

litigants and physicians. Moreland v. Austin, 284 Ga. at 734, 670 S.E.2d at 72. Defense counsel cannot contact a plaintiff's prior treating physicians to discuss his or her medical history without complying with HIPAA regulations. Moreland v. Austin, 284 Ga. at 735, 670 S.E.2d at 72.¹ The rules promulgating the standards set forth in HIPAA, which govern the disclosure of protected health information by health care providers, are collectively known as the Privacy Rule. Id. at 511-512, 634 S.E.2d at 489.

HIPAA provides the standard for disclosure of protected health information for judicial and administrative proceedings. 45 CFR § 164.512(e). Protected health information includes any information, whether oral or recorded in any form or medium, that: (1) 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 (2) 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. Northlake Medical Center, LLC v. Queen, 280 Ga. App at 512, 634 S.E.2d at 489. The regulations provide that "[a] covered entity may disclose protected health information in the course of any judicial or administrative proceeding: (i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information

¹ Although defense counsel can engage in such discussions if a plaintiff gives his or her consent, it must be clear that the plaintiff consented to *ex parte* oral communications. Moreland v. Austin, 284 Ga. at 735, 670 S.E.2d at 72.

expressly authorized by such order." 45 CFR § 164.512(e)(1); 45 CFR § 164.512(e)(1)(i).

A Qualified Protective Order from the Court means an order which "[p]rohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and 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."² 45 CFR § 164.512(e)(1)(i); 45 CFR § 164.512(e)(1)(v)(A); 45 CFR § 164.512(e)(1)(v)(B). The Protective Order must prohibit the use or disclosure of the patient's protected health information for any non-litigation purpose. Moreland v. Austin, 284 Ga. at 734, 670 S.E.2d at 72. Once these steps are taken, a healthcare provider can choose to disclose the protected health information; but it must take reasonable steps to ensure that it discloses only the minimum necessary to accomplish the intended purpose of the

² O.C.G.A. § 9-11-26(c) provides in part that "[u]pon motion by a party or by the person from whom discovery is sought and for good cause shown, the court in which the action is pending or, alternatively, on matters relating to a deposition, the court in the county where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (1) That the discovery not be had;
- (2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) That certain matters not be inquired into or that the scope of the discovery be limited to certain matters;
- (5) That discovery be conducted with no one present except persons designated by the court. . . ."

disclosure. 45 C.F.R. § 164.508; Moreland v. Austin, 284 Ga. at 731-732, 670 S.E.2d at 70-71.

Defendant's Contentions

Plaintiff was admitted to DeKalb Medical Center, Inc., on May 23, 2007, for a strangulated incisional hernia repair. (Complaint, ¶ 12). She remained a patient in DeKalb Medical Center following the surgical repair until June 4, 2007. (Complaint, ¶ 12). Plaintiff alleges that from June 21, 2007, through June 25, 2007, and from September 28, 2007, through October 2, 2007, the staff, agents and employees of DeKalb Medical Center were negligent and breached the applicable standard of care in the manner in which they evaluated the abdominal wound of Plaintiff by failing to perform a proper nursing assessment to document, record, and report the appearance of the wound bed and to detect the presence of retained dressing material. (Complaint, ¶ 17). In compliance with HIPAA rules governing the disclosure of protected health information by a healthcare provider, Defendant requests that the Court issue a Qualified Protective Order allowing it to conduct *ex parte* interviews with Plaintiff's treating healthcare providers.

Defendant argues that *ex parte* interviews are authorized by federal and state law.³ Further, *ex parte* interviews avoid considerable inconvenience and expense to healthcare providers, and they advance the discovery process in the most efficient and cost effective manner. Scheduling of *ex parte* interviews is much easier because fewer schedules have to be accommodated and less time

³ Defendant cites to C.F.R. § 164.512(e)(1)(i), which permits oral and written disclosure of protected health information from a physician or other healthcare provider pursuant to a valid authorization or a court order.

is required to complete the interview. Court reporting and transcription fees are avoided completely; attorney hours are significantly reduced; and counsel can often speak briefly with the physician by telephone to determine whether a deposition is necessary. If defense counsel is not permitted to meet privately with Plaintiff's healthcare providers in this case, it may be necessary to take the depositions of nearly every physician who has been involved in Plaintiff's care since May of 2007.

Additionally, Defendant argues that *ex parte* interviews are necessary because they ensure equal access to potential trial witnesses, and they promote fundamental fairness.⁴ Discovery rules are designed to ensure that all parties have the opportunity to adequately prepare for trial, with each party having full knowledge of the pertinent issues and facts. The discovery process should ensure that one party is not placed at a disadvantage simply because it does not have access to certain evidence. Plaintiff and her counsel have exclusive, unlimited access to Plaintiff's healthcare providers, subject only to the willingness of the healthcare providers to meet with Plaintiff's counsel. It is important that Defendant be allowed equal access to these healthcare providers to ensure a level playing field and to prevent Plaintiff from having a demonstrably unfair advantage as this case is prepared for trial. Defendant must be given the

⁴ Defendants rely on International Harvester Company v. Cunningham, 245 Ga. App. 736, 538 S.E.2d 82 (2000), where the Court held that discovery rules are designed to ensure that all parties have the opportunity to adequately prepare for trial, with each party having full knowledge of the pertinent issues and facts. The Court held that the goal of discovery is the fair resolution of legal disputes by removing the potential for secrecy or surprise at trial; and that the discovery process should ensure that one party is not placed at a disadvantage simply because it does not have access to certain evidence.

opportunity to interview potential witnesses to determine if they have any information or opinions that may be relevant to the material issues in this case.

Defendant seeks to meet only with those medical healthcare providers who have information relevant to the medical issues and conditions Plaintiff has raised in her Complaint and who have been identified in medical records and in depositions and written discovery. Plaintiff's treating healthcare providers may have knowledge, information and opinions that may be relevant to material issues, including the status of Plaintiff's surgery; surgical wound; healing process; the extent of her injury; infection; rehabilitation; and malaise. Defendant argues that there is no legitimate justification for Plaintiff's refusal to allow defense counsel to discuss the contents of her medical records with her healthcare providers.⁵ The *ex parte* interviews would be limited as to subject matter and as to time. Specifically, Defendant requests a Qualified Protective Order that will allow *ex parte* interviews with Plaintiff's healthcare providers only with respect to Plaintiff's abdomen; scar tissue; hernia development; hernia repair; infection; rehabilitation; and malaise from the period of May of 2007 to the present.

Plaintiff's Contentions

Plaintiff argues that Defendant's request for blanket permission to conduct secret meetings with Plaintiff's doctors is improper and should be denied. Plaintiff argues that *ex parte* meetings are prohibited under federal and Georgia

⁵ Defendant argues that Plaintiff did not object to Defendant's requests for production of medical records from her healthcare providers. The medical records are already in possession of Defendant.

law. Plaintiff contends that the Supreme Court in Moreland v. Austin, 284 Ga. 730, 670 S.E.2d 68 (2008) rejected Defendant's argument that HIPAA permits healthcare providers and covered entities to disclose protected health information without patient consent in judicial proceedings. *Ex parte* meetings between defense counsel and a Plaintiff's doctors are prohibited because such meetings provide no means for Plaintiff to prevent and object to improper disclosures in these meetings. Even where HIPAA allows for disclosures in judicial proceedings pursuant to a court order, the privacy rules limit disclosures to only the protected health information expressly authorized by such order. 45 C.F.R. §164.512(e)(1)(i). HIPAA and due process require a specific and meaningful description of what is to be disclosed. HIPAA does not mean that defense lawyers can have secret, unrestricted and, unmonitored conversations with a patient's healthcare providers.

Plaintiff argues that she did not consent to *ex parte* communications simply because she did not object to Defendant's requests for her medical records.⁶ There is a difference between producing a Plaintiff's written medical records to defense counsel and authorizing unsupervised oral *ex parte* contact between the physicians and defense counsel. In *ex parte* meetings, defense counsel would be able to conduct unfettered discovery of the physicians' recollections and mental impressions, and Plaintiff would be powerless to object

⁶ Plaintiff relies on Moreland v. Austin, 284 Ga. 730, 670 S.E.2d 68 (2008), where the Court held that service of a request to produce records is insufficient compliance with HIPAA 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."

or otherwise ensure that her HIPAA mandated privacy rights were protected. Plaintiff argues that where there is no restriction on the topics to be discussed and the information provided, and no opportunity to object to such questioning by Plaintiff or her representatives, the rights that are to be preserved under HIPAA and Georgia law are nullified.

Rather than engaging in discovery pursuant to the Civil Practice Act, Defendant wants secret, unfettered, unsupervised and unregulated access to Plaintiff's healthcare providers. Georgia law provides ample methods for discovery of medical information, including interrogatories, production requests to parties and non-parties, request for admissions and depositions. Further, discovery can be obtained in joint meetings with all counsel present. These discovery methods provide mechanisms for notice and an opportunity to object, as well as procedures for meaningful court intervention and protection when necessary. *Ex parte* interviews provide none of these protections.⁷

Defendant does not identify whom they would interview or describe the content of the discussion. Where HIPAA allows for disclosures in judicial proceedings pursuant to a court order, the privacy rules limit the disclosures to only the protected health information expressly authorized by such order. HIPAA requires that the scope of disclosures be constrained to relevant and minimum necessary information, and it requires a specific and meaningful description of

⁷ Plaintiff also argues that *ex parte* interviews violate Plaintiff's right to due process because Defendant's proposed order does not provide for any notice or opportunity to object and does not require identification of whom Defendant would interview. Further, *ex parte* discovery is dangerous and unfair to both patient and healthcare providers because doctors are constrained by professional and ethical duties to protect the privacy interests of their patients.

what is to be disclosed. An order that allows unstructured, unsupervised and secret discussions with doctors can never meet these requirements. If the Court grants Defendant's Motion, Plaintiff requests the Court to modify any order to include certain stipulations.⁸

Conclusions of the Court

In compliance with HIPAA rules governing the disclosure of protected health information by a healthcare provider, Defendant has requested that the Court issue a Qualified Protective Order allowing it to conduct *ex parte* interviews with Plaintiff's treating healthcare providers who have information relevant to the medical issues and conditions Plaintiff has raised in her Complaint. The Court finds that under the facts and circumstances of this case, Defendant's Motion for Qualified Protective Order should be granted. HIPAA regulations provide that "[a] covered entity may disclose protected health information in the course of any judicial or administrative proceedings: (i) in response to an order of a court or administrative tribunal, provided that the covered entity disclose only the protected health information expressly authorized by such order."⁹ 45 CFR § 164.512(e)(1); 45 CFR § 164.512(e)(1)(i). The Court has discretionary authority to enter protective orders "for good cause shown." O.C.G.A. § 9-11-26(c); Gropper v. STO Corp., 276 Ga. App. 272, 623 S.E.2d 175 (2005).

The Court finds that Defendants have shown good cause for an Order allowing them to conduct *ex parte* interviews with Plaintiff's treating healthcare

⁸ Plaintiff attached a list of proposed stipulations to the Brief in Opposition.

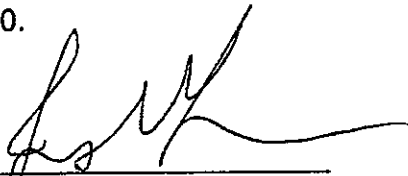
⁹ "Proceeding" refers to "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment." Black's Law Dictionary 1324 (9th ed. 2009).

providers whose medical records and opinions are based upon their personal involvement in the care and treatment of Plaintiff. Defendant seeks to meet only with those medical healthcare providers who have information relevant to the medical issues and conditions Plaintiff has raised in her Complaint and who have been identified in medical records and in depositions and written discovery. Defendant has shown that the relief sought by Defendant is not overbroad; it is sufficiently protective of Plaintiff's rights; and Defendant has limited its inquiry to facts and issues relevant to this case. Defendant seeks information and opinions that may be relevant to material issues in this case, including the status of Plaintiff's surgery; surgical wound; healing process; the extent of her injury; infection; rehabilitation; and malaise. Defense counsel's *ex parte* interviews with Plaintiff's treating healthcare providers will be limited to discussion of their care and treatment of Plaintiff with respect to her abdomen; scar tissue; hernia development; hernia repair; infection; and rehabilitation from the period May of 2007 to the present.

Accordingly, Defendant's request for a Qualified Protective Order allowing it to conduct *ex parte* interviews with Plaintiff's treating healthcare providers in compliance with HIPAA is granted. The Court is attaching a separate Qualified Protective Order which permits *ex parte* communications **subject to the conditions stated therein**. Specifically, Defendant's attorneys must provide to each healthcare provider they plan to interview a copy of the attached Order at least seven (7) days prior to any interview.

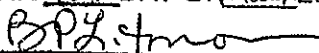
WHEREFORE, Defendant's request for a Qualified Protective Order is
GRANTED subject to the conditions stated therein.

SO ORDERED this 12 day of March, 2010.



JANIS C. GORDON, JUDGE
State Court of DeKalb County

cc: ✓ Jo A. Jagor, Esq.
✓ George S. Johnson, Esq.
✓ Daniel W. Cotter, Esq.

FILED IN THIS OFFICE
THIS 12 DAY OF March 2010


Clerk, State Court, DeKalb County