, provided the request is made in writing and, if litigation is pending, a copy of the request and the practitioner's response is provided simultaneously to the patient or his attorney, (iii) obtaining information necessary to obtain service upon the practitioner in pending litigation, (iv) determining when records summoned will be provided by the practitioner or his agent, (v) determining what patient records the practitioner possesses in order to summons records in pending litigation, (vi) explaining any summons that the lawyer or his agent caused to be issued and served on the practitioner, (vii) verifying dates the practitioner treated the patient, provided that if litigation is pending the information obtained by the lawyer or his agent is promptly given, in writing, to the patient or his attorney, (viii) determining charges by the practitioner for appearance at a deposition or to testify before any tribunal or administrative body, or (ix) providing to or obtaining from the practitioner directions to a place to which he is or will be summoned to give testimony.

Va. Sup. Ct. R. 2:505(d)(3). Florida also explicitly codified permissible informal discovery. *See* Fla. Stat. Ann. § 766.106.

Other jurisdictions, rather than codifying what and how certain information may be gleaned, rely on the gatekeeping authority of the trial courts. For example, Tennessee permits ex parte contacts with non-party treating providers where defendants petition the trial court for a qualified protective order and identity the providers with whom they wish to have interview. *See Willeford v. Klepper*, 597 S.W.3d 454, 471–73 (Tenn. 2020) (interpreting the constitutionality of Tenn. Code Ann. § 29-26-121(f)). The use of the petition allows the plaintiff an opportunity to object to defense counsel conducting such *ex parte* interviews. *Id*. The burden remains on defense counsel to demonstrate that "non-discoverable health information will remain confidential if permission is granted to engage in ex parte interviews." Id. If granted, the qualified protective order must include indication that participation by the non-party treating provider is voluntary. *Id*.

New Jersey similarly relies on the trial courts to direct discovery of protected health information. *See Stempler v. Speidell*, 495 A.2d 857, 864–65 (N.J. 1985). Defense counsel must provide reasonable notice of interviews, as well as a description of the anticipated scope of the interview and "communicate with unmistakable clarity the fact that the physician's participation in an *ex parte* interview is voluntary." *Id*. This procedure provides the patient/plaintiff the opportunity to speak with the provider, address the scope of the interview, and seek a protective order if needed. *Id*.

A common theme among jurisdictions that have created their own rules is that the courts assume attorneys will make their identities and interests known to the non-party treating providers and emphasis on informing the provider that his or her participation is voluntary. Providers remain free to decline to participate in ex parte interviews, leaving the defense with formal discovery only.

Formal Discovery Only

The remaining jurisdictions limit defense counsel to utilizing formal discovery only to learn the knowledge and opinions of non-party treating providers. This comes at a cost to defense counsel, as depositions can be expensive and give plaintiffs' attorneys access to relationship building during informal, pre-deposition conversations. However, these courts limit defense counsel's contact due to concern of potential impropriety.

The remaining jurisdictions limit defense counsel to utilizing formal discovery only to learn the knowledge and opinions of non-party treating providers. This comes at a cost to defense counsel

The Arizona Supreme Court, following the Washington Supreme Court, concluded "[u]pon review of the numerous countervailing public policy considerations presented... the advantages to be gained in the informal ex parte procedure are clearly outweighed by the dangers that procedure presents to the physician-patient relationship as well as the pressure the procedure brings to bear on the physician and attorney participants." *Duquette v. Superior Court In and For Cnty. of Maricopa*, 778 P.2d 234, 277 (Ariz. 1989) (citing on *Loudon v. Mhyre*, 756 P.2d 138, 142 (1988)). The Iowa court explained:

> We do not mean to question the integrity of doctors and lawyers or to suggest that we must control discovery in order to assure their ethical conduct. We are concerned, however, with the difficulty of determining whether a particular piece of information is relevant to the claim being litigated. Placing the burden of determining relevancy on an attorney, who does not know the nature of the confidential disclosure about to be elicited, is risky. Asking the physician, untrained in the law, to assume this burden is a greater gamble and is unfair to the physician. We believe this determination is better made in a setting in which counsel for each party is present and the court is available to settle disputes.

Roosevelt Hotel Ltd. P'ship v. Sweeney, 394 N.W.2d 353, 357 (Iowa 1986). Wisconsin echoed the danger of the unknown and risks presented to both the attorneys and physicians in the setting of *ex parte* interviews. *Steinberg v. Jensen*, 534 N.W.2d 361, 371–72 (Wis. 1995) ("The questioning attorney simply cannot reasonably anticipate the physician's response and, therefore, cannot protect against the disclosure of confidential information.")

These jurisdictions find the risk that defense counsel could influence testimony or opinions greater than that of plaintiffs' counsel. The courts speculate that *ex parte* contacts could "disintegrate into a discussion of the impact of a jury's aware on a physician's professional reputation, the rising cost of malpractice insurance premiums, the notion that the treating physician might be the next person to be sued." *Crist v. Moffatt*, 389 S.E.2d 41, 47 (N.C. 1990). There is heightened concern if defense counsel has been retained by the treating physician's own insurance carrier. *Id*. These concerns, in these jurisdictions, carry more weight than the concern that a plaintiff's attorney may promise not to sue the treating physician depending on what he or she has to say.

In concluding that defense counsel shall be limited to formal discovery methods, the North Carolina Supreme Court reasoned "that considerations of patient privacy, the confidential relationship between doctor and patient, the adequacy of formal discovery devices, and the untenable position in which *ex parte* contacts place the nonparty treating physician supersede defendant's interest in a less expensive and more convenient method of discovery." *Crist*, 389 S.E.2d at 47.

Similarly, the Supreme Court of Alaska recently revisited the issue of *ex parte* contacts by defense counsel. *Harrold-Jones v. Drury*, 422 P.3d 568 (Alaska 2018). It concluded that, given the cultural shift in views on medical privacy, defense counsel should be limited to formal discovery methods absent voluntary agreement by the patient or court order in rare and extraordinary circumstances. *Id*. at 569. It concluded the trial court erred in compelling the release of plaintiff's complete medical records, including psychiatric treatment, psychological treatment, and drug and alcohol treatment, when she was seeking compensation for alleged malpractice in treatment of a clavicle fracture. *Id*. at 577.

Jurisdictions prohibiting *ex parte* contacts impose a significant burden on the defense and subject defense counsel to significant consequences if they do not comply with the rules.

Potential Consequences

If defense counsel violates the rules and has improper *ex parte* contact with non-party treating providers, there are varying consequences, ranging in severity:

- **Disclose Notes/Work Product:** The North Carolina Supreme Court determined that the remedy to the *ex parte* contact, which was in good faith but improper, was for defense counsel to fully disclose the substance of his communication, over the attorney work product objection. *Crist v. Moffatt*, 389 S.E.2d 41 (N.C. 1990).
- **Impose Monetary Sanction, Potentially Attorney Fees:** An Arkansas Court imposed a monetary fine and imposed the cost of deposing the provider for defense counsel's violation of its prohibition against ex parte contacts. *Harlan v. Lewis*, 141 F.R.D. 107 (E.D. Ark. 1992); *see also Ritter v. Rush-Presbyterian-St. Luke's Med. Ctr.,* 532 N.E.2d 327, 329 (Ill. App. Ct. 1988).
- **Exclude Provider Testimony:** The Illinois Court of Appeals prohibited defense counsel from calling providers with whom they had ex parte contacts and could offer testimony in support of the defense's theory of the case. *Karsten v. McCray*, 509 N.E.2d 1376 (Ill. App. Ct. 1987); *see also Yates v. El-Deiry*, 513 N.E.2d 198 (Ill. App. Ct. 1987); *see also*

Scott v. Flynt, 704 So. 2d 998, 1007 (Miss. 1996).

• **Grant New Trial:** The Supreme Court of Arkansas granted plaintiff a new trial where an attorney had continued *ex parte* contact with a treating physician the attorney represented during the pre-suit investigation, but was not named as party when the lawsuit was filed. *Bulsara v. Watkins*, 387 S.W.3d 165 (Ark. 2012).

• **Sanction Attorney:** The Illinois Court of Appeals held an attorney in contempt for having *ex parte* contacts with treating physicians. *Yates v. El-Deiry*, 513 N.E.2d 198 (Ill. App. Ct. 1987); *see also Merits v. Oh*, 289 A.3d 532, 537 (2022), *aff'd*, 317 A.3d 529 (Pa. 2024) (considering whether to disqualify the attorney due to conflict created by having *ex parte* contacts).

• **Cause of Action Against Provider:** The *ex parte* contact could result in the patient having a cause of action against the non-party provider for breach of confidentiality, loyalty, and/or fiduciary duty. *See Byrne v. Avery Ctr. for Obstetrics & Gynecology*, P.C., 175 A.3d 1, 12 (Conn. 2018) (collecting cases).

• **Cause of Action Against Attorney:** West Virginia concluded that, in certain circumstances, patients may have viable causes of action against third parties who induce treating providers to breach their fiduciary relationship and disclose confidential information. *Morris v. Consolidation Coal Co.*, 446 S.E.2d 648 (W. Va. 1994). To state such a claim, the patient must establish:

(1) the third party knew or reasonably should have known of the existence of the physician-patient relationship;
(2) the third party intended to induce the physician to wrongfully disclose information about the patient or the third party should have reasonably anticipated that his actions would induce the physician to wrongfully disclose such information;
(3) the third party did not reasonably believe that the physician could disclose that information to the third party without violating the duty of confidentiality that the physician owed the patient; and
(4) the physician wrongfully divulges confidential information to the third party. *Morris*, 446 S.E.2d at 657.

In determining the remedy, some courts consider whether the plaintiff was prejudiced by the improper *ex parte* contact. *See, e.g., Smith v. Orthopedics Intern.*, 244 P.3d 939 (Wash. 2010) (denying plaintiff's motion for new trial where no prejudice or harm resulted from the improper contact). Regardless of the analysis the court undertakes, or the sanction imposed, defense counsel should be mindful to abide by local rules to avoid costly consequences.

Conclusion

In most jurisdictions, litigating claims where protected health information is relevant can be tricky. Defense counsel must be aware of the rules to avoid sanctions that could result in disqualification of a helpful witness, disqualification as counsel, and other monetary and professional consequences. The rules do not equally apply to plaintiffs or their counsel, and some counsel may try to use the physician-patient privilege offensively.

Tips to Avoid Sanctions

1. *Know the Rules:* The best way to avoid sanctions is by knowing the local rules and abiding by them. Look to general statutes, the rules of civil procedure, the rules of evidence, medico-legal guidelines, and case law.
2. *Seek Authorization:* Request the plaintiff execute an authorization for release of information and move for entry of a Qualified Protective Order.
3. *Clearly Communicate:* If the local rules permit contacts with treating providers, be sure to clearly identify who you are and what your role is. In many jurisdictions, you must also advise the provider that his or her participation is voluntary.
4. *Be Reasonable:* Think about what information is relevant to the claims being litigated. While a plaintiff's medical records are a wealth of information, prior obstetrical records are not likely highly relevant to a claim seeking damages for broken bones allegedly caused by a slip-and-fall. Conversely, mental health records are highly relevant when a plaintiff is claiming emotional distress. As with other discovery requests and disputes, choose your battles wisely.