

HIPAA: Court Discusses Requirements For Contacts With Attorneys In Litigation.

A Parkinson's Disease patient was getting home nursing care from a nurse practitioner. She came to believe he was contemplating imminent suicide and phoned the police. Two state troopers went to his house and had him transported by ambulance to a hospital for a mental health evaluation.

The patient was released the next day with a finding of no suicidal ideation. That is, the hospital's psychiatric staff determined there were no grounds to apply for a court order for an involuntary mental-health hold.

The patient sued the state troopers for false imprisonment and violation of his civil rights. The attorneys representing the state troopers wanted to interview the nurse practitioner *ex parte*, that is, without the presence of the patient or his attorney.

The US District Court for the Northern District of New York issued a complex decision explaining how the US Health Insurance Portability and Accountability Act (HIPAA) applies to this scenario.

State Law Can Be More Restrictive

The HIPAA is a Federal law which provides a baseline of protection to patients with respect their medical records. It also provides a baseline of protection against health care providers communicating with others about the patient, verbally or in writing, in or outside the context of civil litigation, whether it be malpractice, personal injury or other types of litigation.

The court first looked for the possibility that New York law would be more patient-protective than the HIPAA. If so, state law would apply. The court found no explicit bar under New York law to *ex parte* interviews of healthcare providers by defense attorneys, and turned to the HIPAA for direction.

The nurse practitioner could speak with the patient's lawyers if, and only if, the patient's lawyers had a judge sign a court order that fully complied with the HIPAA. **Bayne v. Provost**, ___ F. Supp. 2d ___, 2005 WL 469360 (N.D.N.Y., January 25, 2005).

When contacted by a patient's lawyer, a healthcare provider should obtain advice from legal counsel how the US Health Insurance Portability and Accountability Act (HIPAA) applies.

In this case, before the patient's lawyers can speak with the patient's nurse practitioner the lawyers must go to court for a protective order containing all of the provisions outlined in the Code Federal Regulations 45 CFR 164.512(e)(1)(v)(A) and (B).

Even with a protective order, the lawyers must advise the nurse practitioner that she is not required to speak with them about the patient against her wishes or without the presence of her own lawyer if she wants a lawyer present.

If the nurse practitioner is placed under subpoena to testify in a deposition or in court, the HIPAA still applies and it is necessary to ascertain that compliance with the Federal Regulations is taking place.

State law may be more patient-protective and may overrule Federal law.

UNITED STATES DISTRICT COURT
NEW YORK
January 25, 2005

Nursing Home Admissions: HIV Discrimination Suit Upheld.

An HIV+ patient was to be discharged from the hospital after treatment for liver disease. She was not symptomatic for AIDS. She needed to be placed in a skilled nursing facility.

Her nurse case manager phoned two nursing facilities. Both said they had female beds available. The nurse case manager faxed portions of the patient's medical chart and received phone messages back within hours from each facility indicating that no space was available. A suitable placement was found elsewhere that same day.

The nurse case manager reported the two facilities to an AIDS advocacy group. The group had people call the facilities pretending to seek admission for an HIV+ patient and were turned down. They also called pretending to place a non-HIV+ person and received open welcomes.

The patient sued for HIV discrimination.

HIV is a disability. Disability discrimination violates the US Americans With Disabilities Act, US Rehabilitation Act, US Fair Housing Act and a host of state civil rights laws.

UNITED STATES DISTRICT COURT
CALIFORNIA
February 22, 2005

The US District Court for the Northern District of California pointed to a laundry list of Federal and state laws which outlaw discrimination by healthcare facilities on the basis of disability, HIV being a disability recognized by law. The only legal issues where to what extent each law allows facility staff as well as the facility itself to be sued. **Wood v. Helping Hands Sanctuary**, 2005 WL 589328 (N.D. Cal., February 22, 2005).