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Does the *Petrillo* doctrine override the right to counsel?

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In 1986, the Illinois courts created the *Petrillo* doctrine, which prohibited attorneys representing defendants in personal-injury actions from having ex parte discussions with a plaintiff's treating physician.

See *Petrillo v. Syntex Laboratories*, 148 Ill.App.3d 581 (1st Dist. 1986).

In the typical personal-injury case, involving a plaintiff injured in an auto or construction accident, this created few problems, because physicians had little reason to be concerned that their testimony could lead to being named in a lawsuit.

Nevertheless, some physicians in these situations are uncomfortable with the deposition process, and either retain an attorney or request their insurance company to provide an attorney to assist them in the deposition.

More commonly, in medical-malpractice cases, treating physicians fear that their deposition will be used to assist the plaintiff's attorney in developing testimony that can later be used against them in a medical-malpractice case. Even in cases that do not start out as a medical-malpractice case, a defendant could conclude that they would be best served by bringing an action against a treating physician for contribution. In any event, there is reason for a physician being deposed to seek the assistance of counsel.

The *Petrillo* doctrine was designed to protect the physician-patient relationship, by preventing a patient's physician from having ex parte discussions with counsel for the patient's adversary. The *Petrillo* court found "it difficult to believe that a physician can engage in an ex parte conference with the legal adversary of his patient without endangering the trust and faith invested in him by his patient." *Petrillo*, 148 Ill.App.3d at 595.

The court emphasized that its decision was based on the lack of legitimate need for ex parte conferences and the damage to the physician-patient relationship that could result. It also recognized that neither the physician-patient privilege nor the fiduciary relationship between physician and patient is absolute, as there are several exceptions to each designed to ensure that the truth is ascertained in civil disputes.

Both Illinois courts and the Illinois legislature have recognized that when determining the scope of the *Petrillo* doctrine the court must consider the right of a physician or other health care provider to consult with counsel. The Hospital Licensing Act provides that the "hospital's medical staff members and the hospital's agents and employees may communicate, at any time and in any fashion, with legal counsel for the hospital concerning… Any care or treatment they provided or assisted in providing to any patient within the scope of their employment or affiliation with the hospital" (210 ILCS 65/6.17(e)). This was later amended to provide that after a medical malpractice case is filed against the hospital or its agents or employees, non-employees of the hospital may not consult with the hospital's legal counsel concerning the malpractice claim (201 ILCS 65/6.17(e-5)). Nothing in this section, however, precludes a physician not employed by a hospital from consulting with the physician's own attorney.

In *Burger v. Lutheran General Hospital*, 198 Ill.2d 21, 45-46 (2001), the Illinois Supreme Court recognized the importance of allowing health care providers to consult with their attorneys both before and after a suit had been filed, noting that a rule precluding a hospital's counsel from consulting with the hospital's staff would "preclude the obtaining of prompt legal advice… In addition… a hospital would be required to formally depose its own medical staff, agents and employees prior to investigating an adverse incident occurring in the hospital, and for which the hospital may potentially be liable. Such a procedure would hamper the prompt investigation of the adverse event."

In *Morgan v. County of Cook*, 252 Ill.App.3d 947 (1st Dist. 1993), the court examined the application of the *Petrillo* doctrine to cases in which the plaintiff sought to hold a hospital vicariously liable for the conduct of a physician, and held that a rule precluding consultation with the hospital's attorney would effectively preclude the hospital from defending itself. Therefore, in those situations, "the patient has impliedly consented to the release of his medical information to the defendant hospital's attorneys."

There should be no question that a physician has as much right to consult with counsel as a plaintiff or any other deponent, litigant, or prospective litigant. When a physician is called upon to testify at trial or in a deposition, the physician may have no idea whether something he or she says could lead to liability. Sometimes, the risk to the physician of testifying as a treating physician in a personal injury case will be nominal. In other cases, however, something said during a deposition could become the basis for a subsequent malpractice suit. There is nothing about the physician-patient privilege or the *Petrillo* doctrine which suggests that a physician must face these situations without counsel. See *Baylaender v. Method*, 230 Ill.App.3d 610, 624 (1st Dist. 1992).

The policy underlying the *Petrillo* doctrine does not support the argument recently advanced by Jack Casciato in a recent column in the Law Bulletin that a physician obtaining a "dep assist" from counsel the physician retains, or that the physician's insurer retains, violates a patient's right to confidentiality. All such consultations do is ensure that the physician understands his or her legal rights and the implications of his or her testimony. Likewise, there is nothing improper for counsel representing the physician to do all he or she can to ascertain the facts of the case in which the physician is being deposed so the physician can be properly represented. A rule that precludes counsel from investigating everything pertinent to the physician's testimony would consign physicians to ineffective assistance of counsel.

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