Patient Confidentiality

and Treating Physician Participation in Informal Interviews with Defense Counsel:

Guidance and Recommendations

By John Zen Jackson, Esq.

Medical practitioners are an important source of information for the participants in civil litigation. Whether the matter involves a relatively simple auto accident, a wrongful termination of employment, a product liability claim or alleged medical malpractice, the treatment before or after the incident at issue provided by physicians who are not parties to the lawsuit can be important information. Patient records are one source of information regarding the treatment, but so is direct discussion with the physician. This discussion may occur through testimony at trial, or at a pretrial deposition or in narrative written reports. Additionally, the practitioner's insights and comments may also emerge through a process of informal interviews with the lawyers involved in the case. A New Jersey Supreme Court decision has given its name–*Stempler*–to the process of physician participation in unsupervised interviews with an attorney adverse to the physician's patient.

THE INFORMAL *EX PARTE* INTERVIEW

Interviews of nonparty witnesses are commonly used by attorneys in determining whether witnesses have sufficiently valuable information to warrant taking their deposition or using their testimony at trial, as well as in actually preparing witnesses to testify. Such interviews typically are conducted without the other side being present. Although such *ex parte* interviews are accepted for most witnesses, *ex parte* contact between a plaintiff's treating physician and a defendant's attorney raises the question of whether such communications are inconsistent with the physician-patient privilege and the physician's duty of confidentiality.

Both before and since the effective date of the Federal Privacy Rule, the need in New Jersey for a patient's written authorization or a court order for a physician to disclose patient medical records has been clear. Similarly, because of physician-patient privilege and confidentiality, even though the patient may have put a medical condition "at issue" in the litigation, there is also an authorization aspect to any direct discussions with the lawyers in a lawsuit.

When the lawyer represents the physician's patient, the authorization for a doctor to participate in this process is usually explicitly given and is rarely an issue. However, such interviews may be requested by the lawyers who are adverse to the physician's patient with the request that the interview be conducted on an *ex parte* basis without the presence of the attorney for the patient. In New Jersey and elsewhere, such proceedings have long been considered an informal investigatory technique that supplements the formal discovery process of written interrogatory questions and depositions. These interviews are typically unsupervised without any written record being made of the dialogue between the physician and lawyer, of the questions and answers or of information that is being disclosed.

There are many reasons why defense counsel will seek an *ex parte* interview.[2] Counsel may need to have an understanding of the reason underlying a brief entry into the plaintiff's medical record and want to avoid the expense of a full deposition. Alternatively, counsel may wish to clarify

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the course of the patient's treatment in order to determine if there are problem areas or opinions that might appear in a formal deposition or trial testimony. Additionally, counsel may wish to discover information in an informal setting that could be useful to the defense of the matter.

The request for an *ex parte* interview could arise regarding a relatively straightforward car accident, but it may also come up in an employment case in which defense counsel wants to learn about the plaintiff's claim for emotional injuries. Also, in connection with drug and medical device products liability actions, a treating physician may have prescribed the treatment that allegedly caused plaintiff's injury. Such a prescribing physician acted as a learned intermediary and as such has the potential to absolve a defendant drug or device manufacturer of liability. The information provided to the patient may or may not be fully set out in the medical record, but the extent of a physician's knowledge of the product's indications and potential adverse effects will certainly not be.

THE EFFECT OF THE *STEMPLER* RULING ON PHYSICIANS

While other states have taken varying approaches to *ex parte* interviews, including prohibiting such interviews, since at least 1985 it has been clear that in New Jersey *ex parte* interviews are a permissible part of civil litigation practice.

In *Stempler v. Speidell,*[3] the Supreme Court considered a medical malpractice and wrongful death case in which the defendant's attorney sought to interview one of the decedent's treating physicians out of the presence of the plaintiff's attorney. Defense counsel sent authorizations to the plaintiff for release of information. These were signed by the patient's representative after the plaintiff's attorney crossed out a passage that authorized the treating physicians "to discuss any and all information concerning any treatment by you or any examinations performed by you" and substituted a statement that the authorization was limited to release of records and "does not authorize you to have any discussions concerning these records, my care or my claim." Defense counsel filed a motion with the trial court to compel authorizations in the form submitted. Plaintiff resisted the motion to compel the authorizations, contending that the only appropriate means by which physicians may furnish additional information were through depositions. The trial court granted the motion to compel, and the case reached the New Jersey Supreme Court.

The Court observed that the Rules of Court regarding pretrial discovery did not completely identify the methods by which information for litigation could be obtained. It recognized that informal personal interviews, even though not specifically referred to in the Rules, were an accepted method of gathering facts and documents as preparation for trial. The Court further perceived the plaintiff's objection to the requested interviews as rooted in the physician-patient privilege even though the request for an interview would take place in an informal non-testimonial context.

The Court noted that plaintiff "concedes that instituting a suit extinguishes the privilege to the extent that decedent's medical condition will be a factor in the litigation."[4] However, plaintiff maintained that the unsupervised *ex parte* interviews presented a risk of disclosure of parts of the patient's medical history information that were irrelevant or still privileged as outside the scope of the litigation. The Court acknowledged that the unauthorized disclosure by a physician of confidential patient information outside a judicial proceeding could be actionable. As a general proposition, a physician had no "right to gossip about a patient's health."[5]

The potential exposure of a physician to liability for breach of confidentiality added some weight to the argument against unsupervised interviews by defense counsel as not adequately protecting the physician's interest in avoiding inadvertent disclosures or the patient's privacy. Weighed against these concerns was the assertion by the defendant that requiring the formality of depositions would impose unnecessarily cumbersome restrictions on preparation for trial. Furthermore, defense counsel maintained that it was unfair to restrict access to potential witnesses when no comparable restrictions were imposed on plaintiff's attorney.

The Court identified and then weighed three intersecting interests: that of the physician, the defendant and the patient. It ultimately resolved the conflicting interests with what it thought was adequate recognition and protection for the competing positions and concluded that this did not require the formality of depositions in every case.

The Court viewed the physician interest as focused on prevention of inadvertent disclosure of information still protected by the privilege, noting that an unauthorized disclosure of such information may be unethical and actionable. The defendant's position emphasized an approach to developing information without the formality, expense and inconvenience of depositions along with the hope that the interviewed physi-

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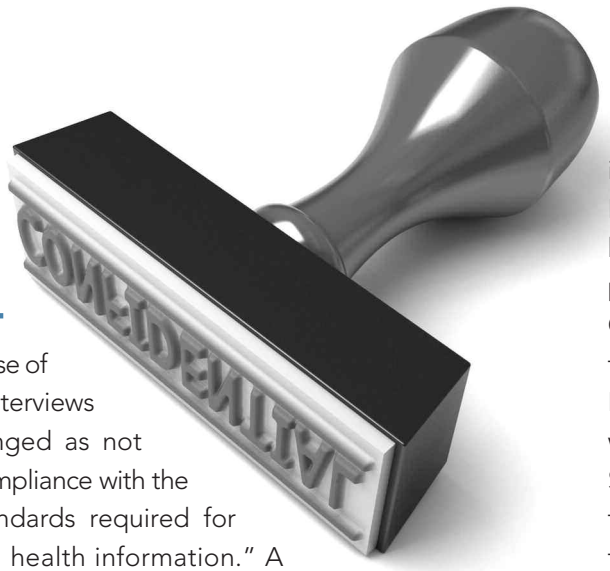
cians might provide evidence or testimony that would be helpful to the defendant at trial. Tactically, defendant's counsel would prefer to explore the prospect of such testimony in an interview out of the presence of plaintiff's counsel. The Court viewed the plaintiff's interest as twofold. The primary interest was protecting confidential medical information not relevant to the litigation and, therefore, still protected by the patient-physician privilege and the physician's professional obligation to preserve confidentiality. It also referred to "an equally if not more important interest of the plaintiff" of preserving the physician's loyalty to the patient (who was now a plaintiff) in the hope that the physician will not voluntarily provide evidence or testimony that will assist the defendant's cause. This duty of "loyalty" in the litigation context still has not been fully developed in the case law.

The Supreme Court's ruling in *Stempler* set forth a general expectation that plaintiff's counsel would provide written authorizations to facilitate the conducting of interviews with treating physicians. The ruling noted that if the authorizations were unreasonably withheld, such authorizations could be compelled by a motion requesting an order of the court requiring the authorizations. Additionally, the ruling indicated that conditions could be imposed in the authorizations that required defendant's counsel to provide plaintiff's counsel with reasonable notice of the time and place of the proposed interviews as well as a description of the anticipated scope of the interview. It is also required that defense counsel communicate with unmistakable clarity the fact that the physician's participation in the interview is voluntary. In the Court's view, this advance notice procedure would afford plaintiff's counsel the opportunity to communicate with the physician, if necessary, in order to express any appropriate concerns about the proper scope of the interview and the extent to which plaintiff continued to assert the patient-physician privilege with respect to that physician. The Court also recognized that with such notice of the intended scope of the interview in some circumstances, plaintiff's counsel might seek a protective order to limit the interviews or require judicial supervision through the formal deposition process or other appropriate procedures.

STEMPLER VS. HIPAA

After the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule went into effect in 2003, the



continued use of *Stempler* interviews was challenged as not being in compliance with the federal standards required for "protected health information." A HIPAA standard or requirement that is "contrary" to state law preempts state law, unless the state law is "more stringent" than HIPAA.[6] The regulation defines "contrary" as meaning either that a covered entity would find it impossible to comply with the state and federal requirements or that the provision of state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA.[7] The test of "more stringent" on the other hand means that the state law provides greater privacy protection than HIPAA. After an extended analysis of the history and purposes of the HIPAA Privacy Rule, the trial court in *Smith v. American Home Products*[9] rejected the contention that the New Jersey *Stempler* discovery process was preempted by the Federal Privacy Rule. That conclusion has been accepted by other New Jersey trial-level decisions[10] but has not been addressed in any reported appellate decision. Nonetheless, the New Jersey Supreme Court used its rule-making power to solidify the *Stempler* practice. Effective September 1, 2006, the pretrial discovery portion of the Rules of Court were amended to state that "[a] party shall not seek a voluntary interview with another party's treating physician unless that party has authorized the physician … to disclose protected medical information" using a form of authorization included in the Appendix to the Rules of Court.[11]

Despite the general approval of the informal interview process by the New Jersey Supreme Court in *Stempler*, the decisions ruling that the *Stempler* process was not pre-empted by HIPAA, and the adoption of a form of authorization as part of the Rules of Court, the trial judges managing the various mass tort programs in New Jersey have been resistant to entering orders permitting *Stempler* interviews. There have been orders precluding such interviews in the mass tort litigation involving such products as Vioxx and Aredia/Zometa that present continuing controversy.[12]

Controversy has persisted in other jurisdictions regarding the propriety of *ex parte* interviews in light of the HIPAA Privacy Rule. The issue was finally addressed by New York's highest court in 2007 with a ruling permitting the *ex parte* process.[13] More recently, in 2010 the Michigan Supreme Court held that *ex parte* interviews that had been permitted under Michigan state law were consistent with the HIPAA regulation as long as certain notice requirements were met.[14] On the other hand, soon thereafter the Supreme Court of Missouri concluded that HIPAA precluded the practice of *ex parte* interviews.[15] Following the loss at the state level, the Michigan plaintiff sought review by the Supreme Court of the United States of the conflict between the decisions of the highest courts of different states on the question of federal law that was presented. Further review was denied.[16]

KEY FACTORS IN DECIDING WHETHER TO PARTICIPATE

Physician participation in the unsupervised *ex parte* interviews with attorneys adverse to a patient is permissible under New Jersey law as long as an appropriate *Stempler*-type authorization has been obtained. As emphasized by the Supreme Court in its *Stempler* opinion, participation in an *ex parte* interview is voluntary. Sometimes plaintiff's attorneys seek to influence that decision by the physician. This is contrary to the case law that indicates that "the plaintiffs and their attorneys are directed to take no steps designed to interfere or discourage the physician's participation."[17] Indeed, such conduct may cross an ethical line.[18] It is appropriate, however, for plaintiff's counsel to identify areas of continuing privilege and what is at issue in the case. Counsel may also seek to meet with the physician.

Because the unauthorized disclosure of protected health information presents a risk of a tort claim against the physician and because such disclosures may not constitute a "medical incident" or the provision of professional services for purposes of malpractice coverage,[19] caution in deciding to participate in a *Stempler* interview is prudent. Nonetheless, a number of medical malpractice insurers will make legal counsel available to a physician contacted about a *Stempler* interview. Risk management principles recognize that there may be exposure to a medical negligence claim arising out of the underlying treatment even though it has not yet become the focus of a claim. The involvement of counsel can help clarify the scope of the

anticipated interview to prepare and to keep it within the identified scope to avoid exceeding the implied waiver of confidentiality that resulted from the filing of the lawsuit. In addition, counsel can assist in ascertaining if the interview is a substitute for or merely a prelude to a deposition. That information may be a factor in deciding whether to participate voluntarily in the informal process. Choosing not to participate in an informal interview may cause the requesting lawyer to use the alternative of serving a deposition subpoena. It must be recognized that if the subpoena is properly served, it cannot be ignored without risk of contempt of court sanctions.[20] No records should be provided in advance of the date of the deposition scheduled in the subpoena. The party taking the deposition must pay the nonparty treating physician a reasonable fee for his or her appearance, absent a court order directing otherwise.[21] Moreover, unless the court orders otherwise, the party taking the deposition must pay for the time and travel expenses of the nonparty treating physician if the deposition is not conducted at the physician's residence or place of business.[22] Similarly, the physician can charge for the *Stempler* interview if he or she decides to participate.

It is well established that a patient waives the physician-patient privilege as to the subject of the litigation by bringing a lawsuit for personal injuries involved in the treatment.[23] While the scope of the waiver is not always clear, physicians should recognize that factual information as to cause and effect is important in arriving at the truth of a claim of injury. Thus, potential interaction and involvement with the legal system are to be expected and should not be avoided. The decision to participate or not participate in an informal *Stempler* interview requires a weighing of many factors that vary from one case to another.

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[1] *See generally Crescenzo v. Crane*, 350 N.J. Super. 531 (App. Div.), *certif. denied,* 174 N.J. 364 (2002); *See also*, Jackson, J. Z. (2003). The HIPAA Privacy Rule and physician responses to medical-record requests in civil litigation. *New Jersey Medicine, 100*, 21–26.

[2] *See generally* Bufano, M. M., & Reinartz, R. A. (2009). *Fight For Your Right To Ex Parte*, 198 N.J.L.J. 870.

[3] 100 N.J. 368 (1985).

[4] *Id.* at 372-73.

[5] *Id.* at 375.

[6] 45 CFR § 160.203.

[7] 45 CFR § 160.202.

[8] 45 CFR § 160.203.

[9] 372 N.J. Super. 105 (Law Div. 2003).

[10] *See, e.g., Brigham v. Wyeth, Inc.* 384 N.J. Super. 546, 559-60 (Law Div. 2005); *In re Vioxx*, 2004 N.J. Super. Unpub. LEXIS 6, at *6-7 (Law Div. 2005).

[11] Rules Governing the Courts of the State of New Jersey, R. 4:10-2(d)(4).

[12] *Gaus v. Novartis Pharmaceuticals Corp.*, Docket No. MID-L-7014-07-MT (October 29, 2009) Reviewing various mass tort litigation orders. www.judiciary.state.nj.us/mass-tort/zometa-aredia/gaus102909.pdf

[13] *Arons v. Jutkowitz*, 9 N.Y.3d 393, 880 N.E.2d 831, 850 N.Y.S.2d 345 (N.Y. 2007).

[14] *Holman v. Rasak*, 486 Mich. 429, 785 N.W.2d 98 (Mich. 2010).

[15] *State ex rel. Proctor v. Messina*, 320 S.W.3d 145 (Mo. 2010).

[16] 131 S.Ct. 913 (2011).

[17] *Brigham v. Wyeth, Inc.* 384 N.J. Super. 546, 565 (Law Div. 2005).

[18] NJ Rule of Professional Conduct 3.4(f) provides that "a lawyer shall not … request a person other than a client to refrain from voluntarily giving relevant information to another party."

[19] *See, e.g., Delaware Ins. Guaranty Ass'n v. Birch*, 2004 Del. Super. LEXIX 251 (Del. Super. Ct. 2004); *Wyatt v. St. Paul Fire & Marine Ins. Co.*, 868 S.W.2d 505 (Ark. 1994).

[20] *See generally N.J. CURE v. Estate of Hamilton*, 401 N.J. Super. 247 (App. Div. 2007).

[21] Rules Governing the Courts of the State of New Jersey, R. 4:10-2(d)(2).

[22] Rules Governing the Courts of the State of New Jersey, R. 4:14-7(b)(2).

[23] *See, e.g., Stigliano v. Connaught Labs*, 140 N.J. 305, 312-13 (1995).

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