

MSC Opinion: HIPAA does not preclude ex-parte interviews with health care providers so long as reasonable efforts are made to obtain a qualified protective order

14. July 2010 By Jason Byrne

On July 13, 2010, the Michigan Supreme Court published Justice Corrigan's majority opinion in [Holman v. Rasak, No. 137993](#). In this case, the Court was presented with the question of whether the federal Health Insurance Portability and Accountability Act ("HIPAA") prevented defense counsel from conducting an ex parte interview of a plaintiff's treating physician. Justice Corrigan, joined by Justices Cavanagh, Young, Markman and Kelly concluded that it did not.

The majority reasoned that the starting point of the analysis was that Michigan law allowed ex parte interviews of a plaintiff's treating physician if that plaintiff has waived the doctor-patient privilege by producing a treating physician as a witness. The majority then turned to the provisions of HIPAA, noting the general prohibition against the disclosure of health information. The Court focused on the exception in the accompanying federal regulations allowing disclosures for judicial proceedings in "response to a subpoena, discovery request or other legal process." 45 CFR 164.512. In that situation disclosure is allowed if the health care provider is supplied with assurance that the party seeking the information has made reasonable efforts to secure a protective order that limits the use of the protected information to the litigation/proceeding, and requires a return or destruction of the information at the end of the litigation/proceeding. The majority concluded that an ex parte interview of a treating physician in the context of litigation fell within the "other legal process" exception, and thus the Michigan law allowing such interviews was not contrary to HIPAA. The Court indicated that so long as reasonable efforts are made to secure the necessary protective order, such interviews are permissible. However, the majority also noted that the ruling does not require a physician to disclose such information in an interview.

Justice Hathaway, joined by Justice Weaver, dissented from this ruling arguing the HIPAA did conflict with Michigan law and precluded such ex parte interviews. Specifically, Justice Hataway focused on a provision of the federal regulation which states, when the provider "is required by this section to inform the individual of, or when the individual may agree to, a use or disclosure permitted by this section, the [provider's] information and the individual's agreement may be given orally." 45 CFR 164.512. The dissent contends that this language restricts oral communication of protected information to these limited circumstances, and because ex parte interviews are not included, they are not permitted. Justice Hathaway also reasoned that the majority's "reasonable effort" requirement for a protective order was at odds with Michigan Court Rules which only provide for a motion to be granted or denied.