Ex parte communications with Treating Physicians: Leveling the Playing Field

Joseph D. Piorkowski, Jr.

The Piorkowski Law Firm, PC

Georgetown University Law Center

Washington, DC

ABSTRACT

This session explores strategies to "level the playing field" with respect to defense counsel's access to plaintiff's prescribing and treating physicians. The law governing the permissibility of *ex parte* communications between defense counsel and plaintiff's treating physicians varies widely from venue to venue, although the recent trend, particularly among judges coordinating multi-district litigation, has been towards greater restrictions on defense counsel's ability to conduct informal discovery of these important witnesses. At the same time, plaintiff's attorneys are permitted unfettered access to these physicians which they regularly use to "woodshed" them with selective documents, potentially coloring their view of the case and important issues prior to their depositions. The legal rationales underlying the prohibition on *ex parte* communication (e.g., physician-patient privilege) do not support the scope of the prohibitions that many courts currently impose. Moreover, these prohibitions are anathema to the fundamental premise in litigation more broadly that, with the exception of parties and their agents, litigants should have equal access to third party witnesses. Strategies for convincing judges that fundamental fairness necessitates equal access to these witnesses and options that have been successfully used to level the playing field in litigation will be reviewed.

INTRODUCTION

Numerous states restrict defense counsel from engaging in *ex parte* meetings with plaintiff's treating physicians. These restrictions often extend far beyond limiting informal discovery of information that would arguably be protected by the physician-patient privilege, and in some jurisdictions include limitations even with respect to non-substantive contacts with a physician's staff (e.g., to schedule a deposition). At the same time, plaintiff's attorneys in these states have unfettered access to these non-party treating physicians, which is frequently used to "woodshed" them on plaintiff's theory of the case. The result of judicial decisions applying these restrictions on defense counsel but not plaintiff's counsel is to create an incredibly uneven playing field, a situation unparalleled in criminal or civil litigation in terms of unequal access to non-party fact witnesses. This review explores strategies to encourage courts to "level the playing field," and ensure that each side has access to the same information and that neither side is afforded an opportunity to improperly influence a witness's testimony.

VARIATION IN STATE LAW

Although numerous states have held that there is no right of defense counsel to conduct *ex parte* meetings with a plaintiff's treating physicians, and, in fact, that conducting such meetings is contrary to public policy, *see, e.g.*, *Petrillo v. Syntex Laboratories*, 499 N.E.2d 952 (Ill. App Ct. 1986); *Anker v. Brodnitz*, 413 N.Y.S.2d 582 (N.Y. Sup. Ct. 1979), many other states impose no such restrictions and permit informal discovery conferences limited only by the willingness of the physician to participate. *See, e.g.*, *Trans-World Investments v. Drobny*, 554 P.2d 1148 (Alaska 1976); *Street v. Hedgepath*, 607 A.2d 1238 (D.C. 1992). Almost all states that recognize a physician-patient privilege have determined that, when a plaintiff brings a lawsuit alleging personal injury, the physician-patient privilege is waived; the critical question is whether the waiver is limited to formal discovery or whether the waiver also applies to informal discovery. Court such as *Petrillo*, which prohibit *ex parte* conferences, have determined that a plaintiff's implicit consent to disclosure "is obviously and necessarily limited" to release of medical information specifically authorized by the applicable methods of formal discovery set forth in the state's rules of civil procedure. *Petrillo v. Syntex Laboratories*, 499 N.E.2d 952, 959 (Ill. App Ct. 1986). Other courts have held that "*ex parte* interviews with a treating physician are a permissible means of informal discovery," *Street v. Hedgepath*, 607 A.2d 1238, 1247 (D.C. 1992), reasoning that "the filing of a personal injury action waives the physician-patient privilege as to all information concerning the health and medical history relevant to the matters which the plaintiff has put in issue." *Trans-World Investments v. Drobny*, 554 P.2d 1148, 1151 (Alaska 1976). In fact, some of these courts have even stated that informal methods of discovery, such as private conferences with the attending physicians "are to be encouraged, for they facilitate early evaluation and settlement of cases, with a resulting decrease in litigation costs, and represent further the wise application of judicial resources." *Id*. at 1152.

The variation in the law on this issue from state to state, therefore, is tremendous. About half of all states prohibit *ex parte* communications with treating physicians, and half permit them. Melissa Phillips Reading and Laura Marshall Strong, *Ex Parte* Communications Between Defense Counsel and Treating Physicians, 53 No. 10 DRI For Def. 30, 30 (2011). At one extreme, courts are actively encouraging the use of such interviews to promote the interest of judicial efficiency. At the other extreme, courts prohibit all contacts with a treating physician, whether or not the substance of the conference involves information that would be considered privileged, and in some cases, even prohibiting non-substantive/ministerial communications as contrary to public policy. This wide variation in state law is of particular importance in multi-district litigation, in which courts attempt to design a uniform approach to fact discovery for cases from numerous different venues.

IF INFORMAL DISCOVERY IS NOT NECESSARY FOR DEFENSE COUNSEL TO OBTAIN RELEVANT DISCOVERY, IT IS NOT NECESSARY FOR PLAINTIFF'S COUNSEL EITHER

Part of the rationale used by courts for prohibiting *ex parte* conferences between defense attorneys and plaintiff's treating physicians is that such meetings are unnecessary. The court in *Petrillo*, for example, noted that "a thorough review of case law from other jurisdictions reveals that in not one instance has a court found that *ex parte* conferences were necessary in order to permit defense counsel to obtain information that they were unable to obtain through the regular

channels of discovery. Thus, it is undisputed that *ex parte* conferences yield no greater evidence, nor do they provide any additional information, than that which is already obtainable through the regular methods of discovery." *Petrillo*, 499 N.E.2d at 587. The Court relied on "the fact that no appreciative gain (regarding the evidence to be obtained) can be had through such meetings." *Id*. at 588.

Giving the *Petrillo* court the benefit of the doubt and assuming, for the sake of argument, that the Court's reasoning is sound in this respect, then the lack of necessity for *ex parte* interviews with a plaintiff's treating physicians would apply equally to plaintiff's counsel as well as defense counsel.

NO PARTY HAS A PROPRIETARY RIGHT TO A NON-PARTY WITNESS'S TESTIMONY

One of the most fundamental tenets of fairness in litigation is that no party is entitled to restrict another party's access to a non-party witness. "As a general proposition . . . no party to litigation has anything resembling a proprietary right to any witness's evidence. Absent a privilege no party is entitled to restrict an opponent's access to a witness, however partial or important to him, by insisting upon some notion of allegiance." *Doe v. Eli Lilly Co.*, 99 F.R.D. 126, 128 (D.D.C. 1983).

Even the court in *Petrillo* acknowledged that "no person owns the testimony of another." *Petrillo*, 499 N.E.2d at 600. The Court also specifically stated that one could not infer from its decision "that a plaintiff has a right to stop his treating physician from so testifying," and that "a plaintiff, like a defendant, has no right to influence the opinion of the treating physician." *Id*. At 600.

It would be naïve to suggest that when one party is afforded an opportunity for an *ex parte* meeting, and another party is not, the party who is not afforded the opportunity is disadvantaged, even if the conduct of the attorney who is permitted to interview the witness is appropriate and does not improperly attempt to influence the witness' testimony.

Completely apart from the substance, an *ex parte* meeting affords the attorney conducting the interview with an opportunity to form a working relationship with the witness, to show that the attorney is reasonable, and to establish some level of trust and confidence. Accordingly, if the witness shows up for a deposition after plaintiff's counsel has had an *ex parte* meeting, the defense counsel is already at a disadvantage – the defense counsel is a stranger with no established credibility or rapport with the witness. Defense counsel is at a decided disadvantage when he or she begins questioning in the context of a formal deposition after opposing counsel has had a prior opportunity to meet with the witness and defense counsel has not.

Substantively, the mere opportunity to tell a witness one side of a disputed story has the potential to influence the witness's testimony in favor of the party whose version of the story the witness is being told. Although such conduct on the part of the plaintiff's attorney may not rise to the level of ethical impropriety, one cannot reasonable suggest that telling a witness one side of the story is not likely to influence his or her testimony.

For example, in the context of pharmaceutical products liability litigation, the key issues usually involve 1) the prescribing physician's knowledge and awareness of the risks of the medication at the time of the prescription and 2) whether the physician would have made a different prescribing decision had he/she been made aware of some additional information. In venues that permit only plaintiff's attorneys to conduct *ex parte* interviews, plaintiff's attorneys frequently will meet with prescribing physicians to preview their theory of the case and their questions at deposition:

- "Now, I know the labeling for this product warns about the risk of bleeding in this situation, but wouldn't it have been helpful to you to know what the exact risk of bleeding was?
- And if the company was aware of information and knew what the risk of bleeding was, isn't that something you would have expected them to share with you?
- And if you had known that information, would you have second thoughts about prescribing it for my client?
- And if my client told you that she never would have accepted such a risk, surely you would have prescribed a different medication?

Again, it would be naïve to suggest that such a discussion is not likely to "influence the opinion of the treating physician," which the *Petrillo* court acknowledges would be inappropriate. Whether it crosses an ethical line of attempting to influence a witness's testimony improperly may be the subject of debate, but the fact that such questioning is likely to have an effect – advantageous to plaintiff and disadvantageous to the defendant – is incontrovertible.

Finally, experienced defense counsel have often encountered the practice of many plaintiff's attorneys of coupling their request for an *ex parte* interview with a treating physician (or the treating physician's counsel) that – "at this point, we are not planning on bringing you in as a co-defendant, but before we decide, we would like to interview you and hear what you have to say about the issues." This kind of not-so-thinly-veiled threat that "you say what we want you to say-- or we'll sue you, too" certainly represents an effort to influence improperly the witness' testimony, although plaintiff's counsel typically are careful to choose their words very carefully to avoid being accused of the ethical violation that such conduct inherently represents.

STRATEGY ONE: BOTH OR NEITHER

One strategy for convincing courts to "level the playing field"-- is to tie together three key points discussed above. First, no party has a proprietary right to any particular witness' testimony; the existence of a physician-patient privilege does not confer upon plaintiff's counsel a proprietary right with respect to the testimony of plaintiff's treating physicians. Second, as noted in *Petrillo*, plaintiff's counsel has no right to influence the opinions of a treating physician. And third, if we accept the premise that informal discovery of treating physicians is not necessary to gain the relevant information known to treating physicians, that fact is equally true for plaintiff's attorneys and defense attorneys.

So, what measures can be implemented practically by a court to ensure that plaintiffs do not effectively obtain a proprietary interest in the testimony of treating physicians and to ensure that plaintiff's counsel does not influence the testimony of treating physicians? One option, adopted

by some courts, is to order plaintiff's counsel to refrain from meeting with plaintiff's treating physicians (since, as noted in *Petrillo*, such meetings are not necessary) or alternatively, if plaintiff's counsel chooses to meet with plaintiff's treating physician, to require plaintiff's counsel to provide defense counsel with notice and an opportunity to attend (as would be the case in a formal deposition) when plaintiff's counsel is having any substantive discussion with a treating physician, either at an in-person meeting or by phone. Just as the presence of plaintiff's counsel at a meeting with a treating physician would ensure that defense counsel does not improperly influence the testimony of a treating physician, the presence of defense counsel would ensure the same with respect to plaintiff's counsel.

PROTECTION OF CONFIDENTIAL MEDICAL INFORMATION IS THE PRINCIPAL RATIONALE FOR PROHIBITING *EX PARTE* COMMUNICATIONS WITH DEFENSE COUNSEL

Courts that have prohibited *ex parte* communications between defense counsel and plaintiff's treating physicians have almost uniformly focused on the importance of preserving the expectation of confidentiality of information disclosed between the physician and the patient. In Petrillo, for example, the court stated: "at the very minimum, the confidential relationship existing between a patient and physician demands that information confidential in nature remain, absent patient consent, undisclosed to third parties. If such were not the case, then no confidentiality between a patient and his physician in fact exists." *Petrillo*, 499 N.E.2d at 590.

There is significant variability from state to state with respect to the purpose and the scope of the physician-patient privilege. (Some states, such as Maryland, for example, do not recognize a physician-patient privilege). In states that recognize the privilege, however, filing a lawsuit alleging personal injury consistently is interpreted as waiving the privilege, at least with respect to those conditions that are at issue in the lawsuit. The semantics of how this is handled also vary from state to state (for example, some states characterize the plaintiff as having "waived" the privilege whereas others discuss "an implied consent to disclosure"). But one consistent difference is that states that prohibit *ex parte* communications with defense counsel limit the waiver to formal discovery whereas courts that do not prohibit such *ex parte* contacts consider the privilege waived as to informal discovery as well.

THE SCOPE OF THE RESTRICTIONS FAR EXCEEDS WHAT IS REQUIRED TO PROTECT THE PLAINTIFF'S INTEREST

Even were one to agree, for the sake of argument, that any information about the patient's medical condition is sacrosanct, and can only be discovered through formal discovery methods, no legitimate legal basis exists for prohibiting a defense lawyer from meeting with a plaintiff's physician about information that is relevant to the case, but not protected by the physician-patient privilege. For example, in the context of a pharmaceutical product liability case, a defense attorney could explain at the outset of a meeting that he represents the defendant in an ongoing lawsuit, that he is not at liberty to discuss any facts about the plaintiff and/or the plaintiff's medical condition, but he would nonetheless appreciate the opportunity to discuss the physician's knowledge of various other matters relevant to the case. Such matters might include,

for example, what risks and benefits the physician was aware of at the time of the prescription, how the physician learned this information, the physician's practice with respect to reading pharmaceutical drug labels, whether the physician attended any programs specifically promoting the medication, whether the physician met with any pharmaceutical product representatives concerning the medication, and if so, what information was provided by the representative. All of these lines of inquiry are appropriate subjects of discussion and none of them threaten disclosure of any information arguably protected by the physician-patient privilege.

There is simply no rational basis for permitting plaintiff's counsel to engage in *ex parte* conference with treating physicians on matters not protected by the physician-patient privilege while at the same time prohibiting defense counsel from engaging in similar discussions. Indeed, restrictions on defense counsel on matters that go beyond what is needed to protect information covered by the physician-patient privilege may well implicate First Amendment concerns. In *Petrillo*, for example, the defense attorney/appellant had raised an argument based on the First Amendment. The court agreed that "[w]here a court restricts the speech of a private person, that restriction can be sustained only if it can be shown that the court's restriction is a precisely drawn means of serving a compelling state interest." *Petrillo*, 499 N.E.2d at 606-07. The *Petrillo* court proceeded to find that, in that case, "the trial court's restriction was precise: [defense counsel] was barred from speaking *ex parte* to the plaintiff's treating physicians regarding the mental of physical condition of the plaintiffs." *Id.* At 607. The court went on to conclude that the restriction "served compelling state interests, namely: (1) the right of privacy possessed by the patient-plaintiffs; and (2) the confidential and fiduciary relationship existing between a patient and his physician." The court further held that the restriction in the trial court's order was "precisely drawn and was necessary to serve a compelling state interest." *Id*. Taking the court's analysis at face value, one could certainly argue that the only compelling state interest identified by the court was the interest in protecting confidential patient information, and that, therefore, any restrictions that limited the ability of defense counsel to speak with treating physician about matters other than those covered by the physician-patient privilege would not represent a "precise restriction, " and accordingly, would be a violation of defense counsel's rights under the First Amendment.

STRATEGY TWO: A "FAIR GAME" ORDER

A second strategy to help "level the playing field" in jurisdictions restricting *ex parte* communications, therefore, is to convince the court that restrictions on *ex parte* interviews should be limited to discussions about confidential information that would be protected by the physician-patient privilege. *Ex parte* conferences as to other issues relevant to the litigation, however, should be permitted. The Court could issue an order clarifying that, in meeting with a treating physician, defense counsel will not engage in any discussions about the patient-plaintiff, and the physician should not disclose any information protected by the physician-patient privilege. The order, however, could outline the specific subject areas as to which discuss is permitted, in other words, what issues are "fair game" for *ex parte* conferences between defense attorneys and treating physicians. Such an order would provide clear direction and guidance to both parties--and would also provide some reassurance to the physician about the appropriate scope of discussion.

A number of courts recently have grappled with the issue of whether, in the context of mass torts, defense counsel is permitted to retain as expert witnesses physicians who are, or have been, treating physicians for one or more individual plaintiffs. In general, courts have permitted defense counsel to retain such physicians as experts in individual cases that do not involve the patient-plaintiff for which the doctor served as the treating physician. See *In Re Pelvic Mesh/Gynecare Litigation*, 426 N.J. Super. 167 (2012). Although a broad discussion of the use of treating physicians as experts is beyond the scope of this paper, the court's reasoning is instructive as to the practicability of using a "fair game" order in individual cases.

The court in *In re Pelvic Mesh* overturned a trial court determination barring defense counsel from using any physician who had treated any plaintiff as an expert in the litigation, including in cases not involving the plaintiff who was the physician's patient. At the trial court level, "[w]ith appropriate sensitivity to physician-patient confidentiality, defendants proposed a protocol and protective order that barred the expert from assisting the defense regarding a patient-plaintiff's specific medical condition." *Id*. at 180. Nonetheless, "[t]he trial court . . . accorded little weight to defendants' commitment and proposal. . . ." *Id.* In overturning the trial court's determination, the court in *In re Pelvic Mesh* identified several subjects that would be relevant, but which do not infringe on the physician-patient privilege. "Issues of product defect or safety, however, or the causes of common injuries and conditions of plaintiffs are not dependent upon the physician's knowledge of a particular patient's medical history or condition. . . . Furthermore, a physician's practices or methods in treating a patient-plaintiff are not privileged information and are accessible to the defense [under New Jersey law]." *Id*.

The importance of this case, and others with similar holdings, is that they implicitly recognize that a defense lawyer can have a discussion with a physician about general matters that are relevant to a case without threating disclosure of information that may be protected by the physician-patient privilege. If a physician can serve as a compensated expert on behalf of a defendant in a case with the understanding on the front end that discussions about a particular patient-plaintiff are off limits, certainly a physician can have a similar discussions with defense counsel about the same general issues in the physician's capacity as a fact witness in the case.

An order that permits defense counsel to discuss matters relevant to the case but not protected by the physician-patient privilege would be a tremendous step forward, particularly in jurisdictions in which the custom and practice has been to prohibit defense counsel from any and all contacts with the physician whatsoever.

APPLICABILITY TO MDL PROCEEDINGS

This issue is of particular importance in the context of coordinated complex litigation such as and MDL ("Multi-District Litigation"). Often, MDL judges simply use the applicable law in the most restrictive jurisdiction and apply it across the board to discovery, regardless of the venue. Reminding judges that defense counsel has a right to contact plaintiff's treating physicians in many venues can be important in attempting to negotiate a compromise agreement that is more favorable to defendants than applying the most restrictive standard across the board. Good compromise solutions would include getting an order than ensures equal access to these important witnesses (i.e., if plaintiff's counsel wants to meet, defense counsel is invited to

attend) and/or an order permitting defense counsel to engage in *ex parte* interview so long as information covered by the physician-patient privilege is not discussed.

CONCLUSION

Treating physicians are often the most important witnesses in cases alleging personal injury, medical malpractice, toxic exposure, and product liability. The effect of judicial decisions prohibiting defense counsel from having *ex parte* communications with plaintiff's treating physicians – while simultaneously allowing plaintiff's counsel unfettered access to such witnesses – tremendously disadvantages defendants and creates an "uneven playing field."

This paper offers some recommendations for how defense counsel can attempt to overcome these restrictions, but it is intended, most importantly, to stimulate creative thinking among the defense bar about this challenging problem. Reminding judges 1) that plaintiff's attorneys do not have a propriety interest in the testimony of their client's treating physicians, 2) that the necessity of informal discovery does not vary from party to party, and 3) that one side should not be permitted access to important witnesses which can disadvantage the opposing party, even in the absence of improper conduct – should help courts reach more equitable solutions to unequal access to these important witnesses. Challenging restrictions on *ex parte* contacts that go far beyond what is necessary to safeguard any legitimate protected interest in non-disclosure of confidential information should be an important objective for the defense bar to advance the interests of our clients.