Ex Parte Interviews of Treating Physicians are Allowed Under HIPAA

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PRACTICE AREAS
Health Care
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In a recent decision, the Michigan Supreme Court held that the federal HIPAA medical privacy law does not prohibit ex parte interviews of treating physicians by defense counsel as long as reasonable efforts have been made to secure a qualified protective order. *Holman v Rasak* (July 13, 2010).

BACKGROUND

Under Michigan law, an individual waives the physician-patient privilege by bringing an action to recover for personal injury or malpractice. Based on this waiver, defense counsel have been allowed to interview treating physicians without the patient's permission or presence. This informal discovery is allowed to obtain information related to the patient's claims and relevant to preparing a defense.

As a general rule, HIPAA prohibits a covered entity, such as a physician, from disclosing protected health information (PHI) without the patient's authorization or opportunity to object. There are several exceptions to the general rule, including provisions for disclosure for judicial proceedings if certain conditions are satisfied. Because Congress wanted to mandate certain standards for medical privacy on a national level, HIPAA preempts any "contrary" state laws that cannot be reconciled with federal law or provide less protection for patient privacy.

HOLDING

The Supreme Court held that Michigan's law allowing ex parte interviews is not contrary to HIPAA, as long as defense counsel complies with the requirement of making "reasonable efforts" to obtain a "qualified protective order." HIPAA does not prevent informal discovery through ex parte interviews. Instead, it imposes procedural requirements.

PRACTICAL APPLICATION

The decision does not affect the common practice of obtaining HIPAA-compliant authorizations from the patient.

When a plaintiff is not willing to provide an authorization, the decision requires defense counsel to make "reasonable efforts" to obtain a "qualified protective order." The covered entity must receive "satisfactory assurances" of those reasonable efforts.

A "qualified protective order" under HIPAA must (1) prohibit use or disclosure of PHI for any purpose other than the associated litigation, and (2) require the disclosed information to be returned to the disclosing entity or destroyed at the end of the litigation.

A defense counsel makes a "reasonable effort" by attempting in good faith to notify the patient and provide sufficient information about the litigation to permit the individual to raise an objection to the court.

A covered entity receives "satisfactory assurance" of defense counsel's reasonable efforts by a written statement and accompanying documentation demonstrating that (1) the parties have agreed to a qualified protective order and presented it to the court, or (2) defense counsel has requested a qualified protective order from the court and the plaintiff's time to object has elapsed.

The decision does not require physicians to agree to ex parte interviews. As before, a plaintiff may not restrict access to treating physicians and defense counsel may request an interview. However, compliance with HIPAA permits, but does not require, a covered entity to disclose PHI.