

HIPAA Does Not Prohibit Ex Parte Defense Interviews

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The Michigan Supreme Court recently held that in medical malpractice cases, *ex parte* interviews by defense counsel with treating physicians, which are permitted under Michigan law, are also consistent with the Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d *et seq.*, as long as reasonable efforts have been made to secure a qualified protective order that meets HIPAA's regulatory requirements.

In *Holman v Rasak*, --- Mich --- (July 14, 2010), the plaintiff refused to waive confidentiality rights under HIPAA. The plaintiff did sign a waiver that permitted the release of medical records, but refused to sign a release pertaining to oral communications. The defendant sought a protective order to allow an *ex parte* (on behalf of one party only) interview with the plaintiff's treating physician, but the trial court denied the motion, holding that the HIPAA provision concerning protective orders pertained to documentary evidence only and that HIPAA did not authorize *ex parte* oral interviews.

The defendant appealed and the Michigan Court of Appeals reversed the trial court, holding that *ex parte* interviews were permissible under HIPAA, if a qualified protective order consistent with federal regulations was first put in place. The plaintiff sought leave to appeal with the Michigan Supreme Court, which was granted, and the Supreme Court affirmed the appellate court.

The majority began its analysis by citing to *Domako v Rowe*, 438 Mich 347 (1991), for the proposition that, under Michigan law, defense attorneys in a medical malpractice case are allowed to seek an *ex parte* interview with the plaintiff's treating physician once the plaintiff waives the physician-patient privilege.

The court then noted that subsequent to its decision in *Domako*, the Michigan Legislature enacted MCL 600.2912f, which provides that an attorney or representative of a defendant in a medical malpractice case may communicate with persons or entities for whom the plaintiff has waived the physician-patient privilege "in order to obtain all information relevant to the subject matter of the claim or action and to prepare the person's or entity's defense."

HIPAA's general rule regarding the disclosure of an individual's protected health information is that a covered entity may not disclose such information without written authorization from the individual, but several exceptions to this rule exist permitting the disclosure without such authorization, including judicial proceedings. Under HIPAA, covered entities are permitted to disclose such information upon an order of a court or in response to a "subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court," so long as the covered entity has received satisfactory assurance

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from the requesting party that reasonable efforts have been made to seek a qualified protective order that meets the requirements of 45 CFR 164.512(e)(1)(v).

A qualified protective order prohibits the parties from using or disclosing protected information for any purpose other than the litigation for which it was requested and requires the requesting party to return or destroy the information at the conclusion of the litigation.

The Supreme Court held that Michigan law permitting *ex parte* interviews was not contrary to HIPAA, and, therefore, not preempted, in that a party could comply with both Michigan law and HIPAA. The court noted that *ex parte* interviews are not specifically precluded by HIPAA and defense counsel could ensure that any disclosure of protected health information by the covered entity was compliant by making reasonable efforts to obtain a qualified protective order.

The court rejected the plaintiff's argument that HIPAA does not authorize informal discovery and its provision regarding a qualified protective order applies only to formal discovery, holding that an *ex parte* interview was an "other lawful process" within the meaning of HIPAA regulations. 45 CFR 164.512(e)(1)(ii).

The court held that "as long as '[t]he covered entity receives satisfactory assurance . . . that reasonable efforts have been made . . . to secure a qualified protective order' that meets the requirements of subsection (e)(1)(v), disclosure of protected health information by a covered entity during an *ex parte* interview is consistent with both Michigan law and HIPAA."

The court also rejected the plaintiff's argument that *ex parte* interviews were not properly the subject of a qualified protective order because the information obtained in such an interview could not be returned or destroyed at the end of the litigation and that HIPAA only contemplated documentary evidence. The court responded that HIPAA made no distinction between types of information, that HIPAA explicitly included oral communication as health information, and that *ex parte* interviews could involve the use of e-mail or an exchange of documents that could be destroyed or returned.

Significantly, the opinion states that HIPAA does not *require* a trial court to issue a protective order and, therefore, the trial court retains its discretion to issue such orders under the court rules (under MCR 2.302(C), "good cause" must be shown for a court to issue a protective order of any type).

Further, a trial court may craft conditions on *ex parte* interviews (while the court cited no examples, a condition commonly imposed by some trial courts is that defense counsel give notice to plaintiff's counsel of any *ex parte* interviews). However, a trial court cannot deny a motion for a protective order on the basis that HIPAA preempts Michigan law (the chief argument made by plaintiffs opposing such protective orders).

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Justice Hathaway's dissent contends that under the majority's analysis, even where defense counsel's motion for a protective order is denied, an *ex parte* interview could proceed so long as "reasonable efforts" are made to obtain the order.

The "reasonable efforts" language of the regulations discussed by the majority, and highlighted by Justice Hathaway in her dissent, leaves open the question of whether a qualified protective order is actually necessary to allow defense counsel to conduct *ex parte* interviews. The majority offers no definition or guidance as to what constitutes "reasonable efforts." Therefore, as a practical matter, since it is unlikely a treating physician would conduct such an interview without first having been supplied a qualified protective order, obtaining such orders will still be prudent.

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