

# Medical Malpractice Claims

## **Medical History in Medical Malpractice Claims: Independently Obtain Plaintiff's Medical Records Rather Than Permitting Plaintiff's Counsel to Serve as the Gatekeeper<sup>[1]</sup>**

In the medical malpractice arena, obtaining a plaintiff's past medical history is an essential tool in evaluating a claim and finalizing the presentation of evidence before the medical review panel. Typically, defense counsel sends medical authorizations to opposing counsel to be executed by the plaintiff. If the authorizations are executed by plaintiff, the defendant is able to obtain plaintiff's medical records within a few weeks.<sup>[2]</sup> When proceeding before the medical review panel, nonparty requests for production are usually not available since most medical malpractice claims are filed without a simultaneous court action (ie. without a court action, no attorney's subpoena can be issued along with the request).

This article will address the scenario wherein opposing counsel refuses to permit plaintiff to sign the medical authorizations regarding her prior medical history. Plaintiff's counsel typically makes a blanket claim of privilege, claiming that he does not possess the requested medical records and therefore does not know what is contained within those records. In this scenario, plaintiff's counsel may make a compromise offer by suggesting that if and when the records are obtained, he will be happy to release those medical records that he deems relevant to the malpractice claim. As a zealous advocate for the medical provider, do you want the plaintiff's lawyer acting as the "gatekeeper" of what is relevant to the claim, and therefore, what records are submitted to the medical review panel? Ethically, the question has to be answered No. Under Indiana case law, the defendant medical provider has every right to obtain those medical records that are causally and historically related to the condition put in issue and which have a direct medical relevance to the claim, counterclaim, or a defense to the claim. (See *Canfield v. Sandock*, 563 N.E.2d 526, 529 (Ind. 1990)).

Recently, I was faced with this exact predicament and took an aggressive position in order to obtain the plaintiff's prior medical history from a large metropolitan hospital located in Indiana . In that case, the defendant medical provider had a very strong suspicion that plaintiff's past medical treatment at the subject hospital would demonstrate several diagnoses causally and historically related to the focus of plaintiff's malpractice claim. Opposing counsel made the blanket privilege claim and prohibited his client from signing a medical authorization. Opposing counsel made the aforementioned compromise offer to release those records he deemed relevant to the claim once he was able to obtain the records. Unsatisfied with this compromise offer, I filed a Chapter 11 Petition pursuant to Ind. Code §34-18-11-1 seeking to compel plaintiff to sign the medical authorization, or alternatively, that plaintiff permit production of the medical records via a non-party request for production. In his response, plaintiff's counsel admitted to the court that he had not obtained the medical records and did not know what was contained in the records. Plaintiff's counsel argued that compelling plaintiff to sign a medical authorization would result in an unintended waiver of the physician-patient privilege. Plaintiff's counsel once again offered to produce the records once he had an opportunity to review the records and determine what was relevant to the proceeding. Plaintiff's counsel argued to the court that he should be the "gatekeeper" and not the court.

At oral argument, the court focused on trying to resolve the discovery dispute in a way that would permit my client discovery of the medical records while preserving the plaintiff's entitlement to the physician-patient privilege. The court was keenly aware of the argument and rationale for why the plaintiff's lawyer should not be the "gatekeeper" regarding what medical records were discoverable. In addition, the court seemed hesitant to conduct an in camera inspection of the entire hospital chart to filter out the discoverable medical records. Ultimately, the trial court issued a seven (7) page opinion directing the parties to strictly comply with Trial Rule 34(C).<sup>[3]</sup> The insight and analysis gained through the trial judge's opinion has been provided below and may be a useful tool when defense counsel are faced with this regularly encountered discovery dispute. The critical analysis by the court is as follows:

However, a blanket claim of privilege is insufficient. In the context of the physician-patient privilege, the bare assertion of a claim of privilege will not suffice to block discovery of information sought by the discovery request. Rather, the trial court must review the contested materials and determine whether the claim of privilege is justified or mistaken and whether production of the requested documents should be barred or compelled. *Canfield*, 563 N.E.2d at 531.

The privilege is designed to prevent public disclosure of physician-patient confidences without the consent of the patient. The discovery process, however, is not public. It is the exchange of information between the parties to the lawsuit. By allowing discovery of arguably privileged information, the policy behind the privilege is not being thwarted. Of course, to ensure that any material that ultimately is determined to be privileged remains protected, the trial court should allow discovery under a protective order limiting who has access to the materials and how they may be used.

Allowing discovery of the privileged material will enable the trial court to have the benefit of arguments from both parties before determining whether certain material is related to the condition put in issue. If the court finds that the material is privileged, it will not be admissible at trial. To ensure that the privileged material will not be used at trial, the party-patient can make a motion in limine to prevent the opposing party from making any reference to the material.

There is no significant difference in allowing discovery of privileged material in order to prepare a case in the event the privilege will be waived and allowing discovery to facilitate the determination whether the privilege has been waived for purposes of trial. In both circumstances, discovery will allow both litigants an opportunity to be fully prepared. In the event that the plaintiff does not waive the privilege, the effect will be as if the discovery of the privileged material never occurred.

As a result of the Court's opinion and order, a non-party request for production was sent to the hospital. Plaintiff waived the fifteen day waiting period and the records were eventually obtained. The whole process took approximately four (4) months, from the time the initial authorizations were sent to plaintiff's counsel, the Chapter 11 proceedings were concluded, to the time the records were obtained from the hospital. Fortunately, the trial court set the matter expeditiously for a hearing and issued its opinion and order within five (5) days of the hearing.

Without question, defense counsel should not sit idly by and permit the plaintiff's bar to be the "gatekeeper" of what medical records are relevant to the proceedings and therefore discoverable. The better practice is to obtain the plaintiff's past medical history independently from the medical providers either with signed medical authorizations or through non-party requests for production. As a zealous advocate, counsel should not rely upon the records produced by plaintiff's counsel. Indiana courts have repeatedly rejected blanket claims of privilege by plaintiff's counsel. As the trial judge correctly stated in the aforementioned opinion, the parties should permit discovery of the records as there are adequate protections to preserve the plaintiff's entitlement to the physician-patient privilege should the case continue to trial.

<sup>1</sup>*This article originally appeared in print in the Indiana Lawyer in a special section published in March 2003 by the Defense Trial Counsel of Indiana; 9505 Copley Drive; Indianapolis, IN 46260.*

<sup>2</sup>*In Andreatta v. Hurley*, 714 N.E.2d 1154 (Ind.Ct.App. 1999), the Indiana Court of Appeals upheld a trial court's order requiring the patient to execute medical authorizations for out-of-state medical providers. In the federal courts, a plaintiff may be compelled to execute a medical authorization regarding past medical treatment. See *Shots v. CSX Transportation, Inc.*, 887 F.Supp. 206 (S.D.Ind. 1995); See also *Everhart v. National Passenger Railroad, Corporation*, 2003 WL 83569 (S.D.Ind. 2003).

<sup>3</sup>*Although not explicitly stated in the opinion, the Court did not foreclose the possibility that the medical records could be obtained by ordering plaintiff to execute the medical authorizations. Based upon the tone of the opinion, had the records not been obtained pursuant to T.R. 34(C), it seems likely that the Court would have ordered plaintiff to sign the medical authorizations.*

