Ethics in DC - It's Not an Oxymoron

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Thanks to FDA guru, regular reader, and occasional correspondent, Arnie Friede, we're aware of an interesting ethical development in the District of Columbia. It has to do with one of our recurrent topics – the ability of defense counsel to investigate their cases through informal contacts with probably the most relevant witnesses in the case – the plaintiff's treating physicians – without harassment from the other side (who, of course are perfectly free to do so themselves).

We've even created a 50-state chart, that we try to keep updated, of what we're allowed to do where in this regard. Most of what's in that chart is case law, but not all of it.

As our chart indicates, as in a number of states, DC law freely allows informal interviews with treating physicians. Street v. Hedgepath, 607 A.2d 1238, 1247 & n.8 (D.C. 1992); Miller v. Hilton Hotels Corp., 1993 WL 210866, at *3, 995 F.2d 305 (D.C. Cir. 1993) (table); Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128 (D.D.C. 1983).

Notwithstanding that informal interviews are permissible, a DC plaintiff attorney wanted to order his client's treater not to speak to defense counsel (even if the doctor wanted to). Fortunately, this attorney had the good sense to check with the ethics committee of the DC bar before attempting such interference. The committee wrote an opinion declaring that such an order to the treater by a lawyer would have been unethical. Here's the committee's reasoning in a nutshell:

- As noted above, the informal interview procedure was allowable under local law, and there was no HIPAA impediment, since defense counsel was proceeding with court approval.
- The informal interviews themselves are ethical. They do not violate Rule 4.4(a), which prohibits a lawyer from "knowingly us[ing] methods of obtaining evidence that violate the legal rights of [a third] person," since they're legally permitted.
- A treating physician is not within any of the exceptions to Rule 3.4(f) – meaning that a treating doctor is not considered a patient's "employee" or "agent," absent highly unusual circumstances not present in most cases.

- "[T]he treating physician is **no different from any other witness** who is neither a client nor a relative, employee, or other agent of a client, and the answer to the inquiring lawyer's first question is clear. Rule 3.4(f) prohibits plaintiff's counsel from requesting that the physician decline to speak with defense counsel" (emphasis added).
- Plaintiff's counsel can inform the treater that he's not required to speak with our side. Big deal, we tell that to treaters ourselves.
- Given that treaters are simply non-party witnesses under Rule 3.4(f) it's not ethical for plaintiff's counsel to "discourage" them from meeting with both sides equally by "requesting" that opposing counsel be present for any interview.
- "[I]t would be inconsistent with the intent of the rule [3.4(f)] to permit a lawyer to request that conditions be imposed on communications with opposing counsel that could discourage the witness from allowing the communication."
- Under Rule 3.4(a) plaintiff's counsel "shall not . . . obstruct another party's access to evidence."
- While a treater can choose to include plaintiff's counsel, "Rule 3.4(f) does not permit the lawyer to request that the witness make [that] particular decision."
- If any legal limitations remain (privacy or privilege rights, to the extent not waived by plaintiff's bringing suit, would be the prime example) counsel may "demand that the treating physician comply" with those limitations.
- Except when treaters have their own counsel, attorneys must ethically treat them as they would any other unrepresented person.

While this particular ruling only binds DC lawyers or lawyers practicing there, the bar committee was dealing with a rule that we don't think differs all that much from jurisdiction to jurisdiction. Thus, the same ethical rationale appears to have force in any jurisdiction where the factual prerequisites of the first bullet point (informal interviews OK; the legal proceeding exception to HIPAA applies; discovery as allowed by the court) are present. Plaintiffs' lawyers who nonetheless attempt to interfere with informal interviews in such circumstances thus do so at their peril.