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Served with a Subpoena? Preparing for Courtroom Testimony & 'Ex Parte' Interviews

This is the second in a two-part Legal Brief article. Part one, "Served with a Subpoena? What to Do Next," was published in the winter 2016-2017 issue of Michigan Family Physician.

In addition to requiring the production of medical records, a subpoena may also require a physician's testimony at a deposition or in court. Whether you are providing testimony as a third-party witness or you are a party to a pending action, it is important for you to understand the process and know your rights.

An attorney in the case may also request to interview a treating physician on an informal basis, separate from testifying. These "ex parte" interviews do not include sworn testimony but would address the physician's knowledge of a patient's treatment and diagnoses made by the physician. The practices related to testifying in a deposition or trial can be applied to these informal interviews.

Fact Witness Versus Expert Witness

If you are subpoenaed to provide testimony, it is important to know whether you are being called as a fact witness, an expert witness or both.

A fact witness will provide testimony regarding the facts concerning the physician's diagnosis and treatment of the patient. An expert witness will give an opinion based upon facts and information developed during the course of a lawsuit and reviewed after the initial diagnosis and treatment. Knowing what testimony is expected will determine how you respond to the subpoena. When offering opinion testimony, a physician is acting in the role of an expert witness and should be engaged, and paid, as an expert witness.

An example of a physician testifying as a fact witness is if he/she testifies that the medical records show the patient's blood pressure was 170/100. If the physician was requested to testify as to whether 170/100 constitutes hypertension, or to evaluate the possibility of other diseases based upon various physical symptoms and a high blood pressure reading, the physician would be testifying as an expert witness.

As a medical professional, if you are testifying as a fact witness but are asked questions requiring an opinion, it is appropriate to notify the questioner that you are appearing only as a fact witness and not as an expert. A refusal to answer questions that require opinion testimony would be an appropriate position to take in the deposition. A treating physician desiring to limit testimony to only factual testimony should testify regarding only the care provided to the patient and should not review or respond to questions about materials not contained in the patient's medical record. Attempting to provide opinion testimony would be ill-advised when adequate preparations have not been made or appropriate compensation is not fully addressed in advance.

The regular fee for appearing and testifying at a deposition or trial as a fact witness is nominal and statutorily determined; however, a reasonable, and larger, fee for your time spent preparing for a deposition and testifying is usually permitted. An expert witness fee is negotiated between the physician and whoever is requesting the testimony. In its simplest form, an expert witness fee should not only compensate the physician for his/her time involved, but factor in the value of the expertise and abilities the physician is offering. Whether you are testifying as a fact witness or an expert witness, it is advisable to have your fee and scope of testimony in writing prior to testifying.

The Deposition Process

A deposition is sworn testimony by the witness before a court reporter. The testifying physician may elect, or not elect, to be represented at the deposition. During the deposition, the attorney for either party can ask questions of the witness. The primary purpose of a deposition is to obtain information that the witness may provide at the time of trial.

If you are not already familiar with the case in which you are testifying, you should request a copy of any relevant documents, and if a legal action is already pending, a copy of the complaint. Understanding the nature of the claim will also be helpful in determining whether notice to your malpractice carrier is necessary, if you are not already a named party. If you treated the patient and you are not yet named in the lawsuit, be careful about providing testimony without an attorney present. The testimony you provide is "under oath" and can be used against you in subsequent proceedings, and possibly provide a basis for adding you as a defendant.

Topics of Inquiry

You will experience two broad categories of inquiry: (1) your professional experience and qualifications, and (2) facts regarding the diagnosis and treatment of the patient. However, there are as many different ways of approaching a deposition as there are attorneys conducting depositions.

For example, the examining attorney may work chronologically through the events or simply work off the documents that first appear in the order they were provided, regardless of the date. Accordingly, you should be prepared for whatever style is adopted. For testimony regarding a patient you treated, you should be prepared to speak about the patient's medical history, examinations, diagnoses and treatments. You may also be forced to support the medical decisions you made. Doing so may be based upon your own experience, treatises and recognized medical standards.

Keep your answers limited to the questions asked and the available facts. It is not your role to educate the questioner during a deposition. Often, volunteering extra information will only provide additional grounds for more questions, which may very well result in unnecessarily prolonging the deposition.

'Ex Parte' Interview and Protected Health Information

In addition to testifying, you may be requested to meet informally with one of the attorneys involved in the case. Whether you are testifying or being interviewed, remaining aware of the disclosure rules is important.

Ex parte is a Latin phrase meaning for the benefit of "one party." An ex parte proceeding is an exception to the general rule in legal proceedings that both parties must be present. As a physician, you will likely encounter requests from attorneys seeking an ex parte interview Subject to certain limitations, Michigan law allows for ex parte interviews.

After an attorney obtains the medical records, from either formal or informal discovery, routinely, the attorney will want to meet with the physician to learn about the significance of the medical records and their application to the case. The information gleaned from the interview will likely shed light on issues that could not otherwise be obtained from just reviewing the medical records.

The Health Insurance Portability and Accountability Act (HIPAA) does not bar obtaining protected health information; rather, the statute and regulations set forth procedures that must be followed prior to obtaining healthcare information. The interaction between HIPAA and the Michigan physician-patient privilege is again an important consideration in determining what information can, or cannot, be disclosed.

Before the enactment of HIPAA, the filing of a lawsuit for personal injury or malpractice resulted in the automatic waiver of the patient-physician privilege by the patient. Under HIPAA, however, the filing of a lawsuit does not automatically waive the privilege. As a result, HIPAA does not permit unfettered access to a patient's medical providers for the conducting of ex parte interviews just because a lawsuit was filed. In the absence of a written waiver or qualified protective agreement, a treating physician may only disclose medical information under the conditions provided by HIPAA regulations.

If you are requested to hold an ex parte interview, you should be provided with a patient authorization or qualified protective agreement. If you receive a qualified protective agreement, it is required to contain a "clear and explicit" notice of the purpose of the interview and a statement that you are not required to participate in the interview. In the event an interview is refused, a subpoena can still be issued to compel your participation and testimony. As such, avoiding the matter entirely is not a likely outcome.

The rules for testimony and ex parte interviews vary slightly from producing medical records and other protected health information. Patient authorizations and written agreements are always the preferred route for keeping the physician compliant with HIPAA and Michigan law, while also avoiding needlessly getting caught in the legal process.

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