Ex Parte Communications Between Defense Counsel and Treating Physicians

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Plaintiffs’ attorneys often argue that ex parte meetings between treating physicians and defense counsel are now impermissible, but HIPAA might not be the weapon your opponents make it out to be.

As a matter of course, before developing case themes, determining the feasibility of early settlement offers, or evaluating potential liability, attorneys must investigate the factual basis for claims against their clients. As part of this standard investigation, defense counsel contacts witnesses with firsthand knowledge of information related to a plaintiff’s claims. The attorney sets up interviews with those witnesses to review the witnesses’ observations and opinions. The information gained through those interviews is crucial to developing themes and strategies for defending a case.

For decades, many jurisdictions permitted defense counsel to use the same informal discovery process to obtain information from a plaintiff’s treating health care professionals as from any other witnesses. In personal injury cases, the health care professionals who treat a plaintiff are necessarily key witnesses. They may have information on a plaintiff’s condition before and after an incident leading to a complaint that will help an attorney to evaluate causation and damages. Treating physicians may have medical opinions on the cause of a plaintiff’s injury and whether the injury is related to an incident that led to a complaint. In medical malpractice actions, treating physicians may also have opinions on whether a defendant breached the standard of care. A defense attorney could meet with treating health care professionals to discuss their knowledge and opinions about the issues in a case.

Defense attorneys widely recognized this informal discovery as an efficient and cost-effective means of obtaining factual information to evaluate and develop a case. After a defense attorney obtained a plaintiff’s medical records from either formal discovery or from the plaintiff informally, an attorney routinely met with health care professionals who treat a plaintiff to learn about the significance of the medical records as they pertained to the plaintiff’s claims. These interviews provided a wealth of information that an attorney could not get by simply reviewing someone’s medical chart. For example, a defense counsel might seek a physician’s...
interpretation of a medical chart, recollections of a plaintiff, an opinion about what caused a plaintiff’s alleged injuries, and an opinion on whether the defendant’s actions did constitute medical malpractice. At times, treating health care institutions would not have the information sought by a defendant’s attorney, so ex parte meetings would save all parties the time and expense associated with depositions.

Enter the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. §1320d et seq. The regulations that implemented the HIPAA privacy standards took effect on April 14, 2003. These regulations govern the disclosure of “protected health information.” Protected health information is “individually identifiable health information.” 45 C.F.R. §160.103. In other words, what the regulations seek to protect is information about the medical condition of a particular person rather than, for instance, information from a widespread medical study that does not name the individuals involved. Health information is “any information, whether oral or recorded in any form or medium, that (1) is created by a health care provider... and (2) relates to the past, present or future physical or mental health or condition of an individual.” 45 C.F.R. §160.103. HIPAA expressly preempts state law governing the release of an individual’s health information unless the state’s laws are more stringent than HIPAA. 42 U.S.C. §1320d-7(a)(2)(B), 45 C.F.R. §160.202.

HIPAA specifically addresses the extent to which a health care professional or health care institution may disclose a patient’s protected health information in judicial and administrative proceedings. 42 U.S.C. §164.512(e). The commentary in the Federal Register regarding 45 C.F.R. §164.512 indicates that HIPAA was “not intended to disrupt current practice whereby an individual who is a party to a proceeding and has put his or her medical condition at issue will not prevail without consenting to the production of his or her protected information. In such cases, we presume that parties will have ample notice and an opportunity to object in the context of the proceeding in which the individual is a party.” Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,530 (Dec. 28, 2000.)

Notably, HIPAA does not bar the disclosure of protected health information. Rather, the statute and regulations establish procedural requirements that someone must meet before obtaining protected health information. See Holman v. Rasak, 486 Mich. 429 (Mich. 2010), cert. denied, Holman v. Rasak, 131 S. Ct. 913 (2011). Further, whether the information is relevant and discoverable is a matter of state law; HIPAA does not affect the relevance of health information to any tort action alleging an injury.

How then does HIPAA affect your ability to meet ex parte with treating health care professionals? The answer is being determined state by state across the country. The United States Supreme Court has yet to weigh in on the issue, most recently denying certification in a petition from a Michigan Supreme Court case authorizing ex parte communications under a qualified protective order. Holman v. Rasak, 486 Mich. 429 (Mich. 2010), cert. denied, Holman v. Rasak, 131 S. Ct. 913 (2010).

As one court facing the issue declared, “The recently enacted HIPAA statute has radically changed the landscape of how litigants can conduct informal discovery in cases involving medical treatment.” Law v. Zuckerman, 307 F. Supp. 2d 705 (D. Md. 2004). Plaintiffs’ attorneys often argue that HIPAA now precludes defense attorneys from holding an ex parte meeting with treating physicians, a time-honored discovery tool. In fact, however, courts across the nation have largely retained the same view of ex parte meetings that they held before HIPAA became legislation. Moreover, some jurisdictions that did not permit ex parte communications between defense counsel and treating health care professionals now permit them under HIPAA. Compare Valentino v. Gaylord Hospital, 1992 WL 43134, at *2 (Conn. Super. Ct. Feb. 19, 1992), with Quadrini v. Sweet, 2007 WL 214605 (D. Conn. 2007). It appears that HIPAA is not the weapon that plaintiffs’ attorneys try to make it out to be.

**State Law Controls Ex Parte Communications in Most Jurisdictions**

In many states the courts have not wrestled with the HIPAA privacy rule because the state laws governing ex parte communications between defense counsel and treating health care professionals are more stringent than the HIPAA requirements. Roughly half of the states disallow substantive ex parte communications by state law.

In some of these states statutory law specifies that an attorney may not conduct ex parte meetings or interviews with a plaintiff’s health care providing professionals. For example, the applicable statute in Arizona reads as follows:

In a civil action a physician or surgeon shall not, without the consent of his patient, or the conservator or guardian of the patient, be examined as to any communication made by his patient with reference to any physical or mental disease or disorder or supposed physical or mental disease or disorder or as to any such knowledge obtained by personal examination of the patient.

Ariz. Rev. Stat. Ann. §12-2235. Statutes that contain similar express prohibitions exist in Arkansas, Louisiana, Mississippi, Pennsylvania, Rhode Island, and Virginia. See Ark. R. Evid. 503(d)(3)(B) (“Any informal, ex parte contact or communication with the patient’s physician or psychotherapist is prohibited, unless the patient expressly consents.”); La. Code Evid. Ann. art. 510(F) (2) (“In medical malpractice claims information about a patient’s current treatment or physical condition may only be disclosed pursuant to testimony at trial, pursuant to one of the discovery methods authorized [by the Code].”); Miss. R. Evid. 503(f) (placing a medical condition at issue “does not authorize ex parte contact by the opposing party”); Pa. R. Civ. P. 4003.6 (“Information may be obtained from the treating physician of a party only upon written consent

**NOTE:** This article by necessity is not an in-depth look at the law in each state. Practitioners should become familiar with the nuances in the states in which they practice, using this article as a starting point. The authors welcome communications from practitioners with updated cases and status of the law in their jurisdictions on this changing issue. The authors were unable to locate decisions outside of the workers’ compensation context in Hawaii, Nebraska, Oregon, South Dakota, Vermont, and Wyoming and would appreciate input from practitioners in those jurisdictions.
of that party or through a method of discovery authorized by this chapter.”); R.I. Gen. Laws §5-37.3-4(b)(8)(ii) (disclosure of a patient’s health information in civil action “shall not be through ex parte contacts and not through informal ex parte contacts with the provider by persons other than the patient or his or her legal representative”); Va. Code Ann. §8.01-399 (“Neither counsel “may seek a protective order structuring all communication by making application to the court at any time.” Id.

The Minnesota statute establishes that a plaintiff waives the physician-patient privilege when he or she files a malpractice suit, and this waiver permits “all parties” and their attorneys to have “informal discussions” with the plaintiff’s health care providers. Minn. Stat. §595.02, subd. 5. However, before meeting with a treating health care professional, defense counsel must provide plaintiff’s counsel with notice and offer him or her the opportunity to attend the meeting. Id.


Along these same lines, the courts in New Mexico, North Carolina, Ohio, and Washington have held that public policy, separate and apart from a physician-patient privilege, prohibits defense counsel from engaging in ex parte interviews with treating physicians. Smith v. Ashby, 743 P.2d 114, 106 N.M. 358 (N.M. 1987); Crist v. Moffatt, 389 S.E.2d 41, 326 N.C. 326 (N.C. 1990); Hammonds v. Aetna Casualty & Surety Co., 243 F. Supp. 793 (N.D. Ohio 1965); Loudon v. Mhyre, 756 P.2d 138, 110 Wash. 2d 675 (Wash. 1988). The articulation of public policy in these decisions often echoes the reasoning of the courts recognizing a duty of confidentiality or fiduciary relationship between a physician and patient. See Smith, 743 P.2d at 115; Crist, 389 S.E.2d at 46; Loudon, 756 P.2d at 141. Courts in Montana and North Dakota have disallowed ex parte contacts on the grounds that the applicable rules of civil procedure do not contemplate this method of informal discovery. Jaap v. District Court, 623 P.2d 1389, 1392, 191 Mont. 319 (Mont. 1981); Weaver v. Mann, 90 F.R.D. 443, 445 (D. N.D. 1981).

Of all of the states that forbid ex parte interviews, only Illinois appears to have contemplated how HIPAA interacts with the preexisting state law. That Illinois court held, unsurprisingly, that HIPAA does not preempt state law regarding a patient’s protected health information because the state law is more restrictive than HIPAA. National Abortion Federation v. Ashcroft, 2004 WL 292079, at *4 (N.D. Ill. 2004). Thus, it would appear that in states with existing laws that forbid ex parte communications, HIPAA really has not changed the landscape of defense practice at all.

Likewise many states that permitted ex parte communications before HIPAA became law continue to allow defense counsel to conduct ex parte interviews. Most of these states have not yet tackled a HIPAA preemption analysis, but two have engaged in it and determined that HIPAA does not preempt the state law. In Alabama, Alaska, the District of Columbia, Delaware, Idaho, and South Carolina, the courts permit defense counsel to conduct ex parte interviews with plaintiffs’ treating physicians. However, these courts do not appear to have assessed whether HIPAA preempts state law in this area. See Romine v. Medicenters of America, 476 So. 2d 51, 55 (Ala. 1985); Trans-World Investments v. Drobny, 554 P.2d 1148 (Alaska 1976); Street v. Hedgepath, 607 A.2d 1238 (D.C. 1992); Green v. Bloodsworth, 501 A.2d 1257 (Del. Super. Ct. 1985); Morris v. Thomson, 937 P.2d 1212 (Idaho 1997); Felder v. Wyman, 139 F.R.D. 85, 90 (D.S.C. 1991).

In Indiana, ex parte communica-
tions have been allowed in federal courts, whereas in the state courts the trial courts have discretion to permit or disallow them. Compare Valentine v. CSX Transportation, 2010 WL 4683939 (S.D. Ind. 2010), with Becker v. Plemmons, 598 N.E.2d 564 (Ind. Ct. App. 1992).

Kentucky, New Jersey and Texas have determined that HIPAA and state law can coexist. New Jersey state law allows defense counsel to interview treating physicians, but the defense attorney must have these interviews transcribed and provide them to the plaintiff’s attorney. In re Diet Drug Litigation, 895 A.2d 493 (N.J. Super. Ct. 2005). The court in the Diet Drug Litigation case found that the other procedural constraints that the state law placed upon ex parte interviews were consistent with HIPAA’s procedural safeguards. Id.

The Supreme Court of Texas held that HIPAA does not preempt the state law requiring medical malpractice litigants to sign an authorization for the disclosure of protected health information before filing suit. In re Collins, 286 S.W.3d 911 (Tex. 2009). The court reasoned that the release that plaintiffs must execute under the state law “authorizes disclosure under the exact same terms as 45 C.F.R. §164.508,” and thus “it would not be impossible for a health care provider to comply with both laws.” Id. at 920. The court further found that HIPAA’s goal of promoting privacy of protected health information had to be balanced with the public policy of reducing the cost of medical care. Id.

Kentucky permitted defense counsel to have ex parte communications with plaintiffs’ treating physicians before HIPAA became law. Roberts v. Estep, 845 S.W.2d 544 (Ky. 1993). In a product liability action filed in a federal court in Kentucky after the promulgation of the HIPAA privacy regulations, the defendants moved to compel the plaintiff to execute a HIPAA-compliant authorization permitting defense counsel to have ex parte contacts with the plaintiff’s treating physician. Weiss v. Astellas Pharma, 2007 WL 2137782, at *1 (E.D. Ky. July 23, 2007). The court granted the defendants’ motion but did not address the applicability of HIPAA other than to order the plaintiff to execute a “HIPAA-compliant authorization.” Id. at *6. The court based the decision on Kentucky law and the absence of a federal physician-patient privilege. Id. at *2–6.

When HIPAA Controls Ex Parte Communications Courts Largely Permit Them with Court Orders


When a state law authorizes ex parte communications with treating physicians, HIPAA permits disclosures under court orders. Holman v. Rasak, 785 N.W.2d 98. Courts have relied on different subsections of one of the HIPAA regulations to authorize these orders. See 45 C.F.R. §164.512(e). Some states have held that HIPAA permits health-related disclosures by treating physicians under qualified protective orders citing 45 C.F.R. §164.512(e)(1)(ii)(B). Lee, 177 Cal. App. 4th at 1108 (finding that in a criminal proceeding health care information discoverable by state statute may be disclosed under a protective order); Crenshaw v. MONY Life Ins. Co., 318 F. Supp. 2d 1015, 1028–29 (S.D. C.A. 2004) (holding that HIPAA requires a protective order before protected health information otherwise discoverable under state law may be disclosed); Quadrini v. Sweet, 2007 WL 214605; Baker v. Wellstar Health System, 703 S.E.2d 601. Other states have held that 45 C.F.R. §164.512(e)(1)(i) authorizes these protective orders. E.g., Rutter v. Weber, 179 P.3d 977; Lowen v. Via Christi, 2010 WL 4739431 (D. Kan. 2010).

These courts hold that determining whether to grant an order permitting ex parte meetings is within the discretion of the trial court. Holman, 486 Mich. at 447–48; Holmes v. Nightengale, 158 P.3d 1039. Courts in some jurisdictions have offered guidance on when trial courts may deny requests for orders permitting ex parte meetings. E.g., Rutter v. Weber, 179 P.3d 977 (finding that a plaintiff should be permitted to attend meetings in certain situations); Baker v. Wellstar Health System, 703 S.E.2d 601 (finding that it may be appropriate to include a provision in a qualified protective court order allowing a plaintiff to attend meetings). Other courts have not offered guidance on when trial courts may grant requests for qualified protective court orders permitting ex parte meetings with treating physicians. Law v. Zuckerman, 307 F. Supp. 2d 705 (D. Md. 2004) (holding that HIPAA preempts Maryland law permitting ex parte meetings between defense counsel and treating physicians).

Courts are more likely to grant orders for ex parte meetings when the qualified protective orders include federal or state law protections for the plaintiffs’ health information. Notably, the HIPAA provisions permitting qualified protective orders do not require those limitations. Compare 45 C.F.R. 164.512(e)(1)(i), with (e)(1)(ii)(B) (subsection (i) permits disclosure pursuant to an order of the court “provided that the covered entity discloses only the protected health information expressly authorized,” while subsection (ii) has no such limitation); see also Holman, 486 Mich. at 445. However, multiple courts have limited qualified protective orders to the parameters established by state law, allowing the HIPAA-approved process to work in conjunction with nuances of state privacy law. As the Georgia Supreme Court held, “though HIPAA preempts Georgia law in its imposition of procedural requirements, the substantive right to medical privacy under Georgia law endures.” Baker, 703 S.E.2d at 604 (internal citations omitted).
The privacy protections that state laws may impose vary widely. For example, in Lee, the court remanded the case for entry of a protective order permitting disclosures authorized by the prevailing state statutes governing health information from particular types of medical providers. 177 Cal. App. 4th at 1137. In Colorado, the role of a treating health care professional in caring for a plaintiff will determine the parameters of a qualified protective order and the disclosure limits. If a provider consulted with a defendant, all of the protected health information within that witness’ knowledge is most likely relevant to the case at bar. Reutter v. Weber, 179 P.3d 977 (Colo. 2007). In Georgia, the Supreme Court requires a qualified protective order to list the names of the health care providers who an attorney may interview ex parte and the medical conditions at issue, and the order must state that the defendant requests the interview and the provider may choose not to meet. Baker, 703 S.E.2d at 605.

Even among states that hold that HIPAA permits ex parte meetings with treating physicians with a court order, the degree of favor with which the courts view these ex parte meetings can vary widely. For example, some courts find that “allow[ing] ex parte interviews with fact witnesses, such as treating physicians, creates a just result by allowing both parties equal, unfettered access to fact witnesses. To prohibit ex parte communications would allow one party unrestricted access to fact witnesses, while requiring the other party to use formal discovery that could be expensive, timely, and unnecessary.” Lowen, 2010 WL 4739431, at *2 (D. Kan. 2010); see also Holman, 486 Mich. at 437 (“[N]o party to litigation has anything resembling a proprietary right to any witness’s evidence.”).

Other courts are concerned that communications with defense counsel may influence the testimony of health care witnesses. E.g., Baker, 703 S.E.2d at 604–605. The authors could locate only one state court opinion that held that the HIPAA privacy rule did not permit ex parte communications. The Missouri Supreme Court held that HIPAA did not permit informal, ex parte meetings between treating physicians and defense counsel without a patient’s consent because the meetings did not constitute “judicial proceedings.” Procter v. Messina, 320 S.W.3d 145 (Mo. 2010). The HIPAA regulations permit disclosures of protected health information in a “judicial proceeding.” 45 C.F.R. §164.512(e). The Procter court defined a “judicial proceeding” as a process within the oversight of a court: formal discovery falls within the definition while informal discovery does not. 320 S.W.3d at 157. The court rejected the trial court’s formal order authorizing informal meetings as an improper advisory opinion that sought to permit disclosures beyond the scope allowed by state and federal laws. Id. at 154 n. 6; but see Lowen, 2010 WL 4739431 (exemplifying a well-reasoned D. Kan. opinion rejecting the reasoning of Procter). However, the court failed to address the procedure authorized by 45 C.F.R. §164.512(e)(1)(B), which permits disclosure of protected health information under a qualified protective order in a judicial proceeding. Furthermore, the court’s ultimate decision—that an ex parte meeting is permissible only with a written waiver from a plaintiff—relies on state law rather than HIPAA. 320 S.W.3d at 145.

In sum, while practitioners who meet with treating physicians when plaintiffs’ counsel do not attend these meetings and without securing an authorization or court order put themselves and the treater at risk of violating HIPAA, the cases that have considered whether HIPAA permits ex parte communications between defense counsel and treating health care professionals have, with but one exception, held that HIPPA authorizes these meetings, typically if practitioners secure court orders.

**Five Practice Pointers—Arguments for Your Jurisdiction**

HIPAA may affect your ability to meet with treating physicians and other health care providers in your jurisdiction, but you want to have them to develop your case. May you do so? What procedural requirements must you meet?

1. Request consent from a plaintiff to meet with his or her health care providers.
2. Examine the language of the HIPAA authorization voluntarily provided to you by the plaintiff’s counsel to determine whether it contains language permitting ex parte meetings. Believe it or not, occasionally a plaintiff’s attorney will bestow one of these on you.
3. File a motion for a qualified protective order seeking the court’s entry of an order permitting ex parte meetings. Make sure that the proposed qualified protective order limits the requested disclosure to protected health information that is (1) relevant to the patient’s condition at issue in the lawsuit and (2) authorized by state law.
4. Use this article to distinguish your state from other states that have limited ex parte meetings on the grounds that the rationales of those states do not apply to yours. For example, none of the state law cases holding that ex parte meetings are precluded by the state law’s statutorily recognized privilege are relevant to Georgia, because Georgia does not have a privilege to provide a foundation for precluding ex parte meetings.
5. Explain to the court why communications will not likely implicate privacy concerns. In medical malpractice actions, use the reasoning of the Colorado court in Reutter v. Weber, 179 P.3d 977 (Colo. 2007), for medical witnesses who treated the patient in consultation with your client. In cases involving alleged continuing injuries, follow the reasoning of the District of Kansas in Lowen v. Via Christi, 2010 WL 4739431, that you will have to schedule multiple depositions during the life of the case to ensure that you have up-to-date information on the patient’s condition, and informal interviews are much cheaper and easier.