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What Every Litigator Needs to Know About Protecting Non-Party Patient Privacy Rights in Litigation

Introduction

On June 28, 2004, Washington County Hospital suspended the medical privileges of Dr. Thomas Coy citing "several" cases of substandard medical care. *Coy v. Washington County Hosp. Dist*., 372 Ill. App. 3d 1077, 866 N.E.2d 651 (5th Dist. 2007). Dr. Coy sued the hospital on January 21, 2005, alleging procedural deficiencies in his suspension and seeking the enforcement of a related settlement agreement. *Coy*, 866 N.E.2d at 653. On February 18, 2005, presumably pursuant to settlement negotiations, counsel for Dr. Coy forwarded to the hospital an agreed order and requested that the hospital submit the order to the court. *Id*. On the same date, the hospital delivered a letter to the court requesting that the accompanying agreed order be filed under seal. *Id*. The agreed order contained the names of seven non-party patients to whom Dr. Coy had allegedly provided substandard care. *Id*. The order did not contain any information about the patients other than their names. *Id*.

Thereafter, The Nashville News and The Southern Illinoisan filed a petition to intervene in the lawsuit, seeking access to the sealed order. *Id*. at 653-654. Dr. Coy moved to amend the sealed order to prohibit the disclosure of the non-party patient names contained therein but to unseal the remainder of the settlement agreement. *Id*. at 654. Eventually, the circuit court granted Dr. Coy's motion to amend, thereby unsealing the order except for the names of the seven non-party patients. *Id*. The interveners moved the court to vacate, or alternatively, to reconsider its decision. *Id*. On February 21, 2006, the court entered an order denying the interveners' request to unseal the order with regard to the names of the patients. *Id*. The trial court ruled that granting the request to unseal would violate the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) and that the court was required to "comply with the HIPAA regulations when issuing orders." *Id*.

Under the common law, judicial records and documents are presumptively open to the public. *Id*. Overcoming the presumption presents an uphill battle. While the presumption of public access afforded to these records is very strong, it is not absolute. *Id*. at 655. The moving party bears the burden of establishing both that there is a compelling interest for restricting access and that the resulting restriction is narrowly tailored. *Id*. Upon appeal in the present case, the Fifth District held that: (1) HIPAA's privacy rule did not apply to court records, and (2) that the patients' right to privacy

outweighed the public's right to access the identities of the parties. *Id*. As a result, the trial court's denial of the newspapers' motion was affirmed. *Id*. at 656.

HIPAA

In *Coy*, the names of non-party patients were not protected from disclosure to the public under the privacy rule in HIPAA. *Id*. at 655. The plain language of HIPAA demonstrates that the judiciary, which is not a health plan, a health care clearinghouse, or a qualified health care provider, is not subject to HIPAA's privacy rule. *Id*. Courts and administrative agencies in a number of jurisdictions have agreed that only the small class of "covered entities" defined in HIPAA is subject to the privacy rule. *Id*. at 655-656.

Majority's Interpretation of the Right to Privacy

The Illinois Supreme Court has deemed the right of access to court records as essential to the proper functioning of a democracy because citizens rely on information about the judicial system to form an educated and knowledgeable opinion of its functioning and to ensure quality, honesty, and respect for the legal system. *Id*. at 654. This presumptive right of public access attaches to court orders and opinions, which are public documents that should not be kept under seal. *Id*.

On the other hand, the majority opinion in *Coy* concluded that Illinois has a strong and broad public policy interest in protecting the privacy rights of individuals with respect to their medical information. *Id*. at 656. Public policy should forbid conduct that tends to harm an established and beneficial interest of society, the existence of which is necessary for the good of the public, even though that conduct is not expressly prohibited by a state statute. *Id*. at 657. The court found that protecting the identities of the non-party patients would not impair the public's ability to "monitor the functioning of our courts, thereby ensuring quality, honesty, and respect of our legal system." *Id*. at 658. As a result, the right to privacy was found to be a compelling interest that must be balanced against the public's right of access to the judicial record. *Id*.

The non-party patients in *Coy* were protected from disclosure to the public because the strong presumption for public access was defeated by properly balancing the two competing interests and by narrowly tailoring its restriction to the omission of only the names of the non-party patients. *Id*. at 657. In so finding, the majority relied heavily on the fact that revealing the name of a patient may also reveal sensitive medical information about that person. *Id*. at 658. Numerous examples including HIV/AIDS specialists, abortionists, mental health professionals and oncologists were cited as examples where releasing the name of a patient could imply sensitive medical information. *Id*.

The Dissent

In his dissent, Justice Spomer did not find a compelling interest in the release of names alone. *Id*. at 658. He stressed that long-standing state precedent is clear in holding that the disclosure of a patient's name does not violate the physician-patient privilege. *Id*. at 660. He went on to say that the Illinois General Assembly has had ample opportunity to re-shape the State's public policy with regard to medical information and has not even recognized the majority's expectation of privacy let alone the elevated status required to overcome the presumption of open access. *Id*. at 661. Justice Spomer's proposed solution was for the parties to make contractual arrangements as part of their settlement agreement and to simply not make them part of the court record. *See also, In re Marriage of Johnson*, 232 Ill. App. 3d 1068, 598 N.E.2d 406 (4th Dist. 1992). Justice Spomer asserted that other, more appropriate remedies are available to the aggrieved including a variety of potential lawsuits.

Conclusion

The presumption of public access afforded to court records and documents is very strong but it is not absolute. Litigators should take pains to remove all non-party patient names before any document is submitted to the court and to make every effort to remove the names if they happen to be submitted to curtail any future damage. Alternatively, as suggested in the dissent of Justice Spomer, the parties may set forth contractual terms as part of their settlement agreement and not make them part of the court record.

About the Author

Roger R. Clayton is a partner in the Peoria office of *Heyl, Royster, Voelker and Allen* where he chairs the firm's healthcare practice group. He also regularly defends physicians and hospitals in medical malpractice litigation. Mr. Clayton is a frequent national speaker on healthcare issues, medical malpractice and risk prevention. He received his undergraduate degree from Bradley University and law degree from Southern Illinois University in 1978. He is a member of the IDC, the Illinois State Bar Association, past president of the Abraham Lincoln Inn of Court, a board member of the Illinois Association of Healthcare Attorneys, and the current president of the Illinois Society of Healthcare Risk Management.

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