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Don't Blow the Privilege

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In most states, direct communications with the treating medical care provider by the defense attorney is prohibited. Typically, there is a statute which prohibits solicitation of confidential information unless it is through the "discovery" process (e.g., usually a deposition).

Increasingly, insurance defense attorneys are attempting ex parte solicitation of confidential medical information from the doctor. The premise is that the victim (plaintiff), by virtue of filing notwithstanding a personal injury suit, has waived privileged communications between doctor and patient. The plaintiff's attorney's response is that the exception to the privilege should only apply to formal discovery proceedings (i.e., depositions) when the plaintiff's counsel is present or, alternatively, when the patient has signed a medical authorization, or if the information has been appropriately subpoenaed with notice to the plaintiff's attorney.

Accordingly, if the treating doctor of chiropractic is directly contacted by the insurance defense firm, he should be wary and notify the plaintiff's attorney. The plaintiff's attorney would, no doubt, motion the court for a protective order to restrict doctor communication with the defense to the discovery process or, as mentioned above, to the subpoena power (with appropriate notice being given). A clever tact to avoid this restriction is for the defense attorney to name the plaintiff's treating doctor as the defense's expert witness. California courts, for example, have ruled that this does not affect the privilege.

Further, if the doctor of chiropractic is not aware of the law and is convinced that he should disclose confidential medical information to the insurance company or counsel for the insurance company, liability to the doctor could ensue. It is apparent that the physician should not reveal confidential communications or information without the express consent of the patient (unless he is required to do so by law.)

For those doctors of chiropractic practicing in Alaska, Florida, and Michigan, only those states allow direct ex parte communication with treating doctors. There are some jurisdictions including Washington D.C., New Jersey, and Kansas which require a court order forcing the patient to sign an authorization after the defense makes the appropriate motion.

The other states, generally speaking, prohibit direct ex parte communication.

Because most doctors of chiropractic are not expected to be thoroughly knowledgeable in all areas of the law, the chiropractor must be wary when contacted by any representative from the defense. After all, the doctor might be led to believe that this private meeting is a part and parcel of the deposition process which, of course, the defense is entitled to undertake.

It is also apparent that providing unauthorized information is violative of the law in most states and can destroy the relationship between the doctor and patient.

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