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The article addresses the Kentucky Supreme Court's decision regarding ex parte communications with treating doctors and the applicability of HIPAA. Although the article is specific to Kentucky, it provides general information regarding the production of confidential health information under HIPAA.

An Analysis Under Kentucky Law Regarding Ex-Parte Communications with Treating Physicians and Compliance with the Health Insurance Portability and Accountability Act of 1996

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In 1996, Congress enacted the Health Insurance Portability and Accountability Act ("HIPAA"). The Act was implemented to address concerns regarding the ability of insurance companies to deny health related claims based upon preexisting medical conditions.[1] Several years later, provisions were added designed to protect privacy concerns regarding the disclosure of health related information. HIPAA now provides procedural safeguards for the disclosure of health information including the necessity of obtaining written authorization for such a disclosure or providing the patient the opportunity to object to the production of the records.[2]

The Act contains provisions specifically designed to address the procedure by which medical information may be disclosed during judicial and administrative proceedings.[3] HIPAA prevents the disclosure of confidential health information during litigation unless certain conditions are met. The Act allows medical providers to disclose confidential health information in response to a court order or in response to a subpoena, discovery request or "other lawful process". For confidential information to be produced without an order from a court, notice must be provided to the patient that the information will be disclosed. Alternatively, the parties may obtain a protective order precluding use of the records for any purpose other than litigation. If medical records are provided without an order, the Act requires either return or destruction of the confidential information.[4]

Not long after enactment of HIPAA, questions arose as to whether an adverse party could directly contact a treating physician to obtain information regarding a claimant. If ex parte communications were permissible, a second issue arose as to whether the information provided by the physician would be governed by HIPAA.

The approach taken by states and federal courts concerning such communications, whether ex parte communications are permitted and the manner in which they may be conducted vary.[5] Kentucky addressed this issue in June of 2015 when the Kentucky Supreme Court undertook a lengthy analysis as to whether counsel for a defendant may contact a treating physician and the parameters under which such contact may occur and still remain in compliance with HIPAA.

In *Caldwell v. Chauvin*, 464 S.W.3d 139 (Ky. 2015), a medical malpractice claim was asserted by Stacey Caldwell claiming that a discectomy was both unnecessary and negligently performed by her doctor. Ms. Caldwell had a significant history of spinal issues prior to the surgery. Accordingly, a request was made by defense counsel for a

[1] 29 U.S.C. § 1181.
[2] 45 C.F.R. § 164.512; 45 C.F.R 164.508; 45 C.F.R.165.510.
[3] 45 C.F.R. § 164.512(e)(1).
[4] 45 C.F.R. § 164.512(e)(1)(i).
[5] Joseph Regalia, V. Andrew Cass; *Navigating the Law of Defense Counsel Ex Parte Interviews of Treating Physicians,* 31 J. Contemp. Health L. & Pol'y 35 (2015).

qualified protective order which would allow the attorney ex parte contact with Ms. Caldwell's healthcare providers to obtain additional information concerning her medical condition. Over objection, the trial court entered an order holding that the healthcare providers were deemed fact witnesses and that contact would be permitted as there was no evidentiary privilege which would prevent counsel from speaking with the physicians. The court's order, however, recognized that there was no obligation for the physicians to speak to counsel and that physicians disclosing medical information faced the possibility of HIPAA sanctions.[6] Counsel for Ms. Caldwell filed a writ of prohibition before the Kentucky Court of Appeals seeking to vacate the order. The Court of Appeals denied the motion resulting in the writ coming before the Kentucky Supreme Court.

In addressing the issues presented, the court undertook a detailed analysis of whether ex parte communications with a treating doctor were permissible, whether the information provided by the doctor was governed by HIPAA and how the information could be protected in accordance with the privacy provisions of the Act. In reaching its decision, the court took into consideration case authority from various states including Missouri, New York and Michigan. Ultimately, the Court recognized that there was no statutory or common law in Kentucky which would preclude an adverse attorney from contacting a treating physician to discuss a patient's treatment or diagnosis. The court noted that the Kentucky Rules of Evidence do not recognize a physician-patient privilege and that a long line of cases in Kentucky held that there is no recognized right of a privilege between physician and patient.[7] Arguments were raised by counsel for Ms. Caldwell that there were confidentiality provisions within the Code of Medical Ethics from the American Medical Association which would preclude a doctor from voluntarily disclosing physician-patient information. The court rejected this argument holding that although the Code acted as an ethical guide, it was not recognized as "authority binding the courts."[8]

As part of its decision, the Kentucky Supreme Court found that there was no law in Kentucky which would preclude counsel from interviewing treating physicians. The decision recognized that there is a significant difference between treating physicians who are considered fact witnesses and those who are deemed experts. To the extent that a doctor would be disclosed as an expert, obtaining information regarding the opinions held by that expert would be governed by Rule 26.02 of the Kentucky Rules of Civil Procedure. However, when a treating physician was not to be designated as an expert, there was no legal limitation on an attorney's ability to undertake an informal interview.[9]

[6] *Caldwell* at 159.
[7] *Caldwell* at 154.
[8] *Caldwell* at 156.
[9] *Caldwell* at 158.

The decision recognized that any information provided by a physician was still governed by HIPAA and the privacy concerns addressed in the Act. In reaching this conclusion, the court undertook a detailed analysis of the Act finding that HIPAA does not prevent attorneys from undertaking ex parte interviews with treating physicians. However, the Act would cover information provided during the interview.

HIPAA does not mention ex parte communication with physicians. HIPAA likewise does not preclude informal discovery such as meetings with doctors. However, information obtained during such a meeting would include the oral disclosure of health information which falls directly under the Act.[10] The court turned to decisions from other jurisdictions for an analysis of varying approaches to such meetings. The court reviewed cases from Missouri, New York and Michigan as each of these jurisdictions found ex parte contact permitted. However, each of these jurisdictions took a different approach as to whether HIPAA was applicable and how the Act applied. In *State ex rel. Proctor v. Messina*, 220 S.W.3d 145 (Mo. 2010), the Missouri Supreme Court ruled that ex parte communications and meetings with doctors were not a "judicial proceeding" as referenced in the Act precluding HIPAA application to such communications.

In reviewing *Arons v. Jutkowitz*, 880 N.E.2d 831 (NY.App. 2007) the Kentucky Supreme Court noted that New York did not find such informal communications to be barred by HIPAA. However, one of the two requirements under the litigation exception of the Act must be satisfied to permit disclosure of health information. A similar analysis was reached by the Supreme Court of Michigan in *Holman v. Rasak*, 785 N.W.2d 98 (Mich. 2010) which found ex parte communications permitted under the Act but that the party seeking the information was required to undertake efforts to obtain a qualified protective order.[11]

The Kentucky Supreme Court adopted a similar position as provided by New York and Michigan. However, the Kentucky Supreme Court found that ex parte interviews of physicians did not fall under the category of "lawful process" as used in the Act. Such ex parte interviews were found to be informal and voluntary and did not fit the general category defined as lawful process which included formal discovery.[12] Accordingly, there was no need to provide notice to a patient that confidential health information may be disclosed nor was there a need to obtain a protective order. Instead, the court held that the better approach would be to allow ex parte communications as long as an order was in place addressing such communications as provided under 45 C.F.R. §164.512(e)(1)(i).

Ultimately, in deciding whether ex parte communications with treating physicians is permissible, a determination must be

[10] *Caldwell* at 149.
[11] *Caldwel*l at 150.
[12] *Caldwell* at 152.

undertaken on a state-by-state basis. State and federal courts have taken a variety of approaches in determining whether such communications with doctors are permitted and how such information must comply with HIPAA. Ex parte communication with treating doctors is allowed in Kentucky as long as the doctor is not an expert. However, information gained from a treating physician is considered confidential health information and is governed by the confidentiality provisions of HIPAA. Prior to meeting with a doctor, Kentucky requires that an order be entered by the court and that information provided by the doctor be limited as authorized by the order. This allows the parties to raise concerns or limitations as to the information a doctor may provide and to ensure that the parties have sufficient time to address concerns regarding the disclosure.

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