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Time for a uniform HIPAA qualified protective order

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Among the first things that a defense lawyer wants to obtain in a personal injury case are the plaintiff's medical records. With the advent of electronic medical records this should have been more expeditious, but that is largely not the case.

The medical records produced by plaintiffs' counsel are often in a different format than those subpoenaed by defense counsel, resulting in both wondering if either set of records are complete. Complicating this process is the lack of uniformity in the manner in which medical records are obtained across Illinois and the resulting various requirements imposed by medical providers.

Last year, the Illinois Supreme Court Rules Committee heard testimony at a public hearing on a proposal from Cook County Circut Judge John Ehrlich to amend Supreme Court Rule 218 and to have the Cook County HIPAA qualified protective order adopted statewide.

The order, which is required to be executed by the plaintiff, plaintiff's counsel, defense counsel, and the court provides, in part, that "[a] party who has disclosed PHI and agreed to the entry of this court order explicitly waives the right to privacy over the disclosed materials but only to the extent provided in this court order." The extent of the waiver, however, only applies to allow disclosure to (1) insurers (for a range of purposes both with respect to and outside of the litigation in which the order was entered) (2) as further ordered by the court or required to comply with a subpoena (3) to parties to the lawsuit and their agents and (4) as necessary to comply with state and federal law.

The privacy waiver was necessary because section 6 of the Illinois Constitution explicitly provides a right of privacy. The reasoning for the order, as explained by Ehrlich in his oral testimony before the Rules Committee, was to expedite the process of obtaining medical records and reduce the time it takes to resolve cases.

There was opposition to the proposal to adopt the Cook County order from individual members of the plaintiffs' bar, the Illinois Trial Lawyers Association, the Illinois State Bar Association, and Lake County Circuit Judge Jorge L. Ortiz. State Farm, the American Property Casualty Insurance Association and the Illinois Association of Defense Trial Counsel supported the proposal. While there was disagreement over the form of the order that should be adopted, the testimony largely favored that some form of uniform order was appropriate.

The 2nd District Appellate Court recently issued an opinion in *Haage v. Zavala*, 2020 IL App (2d) 190499, in which the court rejected the Cook County order. The *Haage* case arose out of the two consolidated cases in the Lake County Circuit Court in which State Farm insureds were defendants. State Farm intervened into both cases because it objected to the form of HIPAA order entered at the request of the plaintiffs as those orders bound State Farm, an insurer which is exempt from HIPAA, to HIPAA's requirements, and because State Farm claimed the orders conflicted with the obligations imposed on it by the Illinois Insurance Code and the implementing regulations.

The trial courts in both cases sided with the plaintiffs, and State Farm appealed those orders. The appellate court affirmed the rulings of the Lake County Circuit Court and made several holdings.

First, the court agreed that State Farm was not a covered entity under HIPAA, but held that "if State Farm wishes to access the [Protected Health Information] at issue, it must abide by the terms of the HIPAA qualified protective orders entered by the court" and stated that there is nothing in the regulations about "whether a non-covered entity is exempt from obeying a HIPAA qualified protective order."

Second, the court held that nothing in the Insurance Code or the implementing regulations that requires an insurer to maintain protected health information, or PHI, in its claims files, and thus it rejected the argument that the HIPAA Qualified Protective Order entered in Lake County that required destruction of the records was in conflict with State Farm's obligations under the Illinois Insurance Code.

Third, the court criticized the Cook County order and stated that the provisions of the Cook County order that allow an insurer to use the PHI outside of the litigation "directly conflict[] with the requirements for a HIPAA qualified protective order under section 164.512(e)(1)(v) of the Privacy Rule."

Fourth, the court held that because there was no waiver of HIPAA's Privacy Rule, to the extent there were obligations to maintain the records to comply with state law, those were preempted.

The *Haage* decision confirms the stark contrast between the practice with regards to HIPAA orders across the state and in particular the difference in practice between Lake County and the Cook County. Though there is not a split between the appellate districts, as no other case on this issue has made it to the appellate court, this is a dispute that needs to be resolved.

A petition for leave to appeal has been filed by State Farm in the *Haage* case. As a consequence, the Illinois Supreme Court is going to have the opportunity to decide this issue by either rendering a decision in *Haage*, by amending the rules, or both. The court should resolve this issue, decide on a form order to be employed, and thereby provide direction to the bench and bar, so that cases can be resolved more expeditiously.
