"Open" Discovery in the Age of HIPAA

By Sara B. Conn

Fast Facts:

In the context of discovery, health information protected under HIPAA may not be disclosed absent a proper qualified protective order, written permission from the patient, or, in the case of formal discovery mechanisms such as subpoenas and discovery requests, "satisfactory assurances that the patient has been informed of the request and given an opportunity to object."

A proper qualified protective order (1) prohibits use or disclosure of the protected health information outside the confines of the subject litigation, and (2) requires the "return" or destruction of the protected health information once the litigation ends.

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The traditional rule in Michigan has been that a plaintiff waives the physician-patient privilege when an action is brought to recover for personal injuries or medical malpractice. The Michigan Supreme Court explained the dynamics of this balance as follows:

> The purpose behind the physician-patient privilege is to protect the confidential nature of the physician-patient relationship and to encourage the patient to make a full disclosure of symptoms and conditions. The purpose of providing for waiver is to prevent the suppression of evidence. An attempt to use the privilege to control the timing of the release of information exceeds the purpose of the privilege and begins to erode the purpose of waiver by repressing evidence. Both consequences are anathema to the open discovery policy of our state. The statute and the court rule both allow waiver, thus striking an appropriate balance between encouraging confident disclosure to one's physician and providing full access to relevant evidence should a charge of malpractice follow treatment.[1]

On the basis of these principles, once the privilege had been waived by a plaintiff in a personal-injury case, the defendant's counsel was entitled to conduct formal and informal discovery—including ex parte meetings with the plaintiff's treating physicians.[2] Indeed, the Michigan Supreme Court not only allowed informal discovery, but encouraged it, noting that "[r]estricting parties to formal methods of discovery would not aid in the search for truth, and it would only serve to complicate trial preparation."[3]

And so it went until HIPAA, the federal Health Insurance Portability and Accountability Act[4] came along. Intended, among other things, to protect private medical information from improper disclosure, HIPAA also yielded some unintended consequences. Namely, in the state of Michigan, it upset the balance that had prevailed between the competing interests of open discovery and patient confidentiality. No longer could legal practitioners handling personal-injury cases safely assume that the mere filing of a lawsuit that put a plaintiff's physical or medical condition "in controversy" meant nearly unfettered access to that plaintiff's private medical information. In the age of HIPAA, the repercussions for violating the physician-patient privilege pale in comparison to the consequences of violating federal privacy laws.

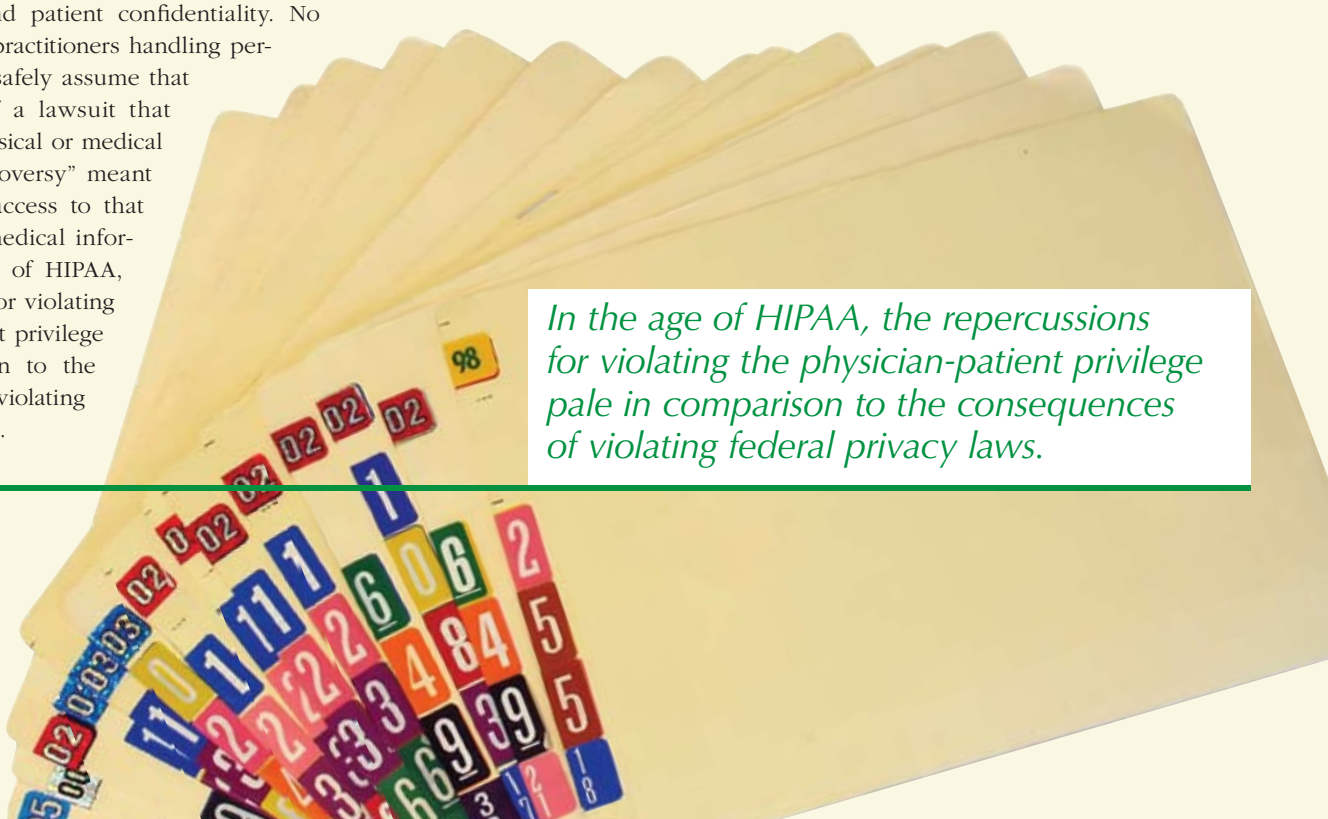
The Michigan Courts' Response to HIPAA

Legal practitioners on both sides of the personal-injury equation recognized HIPAA for the discovery "game changer" it was, but the Michigan courts have been slow to provide much guidance. Until recently, only two courts[5] in Michigan had discussed the intersection between HIPAA and Michigan's open discovery rules. Both ruled that because Michigan law regarding the release of private health information in the context of informal, ex parte meetings between defense counsel and plaintiffs' physicians is less stringent than HIPAA (and the rules promulgated thereunder),[6] HIPAA now controls. But the issue of whether the application of HIPAA means that ex parte meetings between defense counsel and a plaintiff's treating medical providers are—or should be—entirely precluded remained cloudy.

Specifically, the Michigan Court of Appeals in *Belote v Strange*[7] and the U.S. District Court for the Eastern District of Michigan in *Croskey v BMW of North America*[8] each held that HIPAA controls over less stringent Michigan law. The *Belote* Court stated:

> **Even in the discovery context, HIPAA prevents a physician from disclosing health information absent a court order, written permission from the patient, or assurances that the patient has been informed of the request and given an opportunity to object**.... Because the requirements and standards imposed by HIPAA are stricter and afford more protection for a patient's health information than MCL 600.2157 and the Michigan Court Rules, HIPAA controls.[9]

With HIPAA's supremacy established, the Michigan Court of Appeals acknowledged the critical intersection between HIPAA



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and the informal discovery encouraged by Michigan's "open" discovery scheme:

> Under HIPAA, the Secretary of Health and Human Services (Secretary) is charged with promulgating rules and regulations for the safeguarding of health information. Health information is defined as "any information, whether oral or recorded in any form or medium, that—(A) is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and (B) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual." An ex parte meeting between a plaintiff's physician and defendant's counsel to discuss the plaintiff's medical history or condition clearly falls within the definition of health information that is subject to the standards promulgated by the Secretary.[10]

Therefore, there is no longer much debate that defense attorneys must comply with the rules promulgated under HIPAA when obtaining information from a physician or other health care provider, particularly in the context of an ex parte meeting.

As previously noted, although HIPAA controls over Michigan law, the question of whether it precludes ex parte meetings between defense counsel and a plaintiff's medical providers remains somewhat unsettled. This question is routinely contested at the circuit court level, with widely varied results. Some judges allow ex parte meetings as long as the defendant's counsel has sought and obtained a proper qualified protective order, some do not allow them under any circumstances, and some allow them in certain cases and not in others. Circulating among practitioners who handle personal-injury cases are a number of circuit court orders that address the issue. These orders are routinely attached to briefs either in favor of or against the granting of a qualified protective order to conduct ex parte meetings. The number of orders on each side of the issue has continued to grow, while the uncertainty has only recently begun to abate.

Defense counsel argue that, as long as they adhere to certain procedural requirements, ex parte meetings can—and should—be permitted. Indeed, defense counsel note that HIPAA regulations provide a mechanism by which "permitted disclosures"—including ex parte meetings—may occur, and only preclude such meetings if that mechanism is not used.

Specifically, defense counsel urge that they may conduct ex parte meetings with plaintiff's medical providers by obtaining a qualified protective order that meets the requirements of 45 CFR 164.512(e)(1)(v) as follows:

- It is obtained through an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding.
- It prohibits the parties from using or disclosing the protected health information for any purposes other than the litigation or proceeding for which such information is requested.
- It requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

In support of their position, defense counsel point to *Croskey,* in which the magistrate found, and the U.S. District Court confirmed, that "there are three ways in which Defendant may comply with [45 CFR 164.512(e)(1)]: '[O]btaining a court order,' 'sending a subpoena or discovery request where plaintiff has been given notice of the request,' or 'sending a subpoena or discovery request where reasonable effort has been made to obtain a qualified protective order.' "[11]

In *Croskey,* the magistrate had ordered that an ex parte meeting between defendant's counsel and plaintiff's physician could occur only if defense counsel obtained a qualified protective order that satisfied the HIPAA regulations, *and both* (a) notified plaintiff's counsel of the impending meeting, and (b) obtained plaintiff's consent for the meeting. In discussing the two additional requirements imposed by the magistrate (notice to plaintiff's counsel and plaintiff's consent), the district judge in *Croskey* explored the critical distinction between superseding Michigan law and entirely precluding ex parte meetings:

> Defendant argues that the requirement of notice to Plaintiff's counsel will have the practical effect of obstructing, or precluding entirely, *ex parte* interviews, and that it is "entitled under principles of fundamental fairness to investigate the health condition of Plaintiff without interference of and without disclosing its work product to [opposing] counsel." Defendant maintains that Plaintiff should not be permitted to use the patient-physician privilege "as both a sword and shield." Similarly, *amicus curiae* Michigan Hospital Association describes the requirements as being "analogous to sending a boxer into the ring wearing a blindfold!"
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> These concerns are legitimate. Indeed, as the *amicus curiae* ProNational Insurance Company goes to great lengths to point out, they provide the basis for Michigan law, which would give Defendants relatively unfettered access to a Plaintiff's physician based on the goal of open and fair discovery. See *Damako v Rowe,* [438 Mich 347, 475 NW2d 30 (1991)]. This is exactly what led to the Magistrate's correct conclusion that Michigan law is less stringent than HIPAA, and is therefore preempted. Preemption does not extinguish the possibility, however, that the policy rationale behind Michigan law might fit neatly within the HIPAA framework.[12]

The court further recognized, however, that allowing a "permitted disclosure" specifically in the context of an ex parte meeting creates an additional wrinkle in the process: "the problem with [45 CFR 164.512(e)] is that it does not explicitly mention *ex parte* interviews."[13]

Strict federalists have argued that a proper qualified protective order can only be drafted to protect private medical information in documentary form. In *Croskey,* the court recognized this as an "ambiguity" and resolved it by imposing additional—but different—safeguards than those imposed by the magistrate. Namely, the court concluded that a proper qualified protective order requires "clear and explicit notice to Plaintiff's treating physician both as to the purpose of the interview and to the fact that the interview is not required."[14] The court held that "[o]nly by complying with these restrictions, and the requirements made explicit under the statute, may Defendant conduct an *ex parte* interview with Plaintiff's treating physician."[15] As to the safeguards originally

imposed by the magistrate (notice to plaintiff's counsel and plaintiff's consent), the court held "[45 CFR 164.512(e)(1)(ii)(B)], as defined by Section 164.512(e)(1)(v), does not require specific notice to Plaintiff's counsel before Defendant conducts an *ex parte* interview with Plaintiff's treating physician. Nor does it require Plaintiff to consent to such an interview."[16] Most recently, the Court of Appeals addressed the issue in *Holman v Rasak*[17] and ruled that oral ex parte interviews can be the subject of a qualified protective order under HIPAA.

Michigan Lawyers' Response to HIPAA

Defense counsel often seek to exercise their presumed right to meet privately with a plaintiff's medical providers. In response, as previously discussed, plaintiffs have noted that the regulations refer only to documentary information, since documents can be returned or destroyed as the regulations require. This distinction without a difference was recently rejected in *Holman*.

Plaintiffs also argue that ex parte meetings between defense counsel and a plaintiff's medical providers would be an unnecessary affront to HIPAA because defendants can access the same information through formal discovery, including depositions and subpoenas. Plaintiffs argue that "secret" meetings between defense counsel and a plaintiff's medical providers raise the possibility that defense counsel will exert undue influence over the medical provider and thereby shape anticipated testimony. This becomes particularly concerning to plaintiffs when the medical provider with whom the ex parte meeting is sought has a professional relationship with the defendant. Plaintiffs fear an "army of risk managers" bearing down on the witness and influencing in some way the anticipated testimony.

But these concerns do not legitimately implicate HIPAA. Any argument that a request for an ex parte meeting is obviated by defense counsel's access to medical records and deposition testimony from these same medical providers makes the point that preventing such meetings does nothing to honor the privacy rights HIPAA seeks to protect. Rather, preventing such meetings would only stymie Michigan's broad discovery rules and hinder a defendant's right to a defense; it would do nothing to protect a plaintiff's right to privacy. Furthermore, access to medical records and deposition testimony alone, without an opportunity to meet privately with plaintiff's medical providers, would place defendants at a significant strategic disadvantage. In every other litigation context, attorneys are permitted to meet privately with potential witnesses; in fact, a Michigan jury instruction specifically advises a jury that there is nothing improper about such meetings.[18]

Plaintiffs' true objection to ex parte meetings between defense counsel and plaintiff's medical providers appears to stem from an aversion to the ex parte nature of the meeting rather than from any privacy concerns. If plaintiffs fear that defense counsel will derive an improper strategic advantage from an ex parte meeting, then HIPAA is not the proper tool to combat that fear. Unfortunately, HIPAA has been "hijacked" and successfully used to limit defense counsel's access to witnesses who happen to be medical providers. Ultimately, although HIPAA has injected confusion, it should not alter the dynamic of the discovery process. The Michigan Court of Appeals has now confirmed that there is nothing in HIPAA that should preclude ex parte meetings between defense counsel and plaintiff's medical providers, as long as defense counsel requests and obtains a proper qualified protective order. Even in the age of HIPAA, "open discovery" can prevail. ■

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FOOTNOTES

1. *Domako v Rowe*, 438 Mich 347, 354–355; 475 NW2d 30, 33 (1991) (internal citation omitted).
2. *Domako, supra*; *Davis v Dow Corning Corp*, 209 Mich App 287, 293; 530 NW2d 178 (1995).
3. *Domako, supra* at 360.
4. 42 USC 1320d *et seq.*
5. *Belote v Strange*, unpublished opinion per curiam of the Court of Appeals, issued October 25, 2005 (Docket No. 262591); *Croskey v BMW of North America, Inc*, 2005 WL 1959452 (ED Mich, February 14, 2005) (magistrate opinion upheld in *Croskey v BMW of North America*, 2005 WL 4704767 (ED Mich, November 10, 2005)).
6. 45 CFR 164.500 *et seq.*
7. *Belote, supra.*
8. *Croskey v BMW of North America*, 2005 WL 4704767 (ED Mich, November 10, 2005).
9. *Belote, supra* at *5.
10. *Belote, supra* at *3 (internal citation omitted).
11. *Croskey, supra* at *2.
12. *Id.* at *3 (internal citation omitted).
13. *Id.* at *4.
14. *Id.* at *5.
15. *Id.*
16. *Id.* at *4.
17. *Holman v Rasak*, ___ Mich App ___; ___ NW2d ___ (2008).
18. See M Civ JI 4.06 and *Holman*.