A Practitioner's Guide to the Limits HIPAA Places on Ex Parte Interviews of Michigan Medical Care Providers Related Issues Concerning Discovery of Confidential Information

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On February 14, 2005, Magistrate Judge Paul J. Komives of the United States District Court, Eastern District of Michigan, Southern Division, entered a Memorandum/Opinion and Order, which will affect not only any lawyer who seeks protective health information from a litigant, but also medical care providers who may be asked to provide the information. The decision directly impacts and significantly changes an informal discovery device for obtaining medical information that Michigan lawyers have utilized in the past through *ex parte* interviews with medical care providers.

Medical Confidentiality in Michigan: A General Overview

We all accept the general proposition that a person has the right to receive medical care and treatment in confidence. Such a principle encourages free discussions between doctors and their patients. However, while there is an ethical and possibly constitutional basis for the physician/privilege, it did not exist in common law. It is purely statutory and in Michigan is embraced in MCL 600.2157, MSA 27A.2157. In addition to the general physician/patient privilege statute, there are numerous other related statutes. In essence, they all tend toward the purpose of assuring a person the right of receiving medical care and treatment in confidence.

Issues regarding medical confidentiality often arise in litigation. For example, when one sues for personal injury, medical conditions are often at issue. Consequently, defendants frequently seek a plaintiff's medical information to better evaluate damage and causation claims. That medical information is most commonly sought from those medical professionals providing relevant care and treatment. However, both those seeking the information, as well as those in possession of the information, had to assure that proper steps were taken in obtaining and revealing that information so as to avoid violating a patient's physician/patient confidentiality.

In Michigan, the scope of the physician/patient privilege is governed by statute and is very wide-ranging. It was designed to forbid the disclosure of information a physician acquires in attending to a patient and to protect that physician/patient relationship. Even the unauthorized identification of a patient's name who is being treated can violate that confidentiality. It also protects medical records from unauthorized disclosure even when patients' names are redacted. Additionally, the mere fact that a patient dies does not automatically mean that medical information is available, because it is the patient who owns the privilege and that privilege, in most cases, survives death.

Obtaining Medical Information Prior To HIPAA

Prior to HIPAA, there were several ways litigants could obtain an opposing party's medical information. The simplest method was by having a patient sign a document, which was commonly called a medical records release. It had no specific form, but generally set forth a statement in which the patient waived the privilege, allowing a medical practitioner or medical facility to release specified relevant information, usually medical records.

Additionally, when a person filed a lawsuit for personal injury, the general rule was that if it raised an issue of medical, physical or psychological conditions, the patient would be required to waive the physician/patient privilege or be precluded from raising any of those issues at time of trial. Most plaintiffs knew about these restrictions and would not assert their privilege and would allow defendants to obtain medical information by way of authorization or release. To do otherwise jeopardized their ability to recover damages and undercut their entire claim.

One approach often used by defense attorneys to obtain medical information would be to send an initial set of interrogatories asking whether or not the plaintiff waived his/her physician/patient privilege. Additionally, they would seek execution of an appropriate medical authorization or release and include that with the interrogatories to be returned with the answers. Another approach was to contact a medical record copy service and provide them with the name of the patient and have that service supply an authorization to the patient for release of the medical records. That copy service would then obtain and copy the information sought and send it to the requesting litigant.

Some attorneys would simply try to use subpoenas to get medical records. However, most soon realized that a simple subpoena *duces tecum* for discovery purposes was insufficient without a release or authorization.

Obtaining Information Directly From the Individual Heathcare Professional

In addition to the above, attorneys often wished to obtain information directly from specific health care providers. One way of doing this was simply to take that person's deposition. However, taking unrestricted depositions without having a sense of what a witness may say is an uncertain proposition, at best. An alternative was to take a court-ordered discovery-only deposition. This kind of deposition allows an attorney a wide latitude of questioning without the testimony necessarily coming back in a negative fashion at time of trial. However, discovery-only depositions were not only expensive and time consuming, but also often prematurely exposed defense strategy. Additionally, there is no guarantee the court will agree to an order allowing them.

Consequently, attorneys often utilized another approach for informal discovery with healthcare providers - the *ex parte* interview. Simply put, once the attorney obtained an appropriate medical release and submitted it to the medical care provider, the attorney would ask the medical care provider to meet, on an informal basis, to discuss the patient's medical care and related issues. These *ex parte* interviews were generally quick and relatively inexpensive to take. Additionally, they often provide valuable information, not contained in the medical records. This information then could then be memorialized and/or elicited in more formal ways. Some attorneys would merely take a deposition of the health professional after the ex parte interview, secure in the knowledge that there was some certainty in knowing how the witness would answer questions. Others might also ask a medical care provider to confirm statements made in an ex parte interview by an affidavit, which could then be utilized either at future depositions, at trial, in motions for summary disposition, as well as in case-evaluation hearings.

Ex parte interviews of medical care providers had long offended the plaintiff's bar. Indeed, the battle raged for some time until the Michigan Supreme Court, in *Domako v Rowe*, 438 Mich 347 (1991), held that *ex parte* interviews with medical care professionals were allowable in cases where the physician/patient privilege had been waived by a lack of timely assertion of the physician/patient privilege. The court did not address the issue in relation to an executed authorization to release medical information or the specifics of what constituted an appropriate release/authorization in order to allow *ex parte* interviews. However, a reasonable conclusion under the holding of *Domako* was that when an authorization was executed, it was tantamount to a waiver of the privilege and *ex parte* interviews were appropriate.

Discovery of Medical Information Subsequent to HIPAA

On Aug. 21, 1996, Congress enacted HIPAA. The Privacy Rule, compliance with which was mandated effective April 14, 2003, is that portion of HIPAA which has had the greatest impact on discovery of medical information. Simply viewed, this rule is designed to provide a national framework to provide a minimum level of privacy protection to a wide range of an individual's medical and medically related information, referred to as "Protected Health Information (PHI)." The rule sets forth the means by which PHI may be used or disclosed. As with Michigan law, the rule sets forth how PHI may be used or disclosed either with or without the authorization of a patient. The rules mandate disclosure of PHI to an individual pursuant to an appropriate request. The rule also provides for PHI to be produced in judicial or administrative proceedings either by subpoena or court order, but only when specific conditions exist and only when specific procedures are undertaken to obtain the subpoena or order.

Of particular importance is the fact that the federal rules preempt state law where the state law is contrary to the federal law and where the federal law is more stringent than state law. Generally, therefore, if one cannot comply with both a state and related federal requirement, or the state law stands in the way or is an obstacle to the accomplishment, execution or purpose of the federal rule, then the federal rule prevails. Additionally, if a federal rule provides greater protection to an individual's PHI, or enables the individual greater control over the PHI, the federal rule prevails. It is this element of preemption, which has caused the greatest amount of controversy in Michigan regarding discovery of PHI during litigation.

The HIPAA Complaint Authorization

As with prior Michigan state law, the easiest way to obtain the medical records of a litigant is with an appropriate authorization to release that material. However, HIPAA mandates the specifics of what is needed for an authorization to be viable. There are seven required core elements, including: a specific and meaningful description of the PHI to be used/disclosed; identification of the entity authorized to make the requested use/disclosure of the PHI; identification of the authorized recipient(s) or class of recipient(s) of the PHI; description of each purpose or use of the disclosure/use; an expiration date or event; the signature of the person authorized to sign for the use/disclosure; and a description of the authorization if signed by a personal representative or similar agent.

The authorization also needs three statements: information regarding the right to revoke and how to do it; information related to the ability or inability to restrict certain activities for failure to sign authorization under certain circumstances; and a warning that with disclosure, there is a risk of unprotected re-disclosure. Recently, an approved State Court Administrative Office (SCAO) authorization has been made available for the release of medical information, which is HIPAA compliant. All one needs to do is complete the information for each entity and have the patient sign it.

In an authorization drafted for use by our firm prior to this new SCAO form, we attempted to include in the form a demand for "any and all protected health information." This was done in an attempt to be as broad as possible in order to get the kind of information we wanted and still be compliant with the

demands of the rules. Additionally, it was designed with the specific intention of being able to show any medical care provider that the patient had waived any privilege to any PHI, including *ex parte* interviews. Armed with this authorization, together with the statutes and case law of Michigan, we believed we had a good faith argument that the medical care provider could be assured that in providing an *ex parte* interview, he/she would not be violating HIPAA or Michigan law. Until the recent *Croskey* opinion, this approach was generally successful.

The *Croskey* Opinion and its Application to Ex Parte Interviews

The *Croskey* opinion arose in the contest of an emergency motion in which the defendant sought an order staying the plaintiff's *de bene esse* deposition of one of the plaintiff's treating physicians and to allow defense counsel to meet *ex parte* with all of the plaintiff's healthcare providers and treating physicians. The issue boiled down to whether federal law, under HIPAA, preempted Michigan law and precluded the defendant from engaging the plaintiff's healthcare providers in *ex parte* interviews. The court held federal law was more stringent than Michigan law and did, therefore, preempt Michigan law, but also held that *ex parte* interviews could be conducted under certain circumstances.

In analyzing this issue, the court looked at MCLA 600.2157 as the basis for "involuntary" waiver of the physician/patient privilege. The court viewed this statute as forcing disclosure of medical information of a patient without a court order or the patient's consent. The court then looked to 45 CFR §164.512(e)(1) as the basis for disclosures for which an authorization or opportunity to agree or object is not required and discovered that the only means for such forced disclosure is pursuant to a court order or a subpoena containing what is called "satisfactory assurances." The court then jumped to the conclusion that while Michigan law allows *ex parte* interviews, HIPAA does not permit such informal discovery unless the patient consents, and that only formal discovery requests appear to satisfy the requirements of 45 CFR §164.512(e). The court opined the federal rule is more stringent than Michigan law because it gives the patient more control over his/her medical information. Consequently, the court concluded federal law trumps Michigan law on this issue and HIPAA does not permit informal discovery.

The court did not completely ignored the fact that pursuant to 45 CFR §164.502(a)(1) & §164.502(a)(2) a covered entity is mandated to comply with the uses/disclosures a patient authorizes pursuant to an appropriate HIPAA compliant authorization set forth in 45 CFR §164.508. However, in spite of the fact that nowhere in HIPAA is there any reference to *ex parte* interviews as an informal discovery method, or any need to notify an opposing counsel of these interviews, the court concluded HIPAA has a strong distaste for informal discovery. In light of this unsupported view, the court held that if a patient signs an appropriate authorization, which specifically allows *ex parte* interviews of healthcare professionals, and notice is given to a plaintiff's counsel of the desire to take such *ex parte* interviews, and notice is given to the healthcare provider that they are not required to engage in such an interview, then such interviews may take place.

Alternative Discovery Methods Under *Croskey*

As an alternative to obtaining medical information pursuant to an authorization, one may proceed by complying with 45 CFR §164.512(e) and, in this regard, the court appears to be on solid ground. There are basically three alternative methods to obtain PHI outside of obtaining it pursuant to an appropriate authorization. Those three methods are: (1) Obtain a court order as set forth in 45 CFR §164.512(e)(1)(i); (2) Send a subpoena or discovery request where a plaintiff has been given notice pursuant to 45 CFR §164.512(e)(1)(ii)(A); or (3) Send a subpoena or discovery request where reasonable effort has been made to obtain a qualified protective order pursuant to 45 CFR §164.512(e)(1)(ii)(B). Even with a qualified protective order granting *ex parte* interviews, however, the court held that in addition, as with the authorizations allowing *ex parte* interviews, the defense counsel must give the plaintiff's counsel

notice of the *ex parte* interviews and must inform the healthcare providers that they are not required to engage in such an interview.

Future Approaches to PHI Discovery

In general personal injury litigation, it would appear there are several things defense counsel may consider in attempts to obtain PHI.

First, they may use initial interrogatories to seek the identity of any and all healthcare professionals who have ever been involved in rendering any care, treatment and/or evaluation of the plaintiff. They may also include a specific interrogatory asking the plaintiff whether or not he/she waives the privilege regarding any and all medical care, evaluation and/or treatment that may be relevant or lead to relevant information. If they do, that provides support to the argument the plaintiff has not asserted any physician/patient privilege and is voluntarily waiving that privilege. Also, it may become standard practice to enclose multiple copies of HIPAA compliant authorizations, completely filled out with all necessary specifics, including a request for "any and all medical records," leaving the space for the covered entity blank to be filled out by the plaintiff.

As a separate authorization is needed for each covered entity, an authorization will need the specific name of the covered entity from which the PHI is being sought. An authorization containing generic names such as "any and all medical care providers for plaintiff" will not be sufficient and is inappropriate. A demand for *ex parte* interviews may be included as part of the authorization, together with notice to the medical care professional that he/she need not engage in such an interview.

However, the author is of the opinion that this will not be very common because such a request will merely raise a red flag with some less sophisticated counsel who will then start looking for ways to preclude such interviews. Be advised that defense counsel has received authorizations returned with language added to them specifically limiting the information to medical records and precluding any *ex parte* interviews. The author is of the opinion that a plaintiff is entirely within his/her rights to do this in light of HIPAA. Simply put, such a limitation does not preclude any defendant from getting the PHI, so the plaintiff has not asserted the privilege, thereby, limiting the ability to raise the issue at trial. It merely limits the means by which the information can be obtained.

Upon receipt, defense counsel usually reviews the records as quickly as possible. They will be looking at information relevant to issues in the lawsuit, which may either help or hinder their position. They will then decide from which medical care provider it may be necessary to get additional and/or supportive information. Under current legal constraints, the usual approach would be by deposition. While depositions have been, and will remain, a method of obtaining sworn testimony from witnesses to be used for many purposes, including providing testimony in place of the witness at trial when the witness may not be available, it is anticipated that "discovery-only depositions" will become increasingly popular.

"Discovery-only" depositions are depositions generally taken for the sole purpose of discovery and impeachment at time of trial. This may require additional time and expense, but without this method, defense counsel will not be on equal footing with plaintiff's counsel. The "discovery-only" deposition is as close to an *ex parte* interview as one can get, because most plaintiff's counsel will want to be present even if one does get a court order for an *ex parte* interview. Court orders requesting ex parte interviews are always an alternative, but depositions may still be required even with all the effort of getting the court order.

The practitioner should be aware plaintiff's counsel does not have to jump through all of these hoops to discover his/her client's PHI. They simply get an appropriate authorization, get the medical records, and easily obtain a client's permission to confer with any medical care providers *ex parte*. If this sequence of

events happens, plaintiff's counsel knows which care provider's testimony would be important at trial and which are not. The practitioner needs to appreciate that while he/she may be required to provide medical records pursuant to an appropriate authorization and state law, there is no mandated requirement that the practitioner engage in **any** *ex parte* interview, whether with plaintiff's counsel or defense counsel. While one can be compelled to testify by subpoena or court order, *ex parte* interviews are considered to be voluntary, even if authorized by the patient. Additionally, while fact witness may be compelled to testify and, by statute, are entitled a witness fee, it is very modest. Conversely, *ex parte* interviews, being voluntary, may be subject to compensating a physician for his/her time.

Some Related Considerations

Effective April 1, 2004, PA 47, MCL 333.26.261 *et seq.*, entitled The Medical Records Access Act of 2004, took effect. Among other things, this act is designed to regulate access to and disclosure of medical records, defines medical records and healthcare providers, as well as establishes fees that may be charged for the production of medical records. The act is short and is worth reading. Of particular importance to lawyers, however, is how this act addresses the issue of which medical records a healthcare provider decides to send pursuant to an authorization to release "any and all medical records" and how much they can charge. Many times, an attorney will take the deposition of a doctor and during the deposition, the doctor will have a thick stack of documents he/she contends constitute the medical records. Nonetheless, what that doctor provided was only a fraction of the records. The usual response is that the doctor could only provide records produced by that doctor because there was no release for records provided by other care providers. The Medical Records Access Act of 2004, however, defines "medical record" very broadly to include:

> …information oral or recorded in any form or medium that pertains to a patient's healthcare, medical history, diagnosis, prognosis, or medical condition and that is maintained by a healthcare provider or health facility in the process of the patient's health(emphasis added).

With an appropriate authorization seeking "any and all medical records," the author would suggest that the physician is mandated, under most circumstances, to release the entire stack of records, even those produced by other care providers. Consider not only the definition of medical records in this act, but also the language of the patient's authorization that calls for the release of "any and all medical records." Another issue that has arisen is whether defense counsel can speak with employed physicians of a hospital, which is a party to a lawsuit. While there is no specific provision in the regulations covering this issue, the author believes *ex parte* interviews with these healthcare providers are appropriate under HIPAA.

To support that position, consider that HIPAA classifies a hospital as a "covered entity." Covered entities do not need authorizations to use PHI for treatment, payment or operations. Operations include activities like quality assessment, reviewing competency or qualifications of healthcare professionals and conducting and arranging for medical review and legal services. As such, the author does not believe one is precluded from speaking to healthcare professionals in the employ of a hospital who were involved in the care and treatment of the patient at that facility.

Also, the hospital owns and retains control over the medical record, itself, and already has access to the information contained in it. It would seem to be an absurdity to argue that the hospital could not speak to the hospital owns and retains control over the medical record, itself, and already has access to the information contained in it. It would seem to be an absurdity to argue that the hospital could not speak to one of its employees who created the hospital record to discuss aspects of the care reflected in the record and for which the hospital is being held responsible.

Furthermore, one physician may share a patient's PHI with another physician, such as a retained specialist also involved in the care and treatment of the patient, without authorization. The Department of Health and Human Services, in response to frequently asked questions, responded, Dec. 3, 2002, that if the rules allow covered entities to share PHI with one another, then "business associates" of those covered entities may do the same.

As defense counsel for hospitals and attorneys representing them in medical malpractice claims are considered business associates, they should be able to share information between one another without any authorization with the same freedom as do their respective covered entities. While this same rationale would seem to apply to private attending physicians who treated the patient at the hospital, it is unclear to what extent it also extends to these physicians for information that is obtained prior to or after the hospitalization in question. It is even less clear if the same rationale would apply to other covered entities that were ever involved with the patient.

The *Croskey* opinion does not deal with one covered entity seeking *ex parte* interviews with another. Rather, it deals with a non-medical party seeking *ex parte* interviews with covered entities. As such, perhaps a distinction can be made that because the defendant in *Croskey* was not able to exchange PHI with covered entities prior to the lawsuit, they could not do so after it was commenced. With medical defendants, however, the issue is different. Until the issue is clarified, it may be a wise approach to limit *ex parte* interviews to those physicians employed by a hospital and involved in the care at issue.

Conclusion

While HIPAA does not preclude defense counsel from engaging in *ex parte* interviews with a plaintiff's treating physicians, the *Croskey* opinion interpreting HIPAA, as well as similar opinions in other jurisdictions, does significantly change the way Michigan attorneys will be able to engage in such discovery in the future. Consequently, alternative forms of discovery may well become the norm for the defense bar.

The requirements the *Croskey* opinion places on obtaining these kinds of interviews are burdensome, and place defense counsel on an uneven footing by denying the same advantage of obtaining information from medical care providers as a plaintiff's counsel has. Nevertheless, it would behoove defense counsel to follow the requirements set forth in the *Croskey* opinion if *ex parte* interviews are sought. To do otherwise would expose the healthcare provider to potential sanctions for violating HIPAA, as well as the defense counsel for potential ethics violations. It also behooves the practitioner to be aware of what the parameters are of appropriate discovery of PHI to protect his/her patient's rights, to avoid potential sanctions and/or adverse legal consequences and to reinforce his/her rights and obligations.

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