Litigating Physician Non-Competition Agreements in Michigan

By Michael Rhodes and Warren Krueger

Michigan's physician-patient privilege law restricts a health care provider's ability and legal duty to disclose patient information for purposes of litigation. Interestingly, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") provides exceptions to the disclosure of patient information for litigation purposes. But the absence of a corollary exception under Michigan's privilege statute nevertheless prohibits disclosure of that information – at least is the conclusion the Michigan Court of Appeals has reached. This quirk in Michigan law carries significant consequences.

That is, recovery of monetary damages in litigation requires a party claiming damages to prove them. In other words, if damages are not proven, they are not recoverable. And in the healthcare setting, proving damages may require access to patient information.

Take for example a lawsuit involving a physician's breach of a non-competition agreement by treating the patients of his former employer. This was the situation faced by the Court of Appeals when it analyzed the extent to which patient information can be disclosed under Michigan's privilege law for litigation purposes. The extent of the former employer's damages depends on the amount of treatment provided by the physician to those patients. However, determining the extent and nature of that treatment requires reviewing the patients' records. But because Michigan law prohibits disclosure of patient information without patient consent, even by a judicial order, the former employer cannot review that information and prove its damages.

Recently, a federal court in Michigan analyzed the Court of Appeal's ruling and did little to change the result. While the federal court did not fully agree with the Michigan Court of Appeals reasoning, it did not come and say that the ruling was totally incorrect. As a result, the current state of the law appears to be that any healthcare provider that has patient information cannot be compelled to disclose that information in litigation that does not involve the patient, unless the patient consents to disclosure.

The interesting and seemingly unexplored consequences of this ruling may be how it affects business associates of health care providers, and how litigants explore the records and business practices of adverse parties in discovery. The term "business associate" has a specific definition under HIPAA, a definition which was recently expanded by the Health Information Technology for Economic and Clinical Health Act ("HITECH"). Boiled to its simplest terms, it means any person or entity that obtains protected health information from a covered provider for purposes of assisting the provider in completing its duties. Interestingly, the Michigan privilege law is limited by its terms to prohibiting only "a person duly authorized to practice medicine or surgery" from disclosing information. It creates no corollary prohibition on business associates. Thus, a savvy litigant in dire need of patient information may subpoena patient records form a business associate that is not barred from disclosure by the Michigan privilege statute.

Again, this is an unexplored and potential powder-keg for unassuming litigants, particularly those who are now business associates under the extended HIPAA definition. They may not only find themselves in the litigation crosshairs of a desperate plaintiff, but also entangled in a messy dispute with the covered entity they serve.

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Recent Developments continued from page 5...

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