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# Challenging Ex Parte Communications With Physicians

*Law360, New York (February 04, 2013, 11:35 AM ET)* -- Recently, I heard a plaintiffs' lawyer state that an issue of concern to the plaintiffs bar is the defendants increasing ability to talk with plaintiffs' treating physicians. Apparently, they view this as ground that is their sacred territory. These attorneys' concerns are real — this article will highlight recent key rulings on this issue in the mass tort arena.

Plaintiffs' and defendants' lawyers continue to jockey for position in regard to their ability to talk with treating physicians and other health care providers outside of the presence of opposing counsel. While in individual tort cases, federal courts look to the substantive privilege law of the forum state, in mass torts, both in federal and state venues, the courts must consider and balance the varying privilege laws of all states in which the plaintiffs reside, unless the parties agree otherwise.

As a result, these courts handling mass torts routinely enter case management orders that directly address communications with health care providers by all parties.

As we all know, plaintiffs' counsel want to prohibit all communications between defense lawyers and health care providers regardless of the subject matter of the conversation. Some plaintiffs' lawyers refuse to even allow defendants' lawyers or their staff to call a doctor's office to schedule a deposition.

Plaintiffs vehemently argue that such communications are prohibited by the statutory and common law physician-patient privilege. On the other hand, defense counsel often seek both the opportunity to talk with the doctor about the patient's care and seek to prevent the plaintiffs from "woodshedding" the doctor with confidential documents from the defendant company's internal files. The varying rulings on this topic keep it a fertile ground for motion practice in the early stages of any mass tort case.

The most frequently cited decision on this issue is that of Judge Eldon Fallon in the Vioxx litigation. While initially permitting either party to interview a plaintiff's prescribing physician after giving the opposing party five-days advance notice of the interview, Fallon reconsidered his opinion and entered a new order prohibiting defendants from conducting any ex parte interviews.[1]

In denying the defendants ex parte access to the plaintiff's prescribing physician, Fallon relied heavily on the need to protect the physician-patient privilege. He also concluded that defendants had access to the information they wanted through the plaintiff's medical records, depositions and defendant's sales representatives' records.[2]

Fallon's decision did not address any limits that should be placed on plaintiff's ex parte discussions with these prescribing physicians. More recently, some courts have considered and agreed to place limits on the scope of plaintiffs' ex parte communications with treating physicians as noted below.

In re Chantix (Varenicline) Products Liability Litigation[3]: plaintiffs' counsel prohibited from discussing "defendant's internal documents with plaintiffs' healthcare providers outside of a deposition or other on the record setting."

In re Ortho Evra Products Liability Litigation[4]: plaintiffs' counsel prohibited from discussing with their physicians "liability issues or theories, product warnings, [d]efendant research documents or related materials."

In re NuvaRing Products Liability Litigation[5]: plaintiffs' counsel prohibited from discussing with their physicians anything other than "the particular plaintiff's medical condition at issue in the current litigation." Plaintiffs agreed to this limitation during oral argument.

In re Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Products Liability Litigation[6]: permitting plaintiffs' counsel to provide treating physicians with documents not previously seen by physicians, including confidential internal documents of the defendant, without notes, highlighting or underlining, but requiring plaintiffs to provide detailed descriptions or copies of all documents shown to the physician to the defendants 72 hours before the doctor's deposition.

In re Aredia and Zometa Litigation[7]: both parties precluded from engaging in ex parte communications with plaintiffs' treating physicians "to ensure that all parties have the same right of access to all non-party fact witnesses."

In re Aredia and Zometa Litigation[8]: defendants permitted to engage in ex parte communications with physicians, subject to some procedural steps, in states that have not specifically prohibited such conversation either substantively or procedurally.

In re Neurontin Marketing, Sales Practices and Products Liability Litigation[9]: defendant's motion to limit plaintiffs' attorneys and expert witnesses from discussing with treating physicians any litigation issues beyond the care and treatment provided to the plaintiff denied without opinion.

As it can be seen from these decisions over the past few years, the courts recognize that "the parties before [them] are attempting to posture themselves and to control the information provided a future trial witness to their advantage."[10]

As the courts become even more aware of the unfettered access that plaintiffs' lawyers have to these future trial witnesses, to the exclusion of opposing counsel, it is easy to envision ongoing placement of restrictions on plaintiffs' lawyers communications with these witnesses.

While we can expect the courts to continue to protect the physician-patient privilege where it exists, that privilege does not and should not be permitted to extend to allow the woodshedding of physicians with documents and information that they have never seen or known and that have no bearing on their treatment of the individual plaintiff.

Continued efforts by the defense bar to challenge the extent of ex parte communications and educate the courts about the activities of plaintiffs' counsel are necessary to keep this favorable trend.

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[1] In re:Vioxx Prods. Liab. Litig., 230 F.R.D. 473, 479 (E.D. La. 2005)

[2] Id. at 477

[3] MDL No. 2092, U.S.D.C. N.D. AL, 2:09-CV-2039-IPJ, docket entry #306.

[4] MDL No. 1742, 2010 WL 320064, at *2 (N.D. Ohio Jan. 20, 2010)

[5] No. 4:08MD1964, 2009 WL 775442, at *2 (E.D. Mo. Mar. 20, 2009)

[6] MDL 2100 3:09-md-02100 DRH-PMF (S.D. IL. Mar. 4, 2011)

[7] Case No. 278: Docket No. MID-L-7014-07-MT (N.J. Super. Law Div. Oct. 29, 2009)

[8] No. 3:06-MD-1760 (M.D. Tenn. Jan. 17, 2008) docket entry # 1094

[9] MDL No. 1629 Master File No. 04-10981 (D. Mass. Oct. 14, 2009)

[10] In re: Chantix (Varenicline) Prods. Liab. Litig., MDL No. 2092, U.S.D.C. N.D. AL, 2:09-CV-2039-IPJ, docket entry #306 at p. 5.