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**EX PARTE COMMUNICATIONS
WITH TREATING PHYSICIANS**

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Syllabus

By pleading a physical or mental condition as the basis of a claim in a personal injury or medical malpractice case, a plaintiff impliedly waives the physician-patient or psychologist-client privilege of confidentiality for matters relating to those conditions. However, a lawyer representing a defendant in that lawsuit may engage in *ex parte* discussions with the plaintiff's treating physicians or psychologists concerning the doctor's care and treatment of the plaintiff or opinions resulting from that care and treatment only after first giving plaintiffs counsel reasonable notice and an opportunity to be present. In the event of a dispute between plaintiff's counsel and defendant's counsel, recourse to the formal discovery process remains an option.

Facts

A plaintiff files a personal injury or medical malpractice action against a defendant, claiming physical or mental injuries. Can counsel for defendant discuss with the plaintiff's treating physicians or psychologist, *ex parte*, the plaintiff's care and treatment and any opinions the doctor may hold which result from that care and treatment?

Opinion

A lawyer representing a party to a lawsuit may ordinarily engage in expanded discussions with prospective witnesses, so long as no privilege applies. However, under Colorado law, a physician "shall not be examined without the consent of his patient as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient . . ." C.R.S. § 13-90-107(d). Communications between psychologists and their clients are similarly protected. C.R.S. § 13-90-107(g). The plaintiff in a personal injury or medical malpractice action "impliedly waives any claim of confidentiality *respecting that same condition*" by pleading a physical or mental condition as the basis of a claim. *Clark v. District Court*, 688 P.2d 3, 10 (Colo. 1983).

The fact that a plaintiff in a personal injury or malpractice action impliedly waives the physician-patient or psychologist-client privilege for information "respecting that same condition" does not mean that counsel for the defendant may engage in *ex parte* discussions with the plaintiff's treating physicians or psychologists without first giving plaintiff's counsel reasonable notice and an opportunity to be present. Such *ex parte* discussions with plaintiff's treating physicians or psychologists may result in the disclosure of privileged information by the plaintiff's treating doctor in violation of Colorado law and, if held without first giving plaintiff's counsel reasonable notice and an opportunity to be present, are prejudicial to the orderly administration of justice.

The plaintiff's treating physician or psychologist may have treated the plaintiff for conditions unrelated to the conditions put in issue by the pending lawsuit. At other times a treating physician, during the course of treatment for the condition in issue, may receive sensitive or embarrassing information which was not necessary for the treatment of that condition or related to that treatment. If the physician or psychologist voluntarily discloses such unrelated information, he or she may, and in all likelihood would, be exposed to potential lawsuits by the plaintiff for violating C.R.S. § 13-90-107(d) or (g). This potential for liability of the physician to the plaintiff for inadvertently disclosing non-waived matters has been addressed. See *Alexander v. Knight*, 197 Pa. Super.Ct. 79, 177 A.2d 142 (1962); *Hammonds v. Aetna Casualty and Surety Co.*, 243 F.Supp. 793 (N.D. Ohio 1965); and *Schaffer v. Spicer*, 88 S.D. 36, 215 N.W.2d 134 (1974). The *Hammonds* case, in language quoted by the *Schaffer* court states:

It is one thing to say that a doctor may be examined and cross-examined by the defense in a courtroom, in conformity with the rules of evidence, with the vigilant surveillance of plaintiff's counsel, and the careful scrutiny of the trial judge; it is quite another matter to permit, as alleged here, an unsupervised conversation between the doctor and his patient's protagonist. It is the opinion of this Court that the mere waiver of a testimonial privilege does not release the doctor from his duty of secrecy and from his duty of loyalty in litigation, and no one may be permitted to induce the breach of these duties.

243 F. Supp. at 805.

The policy considerations underlying the physician-patient and psychologist-client confidentiality privilege have been recognized as being even more compelling in the relation between a psychiatrist and patient or psychologist and client than in the physician-patient relationship. *Bond v. District Court*, 892 P.2d 33 (Colo. 1984).

In Colorado, a trial court cannot issue an order permitting defense counsel to engage in *ex parte* discussions with plaintiff's treating doctors, but may ordinarily order the plaintiff to permit inspection and copying by defense counsel of plaintiff's medical records and x-rays. *Fields v. McNamara*, 540 P.2d 327 (Colo. 1975). The *Bond* case also holds that if counsel for plaintiff or plaintiff's treating doctor object to the release of plaintiff's medical records, then the trial court must balance the plaintiff's interest in protecting the confidentiality of his or her communications with the defendant's interest in full disclosure during discovery. These two policy considerations are "equally compelling." *Bond, supra* at 39.

It is unreasonable to expect the treating doctor, unschooled in law and unfamiliar with the issues framed by the plaintiff's lawsuit, to make the decision as to what information is included within the plaintiff's waiver of the physician-patient privilege, as opposed to what information is still privileged. Counsel for the defendant cannot make this determination, since he or she has a duty of undivided loyalty to the defendant, not the plaintiff, and since, to make the determination, counsel for the defendant would have to know the substance of the privileged information. Counsel for plaintiff must be informed and given the right to object so that, if required, a court can decide the issue of whether the information in question is privileged.

Courts from other jurisdictions have discussed this issue and agreed with the analysis. See *Jaap v. District Court*, 623 P.2d 1389 (Mont. 1981) and *Miles v. Farrell*, 549 F. Supp. 82 (N.D. Ill. 1982).

Lawyers may not "engage in conduct that is prejudicial to the administration of justice." DR 1-102(5). Similarly, DR 7-101(A)(1) states:

(A) A lawyer shall not intentionally:

- (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, *by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.* (Emphasis added.)

Disciplinary Rule 7-102(A)(8) states:

(A) In his representation of a client, a lawyer shall not:

- (8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

Ethical Consideration 7-10 states:

The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.

Ethical Consideration 7-39 states:

A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver or procedural formalities, and similar matters which do not prejudice the rights of this client. He should follow local customs of courtesy and practice, *unless he gives timely notice to opposing counsel of his intention not to do so.* (Emphasis added)

We believe that the above disciplinary rules and ethical considerations provide clear guidance to the Bar that orderly procedures designed to protect the rights of all the parties must be followed.

Allowing carte blanche, *ex parte* communications concerning a physician's care and treatment of the plaintiff could create the spectre of abuse of the orderly discovery process. Additionally, there could be inadvertent disclosure of unwaived privileged information which could expose the doctor to potential liability.

The Committee is of the opinion that treating physicians or psychologists should not be consulted *ex parte* concerning their care and treatment of the plaintiff or opinions which result from the care and treatment, without first giving plaintiff's counsel reasonable notice and an opportunity to be present at the meeting with the doctor. In the event of a dispute between plaintiff's counsel and defendant's counsel, recourse to the formal discovery process remains an option. We believe that this procedure will give credence to the ethical considerations involved and protect the plaintiff's attorney, and the defense attorney, from running afoul of the Code of Professional Responsibility.

The above procedure avoids the appearance of impropriety by the legal profession and assists in maintaining the integrity and competence of the legal profession.

1992 Addendum

The principles and conclusions stated in this Formal Opinion 71 apply equally to workers' compensation actions as they do to personal injury and medical malpractice actions.