Supreme Court of Georgia Reverses Court of Appeals, Finding HIPAA Precludes Defense Counsel's Ex Parte Conversations with Plaintiff's Doctors

By Matthew P. Stone

On November 4, 2008, the Supreme Court of Georgia unanimously reversed ***Austin v. Moreland***, 288 Ga. App. 270, 653 S.E.2d 347 (2007), preventing defense attorneys in personal injury actions from speaking to the plaintiff's treating physicians without written consent from the plaintiff.

Austin involved a medical malpractice claim where defense counsel had ***ex parte*** discussions with prior treating physicians of the plaintiff's deceased husband. The Court of Appeals held that those discussions did not violate HIPAA because the plaintiff had produced her deceased husband's medical records containing protected health information (PHI), and defense counsel's discussions did not go beyond the content of those records. ***Id.*** at 275, 653 S.E.2d at 351. The Court of Appeals reasoned that O.C.G.A. § 9-11-34(c)(2), governing requests for production to non-party healthcare providers, afforded greater protection than HIPAA by requiring notice and opportunity for a plaintiff to object to a defendants' written discovery requests. ***Id.*** at 274-75, 653 S.E.2d at 351.

The Supreme Court of Georgia, however, held that this "analysis misses the mark," as it focuses on the ***discoverability*** of PHI instead of on the ***method*** used to discover it: "[S]ervice of a request for production of documents is insufficient because, although it gave plaintiff notice and an opportunity to object to the production of written documents, it did not give plaintiff an opportunity to object to the ex parte oral contact and the discovery of the physicians' recollections and mental impressions." ***Moreland v. Austin***, 2008 WL 4762052, at *2 -3 (Ga. Sup. Ct., Nov. 3, 2008).

Notwithstanding that a plaintiff waives his right to privacy for medical records relating to a medical condition he places in issue, the Supreme Court concluded that "HIPAA preempts Georgia law with regard to ***ex parte*** communications between defense counsel and plaintiff's prior treating physicians because HIPAA affords patients more control over their medical records when it comes to informal contacts between litigants and physicians." ***Id.*** at *2-3. The Supreme Court clarified that defense counsel may continue to have ex parte conversations with a plaintiff's healthcare providers about "benign" matters that do not relate to PHI, such as scheduling testimony. ***Id.*** at *3. If, however, defense counsel wants to discuss PHI with a plaintiff's healthcare provider, he "must first obtain a valid authorization, or a protective order, or ensure that the patient has been given notice and an opportunity to object to the ex parte contact, all in compliance with the requirements of HIPAA as set forth in 45 CFR § 164.512(e)." ***Id.***

Because HIPAA does not authorize a remedy or penalty for violating its edicts in the context of a civil lawsuit, the Supreme Court noted that it will be left up to trial courts, in the exercise of their broad discretion under O.C.G.A. § 9-11-37, to fashion an appropriate remedy for HIPAA violations. ***Id.*** at *4. Those remedies, of course, range in severity from a slap on the wrist to striking a defendant's answer.

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Matthew P. Stone is a partner in Freeman, Mathis & Gary, Atlanta. His practice spans the Commercial & Complex Litigation and Corporate & Governmental Liability practice groups.