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Informal Discovery Interviews Between Defense Attorneys and Plaintiff's Treating Physicians

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In personal injury and medical malpractice cases, there has been a constant debate about whether a defense attorney may conduct informal interviews of a plaintiff's treating physicians to discover information about the plaintiff's injuries, treatment and recovery. The debate has intensified where the proposed interviews are *ex parte*, that is, outside the presence of the plaintiff or his or her attorney.¹

The positions taken within both the defense and plaintiffs' bar regarding *ex parte* communications with a plaintiff's physicians have not been unified. For example, some defense attorneys conducted *ex parte* interviews of a plaintiff's treating physicians without providing any notice to the plaintiff, whereas others conducted *ex parte* interviews only after the consent of the plaintiff. If the plaintiff objected to the proposed interviews, many defense attorneys abandoned the interviews and resorted to formal discovery.

The practice within the plaintiffs' bar was similarly inconsistent. Some plaintiffs' attorneys believed that all communications between a defense attorney and treating physicians were prohibited, while others agreed to *ex parte* interviews. The differing practices often resulted in uncertain and inconsistent discovery rulings by Colorado trial courts. However, the Supreme Court's recent decision in *Samms v. District Court*² should quiet this debate.

This article discusses *Samms*, analyzes the three requirements for *ex parte* interviews between a defense attorney and the plaintiff's treating physicians, highlights the fact that there is no absolute right to *ex parte* discovery interviews and briefly explores the practical implications of *Samms*.

The *Samms* Decision. *Samms* presented a classic clash of opposing views. In *Samms*, the plaintiff filed a medical malpractice case alleging that her physician negligently failed to diagnose and properly treat a myocardial infarction. She sought damages for physical and mental injuries.

During the course of discovery, the defense attorney sent a letter to the plaintiff's attorney explaining that he intended "to conduct *ex parte* interviews' with five physicians who had treated *Samms* and that

'if any particular interview poses a reasonable concern that privileged matters not already waived by the filing of this suit will be disclosed, I will provide you with adequate notice and the opportunity to be present.'"³ The letter did not set forth the date, time or place of the interviews nor the scope of the implied waiver of the physician-patient privilege.

The plaintiff objected to the proposed interviews and filed a motion for protective order. The trial court denied the motion but, among other things, required the defense attorney to advise the treating physicians of the scope of the waiver of the physician-patient privilege before the interviews. The trial court declined to follow *Fields v. McNamara*⁴ and Colorado Bar Association Ethics Opinion No. 71,⁵ authority historically interpreted and used by the plaintiffs' bar to preclude all *ex parte* interviews between defense counsel and treating physicians. The defense attorney interviewed the five treating physicians.

As discovery progressed, the defense attorney sent the plaintiff's attorney a second letter similarly stating his intent to conduct *ex parte* interviews of fifteen additional treating physicians. Once again, the plaintiff objected and filed a motion for protective order. The trial court denied the motion with respect to fourteen of the fifteen treating physicians and allowed *ex parte* interviews of those physicians. The plaintiff then filed a petition for writ of prohibition to the Colorado Supreme Court.

On appeal, the parties continued their extreme positions. The plaintiff argued that *ex parte* interviews were improper and the trial court could not order such interviews, whereas the defense argued that it had an absolute right to conduct *ex parte* interviews. As explained below, the Colorado Supreme Court adopted a rule that fell between the two extremes.

The Three Requirements. The Supreme Court began its analysis by underscoring the doctrine of implied waiver of the physician-patient privilege in personal injury or medical malpractice cases.⁶ The court stated, "When a patient initiates a civil action and by alleging a physical or mental condition as the basis for a claim of damages injects that issue into the case, the patient thereby impliedly waives his or her physician-patient privilege with respect to that medical condition."⁷ Such implied waiver is "consent" for the purpose of the statutory privilege.⁸

Given this implied waiver of the physician-patient privilege, which occurs to some degree in all personal injury or medical malpractice cases, the broad question was whether in the absence of a plaintiffs express consent a trial court may authorize an attorney representing a defendant in a civil action to communicate informally with non-party physicians who have treated the plaintiff in the absence of the plaintiff or the plaintiffs attorney.⁹ After considering the implied waiver of the physician-patient privilege¹⁰ and the numerous advantages of informal methods of discovery, such as informal interviews,¹¹ the Colorado Supreme Court answered the question "yes." Colorado's rules of discovery "permit a defense attorney to conduct informal interviews in the absence of a plaintiff or the plaintiff's attorney with physicians who have treated the plaintiff."¹² The defense attorney does not need to seek court authorization before scheduling informal *ex parte* interviews.¹³

However, the informal *ex parte* interviews must satisfy three requirements:

1) the plaintiff "must be given reasonable notice of any proposed interview";¹⁴

2) the plaintiff and the treating physician "must be informed specifically of the scope of the plaintiffs waiver of the physician-patient privilege prior to any informal interviews of the physician!";¹⁵ and

3) the "informal questioning must be confined to matters that are not subject to a physician-patient privilege."¹⁶ Each requirement and its practical implications are considered in turn below.¹⁷

Reasonable Notice of The Interview. The first requirement is that the plaintiff be given reasonable notice of the interview. The purpose of the notice requirement is to allow the plaintiff to protect his or her interests.¹⁸ For example, the notice affords the plaintiff the opportunity to attend the scheduled interview; to inform the treating physician of the belief that certain information known to the physician remains subject to the physician-patient privilege; or to seek appropriate protective orders from the court.¹⁹

Although the notice allows the plaintiff to take steps to protect his or her interest, the plaintiff and his or her attorney "may not instruct his or her treating physician not to participate in such interviews solely for the purpose of preventing the disclosure of non-privileged information."²⁰ In other words, instructions and even suggestions not to participate are legally and ethically improper. Further, "in the absence of a Court order, a patient may not require an attorney for an adverse party to forego or postpone a scheduled informal *ex parte* interview of the patient's treating physician."²¹

The notice also must be "reasonable" such that it gives the plaintiff sufficient time in which to protect his or her interests.²² In practice, this requirement means that a defense attorney must try to accommodate the schedules of both the treating physician and the plaintiffs attorney.²³ Notice of an informal interview should be presumed reasonable if it complies with the Colorado Rules of Civil Procedure.

The Colorado Supreme Court did not address the form of the notice in *Samms*. However, the opinion and good practice suggest that the notice should be in writing. A letter that is sent to the plaintiffs attorney and the treating physician and outlines the date, time and location of the interview, as well as the other requirements, should be adequate. Some defense attorneys may elect to set forth the notice in a formal discovery pleading.

Definition of Scope of Waiver. The second requirement is that prior to any informal interview, the plaintiff and the treating physician "must be informed specifically of the scope of the plaintiffs waiver of the physician-patient privilege."²⁴ This requirement is necessary, in large part, because these informal communications raise legitimate concerns of many persons:

The patient may be concerned that privileged information may be disclosed before the patient has any meaningful opportunity to object to the information solicited. The attorney representing the June party seeking discovery is concerned about potential disciplinary proceedings for professional misconduct in seeking to elicit information for which the privilege has not been waived. The physician may be concerned about disclosing information to which the physician-patient privilege has not been waived.²⁵

The Colorado Supreme Court recognized that attorneys, judges and physicians all "may at times find the task of delineating the scope of a waiver to be problematical."²⁶ Indeed, defining the scope of the waiver likely will remain a fertile ground of dispute. The scope of the implied waiver necessarily depends on the nature of the claim asserted by the plaintiff.²⁷ However, the dispute over the scope can be minimized if the notice explains to the treating physician that by seeking damages in the personal injury or medical malpractice case, the plaintiff has impliedly waived the physician-patient privilege with respect to "matters known to the physician that are relevant in determining the cause and extent of injuries [including recovery/prognosis] which form the basis for a claim for relief."²⁸

The notice then should specifically identify each injury that is a basis for a claim for relief and damages. A brief narrative of the plaintiff's allegations may be important to define the scope accurately. It also may be helpful to quote from the plaintiff's complaint, discovery responses or medical records, or to attach a copy of the complaint or excerpts of discovery responses to the notice.

When there is a dispute over the scope of the waiver, both counsel should attempt to define the scope clearly and thoroughly and to narrow remaining differences. By doing so, legitimate disputes can be identified in advance and resolved by the Parties or, if not, presented to the court.²⁹

Limiting Interview to Scope of implied Waiver. The final requirement is that the "informal questioning must be confined to matters that are not subject to a physician-Patient privilege."³⁰ The notice should include a provision reminding the treating physician of the physician-patient privilege, the scope of the implied waiver and this restriction on the informal interview. The defense attorney also should remind the treating physician of these ground rules at the beginning of the interview. This requirement is based on the legal and ethical obligations of both the defense attorney³¹ not to elicit and the treating physician³² not to disclose information that falls beyond the scope of the implied waiver.

Inevitably, there will be disputes between and among the attorneys or treating physicians during the informal interview. If the treating physician has questions or concerns during an *ex parte* interview about the scope of the waiver or related issues, it is prudent to contact the plaintiff's attorney or adjourn the interview until the issues are resolved by the parties or the court. The attorneys should accord substantial deference to the relevancy opinion offered by the treating physician. If disputes cannot be resolved, the informal interview should, if possible, continue as to undisputed matters, and court assistance should be obtained as to the disputed matters.

No Absolute Right. The notice allows the plaintiff or his or her attorney to attend the informal interview. Therefore, there is no absolute right to *ex parte* interviews of the plaintiff's treating physicians.³³ In effect, the plaintiff decides whether or not the interview is *ex parte*. If the plaintiff or his or her attorney elects not to attend the interview, it is an *ex parte* interview, whereas if the plaintiff or his or her attorney attends the interview, it is not.³⁴ Regardless of whether the interview is *ex parte*, the defense attorney and the treating physician must abide by the same rules during the interview.

Further, the treating physician has the exclusive right to accept or reject an informal interview.³⁵ If it is rejected by the treating physician, the defense attorney then must resort to a formal deposition.

Practice Implications. In *Samms*, the Colorado Supreme Court took a middle ground on this divisive issue within the bar. It is too early to draw firm conclusions about the effect of *Samms* in the civil discovery context. Plaintiffs' attorneys still have the right to have unlimited communications with plaintiffs' treating physicians in the absence of the defense attorney and without adhering to the requirements of *Samms*. Although *Samms* imposes certain obligations on defense attorneys, it offers the defense bar meaningful strategic benefits and discovery options to limit soaring discovery costs.

Moreover, the new limitations on discovery, including the number of depositions, likely will lead the courts and the defense bar to employ informal discovery interviews more frequently.³⁶ Indeed, courts may more frequently use *Samms*-like interviews in case management orders. Physicians also will have a significant impact on the application of *Samms*. In the long run, the use or abuse of informal interviews is up to the courts, the plaintiffs' and defense bars and the medical community.

Because *Samms* was decided in the narrow context of discovery in a civil medical malpractice case, there remains some dispute within the bar over its application to other contexts. For example, does *Samms* apply to workers' compensation claims? The rationale of *Samms* suggests that the requirements should apply in the discovery context. Beyond the discovery context, do the three requirements apply to trial preparation conferences between the defense attorney and treating physicians? If an informal interview or deposition has already occurred, there are strong arguments against the application of *Samms*. Although these and others remain open or, at least, arguable issues, *Samms* has clarified the rule in the discovery context.

Conclusion. *Samms* has to some degree clarified the law of discovery communications between defense counsel and plaintiffs' treating physicians in personal injury or medical malpractice cases. Defense counsel or the court must: (1) give the plaintiff reasonable notice of any proposed interviews; (2) advise the plaintiff and his or her treating physicians specifically of the scope of the plaintiff's waiver of the physician-patient privilege prior to any informal interviews; and (3) keep the informal questioning of the treating physicians to matters that are not subject to a physician-patient privilege. If these requirements are satisfied, the plaintiff no longer can unilaterally prevent a defense attorney from conducting informal discovery interviews of the plaintiff's treating physicians. The proposed interviews must proceed and will go forward unless the plaintiff seeks protective relief from the court or the treating physicians decline the interviews.

NOTES

1. The Colorado Supreme Court explained "[w]hen an attorney representing a party adverse to a patient informally interviews a treating physician with respect to non-privileged matters in the absence of the patient or the patient's attorney, the interview is properly characterized as an '*ex parte*' interview." *Samms v. District Court*, 908 P.2d 520, 526 n.3, 530 n.1 (Colo. 1995). The concept of *ex parte* interviews should be distinguished from other *ex parte* proceedings, which, in general, are taken or relief granted at the instance of one party only, and without notice to, or contestation by, any adverse party. See *Black's Law Dictionary*, 576 (6th ed. 1990).

2. *Samms, supra*, note 1.

3. *Id.* at 523.

4. *Fields v. McNamara*, 540 P.2d 327 (Colo. 1975). In *Fields*, the plaintiff filed a personal injury action seeking damages for injuries allegedly sustained in an automobile accident. The trial court ordered the plaintiff to execute an authorization, which authorized the plaintiff's treating physicians "to disclose and deliver [to the defense attorneys] all facts and particulars desired with reference to my past, present and future physical condition. . . ." *Id.* at 328. The Colorado Supreme Court sustained the plaintiff's objection to this provision, finding that the authorization went "too far in permitting *ex parte* questioning of physicians or others concerning documents to be examined." *Id.* at 328-29. Although the Colorado Supreme Court recognized that it often is good practice for the parties to agree to such *ex parte* interviews and questioning, the court could not order such *ex parte* proceedings. Instead, the defense attorney should turn to and employ formal discovery methods.

5. CBA Ethics Comm., Rev. Formal Op. No. 71, 14 *The Colorado Lawyer* 2010 (Nov. 1985); see also Interprofessional Code ' 6.3.

6. The physician-patient privilege provides that "[a] physician, surgeon, or registered professional nurse duly authorized to practice his profession pursuant to the laws of this state or any other state shall not be examined without the consent of his patient as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient." CRS ' 13-90-107(l)(d). This privilege, of course, belongs to the patient and may be waived only by the patient. *Samms, supra*, note 1 at 524; *Clark v. District Court*, 668 P.2d 3, 10 (Colo. 1983).

7. *Samms, supra*, note 1 at 524; see also *Clark, supra*, note 6 at 10. The implied waiver does not extend to all of the patient's personal medical matters. *Samms, supra*, note 1 at 525.

8. *Samms, supra*, note 1 at 524; *Clark, supra*, note 6 at 10. In *Samms*, by alleging that the defendant's failure to properly diagnose myocardial ischemia resulted in injuries, the plaintiff "waived her physician-patient privilege with respect to information related to her heart condition obtained by a physician in the course of diagnosing or treating *Samms* for that condition." *Samms, supra*, note 1 at 524.

9. *Id.* at 524. The Colorado Supreme Court noted a marked division of authority on this issue. The more narrow issue was "whether and to what extent this waiver authorized the trial court to allow Bjork's attorney to conduct informal interviews with *Samms*' treating physicians in the absence of *Samms* or *Samms*' attorneys." *Id.* at 524.

10. *Id.* at 524-25.

11. *Id.* at 526; *Bond v. District Court*, 682 P.2d 33, 40 (Colo. 1984). Personal informal interviews "are an accepted informal method of discovery" that "not only effectuate the goals of the discovery process but tend to reduce litigation costs and simplify the flow of information." *Samms, supra*, note 1 at 526.

12. *Id.*

13. *Id.* at 529 n.5. Trial courts may authorize such informal interviews. *Id.* at 526, 529-30.

14. *Id.* at 526.

15. *Id.* at 529.

16. *Id.* at 526. The Colorado Supreme Court adopted these requirements to minimize two "legitimate concern[s]": (1) the danger that the defense attorney "might attempt to improperly influence the physician's trial testimony and (2) the inadvertent disclosure of information about the plaintiffs medical condition that is irrelevant or for which the privilege has not been waived. *Id.* at 528-29.

17. It should be noted that this rule of *Is*, applies only to treating physicians who are identified by the plaintiff as nonexpert treating physicians. *Id.* at 530. Discovery as to physicians who are expert witnesses proceeds according to C.R.C.P. 26. However, the plaintiff cannot circumvent *ex parte* interviews by apply labeling a treating physician as an expert witness. The defense attorney should still be entitled to interview the treating physician with respect to those matters.

18. *Id.* at 528.

19. *Id.* at 526.

20. *Id.*

21. *Id.* at 526 n.3.

22. *Id.* at 526, 528-30.

23. Informal discovery interviews are similar in purpose to a formal deposition. Therefore, a defense attorney should provide at least five business days' notice. See C.R.C.R 121, ' 1-12(l).

24. *Samms, supra*, note 1 at 529.

25. *Id.* at 528-29.

26. *Id.* at 529.

27. *Id.*

28. *Id.* at 525.

29. *Id.* at 529.

30. *Id.* at 526.

31. The defense attorney "may not seek information not relevant to the physical or mental condition at issue in the litigation." *Id.* at 528. If the attorney improperly elicits information beyond the scope of the implied waiver he or she is subject to appropriate professional discipline.

32. The treating physician must be concerned about disclosing information to which the physician-patient privilege has not been waived. After all, in many cases, the implied waiver does not extend to all of the patient's personal medical matters. However, the physician has a "primary obligation to tell the truth regardless of whether his or her testimony will help or hinder the patient's case." *Id.* at 528-29.

33. *Id.* at 526 n.3.

34. "While the rules of discovery permit such *ex parte* interviews, because a patient may personally or through his or her attorney attend any interview of a treating physician scheduled by an adverse party, scheduled *ex parte*, interviews may on occasion not occur." *Id.*

35. *Id.* at 526.

36. See C.R.C.P. 26.

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