

Practice and Procedure

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Ethical Civil Procedure

For some time now, I have realized that the rules of ethics and the rules of civil procedure must work together. With more and more states requiring ethics credits as part of continuing legal education, my hope was that CLE providers would weave ethical considerations into their substantive CLEs rather than tacking them on at the end of the program as “an hour of ethics.” Unfortunately, I haven’t seen this. Only by weaving ethics, professionalism, and substantive questions—and understanding that no single consideration suffices to direct practice—can lawyers maintain the integrity of the profession.



Recently, a call from a friend of mine got me thinking even more about ethical civil procedure. When prosecuting medical malpractice cases, this attorney frequently uses the plaintiff’s treating physicians as his experts. The physicians who helped the plaintiff recover from the physical harm brought about by malpractice, he reasons, are the best to testify as to the defendants’ previous bad practices. In one of my friend’s pending cases, one of the defendant’s law firms tried to prevent his use of treating physicians after receiving the witness lists. Defendants’ counsel, without having contacted the treating physicians and without notifying the plaintiff’s counsel, sent affidavits to the treating physicians, each of which concluded with the following sentence: “If I am called as a witness at trial, I would not testify that doctor [...] violated the stan-

dard of care.” This struck me as at least odd not only because the attorney hadn’t contacted the doctor and because affidavits must include facts, not predictions of future testimony, but also on a more fundamental level.

Federal lawyers will confront these questions mostly in diversity cases. In those cases, states’ substantive law, such as the law of privilege between physician and patient, states’ rules of professional responsibility, as well as the federal procedural rules about discovery apply. But since most of us practice in both state and federal court, we should also think about states’ rules of discovery.

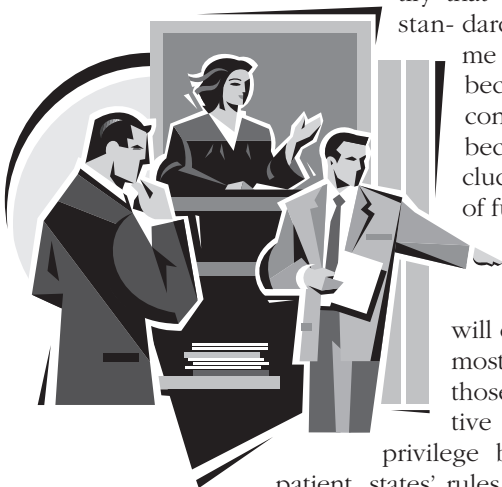
Putting Physical Condition at Issue

When plaintiffs file medical malpractice actions or any other lawsuits that place their physical condition at issue, most states, either by rule of evidence or by statute, find that the patient has waived the physician-patient privilege, at least with respect to the condition at issue. Counsel could argue that the plaintiff has waived the patient-physician privilege, and therefore the physician, like any other witness, can be interviewed by anyone without giving notice to plaintiff’s counsel. Counsel for the injured person may, however, insist that the physician not speak with opposing counsel. The American Bar Association’s Model Rule 3.4(f)(1) allows counsel to request that an *agent* or employee of a client refrain from speaking with opposing counsel, exempting these requests from the general prohibition of keeping witnesses from speaking to opposing counsel.

But one set of courts, for instance those in Alaska, has adopted the position that the waiver of the physician-patient privilege allows—but does not require—the treating physician to speak to opposing counsel but limits the conversation to injuries that are at issue in the litigation. *Arctic Motor Freight Inc. v. Stover*, 571 P.2d 1006 (Alaska 1977). The problem with this approach is that treating physicians, as even the Alaska court noted, may be in possession of more information than is at issue in the litigation. A treating physician may not understand the distinction between what is waived by the patient’s filing of the instant litigation and what is not waived. Consequently, it seems more reasonable at least to follow the approach chosen by many courts that if an *ex parte* communication is to occur, the plaintiff must be notified first.

Judicial Approaches to Ex Parte Communication

The first of three judicial approaches to *ex parte* communication between opposing counsel and a treating physician, discussed above, allows unlimited *ex parte* communication once the plaintiff has put his or her physical condition at issue. The other two approaches might be classified as the “interview after notice” approach and the “formal discovery only” approach. A federal court in Pennsylvania held that only with prior notice to the injured person could there be safeguards against the revelation of irrelevant medical information. This is the “interview after notice” approach. *Manion v. N.P.W. Medical Center Inc.*, 676 F. Supp. 585 (M.D. Pa. 1987). This approach moderates



between the waiver and the “formal discovery only” view.

The courts that have adopted the “formal discovery only” approach do not allow any *ex parte* interviews with treating physicians, or with other experts, but require that any information coming from treating physicians, even if the patient-physician privilege has been waived by filing the litigation, must come through formal discovery. Two cases illustrate this approach. In *Neubeck v. Lundquist*, 186 F.R.D. 249 (D. Me. 1999), the court held that the integrity of the physician-patient privilege could be maintained only by using formal discovery or by acquiring explicit authorization from the plaintiff. The court feared that, without the explicit permission of the patient or the presence of patient’s counsel at a formal discovery deposition, the physician would be put in a position of trying to understand and apply the legal principles of waiver of privilege. The court found this an unreasonable demand to place upon physicians.

Applying well-settled Montana case law, the federal court in *Hampton v. Schimpff*, 188 F.R.D. 589 (D. Mont. 1999) stated the law in that state: “[D]efense lawyers and treating doctors are prohibited from meeting to discuss the plaintiff unless the plaintiff’s lawyer is present or unless the plaintiff gives her consent to the *ex parte* meeting.” It is interesting to note in that case that the defendant wanted to use the plaintiff’s treating physician as an expert *for the defendant*. The court used the Montana law on *ex parte* contacts as part of its rationale, then used public policy to round out the determination.

Allowing a treating physician to be a witness for the patient’s adversary, the court reasoned, goes against public policy, because doing so would place that physician “in the untenable position of having to choose between her fiduciary duty to the patient and her collegial relationship with the referring physician who may have caused or contributed to the harm in question.” The defendant can never call the treating physician to give an opinion that the defendant accused of malpractice had applied the proper standard of care.

What About Ethics

The Montana federal court was concerned about *medical* ethics in *Hampton v. Schimpff* and the duty that a physician owes to his or her patient. In a 1984 Florida case, *Coralluzzo v. Fass*, 450 So. 2d 858 (Fla. 1984), the court noted that, if the physician committed any ethical breach in *ex parte* communication with opposing counsel, these ethical standards were not codified; therefore, the court could not enforce them.

Legal ethical standards, however, have been codified. The courts, like the one in Montana in *Hampton v. Schimpff* and the one in Maine in *Neubeck v. Lundquist*, could also cite ABA Formal Opinion 93-378. In that opinion, the Committee on Ethics and Professional Responsibility holds that *ex parte* contact may

violate model Rule 3.4(c) if the state’s rule of civil procedure is the same as the 1993 version of Federal Rule of Civil Procedure 26(b)(4). The federal rule was changed when detailed expert reports became mandatory, but many states, including Maine and Montana, kept the language of the former federal rule: “Discovery ... [from experts] ... may be obtained *only* as follows[.]” Mont. R. Civ. Proc. 26(b)(4) (emphasis added) and identical to, among others, Maine R. Civ. Proc. 26(b)(4). In addition, ABA Formal Op. 93-378 states that “a lawyer who engages in [ex parte] contacts [with an opposing party’s expert] may violate Model Rule 3.4(c)” in a jurisdiction with the word “only” in its civil procedure rule about expert discovery.

The State Bar of California took a different approach when asked about the “ethical propriety of defense counsel’s communication with plaintiff’s physician, without consent of plaintiff’s counsel, in a pending personal injury action.” In its Formal Opinion 1975-33, the California Standing Committee begins by noting that, but for the fact that the plaintiff had put his physical condition at issue and consequently waived physician-patient privilege with respect to certain information, the evidence code would not allow any discussion at all. However, because the plaintiff had put his physical condition at issue, California’s evidence code states that there is no patient-physician privilege as to communications relevant to the condition of the patient at issue in the litigation.

The California committee determined that no rules of ethics prevent defense counsel from discussing matters with the physician within the evidence code’s waiver; however, the committee stressed that “extreme care should be used to avoid discussion of any unwaived material.” Because the physician-patient privilege is so important, the California committee strongly recommended that defense counsel “notify the plaintiff or plaintiff’s counsel in all cases before communicating with plaintiff’s treating physician.” Not only is the privilege extremely important but the committee recognized that the privilege belongs to the patient and, consequently, it is not the role of defense counsel or the physician to determine whether the privilege has been waived. Furthermore, the committee noted that “the burden of advance notice is not unduly onerous” and that, if the parties cannot resolve matters informally, formal discovery is available.

Best Practice

There is nothing wrong with a party’s using its own treating physician or another fact witness in a dual role as an expert. The party who wants to use someone in a dual role ought to notify the fact witness of that intent at the earliest opportunity, however. As the court in *Hampton v. Schimpff* noted, even though a physician has a primary duty to his or her patient, the

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physician may well have “philosophical or political loyalties to the medical profession” and may not wish to give an opinion about the proper standard of care for either party. Assuming the treating physician does not object, is the only proper contact with opposing counsel through a deposition?

The cost of a deposition is significantly greater than the cost of an informal discussion between the treating physician and counsel. However, as the California committee noted, opposing counsel and the treating physician are hardly the appropriate people to determine the existence or extent of any waiver. Consequently, irrespective of court rules or ethical mandates, the attorney who wants to contact the other party’s treating physician should give some notice to the patient.

If at all possible, in order to manage costs, the parties should arrange some method of informal discussion, perhaps with both attorneys present. Even if state rules apply and contain the “only” language relied upon by ABA Formal Op. 93-378, the parties can agree to an informal procedure. When Federal Rule of Civil Procedure 26 was amended to include detailed expert disclosures, one of the reasons for the change was to eliminate the need for parties to incur the expense of deposing all experts.

Even some of the courts that have held that counsel can hold ex parte interviews with the other party’s treating physician without the other party’s permission seem to assume that the patient has notice of that discussion. For instance, in an Indiana case, *Shots v. CSX Transportation*, 887 F. Supp. 206 (S.D. Ind. 1995), the court held that the defendant’s counsel could communicate ex parte with the plaintiff’s treating physician, but the ruling was stated in terms of compelling the

plaintiff to execute a medical authorization. Consequently, the plaintiff *in fact* had notice of the intent and an opportunity to make an argument to the court. Such notice seems to be the least intrusive means of protecting an extremely important privilege. It seems even more fundamental that counsel should not send an affidavit to any witness without having contact with that witness first.

Physicians are significantly different from other fact witnesses. The contact between physicians and laypersons is always guarded more closely. Frequently treating physicians are in possession of facts that are not relevant to the particular litigation. When approaching them, counsel must treat them with care, whether they limit themselves to just the facts or move into a dual role as both a fact witness and an expert.

If the jurisdiction prohibits contact outside of formal discovery, counsel’s approach is obvious. If it does not, at the very least, the desire to have ex parte contact with a treating physician should be made known to the patient through appropriate notice. **TFL**

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any previous agreements. If the newly hired employee breaches agreements with the prior employer, one of the most expeditious cures for the new employer is to terminate the newly hired employee. That probability should be brought to the candidate’s attention as should the hiring employer’s policies regarding intellectual property. Should the candidate not be forthright during the hiring process, the hiring company may still be able to minimize its exposure to damages if it makes its own good faith effort with respect to others’ intellectual property rights. Even though it is improper to inquire specifically into the candidate’s duties in his or her previous position during the job interview, the interviewer can identify the specific area of technology involved in the new job and the objectives of the position and require the candidate to state whether there would be an unavoidable overlap

of function. Notes of this discussion could be kept and acknowledged by the participants in the interview. Some employers send letters to the previous employer of a newly hired employee providing a statement of the new employee’s particular obligations to the prior employer and indicating that the employee has been admonished to respect those obligations. It should go without saying that the statement be truthful and supportable.

Measures to Take after Hiring

It is advisable that the new employee understand and execute the new employer’s agreement regarding intellectual property and receive a briefing on avoiding issues related to a previous employer’s intellectual property. The hiring employer might also give the new employee the new company’s intended cor-