

## EX PARTE CONTACTS WITH HEALTH CARE PROVIDERS AND HIPAA

In *Crenshaw v. Mony Life Insurance Company* (S.D. Cal. 2004) 318 F. Supp.2d 1015, the United States District Court analyzed the propriety of ex parte contacts with health care providers under the Health Insurance Portability and Accountability Act (HIPAA) (42 U.S.C. section 1320d, et seq.). The court reviewed applicable case law pertaining to such contacts, as well as HIPAA, in determining that federal law mandates formal civil discovery methods be followed in order to communicate ex parte with health care providers.

Previously, the Supreme Court of California addressed the question of whether unauthorized ex parte discussions occurring during the discovery phase of medical malpractice actions between a non-party treating physician and the defendant physician's malpractice insurer violated either the Confidentiality of Medical Information Act (Civ. Code § 56 et. seq.) or the Constitutional right to privacy. In the case of *Heller v. Norcal Mutual Insurance Company* (1994) 8 Cal.4th 30, the court held those communications were proper, since they were designed to assist Norcal in defending the malpractice action against the defendant physician pursuant to section 56.10(c)(4), which allows health care providers and insurers to conduct ex parte discussions so as to facilitate preparation of a defense to a malpractice action. In so holding, the court noted such informal communications were authorized with physicians who are defendants, or potential defendants in the case who may incur malpractice liability.

In 1996, Congress enacted HIPAA to establish uniform standards to prohibit disclosure of protected health information (PHI), which is information relating to the physical or mental health of an individual. Privacy regulations established under HIPAA include limits on the non-consensual use and release of PHI, rights of patients to access their medical records and to know who has accessed them, restrictions on disclosure of PHI for the minimum need and intended purpose, and criminal and civil sanctions for improper disclosure.

Full compliance with HIPAA has been required since April 14, 2003. The law requires that covered entities -- defined as health care providers, health plans, employers and health care clearing houses -- comply with its privacy measures. Covered entities may disclose PHI to a non-covered business associate who performs a function on behalf of the covered entity, provided they enter into a contract that contains specific safeguards.

*Crenshaw v. Mony Life Insurance Company, supra*, involved a plaintiff who had purchased a disability insurance policy and subsequently claimed he was unable to continue working due to tinnitus. He filed a claim for disability benefits under his policy, and was referred to a Dr. Harris for consultation. Although the defendant insurer initially began making payments to plaintiff, it later denied the claim, giving rise to a lawsuit. During the course of litigation, plaintiff sought Dr. Harris' deposition and brought a motion to disqualify the defendant's attorneys and strike Dr. Harris as an expert witness on behalf of the defense.

According to the facts of the case, plaintiff only saw Dr. Harris on one occasion for consultation, but was not actually evaluated by Dr. Harris. Instead, a resident physician saw plaintiff and was supervised by Dr. Harris, who cosigned the chart note.

Thereafter, defense counsel contacted Dr. Harris in an effort to locate an expert for the case and was unaware of this consultation. Defense counsel spoke with Dr. Harris by phone and met with him in person to discuss plaintiff's condition. Of note is that Dr. Harris did not recall ever consulting on plaintiff's case. He went ahead and prepared an expert report, though by that time defense counsel had learned of the prior encounter. Plaintiff's motion followed.

Applying California law, the federal court initially noted the California Bar Association Committee on Legal Ethics had published an opinion stating that a defense attorney should not contact a plaintiff's treating physician without giving prior notice to plaintiff's counsel. The court examined the nature and extent of Dr. Harris's contact with plaintiff and determined he was not plaintiff's treating physician, given his limited role. The court cautioned, however, that its ruling might be different had Dr. Harris' contacts with plaintiff been ongoing, or if he consulted with him regarding health issues beyond those which were the subject matter of the case. Under the latter scenario, the court noted the physician-patient privilege may have been violated and, accordingly, recommended that the better course for defense counsel is to limit contact with health care providers to formal discovery until the scope of a litigant's waiver and the extent of his or her relationship with a physician becomes clear.

Though the court declined to disqualify defendant's counsel in the case for the reasons stated above, the court then addressed HIPAA and recognized its stated purpose of protecting a patient's right to the confidentiality of his or her individual medical information.

Under HIPAA, disclosure of medical information in the course of litigation is permitted through a court order, subpoena, or formal discovery request pursuant to an adequate protective order. Because the parties in the *Crenshaw* case did not enter into a protective order safeguarding plaintiff's privacy, the court ruled HIPAA's disclosure procedures applied and that defense counsel's ex parte contacts with Dr. Harris violated HIPAA. Thus, sanctions were awarded mandating defendant to pay the (1) expert witness fee charged by Dr. Harris for a deposition, (2) court reporter fees, and (3) attorney's fees incurred by plaintiff for taking his deposition.

Although the *Crenshaw* case was decided in federal court, it did apply California law and appears to be the first court in this state to address HIPAA insofar as it applies to informal meetings with physicians. While the *Heller* case remains good law, it was decided prior to HIPAA.

Other jurisdictions have interpreted HIPAA as prohibiting ex parte communications with health care providers, absent patient consent or a protective order. (*Bayne v. Provost* (N.D. N.Y. 2005) 359 F.Supp.2d 234; *In re Vioxx Products Liability Litigation* (E.D. La. 2005) F.2d WL 756742; and *Law v. Zuckerman* (D. Md. 2004) 307 F. Supp.2d 705.) However, at least one court has held that ex parte interviews of treating physicians can be allowed without compromising HIPAA, albeit with certain conditions and procedural safeguards imposed. (*In re Diet Drug Litigation* (N.J. Super.L. 2005) 895 A.2d 493.)

The use of business associate agreements between professional liability carriers and defendant physicians appears to be sufficient so as to allow for disclosure PHI, though whether such agreements apply to non-defendant treating physicians has yet to be directly determined by a court. In any event, the above-referenced cases illustrate the dangers of having attorneys communicate ex parte with non-defendant health care providers, and indicates formal discovery appears to be the proper vehicle to obtain confidential medical information under such circumstances, so as to ensure strict compliance with HIPAA.