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Talking to Lawyers about Patients: When is it really Okay?

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When facing a malpractice claim, a physician knows to hire a lawyer and then not talk to anyone about the patient's care except as specifically instructed by his or her lawyer. Nevertheless, how do you handle the situation when malpractice is not the issue, but a lawyer wants to discuss a patient's care with you? Take, for example, a pharmaceutical product liability case. You prescribed a drug to your patient, and your patient believes he was injured by that drug and sues the manufacturer. You get a call from the manufacturer's lawyer, and she wants to talk with you about your patient. Assuming Mississippi law and rules govern the situation, can you talk to her alone without the patient and/or his lawyer being present? The answer is generally no. Have you ever wondered why? Below is a series of questions and answers to help you understand why and to help you properly deal with such requests.

Q: What exactly is the physician-patient privilege and what does it cover?

A: In a lawsuit, "discovery" is the term for allowing lawyers to learn about the facts of a case. This includes learning facts about the plaintiff's medical condition. Discovery is allowed only of relevant, non-privileged information. Certain medical information shared between a physician and a patient is deemed to be "privileged." Privileged information, even if relevant, is not discoverable. Based on privilege, a patient can refuse to disclose and prevent others (i.e., his physicians) from disclosing: 1) knowledge derived by the treater by virtue of his professional relationship with the patient; and 2) confidential communications made for the purpose of diagnosis or treatment of his physical, mental, or emotional condition. Knowledge derived by the treater has been held to include even such things as test names, not to mention results. A "confidential communication" is any communication that was not intended to be disclosed to a third person except to facilitate treatment. The privilege applies to communications with licensed physicians treating physical, mental, or emotional conditions, as well as licensed or certified psychologists. There is also authority to argue that the privilege applies to communications with osteopaths, dentists, hospital personnel, nurses, pharmacists, podiatrists, optometrists, and chiropractors. The privilege arguably also applies to communications with any person a patient reasonably believes to be such a treater even if that person actually is not a treater. The privilege does not apply to communications with licensed social workers.

Q: Whose privilege is it and who can waive it?

A: The privilege belongs to the patient. It can be claimed by a living patient, by a living patient's guardian or conservator, or by the personal representative of a deceased patient. A treater may assert the privilege but only on behalf of the patient. Except as noted below, because the privilege belongs to the patient, only the patient can waive it to allow disclosure.

Q: Are there any instances when no privilege exists or when the privilege is deemed to be waived?

A: Yes. Examples are: 1) commitment proceedings; 2) court-ordered physical or mental examinations; 3) medical malpractice lawsuits; and 4) the release of medical information needed to comply with certain public health regulations (e.g., reporting of communicable diseases). Before making any disclosures, a physician should ask a lawyer if the situation permits disclosure without the patient's permission.

Q: What actions by a patient can waive the privilege?

A: A patient waives the privilege when he places any aspect of his physical, mental or emotional condition at issue (such as by filing a lawsuit against the manufacturer and requesting damages). Waiver of the privilege, however, is limited and conditional in both personal injury actions and medical malpractice actions. The party is deemed to have waived the privilege only to the extent he places his condition at issue. Only information relevant to that specific condition is now made discoverable by the waiver. Any aspect of the patient's condition that is not placed at issue in his pleadings remains privileged. Statements about non-medical issues, (e.g., the cause of an accident) also remain privileged.

Q: What is an "ex parte" communication?

A: Ex parte is lawyer talk for speaking with one side only (e.g., just the manufacturer without the patient/plaintiff present). This is what is generally not allowed.

Q: If the privilege is waived by the filing of a lawsuit, why can't I talk ex parte to the lawyer who wants to talk to me?

A: The Mississippi Supreme Court has reasoned that since the patient is the holder of the privilege and gets to decide when to waive

it, allowing a physician to speak ex parte with opposing counsel places the physician, rather than the patient, in control of determining what information is or is not privileged and thus, is or is not able to be disclosed. To protect the patient's privilege, the Court has held it necessary for a patient to be given notice of any ex parte contacts with his physicians and the right to prevent them. The Court has further held that the medical information gathered by ex parte contact will not be admissible at trial. If the information obtained is inadmissible, it is effectively useless to the party who obtained it.

Q: Can a patient authorize his physician to have ex parte communications with an attorney?

A: Yes, so it never hurts to ask. But practically speaking, a patient's lawyer (that is who you will have to ask) has no incentive to say yes and likely never will. This is why the opposing party's lawyer generally asks to take your deposition instead of asking just to talk to you alone. A deposition is a proceeding where both sides are present and allowed to ask you questions under oath. A court reporter is present to swear you in as a witness and to record your answers word for word. Busy treaters are often reluctant to give depositions because they can be inconvenient. But generally, the attorney who needs to learn the details of your treatment of the patient cannot learn that information any other way. A physician's testimony can often be instrumental in getting rid of a weak or frivolous claim. Thus, the attorney asking to depose you should try to accommodate your schedule if possible.

Q: If I agree to allow an attorney to depose me, why am I still served with a subpoena commanding me to appear?

A: This is a legal step designed to protect both you and the opposing party. If you appear for a deposition because you were subpoenaed, you do not seem to your patient to be voluntarily cooperating with the opposing party. In addition, if for some reason you elect not to appear, the opposing party cannot be sanctioned (i.e., required to pay the other side's costs associated with coming to the deposition). Understand that you must comply with a subpoena or you can be held in contempt of court.

For further information on the issues discussed, please contact Stephanie M. Rippee, Shareholder at Baker, Donelson, Bearman, Caldwell & Berkowitz at 601-351-8943 or srippee@bakerdonelson.com. ❐

This article is written for a non-lawyer audience and is designed to provide general information on the issues addressed as governed by Mississippi law and the applicable state court rules. Thus, the legal citations that support the information provided have been omitted. For a more in depth legal analysis of the issues discussed, including an analysis of the somewhat conflicting rules and statutes that govern these issues, please see the related legal article written by the author entitled "Don't Ask The Doctor: The Prohibition on Ex Parte Communications with Non-Party Treating Physicians." This article can be found at http://www.bakerdonelson.com/stephanie-m-rippee/.