Disclosure of personal information

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It is well known that personal information, such as health care records, is privileged. As discussed last issue, the federal government has recently taken additional steps to ensure that the privileged nature of this information is maintained. Financial information is also guarded and maintained as personal and private. It is also well known that in litigation, applicable privileges can be waived, and information that is otherwise protected and private must be disclosed to your opponent. In this issue, I examine circumstances in which a defendant health care provider is required to disclose otherwise personal and private health care and financial information to his or her opponent.

Personal health care information is protected by state and federal statute. Personal medical information is protected from disclosure by the Texas Rules of Evidence and Texas statute (1). This information will also be protected by the newly publicized federal scheme that must be complied with by early 2003 (2). Mental health care information is protected by the Texas Rules of Evidence, Texas statute, and federal law (3). Information regarding substance abuse treatment is also protected by federal statute (4). These protections, however, can be waived when the information contained in these records is relevant to ongoing litigation. Disputes about the discoverability of this privileged information first arose when personal injury claimants sought recovery for emotional or physical injuries but invoked the applicable privileges to thwart efforts by defense counsel to obtain and review their medical or mental health care records. This "offensive" use of these privileges was held to be improper. If recovery is sought for a medical or psychological condition, relevant records that discuss the claimant's medical or psychological condition are discoverable. A party seeking redress before the court cannot withhold "evidence which would materially weaken or defeat" that party's claim. Any applicable privileges are waived (5).

The personal injury plaintiffs' bar, responding to calls to "dig for dirt" on their opponents, began to routinely request medical and mental health care information on the defendant health care providers. Appropriately, defense counsel objected to these requests because they sought privileged information. In response to defense counsel's objections, plaintiffs' counsel argued that they were prevented from investigating a potentially relevant part of their case. This became a sensitive issue for courts to deal with. Texas law holds that information that reasonably may lead to admissible evidence is discoverable, even though it may not be admissible at trial (6). Thus, courts were faced with the need

to balance the discovery of potentially relevant information against routine "fishing expeditions" into a defendant's medical and mental health care information that were not only harassing but required production of sensitive, privileged information.

One of the first cases to address this situation involved a claim of negligent surgery, in which the claimant alleged that the defendant physician was impaired due to alcohol and other substance abuse and that these conditions rendered the physician incapable of safely practicing medicine (7). The scope and applicability of the medical and mental health care privileges set forth in the Texas Rules of Evidence were not addressed because they were not raised by defense counsel in a timely fashion. Defense counsel's objection to the request for this information was based on relevance (8). Importantly, the court noted that the information sought, while possibly not admissible at trial, was discoverable because the defendant physician's substance abuse and medical and mental conditions were placed into controversy by the plaintiff's allegations of impairment (9).

When this issue came before the Texas Supreme Court, it involved a claim of negligence in connection with the labor and delivery of a child. Initially, the claimants' complaint was based only on general allegations of negligent treatment. When the plaintiffs initially sought production of one physician's records regarding his medical, mental, and emotional condition, defense counsel objected based on the privileges in the Rules of Evidence. The trial court ordered that the records be produced. The appeals court, however, overruled the trial court and held that the records were not discoverable. The court ruled, "A general allegation of negligence does not bring into issue the medical condition of [R. K.]. Without pleadings to indicate that [R. K.'s] condition was a basis of the claim, there was nothing before the trial court to support its ruling" (10).

Subsequently, the plaintiffs amended their petition and specifically alleged that the physician's medical and emotional problems affected his ability to care for the plaintiff. The plaintiffs again requested the defendant's medical, mental, and emotional records, and the trial court again ordered production of those records. The case made its way to the Texas Supreme Court.

The Texas Supreme Court ruled that relevant records on the defendant physician's medical, mental, and emotional condition

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had to be produced. Production of this information did not violate the defendant's constitutional right of privacy (11). The court held that while there were privileges that protected this information, those privileges have exceptions and are not absolute. Specifically, the court referenced language in amendments to the Rules of Evidence that state:

Exceptions . . . exist . . . as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense (12).

The court went on to state that for this exception to be applicable, there must be active pleadings that indicate that the jury would be required to make a factual determination about the defendant's medical or mental condition. The condition must be such that it is of legal consequence to a party's claim or defense (11). The exception applied in this particular matter because the plaintiffs alleged that these conditions affected the defendant physician's ability to care for the plaintiff. The jury had to determine this matter that was clearly of consequence to the claim before it.

The court cautioned that while an exception to the privileges existed, that determination did not end the court's work. It stated that the court was then required to perform an *in camera* review of the records sought to ensure that only records related to the time and scope of the plaintiffs' claims were disclosed (11). Any irrelevant information had to be deleted or redacted from the records produced (11). A protective order that required the plaintiff to not disclose any irrelevant information that might be in the records produced was not sufficient (13). Thus, even when a defendant's condition is at issue, plaintiffs are not allowed wholesale access to the defendant's medical and mental health care records. The court is to review the records and ensure that only relevant information is disclosed.

As a practical matter, this situation does not often arise in health care liability claims. While plaintiffs routinely request production of information about a defendant's medical and mental health care treatment, these requests are routinely objected to and the process ends there. This is likely because there is no allegation of physical, medical, or psychological impairment in the petition. Thus, as set forth above, the information is not relevant and, therefore, not discoverable.

Allegations of impairment are not frequently asserted. This is likely a function of factual circumstances and the Texas Rules of Civil Procedure. Often, a health care provider is asked in deposition if he or she suffered from any condition at the time of the plaintiff's treatment that affected his or her ability to practice medicine. Since the answer is usually no, there is often no factual basis to assert a claim of impairment. Further, the Rules of Procedure require that at the time a pleading is filed, it must be factually well grounded (14). Thus, the plaintiffs are not allowed to plead impairment as a means to obtain records and see if impairment exists. An allegation of impairment would be particularly troublesome and in violation of the rules if there was no evidence at deposition of impairment or a potentially disabling condition. Understand, however, that deposition is not the only source for supportive factual information. Former employees, colleagues, and criminal records are just a few other potential sources for this information.

Production of personal financial information is equally distasteful and invasive. The personal financial information of a health care provider that is often sought in health care liability claims is that of net worth. While this information is of a personal and sensitive nature, it is relevant and discoverable in certain circumstances. This information is generally sought in connection with claims of gross negligence in which punitive damages are sought. Absent a claim of gross negligence or a claim that entitles one to punitive damages, this information is not discoverable.

In 1988, the Texas Supreme Court ruled that evidence of a defendant's net worth was discoverable in cases in which punitive or exemplary damages may be awarded (15). Net worth, or the "ability to pay," bears directly on a question the jury will be required to answer if gross negligence is established. Specifically, the jury will be asked to determine an amount of money that would adequately punish and deter the defendant. Net worth is relevant to this inquiry because "that which could be an enormous penalty to one may be but a mere annoyance to another" (16). Of note, the supreme court also held that there was not any evidentiary threshold that the plaintiff was required to cross before disclosure of this information was required. For example, in a health care liability claim, it is not necessary for a plaintiff to have expert testimony of the defendant's gross negligence before information about the defendant's net worth is discoverable. The focus is on whether or not the pleadings state a claim in which punitive or exemplary damages can be recovered (17). Despite these rulings, the supreme court left open 2 important issues and considerations. One, the court did not delineate what constitutes evidence of net worth. Second, the court did not address whether a request for this information was unnecessary harassment and an invasion of personal property and privacy rights (18).

What constitutes evidence of net worth has not been clearly defined by the courts. There is no direct guidance from the courts as to what is optimal evidence of net worth, and if that information is not available, what other information must be produced. The case law focuses on whether or not federal tax returns are evidence of net worth and does not really define what constitutes net worth beyond a financial statement. What we do know is this: absent a claim that a party could not produce other information as to net worth such as a financial statement, tax returns should not be discoverable (19). While some cases have held that tax returns are discoverable in this context, they did not squarely address whether the information contained in a return is evidence of net worth (20). An important concern is that tax returns are protected by an individual's right to privacy. Further, tax returns really do not reflect someone's "ability to pay." They only show an individual's income for the year the return was filed. They do not show general wealth or overall financial condition (21). Thus, there is a strong basis from which to argue that tax returns are simply not relevant to this area of inquiry. If no other evidence of net worth exists, however, a party could be reasonably required to produce tax returns. Theoretically, information on a tax return, such as compensation or other sources of income, could be reasonably related to one's net worth.

On the occasions in which this becomes an issue, there are a few things to keep in mind. First, even though there is no evi-

dentiary threshold that needs to be crossed before this information becomes relevant, some judges will not require disclosure of this information until there has been expert testimony that the defendant was grossly negligent. Second, since this information is relevant only to the issue of punitive damages to be assessed by the jury if gross negligence is found by the jury, judges may not require production of this information from the defendant until shortly before trial. Lastly, this information can be protected from dissemination by a protective order. Opposing counsel will usually agree to a protective order. If not, judges uniformly order that this information be kept confidential.

As can be seen from this discussion, defense counsel's response options are very limited in these situations. The threshold for disclosure of this information is based solely on what has been alleged. It is not an evidentiary issue. What the evidence shows, or what has been proven, is not of consequence. These situations are another likely source of anger, dissatisfaction, and frustration with the legal system and process, and counsel will try to prevent, or at least minimize, the invasion and protect you as much as possible. Understand that they often have limited means with which to accomplish those ends.

1. Texas Rules of Evidence, Rule 509 (West 2001); Tex. Occ. Code, Section 159.002 (Vernon's 2001).
2. Standards for Privacy of Individually Identifiable Health Information. 65 *Federal Register* 82461 (2000) (to be codified at 45 CFR Section 160.001, et seq.).
3. 42 U.S.C.A., Section 9501(1)(H) (West 1995); Tex. Health & Safety Code, Section 611.002 (Vernon's Supp. 2001); Texas Rules of Evidence, Rule 510 (West 2000).
4. 42 U.S.C.A., Section 290dd-2(a) (West Supp. 2000).
5. *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, 107 (Tex. 1985).
6. Texas Rules of Civil Procedure, Rule 192.3(a) (West 2001); Rule 166b(2)(a) (West 1998).
7. *Kavanaugh v. Perkins*, 838 S.W.2d 616, 618 (Tex. App.—Dallas 1992, no writ).
8. *Ibid.* at 620.
9. *Ibid.* at 619.
10. *R.K., M.D. v. Ramirez*, 887 S.W.2d 836, 839 (Tex. 1994).
11. *Ibid.* at 843.
12. *Ibid.* at 841.
13. *M.A.W. v. Hall*, 921 S.W.2d 911, 916–917 (Tex. App.—Houston [14th Dist.] 1996, no writ).
14. Texas Rules of Civil Procedure, Rule 13 (West 2001).
15. *Lunsford v. Morris*, 746 S.W.2d 471, 473 (Tex. 1988).
16. *Ibid.* at 472.
17. *Ibid.* at 473.
18. See *Chamberlain v. Cherry*, 818 S.W.2d 201, 205 (Tex. App.—Amarillo 1991, no writ).
19. See *Ibid.* at 205–206.
20. See *Miller v. O'Neill*, 775 S.W.2d 56 (Tex. App. [1st Dist.] 1989, no writ).
21. *Chamberlain*, 818 S.W.2d at 206.