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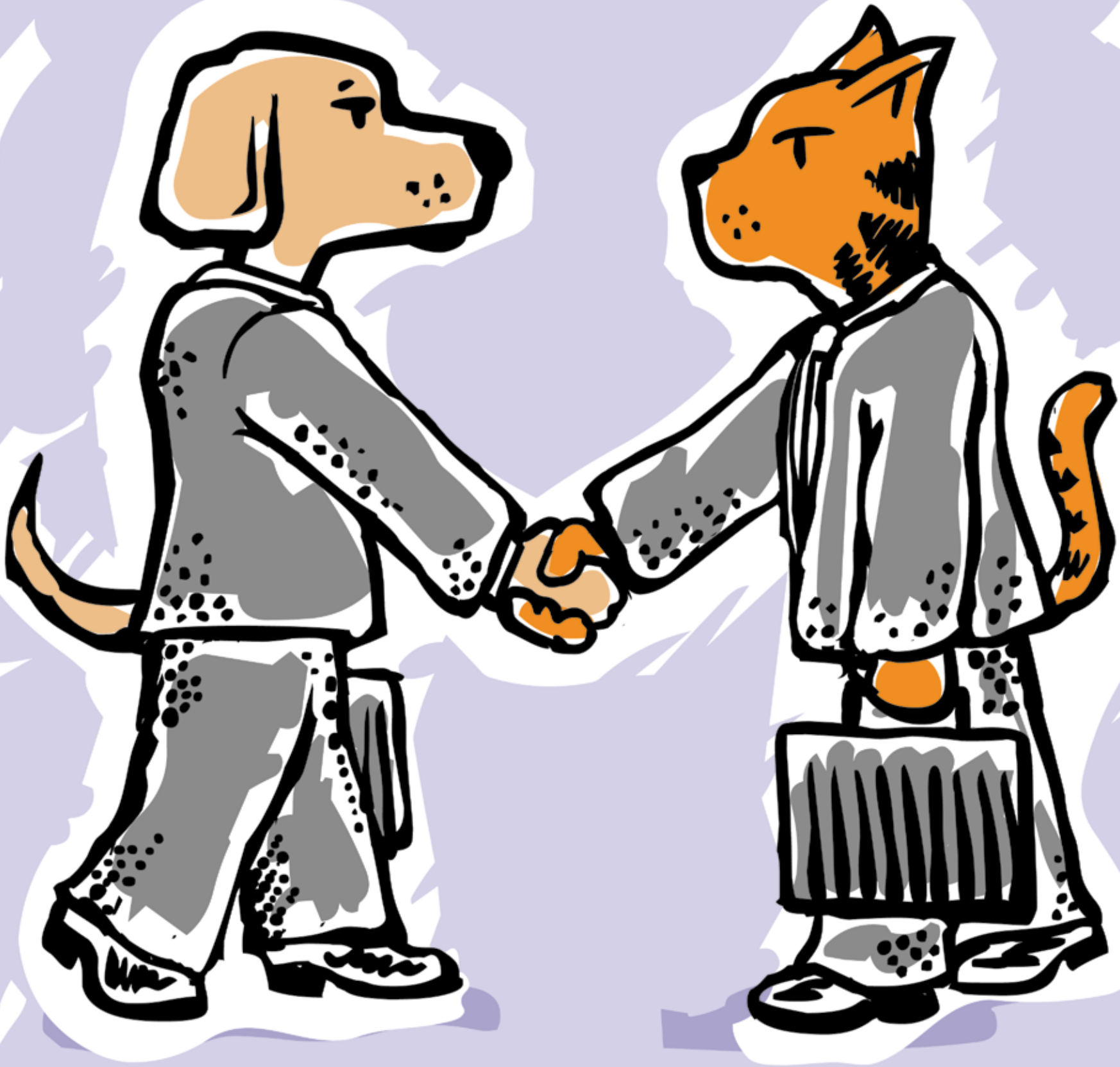

LITIGATION

Ex Parte Communications with the Treating Physician in Litigation

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In any case where medical damages are claimed, the treating physician offers a wealth of potential information both as a fact witness and as a potential expert. Traditionally, litigators have considered the treating physician as one whom the plaintiff and her attorney have access to, but whom remains an unknown except through depositions for the defense.

However, a recent line of cases in federal courts and some state courts have utilized a provision of the Health Insurance Portability and Accountability Act (HIPAA) to grant all litigants access to treating physicians. These courts have recognized that under an appropriate qualified protective order as described in the regulations accompanying HIPAA, defendants should be allowed *ex parte* communications with treating physicians.

Why do *Ex Parte* Communications Matter?

In any litigation where a plaintiff claims medical damages, proof related to those damages and their causal connection to the alleged negligence of the defendant is necessary for both the plaintiff and the defense. The plaintiff has at her disposal treating physicians who evaluate her, are familiar with her medical history and ailments, and often form opinions concerning her damages, prognosis and ultimately the cause of those damages.

Traditionally, plaintiffs sign HIPAA authorizations allowing their attorneys not only to obtain medical records directly from the treating physicians, but also to communicate directly with those physicians. In so doing, the plaintiff grants her attorney access to a potential source of information and opinions concerning the plaintiff's case and damages. This in turn allows the plaintiff's attorney an opportunity to discern whether a treating physician will assist in proving the plaintiff's case and whether the physician will make a good witness for purposes of a deposition or trial testimony.

Since the passage of HIPAA, defendants have not been afforded this access to treating physicians. Historically, Kentucky cases decided prior to HIPAA such as *Davenport v. Ephraim McDowell Memorial Hospital* and *Roberts v. Estep,* permitted *ex parte* communications with treating physicians. These cases follow Kentucky's recognition of the important goals pretrial discovery serves. Those goals include simplification and clarification of the issues, elimination or reduction of surprise, achievement of a balanced search for the truth, and encouragement of settlement.

Discovery of information and opinions of a treating physician would further these goals. Allowing both parties equal access to these physicians would create a more balanced search for the truth about the plaintiff's claims. It would also eliminate and reduce the element of surprise, allowing for both parties to fully understand whether treating physicians support, are neutral, or disagree with the plaintiff's claims.

Further, *ex parte* communications would allow for simplification and clarification of the issues, especially if the treating physician strongly supported or strongly opposed plaintiff's claims of negligence or causation with regard to medical damages.

Finally, perhaps no opinion would more greatly encourage settlement than that of a treating physician if that opinion supported or opposed the claims or defenses of the parties. Thus, the question remains whether the defendant is truly prohibited from *ex parte* communications with treating physicians.

Since HIPAA, however, a plaintiff's attorney will rarely allow his client to sign a HIPAA authorization permitting the defendant to obtain medical records, let alone communicate *ex parte* with the treating physicians. Thus, the defendant's counsel has been resigned to more formal modes of discovery, notably depositions and subpoenas. This leads to strategic and tactical decisions, often made in the blind, as to whether a treating physician's deposition testimony will assist the defendant in disproving or minimizing the damages and causation proof of the plaintiff.

Yet, the inquiry should not end with whether a plaintiff will expressly permit release of protected health information by signing a HIPAA-compliant release of information. HIPAA and its accompanying regulations permit disclosure of protected health information in various contexts, not purely through executed authorizations for release of information.

Are *Ex Parte* Communications Off Limits?

With the passage of HIPAA, Congress sought, in part, to afford privacy protections to "individually identifiable health information." As defined by HIPAA, "individually identifiable health information" includes any information that can be utilized to identify the individual and also discloses medical information about that individual, whether it be past, present or future physical, mental or health conditions.

Most commonly, litigants use individually identifiable health information in the form of medical records of the plaintiff. However, the definition of "individually identifiable health information" is much broader than written records, and includes any disclosure of that information in any format, including oral communications. Covered entities, as defined under HIPAA, must comply with those privacy protections. These entities are most often physicians, hospitals and health insurers, or their business associates.

The confidentiality and privacy standards codified in HIPAA preempt state law *unless* "state law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted under HIPAA." In other words, HIPAA sets the minimum standard of protection for confidential health information and states may elect to adopt more stringent standards. In the absence of a state law setting a higher privacy or confidentiality standard, HIPAA will govern how and when confidential health information can be disclosed.

A review of Kentucky law confirms that there are no codified standards of privacy protection that exceed that of HIPAA. In *Stidham v. Clark*, the Kentucky Supreme Court established that communications made for the purpose of medical treatment are not privileged in Kentucky. Under the Kentucky Rules of Evidence, only six categories of privileges are recognized: (1) attorney-client, (2) husband-wife, (3) religious, (4) counselor-client, (5) psychotherapist-patient and (6) identity of informer. Further, there exists no statute which protects communications with a physician. As recognized in *Roberts v. Estep*, there is also no Kentucky statute which prohibits *ex parte* communications with treating physicians.

But does HIPAA specifically address *ex parte* communications? HIPAA's enabling statute never mentions the term "*ex parte* communications." This has left litigants and courts with interpretation of the accompanying regulations implementing HIPAA when deciding whether *ex parte* communications are permitted. Those regulations allow for defendants to obtain protected health information about the plaintiff from treating physicians.

For example, the most common use of those regulations in litigation is to obtain medical records through the subpoena process found in 45 C.F.R. § 164.512(e)(1)(ii) and 45 C.F.R. § 164.512(e)(1)(iii). Similarly, a treating physician can be subpoenaed under those same regulations for a deposition or trial to testify about the patient's protected health information.

Thus, the question becomes whether HIPAA and its regulations contain a provision that would permit disclosure of protected health information in *ex parte* communications. Pursuant to 45 C.F.R. § 164.512(e)(1), a covered entity such as a treating physician "may disclose protected health information in the course of any judicial or administrative proceeding: …[if] the covered entity receives satisfactory assurance … that reasonable efforts have been made by such party to secure a qualified protective order that meets" the requirements of HIPAA. Because this provision exists along with the provision allowing for a treating physician to be subpoenaed to testify, courts have interpreted this provision as envisioning disclosures in less formal settings such as *ex parte* interviews.

Case Law Addressing *Ex Parte* Communications

A growing number of federal and state courts addressing whether HIPAA permits *ex parte* communications have concluded that with entry of a qualified protective order, a defendant should be permitted access to treating physicians of the plaintiff for the purpose of conducting *ex parte* interviews. These courts' decisions are built upon long-standing recognition of the principle that a treating physician is a fact witness in cases where medical damages are claimed. Recognizing that the treating physician is often a crucial fact witness with a wealth of information pertinent to the claims and defenses in any litigation, these courts

have embraced the provisions of HIPAA and its regulations and granted defendants access to these witnesses through the qualified protective order mechanism found in the federal regulations. Kentucky's U.S. district courts have followed suit. Both district courts have agreed that *ex parte* communications are permitted in litigation with a properly crafted qualified protective order under HIPAA.

In *Weiss v. Astellas Pharmaceuticals US, Inc.,* the Eastern District Court emphasized the importance of treating physicians in discovery. The court concluded "treating physicians are important fact witnesses, and 'absent a privilege, no party is entitled to restrict an opponent's access to a witness, however partial or important to him."

The court also rejected the plaintiff's argument that the ability of the defendant to depose the treating physician weighed against permitting *ex parte* communications. The court held "private interviews permit investigation and preparation of possible defense theories without revealing potential work product." In short, the court recognized the inherent value of *ex parte* interviews in both advancing discovery of facts and in protecting work-product in the form of case theories and strategy.

More recently, in *Pace v. Medco Franklin RE, LLC,* the U.S. District Court for the Western District followed the *Weiss* court's reasoning. *Pace* involved a plaintiff that brought suit against a nursing home alleging negligence, medical negligence, corporate negligence, violation of resident's rights, wrongful death and statutory violations. The nursing home moved for entry of a qualified protective order to permit *ex parte* interviews of the plaintiff's treating physicians. The court concluded that in the absence of Kentucky law setting a higher confidentiality standard, HIPAA controlled the inquiry. The court therefore granted the motion entering a qualified protective order permitting the *ex parte* communications.

In so holding, the court concluded that "limiting Defendants to formal discovery channels is counter to efficiency and judicial economy. Informal discovery mechanisms, such as [a qualified protective order for *ex parte* communications with treating physicians] serve as cost-effective means of obtaining factual information to evaluate and develop a case claim or defense."

The court further rejected arguments that a physician's ethical obligations to his patient would be compromised by entry of the qualified protective order. The court reasoned that because those ethics require a physician to safeguard patient confidences and privacy within the constraints of the law, a properly entered qualified protective order that complied with HIPAA worked to allow the physician to disclose information within the constraints of the law.

Both the *Weiss* and *Pace* courts also rejected arguments that the plaintiff and her attorney should be present for any communications. In so holding, the *Pace* court relied upon a plethora of federal court cases rejecting similar arguments of the plaintiff. The courts recognized that the presence of opposing counsel during an interview would likely cause disruption and make the interview more adversarial in nature.

It should be noted that despite these rulings, HIPAA and its regulations do not allow unfettered access to an individual's protected health information. As with the subpoena process for medical records, a plaintiff can object to production of personal health information. Most commonly, these objections are based on relevancy to the claims made by the plaintiff.

For instance, a plaintiff who is claiming to have sustained a femur fracture in a car accident may have a viable argument that protected health information addressing another unrelated medical condition is irrelevant and should not be subject to disclosure. Some courts have recognized that if the plaintiff can show a specific reason why access to her treating physicians should be restricted, such as particularly sensitive medical history irrelevant to the lawsuit, then the requests for access, either through subpoena or through *ex parte* communications, may be restricted.

Therefore, the qualified protective order affords defendants access to treating physicians for thorough case evaluation and preparation. Similarly, HIPAA allows for the plaintiff to make arguments for restricting that access to matters that are relevant to the litigation. As such, drafting a proper qualified protective order and seeking to tailor it to a specific litigation are crucial in practice.

Drafting the Qualified Protective Order

A HIPAA-compliant qualified protective order must meet the two requirements set forth in 45 C.F.R. 164.512(e)(1)(v). The first requirement of such an order is that it must prohibit the parties from using or disclosing the protective health information for any purpose other than the current litigation. The second requirement is that at the conclusion of the litigation, any protected health information provided to the party by the covered entity must be returned to the covered entity; this includes copies made of the protected health information. It is important to note that a qualified protective order may be one entered by a court or administrative tribunal, or by agreement of the parties to the litigation.

Some courts have tailored qualified protective orders that include additional limitations. These limitations have included requiring the defendant to advise the treating physician that he may refuse to speak with the attorney if he so chooses. Other courts have required that the defendant's attorney be "clear and explicit" about the purpose of the interview.

The *Pace* court delineated the persons associated with the litigation to whom the information could be re-disclosed, such as staff of the attorneys, consulting experts, testifying experts and witnesses at trial or depositions. In addition, the court also required that the parties advise all persons to whom the information was disclosed about the terms of the qualified protective order and receive assurances that those individuals would abide by the terms of the order.

From the plaintiff's perspective, the attorney for the plaintiff should seek to limit the qualified protective order to relevant care providers. The plaintiff's attorney should be well-acquainted with his client's past medical history and be prepared to make cogent arguments why certain physicians or records should be off-limits.

In *Baker v. Wellstar Health System, Inc.,* the Georgia Supreme Court upheld the authority for a trial court to enter a qualified protective order for *ex parte* communications, but instructed the trial court to narrowly tailor the order to matters relevant to the patient's medical condition at issue in the litigation. Thus, if the plaintiff has sought marriage counseling in the past, but there is no claim for loss of consortium or alleging any damage to the marital relationship, the plaintiff's attorney should be prepared to identify that treating physician and those records as irrelevant and make an argument for why the qualified protective order should be limited to not permit disclosure of that unrelated information.

The plaintiff's attorney should also consider arguments related to temporal restrictions that would disallow a defendant from delving into medical treatment rendered years prior to the negligence giving rise to the litigation.

In turn, the defendant's attorney should be prepared to make arguments concerning what treatment or topics are relevant and related to the claims at issue in the lawsuit. Preparing such arguments in advance of making the motion for a qualified protective order or attending a hearing on the motion will avoid judicial concerns that the defendant is on the proverbial fishing expedition. This will require the defendant's attorney to have a good understanding of the medical damages and issues at stake in the litigation.

As a final practice note, Jefferson County's Rules of Practice require any motion for a discovery order to include a certificate that the parties have attempted to resolve the matter addressed in the motion through extrajudicial means. To comply with Rule of Practice 402, the defendant's attorney should make an attempt to obtain an agreed qualified protective order prior to making any motion to the court for a qualified protective order.

Conclusion

The growing body of case law on the use of a qualified protective order permitting defendants to have *ex parte* communications with treating physicians is a valuable tool in case evaluation and preparation. It grants all parties to litigation where medical damages or claims are alleged equal access to the "percipient fact witness" known as the treating physician. In turn, as recognized by the courts that have embraced this pre-trial discovery method, the purposes of discovery are furthered, and economical case evaluation, preparation and settlement are often also advanced.

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