Ex Parte Contacts with Treating Health Care Providers

By Ellen B. Flynn

In most medical malpractice cases and in many other personal injury cases, defense counsel routinely request "permission" to speak with your client's treating health care providers. Nothing good can come from permitting defense counsel to hold secret meetings to speak to your client's current or former treating health care providers. The Health Insurance Portability and Accountability Act (HIPAA)[1] restricts how protected medical information may be obtained so that such information may be procured only with permission of the plaintiff patient, through traditional discovery with participation by all parties or by court order with good cause shown. To speak with your client's treating providers *ex parte,* defendants need a court order finding a defendant has shown good cause to sidestep federal privacy protections.

The Request

Defense counsel's request for *ex parte* contact with your client's treating health care providers is simply the set up for motions practice. In a good faith attempt to proactively resolve a discovery dispute, defense counsel seeks your consent for the entry of a protective order, which will permit them to speak to treating providers without violating HIPAA. Through their investigation of medical records and answers to interrogatories, defense counsel has identified several health care providers that "must" have information that they need to represent their client. They simply want authorization to have conversations with your client's treaters, without any record, without a transcript, without your client's participation and without you. What can possibly be wrong with that?

For starters, it interferes with your client's relationship with this physician. Current health care providers may become uncomfortable continuing to treat your client and/or may begin to document the medical record differently to avoid rendering an opinion in writing that might be damaging to the defendants. There will be no question, after the defense counsel has had a secret meeting with a treating physician, that your client has brought a medical malpractice suit. Defense counsel will think your client is not really injured by the alleged malpractice, is a malingerer, is not truthful, didn't follow instructions or pick any other excuse. If defense counsel represents one of the large hospital systems in the area, treating physicians may feel intimidated by or even compelled to assist defense counsel in providing a defense to his colleagues in the medical profession instead of focusing on the best treatment for your client and the opinions that they formed in the treatment of your client.

As important as the privacy interests that gave rise to HIPAA are, it would be exceedingly dangerous to leave to the physicians (and defense counsel) the task of determining what information is subject to disclosure and what remains privileged. The chance that the physician, untrained in the law, might reveal other information or might engage in discussions about the theories of the case is a gamble. We know it happens even after defense counsel promise to limit their discussions. Because improper disclosure violates a patient's privacy rights and carries penalties for the physician, it is unfair to both the physician and the patient. In addition, such *ex parte* interviews will place the treating physician in an awkward position, having to choose loyalties between fellow doctors in the community, some of whom may be friends or sources of referrals and their patient. The treating physician might even be insured by the same carrier, which could lead to even greater pressure being placed on the treating physician. The potential for impropriety is even greater when defense counsel represents the treating physician's own insurance carrier.

Another obvious problem with endorsing *ex parte* contacts is that there is no record of what was said. You will have no idea what that physician may have actually said, and you will have no idea what might come out at trial

1 HIPAA establishes national standards to protect individuals' medical records and other personal health information and applies to health plans and those health care providers that conduct certain health care transactions electronically. The Rule requires appropriate safeguards to protect the privacy of personal health information and sets limits and conditions on the uses and disclosures that may be made of such information without patient authorization. The Privacy Rule is located at 45 CFR Part 160 and Subparts A and E of Part 164.

because of what was communicated during the meeting. Once the treater is sitting down with defense counsel, if you are not there, the conversation may drift away from the treater's involvement and opinions made during their own treatment and focus on what will best help the defense counsel. You won't know what representations have been made about the evidence in the case and whether the physician is being provided accurate non-biased information. There are many ways that this can spiral out of control, effecting future treatment and the patient-provider relationship. This meeting can quickly become a prep session for a treating health care provider's testimony that can jeopardize their own patient's case and treatment. In addition, there have been occasions where clinical information provided by defense counsel during an ex parte meeting with a treating provider influenced documentation of the patient's medical record and changed how the treating provider documented his opinions to the detriment of their patient.[2]

The Offer of Cooperation

When defense counsel seeks plaintiff's approval for these secret meetings with his or her treating health care providers, plaintiff's counsel should *immediately* respond in writing that only under certain conditions will the plaintiff waive the protections afforded to him through HIPAA. The response should include a request for the identification of the issue that is allegedly not adequately addressed in the written medical records that have already been produced. Offer, in writing, to schedule an opportunity for any issues to be addressed if plaintiff's counsel can also attend and participate. Offer to schedule a conference call, deposition or meeting where any questions may be asked.

There are several purposes of open and fair access. First, it is to ensure that the plaintiff's treating health care providers are not intimidated, misrepresented or harassed. It is also to protect against the inadvertent disclosure of protected health information beyond what is appropriate for the case. Finally, it is to also ensure that any representations made concerning your client and your client's care and condition by counsel at this meeting are accurate. Should a request come from defense counsel for meetings or depositions with treating providers, immediately begin scheduling these meetings around the treater's schedule and within the discovery deadline. In addition, plaintiff's response should include documentation of any possible conflict of interest among defendants. It should also include a treating provider that may be specific to the case and require that a treating provider have their own counsel if there is a potential conflict (i.e. in the circumstance where a contribution claim could be made by a defendant against a non-party treating physician or provider).

If a defendant should accept any offer to cooperate, defendant will have a full and fair opportunity to ask these treating health care providers any legitimate questions. You must make it so. If defense counsel does not accept your offer of cooperation, then they will have to explain to the court why your offer didn't satisfy their need for information and why they did not provide any dates for the meetings or depositions you were willing to schedule. Their failure to cooperate weighs against their argument that they have made any good faith attempt to resolve this discovery dispute and weighs against "good cause" for a protective order granting them unfettered access to a treating provider.

Refusal to Accept the Offer of Cooperation

Despite your willingness to amicably resolve the issue and prevent the ex parte contacts, a motion is coming. Defendant will likely file a motion wherein they seek to obtain the Court's permission through a court-endorsed protective order to have ex parte informal discussions with plaintiff's treating providers without the presence of the plaintiffs or their counsel and without prior authorization or notice. The defendants typically fail to identify any specific justification for these secret meetings (such as an inability to read a medical record or understand the physician's chart) and fail to even mention plaintiff's offer to provide access to the treating health care providers with the plaintiff's participation or in the presence of the counsel. The motion typically suggests that discovery is too onerous and that the Court should level the playing field by permitting defense counsel to meet in secret with plaintiff's treating providers.

Opposition to Motion for Protective Order

The law is on your side. HIPAA preempts Maryland law regarding ex parte contacts between a patient's litigation adversaries and his or her physicians or health care

2 *See, Wilson, et al. v.IHC Hospitals, Inc., et al.,* Civil No. 150100044, Ruling and Order on Plaintiffs' Motion for Sanctions (February 17, 2016); http://fjcadr.com/uploads/3/5/2/0/35203263/2016-02-17_wilson_sanctions_ruling.pdf

providers. In HIPAA, Congress has made plain its disdain for informal discovery devices in exploring protected confidential medical information.

Congress enacted HIPAA in recognition of the importance of protecting the privacy of health information in the midst of the rapid evolution of computerized health information systems. See Pub. L. No. 104-191, 110 Stat. 1936. HIPAA requires that the Department of Health and Human Services (HHS) create standards and regulations for the maintenance and transmission of individual health information. 42 U.S.C. §1320d-2 (1998). Pursuant to HIPAA, HHS adopted regulations providing that "[a] covered entity may not use or disclose protected health information;" 45 C.F.R. §164.502(a) (2001). A "covered entity" includes health plans, health care clearinghouses and health care providers who transmit health information. 45 C.F.R. § 164.502(a) (2001). Protected health information is defined as "any information, whether oral or recorded in any form or medium, that ... [r]elates to the past, present or future physical or mental health or condition of an individual." 45 C.F.R. §160.103 (2001) (emphasis added).

There are a number of exceptions to the HIPAA regulations that permit disclosure under certain circumstances. The exception upon which the Defendant relies to support their motion is found in 45 C.F.R. §164.512(e):

> (e) Standard: Disclosures for judicial and administrative proceedings
>
> • Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial administrative proceeding:
>
> • In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order
>
> 45 C.F.R. §164.512(e)

The federal regulations do not offer any specific instruction or insight as to when an order of the Court should be granted. But HIPAA's stated purpose is clear and protecting a patient's right to confidentiality of his or her individual medical information is a compelling federal interest. See, In re Kugel Mesh Hernia Repair Patch Litig., 2008 U.S. Dist. LEXIS 63475, *12, 2008 WL 2420997 (D. R.I.) (denying ex parte contacts in light of federal law and the practical resolution of the issue of access by formal discovery and production of medical records); see also In re Vioxx Products Liability Litigation, 230 F.R.D. 473 (E.D. La. 2005) (denying ex parte contacts with treating health care providers because "the just option….is to protect the relationship between a doctor and patient by restricting defendants from conducting ex parte communications with plaintiff's treating physician"); Crenshaw v. MONY Life Ins. Co., 318 F. Supp. 2d 1015, 1028 (S.D. Cal. 2004) (holding that ex parte pretrial contact with a treating physician violated HIPAA); In re Baycol Products Litigation, 219 F.R.D. 468 (D. Minn. 2003) (denying request for ex parte treating physician communications in Baycol cholesterol drug MDL); Benally v. United States, 216 F.R.D. 478 (D. Ariz. 2003) (denying request for ex parte treating physician communications in FTCA medical malpractice case following the "greater weight of federal authority"); and Neubeck v. Lundquist, 186 F.R.D. 249 (D. Me. 1999) (denying request for ex parte treating physician communications applying Maine law).

In Maryland, the Court in Law v. Zuckerman, 307 F. Supp. 2d 705, 708 (D. Md. 2004), made it clear that HIPAA prohibits informal discovery of protected health information such as ex parte communications, through its admonition that "counsel should now be far more cautious in their contacts with medical fact witnesses when compared to other fact witnesses to ensure they do not run afoul of HIPAA's regulatory scheme." Law, 307 F. Supp. 2d at 711. The court further cautioned that "[w]ise counsel must now treat medical witnesses similar to the high-ranking corporate employee of an adverse party." Id. The fact that HIPAA so stringently restricts ex parte communications with treating physicians is evidence of a clear distaste for such practices.

More recently, in *Lynch v. SSC Glen Burnie Operating Co., LLC,* 2017 U.S. Dist. LEXIS 208948, *7-10, 2017 WL 6508980 (D. Md. Dec. 19, 2017), the court emphasized that a party seeking a disclosure order permitting *ex parte* communications with health care providers regarding HIPAA-protected information must demonstrate *some* reason that ordinary discovery procedures are not sufficient. *See also, Lopez-Krist v. Salvagno, et al.*, Civ. No. ELH-12-1116, letter op. at 1 (D. Md., March 1, 2013) ("[T]his court has consistently held that such *ex parte* communications are only permitted if a defendant establishes a 'need' or 'good cause' why normal discovery procedures are insufficient."); *Jeffares v. Kheiri, et al.*, Civ. No. BEL-07-1923, mem. op. at 1 (D. Md. Nov. 19, 2008) (concluding that defendants "failed to demonstrate good cause for why traditional discovery methods are unworkable"); *Vongsavang v. Stinson, et al.*, Civ. No. 06-0835, 2006 U.S. Dist. LEXIS 102648, *3 (D. Md.

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Nov. 9, 2006) ("While the Court is within its authority in issuing the relief sought by Defendants, this Court will not do so without good reason."); *Washington v. Tramontona*, No. PWG-04-1144, 2004 U.S. Dist. LEXIS 32882, *3 (D. Md. Oct. 27, 2004) ("There is no evidence that . . . if contacted through the appropriate discovery vehicles authorized under the rules of civil procedure [plaintiff's] treating physicians would be anything less than candid.").

The argument that HIPAA creates an uneven "playing field" where one party may be permitted to engage in *ex parte* communications while the other may not, is generally an insufficient reason to issue an order. *See Piehl v. Saheta*, Civ. No. CCB-13-254, 2013 U.S. Dist. LEXIS 79401, 2013 WL 2470128, at *2 (D. Md. June 5, 2013); *Washington, supra*, 2004 U.S. Dist. LEXIS 32882 at *3 ("Defendants have offered no justification other than an unparticularized desire to 'level the playing field' [and] [s]uch conclusory statements are insufficient to warrant the relief requested.").The Court in *Lynch v. SCC Glen Burnie Op. Co.,* also found the possibility of cost-savings and efficiency were insufficient reasons for granting a disclosure order. 2017 U.S. Dist. LEXIS 208948, *7-10, 2017 WL 6508980 (citing *Rebhan v. Barnett*, Civ. No. RDB-05-2119, 2006 U.S. Dist. LEXIS 102649, *5 (D. Md. June 27, 2006)) (weighing "Defendants' interests in avoiding the cost of formal discovery . . . against privacy interests... and the risk of inadvertent disclosure of confidential information" and finding that a protective order was unwarranted). The possibility that a party will have to expend more resources and time through formal discovery as a result of their inability to engage in *ex parte* informal communication with a witness is not a compelling enough reason, without more, to set aside HIPAA protections. "If mere expense and inefficiency were good cause under these statutes, the purpose of these laws could be circumvented in virtually every case." *Id.*

Finally, it should be pointed out that 45 C.F.R. § 164.512(e) specifically addresses only "formal" methods through which protected health information may be obtained: court order, subpoena, discovery request or other lawful process — all of which clearly involve non-*ex parte* communications. Nowhere in the regulation are ex parte communications addressed. Some courts analyzing HIPAA regulations have held that a trial court has no authority to issue an order advising a plaintiff's non-party treating physicians that they may or may not participate in informal discovery via ex parte communications. See State ex ret. Proctor v. Messina, 320 S.W. 3d 145 (Mo. 2010).

Thus, the court should deny the defendant's motion because, among other reasons: (1) the plaintiff has offered reasonable accommodations to provide access to plaintiffs' treating health care providers and defendants have failed to make any effort whatsoever to avoid this discovery dispute by considering plaintiffs' compromise in good faith; (2) plaintiff will certainly cooperate with obtaining deposition dates for these treating health care providers and any other appropriate discovery; (3) HIPAA requires formal discovery for treating physicians and others who engaged in the treatment and care of a patient; (4) defendant's counsel likely has a conflict of interest in speaking to at least some of plaintiff's treating health care providers.

Despite these compelling arguments, several courts have granted these motions. Defense counsel typically attach numerous court orders where HIPAA restraints have been bypassed to permit *ex parte* discussions between defense counsel and plaintiff's treating providers. Collections of orders denying these motions have also been attached to oppositions. Sometimes they are granted; sometimes they are not. Nonetheless, I soundly believe that there is no adequate justification and these orders are issued in error. Defendants do have a full and fair opportunity to participate in the deposition and discovery. HIPAA does preempt the laws of Maryland regarding *ex parte* contacts between a patient's litigation adversaries and his or her physicians or health care providers. Congress has made plain its disdain for informal discovery devices in exploration of protected confidential medical information. There can be no legitimate argument that the plaintiffs have an unfair advantage that must be redressed by allowing the defendant to have ex parte and secretive contact with health care providers of plaintiff. The defendants invariably fail to show good cause, let alone a "particular and specific demonstration of fact, as distinguished from general, conclusory statements, revealing some injustice, prejudice or consequential harm."

Biography

Ellen B. Flynn is an attorney at Dugan, Babij, Tolley Kohler, LLC with 20 years of experience litigating complex personal injury, medical negligence and commercial cases in the state and federal courts of Maryland, the District of Columbia and Connecticut. She is currently on the MAJ Board of Governors, serves as the co-chair of the Nursing Home Section and the Trial Reporter Committee. Ellen is also slated as the 2018-2019 President-Elect of MAJ.