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Is the Doctor In? Litigation Do's and Don'ts of Contacting Treating Physicians

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Note: Kaye Scholer represented Pfizer in the Hormone Therapy MDL.

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In drug and medical device litigation, juries tend to weigh the impressions and opinions of the plaintiff's prescribers or treating physicians more heavily than those of the paid experts that either side presents. That is because treating physicians are usually neutral witnesses in the litigation; their impressions are formed and treatment decisions are made long before the plaintiff files a lawsuit; and they are not being paid by anyone to offer their opinions.

Consequently, any opportunity for defense counsel to have a conversation with that doctor outside of a deposition or trial could be extraordinarily valuable. But states are split over the issue of allowing a defendant to engage in ex parte medical contact with a plaintiff's physician. The most articulated reason for prohibiting this contact is the privacy rule of the Health Insurance Portability and Accountability Act (HIPAA) of 1996. *42 USC §201 et seq*. The privacy rule states that a provider "may use or disclose protected health information, provided that the individual is informed in advance of the use or disclosure and has the opportunity to agree to or prohibit or restrict the use or disclosure." *45 C.F.R. §164.510*. Because of the Supremacy Clause, some courts construe HIPAA as creating a physician-patient privilege that preempts a defendant from engaging in either formal or informal discovery.

However, the status of informal defense access to treating physicians varies from state to state. While several courts acknowledge that a plaintiff waives any physician-patient privilege when they bring personal injury actions because they affirmatively place their mental or physical condition at issue, others have refused to allow this contact. As a result, it is vitally important to be aware of the rules that apply in the state where the litigation is taking place.

For example, New York's highest court could "see no reason why a nonparty treating physician should be less available for an off-the-record interview" than other types of fact witnesses. *Arons v. Jutkowitz*, *880 N.E.2d 831, 837 (N.Y. 2007)*. California also allows informal interviews with treating physicians, but counsel must comply with the state's Confidentiality of Medical Information Act. *Heller v.*

Norcal Mut. Ins. Co., *876 P.2d 999, 1005 (Cal. 1994)*. Further complicating the issue is that federal courts in California are split, with *Crenshaw v. MONY Life Ins. Co.*, 318 F. Supp.2d 1015, 1024–25 (S.D. Cal. 2004), holding that ex parte contacts are not allowed while *cf. Galarza v. United States,*179 F.R.D. 291, 294 (S.D. Cal. 1998), approves informal interviews.

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In Georgia, informal interviews were allowed by statute until the Georgia Supreme Court held that the statute was preempted by HIPAA. *Moreland v. Austin*, *670 S.E.2d 68, 70-71 (Ga. 2008)*. However, the court recently held that, although HIPAA applies, defendants may apply for a "qualified protective order" to allow informal interviews under HIPAA whether the plaintiff consents or not. *Baker v. Wellstar Health Sys., Inc., 703 S.E.2d 601 (Ga. 2010).*

Florida has enacted a statute that strictly prohibits defendants from conducting informal interviews with plaintiff's treating doctors. *Fla. Stat. §456.057(8). Acosta v. Richter, 671 So.2d 149, 152 (Fla. 1996).* Illinois has gone even further—it does not allow defense counsel to have informal discussions with treating doctors, *Burger v. Lutheran General Hospital, 759 N.E.2d 533, 554-55 (Ill. 2001)*, and the Supreme Court held it was unconstitutional for the legislature to permit informal interviews by statute.*Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1100 (Ill. 1997).*

The bottom line is that every state has its own rules and idiosyncrasies for whether or how defense counsel may informally interview treating physicians, so it is important to check the applicable law before proceeding.

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Checking the applicable state law, however, still may not be enough. When pharmaceutical litigation is coordinated in a Multidistrict Litigation (MDL) proceeding, a variety of procedural orders issued by the coordinating judge also may come into play. For example, in the Hormone Therapy litigation, coordinated in the Eastern District of Arkansas, the coordinating judge issued an order prohibiting ex parte communications with respect to Arkansas residents without the consent of plaintiff's attorney. *In re Prempro Prods. Liab. Litig.,* Order [Dkt. 789], Case 4:03-cv-1507-WRW (Sept. 16, 2005). The order further prohibited such contact even with respect to cases where a non-Arkansas resident was suing a defendant "without first seeking leave of court and showing that the state law applicable to that plaintiff's claims permits such interviews." *Id.* Likewise, in the Vioxx MDL proceedings, the federal trial court prohibited communications between defendants and treating physicians as to plaintiffs in all fifty states. *In re: Vioxx Products Liability Litigation,* Order [Dkt. 729], Case 2:05-md-1657-EEF-DEK at 9-10 (July 22, 2005).

These examples underscore the tensions arising when MDL proceedings intersect with issues involving state law. Even when the appropriate legal criteria permitting ex parte communications with treating physicians are met, there can be far-reaching ramifications that arise from making such contact beyond a plaintiff's particular case.