IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

CHRISTINE LEFLORE,	*	
Plaintiff,	*	
v.	*	**Case No. 2009 CA 009365 M**
		Judge Anita Josey-Herring
WASHINGTON HOSPITAL CENTER CORPORATION, INC.,	*	
Defendant.	*	

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PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION FOR PROTECTIVE ORDER

Plaintiff, Christine LeFlore and her attorneys Patrick A. Malone, Leonard W. Dooren and the law firm of Patrick A. Malone & Associates, request that this Court deny Defendant's Motion for a Protective Order. Defendant Washington Hospital Center has failed to show good cause for an order compelling the authorization of *ex parte* communication with Ms. LeFlore's treating healthcare providers. The request to violate the confidentiality and protection afforded her care with unidentified physicians and other health care providers in an *ex parte* fashion should not be sanctioned.

INTRODUCTION

Christine LeFlore suffered five pressure ulcers that required more than a year to heal and multiple surgeries to close. Ms. LeFlore has been scarred for life and is left with permanent dysfunction and disfigurement. Photographs of Ms. LeFlore's scarring and disfigurement are attached as Exhibit 1 (a, b & c).

On April 21, 2008 Ms. LeFlore was admitted to the Washington Hospital Center, her skin was intact. See Washington Hospital Center's initial skin assessment, attached hereto as

Exhibit 2. Less than three weeks later, Ms. LeFlore was discharged to a rehabilitation center with five pressure ulcers. See Cresent City's initial skin assessment, attached hereto as Exhibit 3. Washington Hospital Center's discharge summary failed to mention the three stage III pressure ulcers Ms. LeFlore developed under its care. See Washington Hospital Center's discharge summary, attached hereto as Exhibit 4.

Defendant's Motion should be denied for these reasons:

1. HIPAA, not Street v. Hedgepath, controls the dissemination of protected health information;

2. Treating physicians have an ethical duty that is placed in jeopardy by *ex parte* communication with individuals adverse to their patients;

3. There has been no showing that full and complete discovery cannot be secured by way of deposition, thereby protecting against the potential abuses of unfettered *ex parte* interviews by defense counsel.

4. Defendant, not Plaintiff, has the advantage of *ex parte* contact with the staff of the Washington Hospital Center.

I. ARGUMENT

A. HIPAA Pre-empts District of Columbia Law

Congress enacted the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), in part, to protect the security and privacy of individual identifiable information. Law v. Zuckerman, 307 F. Supp. 2d 705, 711 (D. Md. 2004); see also United States v. Sutherland, 143 F. Supp.2d 609, 612 (W.D. Va. 2001). The Health Insurance Portability and Accountability Act of 1996 (hereinafter "HIPAA") requires a court order before *ex parte* contact by defense counsel can be permitted, and it gives this Court the discretion to deny a request for such an order. See 42 U.S.C. 1320d, et seq. HIPAA embodies a, "strong federal policy in favor of protecting the privacy of patient medical records." Law v. Zuckerman, 307 F. Supp. 2d 705, 711

(D. Md. 2004).

The federal regulations clearly state the requirements of obtaining health information by a party in a judicial proceeding. See 45 C.F.R. 164.512(e). 45 C.F.R. 164.512(e) states in part:

> (e) Standard: Disclosures for judicial and administrative proceedings.
>
> (1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:
>
> (i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order. 45 C.F.R. 164.512.

Congress has made it clear that health information is protected information and directs the courts to determine the necessity for disclosing information, this includes not only documents but also oral communication about patients. HIPAA's stated purpose of protecting a patient's right to confidentiality of his or her individual medical information is a compelling federal interest. See Crenshaw v. Mony Life Ins. Co., 318 F. Supp.2d 1015, 1028 (S.D. Cal. 2004). HIPAA does not sanction informal discovery of protected health information, such as *ex parte* communications. As the court in Law recommended, "counsel should now be far more cautious in their contacts with medical fact witnesses when compared to other fact witnesses to ensure that they do not run afoul of HIPAA's regulatory scheme." Law, supra 307 F. Supp. at 711. The United States District Court for the Southern District of California also determined that defense counsel's *ex parte* pretrial contacts with a physician who had examined Plaintiff violated HIPAA. See Crenshaw, supra 318 F. Supp.2d at 1027.

HIPAA does not specifically allow *ex parte* communications with healthcare providers, but rather outlines limited methods to obtain protected health information *during* a judicial proceeding. 45 C.F.R. § 164.512(e). HIPAA allows for disclosure pursuant to a court order, a

subpoena or other discovery requests. 45 C.F.R. § 164.512(e)(1)(ii)(A) and (B). The common thread among each means is that they provide notice to the patient of the request and scope of the inquiry.

B. Continued Reliance On Street v. Hedgepath Is Misplaced

There is no known published District of Columbia case law that has held that a person waives his/her right under HIPAA by putting their medical condition at issue. Defendant contends that in Street v. Hedgepath, the District of Columbia Court of Appeals held that when a party puts their medical condition at issue, they waive their statutory right of medical confidentiality under D.C Code §14-307. Street, 607 A.2d 1238 (1992). However, the Street v. Hedgepath holding waives D.C. law, specifically D.C. Code §14-307, not HIPAA. HIPAA provides greater protection than Street and HIPAA preempts District of Columbia law on this issue. The District Court in Maryland held that Maryland's law that allowed *ex parte* communications in situations such as these were found to be pre-empted by HIPAA. Law v. Zuckerman, 307 F. Supp. 2d 705, 710 (D. Md. 2004).[1]

Even in Street, the District of Columbia Court of Appeals did not allow unfettered *ex parte* discovery of treating physicians. The Court stated "[n]othing in our holding should be read to preclude the trial court from limiting *ex parte* contacts between defense attorneys and potential witnesses when requested to do so by either party." Street, 607 A.2d at 1247. Following HIPAA, the burden concerning *ex parte* communication by defense counsel has changed.

1 District of Columbia courts have held that when "there are no District cases squarely on point, ... [and] [i]n the absence of appellate or other authority in this jurisdiction," this court may give Maryland law special attention because the District "was carved out of Maryland and derives its common law from that State." Walker v. Independence Fed. Sav. & Loan Ass'n, 555 A.2d 1019, 1022 (D.C.1989).

Instead of patients seeking orders of protection from *ex parte* contact, Defendant must now first request authorization to contact treating physicians.

C. ***Ex Parte* Communications Place Treating Physicians in an Improper and Unnecessary Ethical Dilemma.**

Defendant does not identify what health care providers it seeks to contact to conduct *ex parte* interviews with, rather they seek a blanket authorization for defense counsel to meet with any of Ms. LeFlore's health care providers. Defendant failed to disclose in their Motion that Plaintiff has already provided defense counsel with copies of Ms. LeFlore's medical treatment records.

Plaintiff will never know if defense counsel gave Ms. LeFlore's physicians the impression that they may be involved in the allegations of this lawsuit. The court should consider the current attitudes in the medical malpractice insurance industry and also those of physicians. An authorized *ex parte* interview, without the presence of Plaintiff's counsel, could disintegrate into a discussion of the impact of a jury's award upon a physician's professional reputation, the rising cost of malpractice premiums, the notion that the treating physician might be the next person to be sued and defense counsel may be called upon to represent them, and other topics which might influence the treating physician's views.[2] The treating physician might be insured by the same carrier, hold privileges and positions at the Washington Hospital Center or other Medstar facilities in Washington D.C. which could lead to even greater pressure being placed on the treating physician. While it cannot be presumed that this will be the case, if an *ex parte* discussion is allowed, absolutely nothing assures that it will not be the case. Whether done overtly or inadvertently and unconsciously, the potential for impropriety exists.

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2 Plaintiff's counsel is not casting any aspersions on Defendant's current counsel, but rather pointing out another reason for disallowing unfettered *ex parte* contact.

Physicians can also be subject to sanctions for violating their ethical duty to maintain the confidences of their patients. D.C. Code § 3-1205.14(a)(16). The American Medical Association has enumerated clear ethical guidelines that require physicians to protect patient confidences:

> E-5.05 Confidentiality
>
> The information disclosed to a physician by a patient should be held in confidence. The patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services. The patient should be able to make this disclosure with the knowledge that the physician will respect the confidential nature of the communication. The physician should not reveal confidential information without the express consent of the patient, subject to certain exceptions which are ethically justified because of overriding considerations.
>
> When a patient threatens to inflict serious physical harm to another person or to him or herself and there is a reasonable probability that the patient may carry out the threat, the physician should take reasonable precautions for the protection of the intended victim, which may include notification of law enforcement authorities.
>
> **When the disclosure of confidential information is required by law or court order, physicians generally should notify the patient. Physicians should disclose the minimal information required by law, advocate for the protection of confidential information and, if appropriate, seek a change in the law.** (III, IV, VII, VIII) Issued December 1983; Updated June 1994 and June 2007.

(emphasis added).

> E-9.07 Medical Testimony
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> In various legal and administrative proceedings, medical evidence is critical. As citizens and as professionals with specialized knowledge and experience, physicians have an obligation to assist in the administration of justice.
>
> **When a legal claim pertains to a patient the physician has treated, the physician must hold the patient's medical interests paramount**, including the confidentiality of the patient's health information, unless the physician is authorized or legally compelled to disclose the information.
>
> Physicians who serve as fact witnesses must deliver honest testimony. This requires that they engage in continuous self-examination to ensure that their testimony represents the facts of the case. **When treating physicians are called upon to testify in matters that could adversely impact their patients' medical**

> **interests, they should decline to testify unless the patient consents or unless ordered to do so by legally constituted authority.** If, as a result of legal proceedings, the patient and the physician are placed in adversarial positions it may be appropriate for a treating physician to transfer the care of the patient to another physician.
>
> When physicians choose to provide expert testimony, they should have recent and substantive experience or knowledge in the area in which they testify, and be committed to evaluating cases objectively and to providing an independent opinion. Their testimony should reflect current scientific thought and standards of care that have gained acceptance among peers in the relevant field. If a medical witness knowingly provides testimony based on a theory not widely accepted in the profession, the witness should characterize the theory as such. Also, testimony pertinent to a standard of care must consider standards that prevailed at the time the event under review occurred.
>
> All physicians must accurately represent their qualifications and must testify honestly. Physician testimony must not be influenced by financial compensation; for example, it is unethical for a physician to accept compensation that is contingent upon the outcome of litigation.
>
> Organized medicine, including state and specialty societies, and medical licensing boards can help maintain high standards for medical witnesses by assessing claims of false or misleading testimony and issuing disciplinary sanctions as appropriate. (II, IV, V, VII) Issued December 2004 based on the report "Medical Testimony," adopted June 2004.

(emphasis added).

Allowing the defense to engage in *ex parte* communications with a treating physician invites physicians to violate these duties, inadvertently, willfully or negligently. The obligations and duties of defense counsel are at odds with those of the treating health care providers and allowing *ex parte* communication needlessly highlights the risk of transgressing these conflicting duties.

If *ex parte* interviews are allowed, it would be left to the physician to determine what information is subject to disclosure and what remains privileged. Should informal discovery by the defense be permitted, at a minimum, Plaintiff's counsel should be present when defense counsel speaks to Ms. LeFlore's' treating physicians to guard against inadvertent influences or breaches of patient privacy and rights.

"When a treating physician is interviewed ex parte by defense counsel, there are no safeguards against the revelation of matters irrelevant to the lawsuit and personally damaging to the patient . . . ." Horner v. Rowan Companies, Inc., 153 F.R.D. 597, 601 (S.D. Tex. 1994). However, "when counsel for the plaintiff is present at a formal deposition, the physician can rely upon that counsel to keep the questioning and his answers relevant to the matters properly at issue in the lawsuit." Alston v. Greater Southeast Community Hospital, 107 F.R.D. 35, 37 (D. D.C. 1985).

Ex parte interviews needlessly place the treating physician in an awkward position, having to choose loyalties between fellow doctors in the community and their ethical obligations to their patient. The rights of the patient and the responsibilities of the physicians must supersede any convenience allowing informal discovery by the defense would generate.

D. The Information Defendant Seeks Can Be Obtained Through Formal Discovery.

The Rules of Civil Procedure provide the defense a means of full and fair discovery of the treaters' care. There is no need to provide defense counsel access to private interviews with Plaintiff's treating doctors. Defendant never identified the doctors they wish to meet with and has made no effort to coordinate the depositions of any treater. Why abandon a readily available means of proper and authorized discovery to run the risks of an *ex parte* interview? Discovery should be in accordance with Rule 26 of the Superior Court Rules of Civil Procedure. Under Rule 26, parties may obtain discovery regarding any matter… that is relevant to the claim or defense of any party." (Rule 26 of the Superior Court Rules of Civil Procedure). One of the purposes of subpoenas and notices of deposition is to inform all parties of the discovery that is sought and to provide an opportunity for a party to object to such a request or to attend the proceeding. Neither of those two rights of a party would be available if this Court grants this

Motion.

If this Court grants Defendant's Motion, it would remove the checks and balances afforded to a party under the Rules of Civil Procedure. The Rules of Civil Procedure also exist to protect parties from the element of unfair surprise at trial. Corley v. BP Oil Corp., 402 A.2d 1258, 1262 (D.C. 1979) (stating that the primary purpose of the liberalized discovery rules is the prevention of unfair surprise at trial). All of which would be bypassed if the Defendant is allowed to participate in *ex parte* communications with treating physicians.

Defendant will suffer no prejudice if its Motion is denied. All of the substantive medical records have already been provided to the defense. Formal discovery is not yet authorized as the parties have not completed their early mediation requirement. A discovery schedule will not be adopted until March 26, 2010.

E. PLAINTIFF'S COUNSEL DOES NOT HAVE ACCESS TO THE DOCTORS AND NURSES ATTENDING TO MS. LEFLORE AT THE WASHINGTON HOSPITAL CENTER

Allowing defense counsel *ex parte* access to subsequent treating physicians, would place even a greater burden upon the Plaintiff and further disadvantage the Plaintiff in the pursuit of this claim. Would Defendant Washington Hospital Center be willing to permit *ex parte* contact by Ms. LeFlore's counsel with the nurses, doctors and staff at the Washington Hospital Center?

Defendant claims there is an imbalance if they are denied unfettered access to Ms. LeFlore's treating health care providers and that the burden of formal discovery is simply too great for them to bear. The party prohibited from having *ex parte* contact with the health care providers that matter most is Plaintiff, not Defendant. The doctors, nurses and staff at the Washington Hospital Center are the critical witnesses to the issues regarding the care and

treatment of Ms. LeFlore.

Plaintiff is unable to meet *ex parte* with the staff of the Washington Hospital Center to ask questions outside of the Hospital's counsel's presence. In order to access the health care providers who have the most to say about Ms. LeFlore's care at issue in this lawsuit, Plaintiff must use formal discovery. For all of the above-stated reasons, Plaintiff respectfully requests that Defendant's Motion be denied.

III. IN THE ALTERNATIVE, SHOULD THIS COURT CONSIDER ALLOWING *EX PARTE* COMMUNICATIONS, PLAINTIFF REQUESTS THAT CERTAIN PROTECTIONS BE AFFORDED.

If the Court is willing to entertain Defendant's Motion, Plaintiff requests that this Court place restrictions on any such Order that protect the Plaintiff. HIPAA has changed the landscape of medical litigation and requires safeguards for the protection of confidential medical information, which are not compatible with unstructured, unguided, unprotected *ex parte* interviews by defense counsel of treating doctors. Numerous Superior Court Judges have addressed the request for *ex parte* contact with treating health care providers. Plaintiff attaches to her opposition the written opinions of six different Superior Court Judges who have either denied outright the request for informal discovery or conditioned any informal discovery to protect patients' rights and have required counsel for Plaintiff to be participants in any informal discussion with Defense counsel. See Exhibits 5 – 10.

If the Court allows for informal discovery by the defense, the Order should include the following protections:

1. During the defense's informal interview of any health care provider, counsel for both Plaintiff and Defendant must be present together and this requirement is made known in writing to the healthcare provider in advance of any discussion;

2. Defendant must identify the specific health care providers they wish to meet with or talk to;

3. Any costs incurred for the doctors time during a meeting or interview must be paid by Defendant;

4. That it is solely up to the treating health care provider to decide whether he/she wants to speak with defense counsel, and that the health care providers is advised in writing that there is no requirement for them to speak with the defense lawyers and that such informal communications are completely voluntary.

IV. CONCLUSION

Confidentiality of a person's protected health care information is of the utmost importance. HIPAA has changed the landscape of medical malpractice litigation. It recognizes and enforces a patient's right to protect irrelevant confidential information from disclosure to adversaries in a lawsuit. *Ex parte* contacts are fraught with the danger of violating this right and placing treating physician in conflict with their duties and responsibilities to their patients. Furthermore, Street v. Hedgepath is no longer the end of the inquiry as to the status of the law, as it has been pre-empted by HIPAA.

Plaintiff respectfully requests this Honorable Court deny Defendant's Motion for Protective Order and deny the *Ex Parte* Communication.

In the alternative, if informal discovery is permitted for the defense that the protections outlined above are implemented before any *ex parte* contact is authorized.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and exact copies of the foregoing Plaintiff's Opposition to Defendant's Motion for Protective Order, and proposed Order, were electronically filed and served this 3rd day of February 2010, on:

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