

LEGAL ALERT

April 2005

CROSKEY V. BMW OF NORTH AMERICA, INC.:

“Much Ado About Nothing”

New federal opinion on HIPAA should have little effect on ex parte communications between a plaintiff’s health care providers and defense counsel in medical malpractice suits.

By Ashley W. Taylor and Cindy C. Boer

A recent ruling on the Health Insurance Portability and Accountability Act of 1996 (HIPAA) from the U.S. District Court for the Eastern District of Michigan has many defense attorneys concerned they will not be able to meet personally with a plaintiff’s health care providers without jumping through several hoops. There is no need for alarm. This unpublished opinion by a federal magistrate is not binding on state courts, which are under no obligation to follow it. Further, for all practical purposes, it does little to change the current practice for such *ex parte* communications in Michigan. As long as defense counsel provide the health care provider with a properly executed HIPAA-compliant authorization permitting the verbal disclosure of health information, such *ex parte* meetings are perfectly appropriate and should continue as a legitimate method of informal discovery in malpractice suits.

HIPAA Preempts State Law

The *Croskey* decision held that HIPAA, a federal law, preempts Michigan state law with respect to the circumstances under which a health care provider may disclose health information through *ex parte* communications with defense counsel. Specifically, HIPAA provides that if there is a conflict between state privacy laws and HIPAA, the law which offers the most protection to an individual’s health information will apply. Under HIPAA, there are only a few procedural avenues through which a health care provider may verbally disclose patient information to defense counsel, including, among others, the execution of an appropriate authorization, a court order, or a HIPAA-valid subpoena. In contrast, under state law, such safeguards are unnecessary because the

physician-patient privilege is waived automatically when a plaintiff files a medical malpractice claim. HIPAA provides more protection to health information in such instances, and thus the magistrate in *Croskey* concluded that HIPAA, the more “protective” law, regulates the procedure by which a health care provider may release patient information through *ex parte* communications.

Appropriate Authorization

The *Croskey* opinion also elaborates on the use of a properly executed authorization to allow a defense attorney to communicate with a plaintiff’s health care providers. To be valid under HIPAA, a signed authorization must contain a number of core elements and required statements. Since the HIPAA privacy rule became effective in April 2003, the Smith Haughey Rice & Roegge Medical Malpractice Department has been using HIPAA-compliant authorizations that expressly authorize verbal disclosure of health information by a plaintiff’s providers. The *Croskey* decision confirms that the use of such an authorization is an appropriate method under HIPAA by which a defense attorney may access protected health information during *ex parte* communications with a plaintiff’s health care providers.

Notice of Ex Parte Communications

The *Croskey* decision departs from HIPAA, however, by suggesting that some form of notice must be provided to plaintiff and/or plaintiff’s attorney before a defense attorney can meet with a health care provider. There is nothing in HIPAA which requires additional notice when health information is requested through an

appropriately signed authorization. The magistrate in *Croskey* seems to acknowledge this when he states that, “although [HIPAA] does not appear to require notice to plaintiff’s counsel, it is difficult to imagine [the defense’s] acquisition of a compliant authorization except through plaintiff’s counsel.” This statement also implies that a fully executed, HIPAA-compliant authorization specifically permitting verbal communications is, in and of itself, sufficient to put the plaintiff’s counsel on notice of the defendant’s intent to meet *ex parte* with health care providers.

Subpoenas and Protective Orders

An authorization is not the only means by which a plaintiff’s health care provider may speak to defense counsel. HIPAA also provides that a health care provider may disclose health information in response to a court order, or a subpoena or other discovery request that is not accompanied by a court order, as long as the provider has satisfactory assurance that reasonable efforts were made to ensure the patient has notice of the request or that defense counsel has secured a qualified protective order that complies with HIPAA. The *Croskey* case recognizes the availability of these additional procedures. There should be no need for defense counsel to go through this added burden and expense, however, when a plaintiff already has a clear obligation under state law to sign authorizations allowing access to medical information in order to pursue a civil legal action for personal injuries.

Advice to Health Care Providers

Health care providers in Michigan may be concerned about this new opinion and how it may affect their ability to meet with defense counsel. Again, there is little need to worry. A health care provider will not be in violation of state or federal law if they agree to speak with a defense attorney who can produce a properly executed HIPAA authorization that specifically permits verbal disclosure of health information. Health care providers presented with such an authorization are under no legal obligation to speak with the defense attorney, but may do so voluntarily if they wish.

As noted above, under HIPAA, a health care provider may also disclose protected information in response to a court order or in response to a subpoena, discovery request, or other lawful process (45 C.F.R. 165.152(e)).

HIPAA Does Not Create a New Privilege

It is important to note that HIPAA does not create a new physician-patient privilege. Instead, HIPAA

simply controls how a health care provider may use or disclose health information. The comments to the HIPAA Privacy rule and other federal opinions on HIPAA make it clear that HIPAA is strictly a procedural rule governing how and when protected health information may be disclosed. It is not intended to disrupt current state practice whereby plaintiffs who put their medical condition at issue must provide complete access to health information, or be barred from bringing their claim. As a result, Michigan law on the physician-patient privilege is not affected or preempted by HIPAA or the *Croskey* decision. Once a patient files a medical malpractice action in the state of Michigan, he or she waives the physician-patient privilege. If a patient chooses to assert the privilege by refusing to sign authorizations allowing defense counsel to speak with health care providers, then, according to state law, he or she should be barred from presenting evidence of his or her medical condition in a civil legal action.

Non-binding Decision

Despite the flurry of activity *Croskey* will undoubtedly create among personal injury attorneys in Michigan, it is really “much ado about nothing.” *Croskey* is a non-binding decision with little precedential value in Michigan state court. Although Michigan state courts are bound by the decisions of the United States Supreme Court construing federal law, there is no similar obligation with respect to the decisions of lower federal courts. Although such decisions may be persuasive, they are not binding. While state courts may find the *Croskey* decision helpful in evaluating how and when HIPAA preempts state law, *Croskey* does not dispose of or bind state courts on the issue of what should happen when a plaintiff attempts to prevent a defendant from accessing health care information through *ex parte* communications. On this issue, we expect state courts to continue to recognize a defendant’s longstanding right to access such information, free of plaintiff interference.

If you have any questions about the Croskey decision or HIPAA in general, please do not hesitate to contact a member of our Health Law or Medical Malpractice Departments.

For your convenience, a laminated contact card for our Medical Malpractice & Health Law attorneys is available upon request. Please contact Lisa Young at lyoung@shrr.com