Medical Malpractice Update  
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**No Guiding Light:**  
*Ex Parte* Communications and the Hospital Licensing Act

Since the amendment to the Hospital Licensing Act (HLA), 210 ILCS 85/6.17, took effect in 2004, defense attorneys representing hospitals in litigation have received little guidance from Illinois courts with respect to the scope of permissible *ex parte* communications. The 10-year gap in instructive case law has left hospital attorneys uncertain about the amendment’s limitations on *ex parte* communications after suit has been filed. Although it is clear that the HLA authorizes *ex parte* communications between a hospital’s attorney and hospital staff whose conduct forms the basis of the hospital’s alleged liability (that is, “Morgan treaters”), the right to communicate *ex parte* with hospital staff whose conduct is not at issue in the plaintiff’s complaint (that is, “non-Morgan treaters”) remains unclear. See *Morgan v. County of Cook*, 252 Ill. App. 3d 947 (1993).

As originally enacted in 2000, the HLA expressly authorized legal counsel for a hospital to communicate “at any time and in any fashion” with members of the hospital’s medical staff about the medical care provided to hospital patients. 210 ILCS 85/6.17(d)–(e). Subsections (d) and (e) of Section 6.17 of the HLA carved out a limited exception to the well-known *Petrillo* doctrine, which generally prohibits *ex parte* communications between a defendant’s attorney and the plaintiff’s treating physicians on the basis of the patient’s right to privacy and the physician-patient privilege. See *Petrillo v. Syntex Labs., Inc.*, 148 Ill. App. 3d 581 (1986). Cases subsequent to *Petrillo* recognized that the *Petrillo* doctrine did not create an absolute prohibition on *ex parte* communications between defense counsel and a plaintiff’s treating physician. In *Morgan v. County of Cook*, 252 Ill. App. 3d 947, 954–55 (1993), for example, the court held that in cases where a plaintiff seeks to hold a defendant hospital liable for the conduct of its physician-employee, the hospital is not a third party to the plaintiff’s relationship with the treating physician, and is included within the physician-patient relationship.

In 2001, the Illinois Supreme Court upheld the constitutionality of HLA Subsections (d) and (e), finding that a hospital is not a third party with respect to its own medical information compiled by its own caregivers. *Burger v. Lutheran Gen. Hosp.*, 198 Ill. 2d 21 (2001). Therefore, hospital patients have no reasonable expectation of privacy with respect to such limited intra-hospital communications. *Id.*

If the development of Illinois law had stopped in 2001, there would be no question that a hospital’s legal counsel could communicate, without restriction, with hospital staff members concerning the care they provided to a hospital patient. In 2004, however, the HLA was amended by the addition of Subsection e-5, throwing in a monkey wrench. The new subsection provides:
Notwithstanding subsections (d) and (e), for actions filed on or after January 1, 2004, after a complaint for healing art malpractice is served upon the hospital or upon its agents or employees, members of the hospital’s medical staff who are not actual or alleged agents, employees, or apparent agents of the hospital may not communicate with legal counsel for the hospital or with risk management of the hospital concerning the claim alleged in the complaint for healing art malpractice against the hospital except with the patient’s consent or in discovery authorized by the Code of Civil Procedure or the Supreme Court Rules.

210 ILCS 86/6.17(e-5) (emphasis added).

While Subsection e-5 unmistakably limits the scope of communication allowable once suit has been filed, the exact nature of the limitation has been a subject of confusion and debate among practicing attorneys for years. The amendment’s language is lengthy and contains ambiguities that arguably support multiple interpretations.

A federal district court in Illinois has attempted to define some parameters for the limitations imposed under Subsection e-5. In E.Y. ex rel. Wallace v. United States, No. 10-CV-7346, 2012 WL 1441402, *1 (N.D. Ill. Apr. 26, 2012), the minor plaintiff, E.Y., and his mother, Tenille Wallace, sued the University of Chicago Hospitals and various physicians and nurses, alleging medical malpractice. The plaintiffs’ claim related to care rendered prior to and during E.Y.’s delivery. E.Y. ex rel. Wallace, 2012 WL 1441402, at *7. The issue before the court was the hospital’s motion pursuant to the HLA to conduct ex parte interviews with three physicians who treated the child after birth (that is, “non-Morgan” treaters). Id. The plaintiffs opposed the hospital’s motion on the basis that the three physicians with whom the hospital sought ex parte interviews were no longer agents or employees of the hospital. Therefore, the plaintiffs argued, Subsection e-5 prohibited ex parte communications with the hospital’s attorney. Id. at *5.

The court concluded that the broad authority granted under the HLA clearly permitted the ex parte interviews sought by the hospital. Id. at *8. Providing a step-by-step analysis of the relevant considerations under Illinois law, the court determined that the three physicians with whom the hospital’s attorney sought ex parte interviews were “non-Morgan” treaters, meaning that the postnatal care that they provided to the minor plaintiff was not the basis of the plaintiffs’ lawsuit. Instead, the lawsuit alleged negligence only relating to the prenatal care and delivery of E.Y. Id. at *7.

As non-Morgan treaters, nothing in Subsection e-5 limited the ability of the hospital’s counsel to interview the doctors ex parte, so long as the interviews did not concern the conduct of others that formed the basis for the plaintiffs’ malpractice claims. This limitation was true irrespective of the physicians’ agency or employment status with the hospital at the time of the litigation. E.Y. ex rel. Wallace, 2012 WL 1441402, at *7.

The court explained that Subsection e-5 “adjusts the privacy-disclosure balance, not by categorically barring all post-suit interviews by hospital defense counsel with persons who are not employees or agents of the hospital at the relevant time, but rather by limiting the scope of those interviews to those matters that do not ‘concern the claim alleged in the complaint for malpractice.’” Id. at *8. Ultimately, the court concluded that the minor plaintiff’s right to privacy in his physician-patient relationship with the doctor who continued to treat the child after he was no longer affiliated with hospital outweighed the hospital’s statutory right to conduct an ex parte interview with that doctor concerning his treatment while he was affiliated with the hospital. Id. at *10.

An important question that E.Y. leaves unanswered is whether a non-Morgan treater’s status as an independent contractor, as opposed to an employee, affects the scope of permissible ex parte communications. If the right to communicate stems from the hospital’s unfettered right to access information concerning the care and treatment of a hospital patient, then presumably it should be irrelevant whether the care was rendered by an employee or a non-employee staff member.
Furthermore, the amendment’s use of the term “concerning the claim alleged in the complaint,” 210 ILCS 86/6.17(e-5), remains ill-defined. Because the timing of the care rendered by the three physicians in E.Y. clearly was subsequent to the treatment at issue in the complaint, the court was confident that the ex parte communications effectively could exclude discussions “concerning the claim.” In cases where treatment by Morgan and non-Morgan providers overlaps, the distinction is nebulous and remains unaddressed by the courts.

Despite the broad authority granted by the HLA, attorneys are advised to err on the side of caution and to seek protective orders in cases of uncertainty. Though E.Y. is not mandatory authority in state court, it provides attorneys with a helpful analysis when seeking judicial protection.

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