Cook County Judge Expands *Petrillo*

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IDC members should be aware of a recent ruling by Cook County Circuit Judge Kathy M. Flanagan, which expands the rule in *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill.App. 3d 581 (1st Dist. 1986), and creates significant risk for defense counsel who are not aware of the scope of this ruling. In *Thompson v. University of Chicago Medical Center*, No. 2012 L 010412, Judge Flanagan ruled that defense counsel violated *Petrillo* by forwarding a copy of the plaintiff's complaint to counsel retained by a treating physician prior to the physician's deposition. As a result, the court entered sanctions against the defendant, ruling that defense counsel could not ask opinion questions of the witness, either at deposition or at trial, and struck many of the questions and answers from the witness's deposition.

In *Petrillo*, the court ruled that counsel for a defendant could not engage in *ex parte* communications with a plaintiff's treating physician. Specifically, the court ruled that "discussions between defense counsel and a plaintiff's treating physicians should be pursuant to the rules of discovery only." 148 Ill.App. 3d at 610. This decision spawned numerous disputes about the scope of the limitation and attacks by the defense bar on the rationale behind the decision. *See, e.g., Almgren v. Rush-Presbyterian-St. Luke's Medical Center*, 162 Ill.2d 205 (1994); *Morgan v. County of Cook*, 252 Ill.App. 3d 947 (1st Dist. 1993); *Burns v. Michelotti*, 237 Ill.App. 3d 1144 (2d Dist. 1992); *Baylaender v. Method*, 230 Ill.App. 3d 610 (1st Dist. 1992). The rationale of the *Petrillo* decision was that a physician has a fiduciary relationship with the patient, and *ex parte* conferences between the physician and counsel for the patient's adversary would threaten that fiduciary relationship.

Despite the sweeping scope of the *Petrillo* prohibition, though, the courts have also recognized that a treating physician has the right to consult with his or her own attorney, even though the physician is not a party to the suit or before suit is filed. *Baylaender*, 252 Ill.App. 3d at 624. As the court held in *Baylaender*:

> It would seem that notwithstanding the risks of possible abuse that neither the statute governing the physician-patient privilege nor the extension of the policies enunciated in Petrillo would seek to deny a physician the right to consult his counsel if in good faith he deems himself exposed to risk of suit which could be lessened by early legal consultation. In exercising his right to maintain such consultation with his attorney, the physician would be mandated by his fiducial duties to his patient to strictly enjoin his attorney and his carrier from any cross-communication or information sharing with anyone else pursuant to the control which he may assert under the attorney-client privilege which would be operative between him, his counsel and his insurer. While such practice is not without risk that there would be some erosions of the protections provided under Petrillo, it is counter-balanced by the fundamental right of any person, including a physician, to seek legal counsel when threatened by potential legal liability without having to wait until suit is filed.

Id. Thus, a physician has the right to seek the representation of counsel when being deposed, even though the physician is not a party to the suit. Presumably, the right to counsel would also include the right for counsel to be fully informed about the plaintiff's claims, so that counsel can adequately represent the physician.

Not so, according to Judge Flanagan in *Thompson*. In *Thompson*, the plaintiff filed suit against University of Chicago Medical Center ("UCMC") and others alleging medical malpractice stemming from a surgery performed by one of the surgeons on hits medical staff. After discovery of the parties was complete, the parties began depositions of treating physicians. UCMC wanted to depose Dr. John Grayhack because he performed surgery on the minor plaintiff substantially similar to the surgery performed at UCMC a year earlier. Fearing a lawsuit, Dr. Grayhack retained his own attorney to represent him. UCMC's counsel obtained permission from the plaintiff's attorney to

send medical records that would be used at the deposition to Dr. Grayhack's attorney. When UCMC's counsel sent the medical records, he also included the reports of the health professionals' reports that had been attached to the plaintiff's second amended complaint. The plaintiff's counsel was copied on this correspondence.

As soon as the plaintiff's attorney learned that defense counsel had forwarded the reviewing healthcare professionals' reports to Dr. Grayhack's attorney, he brought a motion to bar testimony at deposition, relying on *Moss v. Amira*, 356 Ill.App. 3d 701 (1st Dist. 2005) and *Natasi v. United Mine Workers of America, Union Hosp.*, 209 Ill.App. 3d 830 (5th Dist. 1991). Both *Moss* and *Natasi* involved situations in which defense counsel contacted the treating physicians themselves (not their lawyers) and forwarded copies of discovery depositions, favorable Rule 213 opinions, etc.

The court in *Thompson* ruled that any communication with the *attorney* for the physicians which had not been specifically authorized by the plaintiff's attorney was a violation of *Petrillo*, and barred defense counsel from asking Dr. Grayhack any opinion questions, and further deputized plaintiff's counsel to instruct Dr. Grayhack not to answer any such questions if they were asked. Notably, during his deposition, Dr. Grayhack testified that he had never seen the copy of the plaintiff's complaint or the attached health professional reports.

Following the deposition, the court barred large parts of Dr. Grayhack's testimony from being used at trial. UCMC has filed a petition for a supervisory order to reverse Judge Flanagan's ruling before the Illinois Supreme Court, and awaits a ruling on its petition.

The IDC considers Judge Flanagan's ruling to go far beyond the scope of *Petrillo*. First, at no time did UCMC's counsel ever communicate directly with Dr. Grayhack. Second, the communication UCMC's counsel had with the attorney for Dr. Grayhack was limited to forwarding the medical records (as agreed by plaintiff's counsel) and a copy of the *plaintiff's* complaint and reviewing health professional reports. UCMC's counsel was not sneaky about doing this – he copied counsel for the plaintiff on the correspondence. Moreover, the plaintiff's complaint was a matter of public record, so Dr. Grayhack's counsel could easily have obtained a copy of the complaint and reviewing healthcare practitioners' reports with little trouble. Finally, any competent counsel representing a witness in a lawsuit such as this would likely attempt to locate and review the plaintiff's complaint and healthcare practitioners reports so he would be able to properly prepare his client for the deposition.

As noted above, in *Baylaender*, the court specified that when a physician retained an attorney to represent him for a deposition, the physician "would be mandated by his fiducial duties to his patient to strictly enjoin his attorney and his carrier from any cross-communication or information sharing with anyone else pursuant to the control which he may assert under the attorney-client privilege which would be operative between him, his counsel and his insurer." 252 Ill.App. 3d at 624. In other words, the physician is mandated to make sure his attorney did not share the physician's privileged information with defense counsel. However, nothing in this decision suggests that the physician's attorney cannot obtain information needed to assist the attorney in preparing for the deposition by learning everything possible about the case so he can assess the risk to his client in the deposition. Thus, a decision to bar the physician from rendering opinion testimony in response to defense counsel's questions simply because defense counsel shared a copy of the complaint with counsel for the physician seems ludicrous.

In any event, given the serious penalties courts have imposed due to even trivial perceived *Petrillo* violations, all defense counsel should be aware of this decision.