Ex Parte Communications

Mike Karr, Evans & Dixon

Recently, the Missouri Court of Appeals Western District decided *State of Missouri ex. rel. Proctor v. Messina*, which addressed the applicability of HIPAA to discovery in civil lawsuits. Therein, the Court found HIPAA pre-empted Missouri state discovery rules regarding communications with medical providers. Specifically, the Court found a civil trial court could not order a plaintiff's treating physician to engage in informal *ex parte* communications with defendants. The Court recommended physicians not to communicate with other parties or divulge a patient's protected health information unless the patient has specifically authorized such communication. The Court acknowledged under HIPAA a doctor is permitted to disclose, orally or otherwise, protected health information where there is an express authorization, at a formal discovery deposition, or in testimony at hearing where the patient's physical and mental condition is in issue. The Court specifically noted lawyers are not permitted to engage in informal *ex parte* communications with a treating physician absent an express authorization.

Some claimant's attorneys have already alleged that the decision means insurance companies and their representatives cannot have any *ex parte* communication with treating physicians, in spite of the fact the Court noted its opinion was limited to the context of personal injury litigation and not the context of issues relating to permitted disclosures to health insurance companies providing payment for a patient's medical treatment. Clearly, there is nothing in this decision that would affect our rights under Section 140 of the Missouri Workers' Compensation Act to submit a written request for a copy of existing records directly to treating physicians without a signed authorization by the claimant. Section 140 of the Act has not been pre-empted by HIPAA; in fact, HIPAA provides a specific exception for disclosure of health information in workers' compensation cases.

We need to be careful with verbal communications with a treating physician without a signed authorization, as well as when soliciting opinions from the treating doctor. This is especially true in situations where medical case management is used. In reviewing the opinion, the Court makes clear communication with treating physicians, whether oral or in writing, is allowed where the patient has executed an authorization to that effect. Therefore, as long as the claimant has signed, and has not yet revoked, an authorization allowing communication with the physician, insurance companies and their representatives are free to communicate with the physician. It is our recommendation to secure an authorization from a claimant before engaging in any communication or medical case management with a treating physician.

We will continue to monitor the effects of this decision, and its use by the plaintiff's bar. Should you have any questions or concerns about communication with a treating physician, please do not hesitate to contact an Evans & Dixon attorney.

2152281