

CONSULTATION

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& OTHER TOPICS OF INTEREST TO MEDICAL PROVIDERS

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Minimize your risk by properly documenting informed consent

Medical malpractice defense attorneys have long known that the defense of their clients in “lack of informed consent cases” can be severely compromised by poor documentation and communication before the rendering of medical or surgical treatment. Simply put, a thorough informed consent “discussion” with each patient, and complete documentation of that dialogue, can have a profound impact on limiting a physician’s exposure.

At the trial of a physician or surgeon in an “informed consent” case, the judge will charge the jury the following:

Before obtaining a patient’s consent to either an operation or an invasive diagnostic procedure or the use of medication, a doctor has the duty to provide certain information concerning (1) what the doctor proposes to do, (2) the alternatives to that operation, procedure or medication, and (3) the reasonably foreseeable risks of such operation, procedure or medication. It is the doctor’s duty to explain, in words that are understandable to the patient, all the facts that would be explained by a reasonable medical practitioner. Doing so will ensure that when the patient does, in fact, consent that consent is given with an awareness of the following: (1) the patient’s existing physical condition; (2) the purposes and advantages of the operation, procedure or medication; (3) the reasonably foreseeable risks to the patient’s health or life which the operation, procedure or medication may impose; (4) the risks involved to the patient if there is no operation, procedure or use of medication; and (5) the available alternatives and the risks and advantages of those alternatives.

Ultimately, there are two questions that we, as the attorneys for the doctor, must answer. First, did the doctor provide sufficient information in order to obtain the consent of the patient? Second, do the chart and the consent forms sufficiently document that conversation so that a jury will believe the physician at trial when he or she testifies about that conversation?

As stated in the charge given to the jury, the explanation must be understandable to the patient. The term “understandable,” as used in the charge, is subjective and may differ from patient to patient. For instance, one would expect a nurse/patient to have a greater understanding of medicine than a car salesman/patient. Regardless of what words are used, however, the doctor should ensure that the patient clearly understands what is being explained. In that conversation, the doctor should advise why the procedure will be performed, what benefits can

be derived from the treatment, and what alternatives exist. (Nobody expects that every risk be discussed, as the doctor could spend all day doing nothing but warning of the risks. The reasonable risks, however, should be discussed with the patient before consent is obtained). Physicians must do all they can to avoid the all-too-common, “What did the doctor say?” quizzical patient reaction, especially when the patient faces a difficult or risky procedure, the patient’s health status is already poor, or the overall prognosis is not good. However, once the doctor has fully explained these things to the patient, and the doctor is satisfied that the patient has understood the information and consented to the treatment, then the doctor can feel comfortable that the consent was informed.

“Practitioners should view informed consent not just as a document to be signed, but a process ... that leads to an ‘informed decision’ by the patient.”

Are Non-Compete Agreements Valid Among Physicians in New York State?

Despite the State of New York’s general reluctance to uphold and enforce restrictive covenants, it is well-established that non-competition agreements among most professionals will be enforceable only if deemed “reasonable” by the courts.

Historically, judicial disfavor of non-competitive covenants was provoked by strong considerations of public policy against the principle of sanctioning the loss of one’s livelihood. See *Reed, Roberts Associates v. Strauman*, 40 N.Y.2d 303 (1976). Competing legitimate “employer” interests, however, created two powerful arguments pertaining to the hotly litigated issue.

Currently, under New York law, negative covenants restricting competition are enforceable if and only if the specific written provision satisfies the overriding requirement of reasonableness. An agreement not to compete will be enforced only if it is:

1. Reasonable in time and area;
2. Necessary to protect the employer’s legitimate interests;
3. Not harmful to the general public; and
4. Not unreasonably burdensome to the employee.

See *Scott Stackrow & Co., C.P.A.’s., P.C. v. Skavina*, 9 A.D.3d 805 (3rd Dep’t 2004).

In *Reed, supra*, the Court of Appeals limited the cognizable employer’s legitimate interests to the protection against misappropriation of the employer’s trade secrets or of confidential

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COURT RULING ROUND-UPS

Blood sample not protected by physician-patient privilege

In *People v. Elysee*, the Appellate Division, Second Department, held that a physical blood specimen obtained from a patient by a medical professional did not fall under the mandates of Civil Practice Law and Rules §4504(a) definition of information protected by the physician-patient privilege.

The court found that a blood sample may be subject to seizure pursuant to a warrant issued under Criminal Procedure Law §690.10. The court determined that this physical specimen is not a hospital or medical "record or communication," which would fall within the privilege. Instead, the court determined that a blood sample taken from the patient by a medical professional is considered personal property and is therefore subject to a warrant and may be introduced as evidence in a criminal action where blood alcohol content is in dispute. ■

Courts rule on access for defendants to HIPAA-protected patient information



In three discrete medical malpractice cases, the New York State Court of Appeals, the state's highest court, was recently asked to decide whether defendant physicians or hospitals were proper in requesting HIPAA compliant authorizations that would allow the defendant's attorney to interview the plaintiff's treating physicians.

In medical malpractice actions, a defense attorney must request from plaintiff's counsel HIPAA compliant authorizations, as a covered entity may not disclose an individual patient's protected health information to third parties (in this instance, defense counsel) without a valid authorization. HIPAA, however, does permit disclosure of protected information without an authorization in response to a court order or subpoena, discovery request, or other lawful process, when the covered entity has received satisfactory assurances that those seeking the disclosure have made reasonable efforts to ensure that the individual has been notified of the request.

Here are summaries of the three such cases:

In *Arons v. Jutkowitz*, 9 N.Y.3d 393 (2007), the husband as executor of his late wife's estate brought a medical malpractice and wrongful death action against several physicians, other medical professionals and two hospitals. The allegations were that the defendant-physicians failed to tell the patient that her MRI revealed hydrocephalus, thus delaying proper medical care leading to her death. The plaintiff's attorney filed a note of issue (note of issue signifies the end of discovery and this document, filed along with a certificate of readiness signifies to the court that the case is ready to enter the trial calendar stage.) One of the physician-defendant's attorneys requested HIPAA compliant authorizations so that they could interview the decedent's treating physicians.

The plaintiff refused, prompting the defendant's counsel to ask the Supreme Court (New York State's trial court) for an order pursuant to HIPAA directing the plaintiffs to provide authorizations. The Supreme Court granted the motion, reasoning that by commencing the medical malpractice action, the plaintiff put his wife's medical condition into issue and waived the physician-patient privilege. The plaintiff appealed, and the Appellate Division, Second Department reversed. This court found that although the plaintiff had waived the physician-patient privilege by bringing the medical malpractice action, defendants were entitled only to disclosure via the discovery devices in Civil Practice Law and Rules Article 31 and the Uniform Rules for the New York State Trial Court, which do not speak to *ex parte* interviews (interviews of treating physicians not in the presence of plaintiff's counsel).

The same court simultaneously reviewed *Webb v. New York Methodist Hospital*, 35 A.D.3d 457 (2006), in which the plaintiff alleged that she suffered constant nausea, vomiting and malnutrition as a result of improperly performed gastric stapling surgery. In this case, the plaintiff also refused to supply the HIPAA compliant authorizations for defense counsel to speak with caregivers, resulting in the defense seeking the guidance of the court in compelling the plaintiff to supply the authorizations. The Supreme Court granted the motion and directed the plaintiff to furnish the authorizations for the interviews. The Court of Appeals in *Arons* upheld this decision.

In a third case, *Kish v. Graham*, 40 A.D.3d 118 (2007), the Court of Appeals was also asked to rule in an action brought by the administrator of a decedent's estate, which alleged that defendant-physicians did not properly diagnose and treat for peritoneal necrotizing fasciitis, resulting in the patient's death. Again, after discovery

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was complete, the defendant sought to speak with treating physicians and sought HIPAA compliant authorizations, which the plaintiff refused to provide.

The defendants sought traditional intervention from the court itself. The motion directed the plaintiff to provide the authorizations and the Appellate Division, Fourth Department, reversed on the same basis as *Arons* and granted defendants' motion for leave to appeal. Accordingly, the Court of Appeals was now asked to review the decision in the *Kish* case.

In considering these three cases, New York's highest court saw no reason why a non-party treating physician should be less available for an off-the-record interview. The Court of Appeals found that a litigant is "deemed to have waived the physician patient privilege when in bringing or defending a personal injury action, that person has affirmatively placed his or her mental or physical condition at issue."

The court found that after plaintiffs declined to sign these authorizations, the trial court compelled them to do so and the court's granting of these requests was proper. Since the plaintiffs waived the physician-patient privilege as to this information when they brought suit, there was no basis in plaintiff's refusing to provide executed HIPAA compliant authorizations to defense counsel.

The court found that merely because HIPAA compliant authorizations would allow the defense attorney to interview the plaintiff's treating physician, this would not result in a windfall of information outside this medical waiver. Finally, the treating physicians have the right to refuse to cooperate with defense counsel and the HIPAA compliant authorizations cannot force a health care professional to communicate with anyone. ■

If you have any questions about this article or the Court Ruling Round-Up, please contact Jill Greenberg, jagreenberg@lewisjohs.com or call 631.755.0101.

NON-COMPETITIVE AGREEMENTS *continued from page 1*

customer lists, or protection from competition by a former employee whose services are 'unique or extraordinary.'

In 1999, the Court of Appeals held that although the rule of reasonableness in cases involving professionals gives greater weight to the interests of the employer in restricting competition within a confined geographical area, because professionals are deemed to provide "unique or extraordinary services," strict scrutiny of these agreements is required in the learned profession cases. *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382 (1999).

With respect to physicians, as with all restrictive covenants, if an agreement among physicians is reasonable as to time and geographic area, necessary to protect legitimate interests, not harmful to the public, and not unduly burdensome, it will be enforced. *Gelder Medical Group v. Webber*, 41 N.Y.2d 680 (1977). The courts have upheld and enforced some non-competition agreements among physicians, however, they are subject to strict scrutiny by the courts.

The American Medical Association "discourages any agreement between physicians which restricts the right of a physician to practice medicine for a specified period of time or in a specified area upon termination of employment or a partnership or a corporate agreement." *AMA Opinions of the Council on Ethical and Judicial Affairs E-9.02 ("Restrictive Covenants and the Practice of Medicine")*.

Notwithstanding the AMA's ethical discouragement of such agreements, and the strict scrutiny of said agreements among physicians by the courts, the courts have given some deference to the employer's legitimate interest in several medical cases. *Gelder Medical Group*, *supra*; *Karpinski v. Ingrasci*, 28 N.Y.2d 45 (1971); *Bollengier v. Gulati*, 233 A.D.2d 721 (3rd Dep't 1996); *Novendstern v. Mt. Kisco Medical Group*, 177 A.D.2d 623 (2nd Dep't 1991); *Awwad v. Capital Region Otolaryngology Head & Neck Group, LLP*, 18 Misc.3d 1111(A), (Sup. Ct. Albany County 2007).

Some believe that the AMA's ethical discouragement of non-competition agreements involving physicians is only one step away from the total prohibition in the attorney context.¹ Until that time, however, on a case by case basis, some physician non-competition agreements will be enforced, subject to the very strict standards set forth by the courts in *BDO Seidman v. Hirshberg*, *supra*. ■

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¹ Non-compete agreements among lawyers are prohibited by DR2-108(A); 22 NYCRR §1200.13(a), and the courts apply a *per se* rule of non-enforcement. *Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95 (1989).

COURT RULING ROUND-UPS

Patient-physician relationship exists in cancer research study

In *Sosnoff v. Jackman*, the Appellate Division, Second Department considered a cancer research study and found a physician-patient relationship between the supervising hospital and the plaintiff. The court found that the plaintiff who enrolled in the cancer research study was not "merely a subject or controlled person, but expected to receive medical treatment and services as part of her participation." The hospital, based upon the court's finding, was unable to make a *prima facie* showing that there was no physician-patient relationship between itself and the plaintiff. The court held that the hospital's motion for summary judgment dismissing the medical malpractice complaint as to the hospital, should not have been granted on that ground. ■

Questions ?

If you have any questions about the newsletter or Lewis Johs, please contact Eileen Libutti, ehlibutti@lewisjohs.com or call 212.233.7195.

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Buying Your Own Office in These Turbulent Times

These are tough times (to say the least) for the real estate and banking industries. The implosion of the economy and the sagging real estate market are enough to scare off anyone looking to invest in real estate. Even in these difficult times, however, there are still many benefits to acquiring real estate, especially for the small business owner.

Interest rates are historically low and there is a large inventory of commercial and residential properties available at discounted prices.

Have you thought about buying your own building? Perhaps you already own a building and are looking to expand into a larger facility? Either way, there are financing opportunities

available through several national programs. They were created for small business owners - including those in the professional service industry (i.e. doctors and dentists). The programs provide financing for the acquisition, renovation and refinancing of buildings (including cooperatives and condominiums) and the purchase of machinery and equipment used in the operation of the business, such as MRI machines.

One of the best features of such financing is that it allows business owners to invest **only** ten (10%) percent of equity into the project and obtain ninety (90%) percent financing for the entire project cost. The project costs include acquisition, construction, renovation, purchase of machinery and equipment, and soft costs

(attorney and accountant fees, title insurance, engineer, architect, appraisal and environmental report fees). This permits the company to invest a limited amount of its own equity into the project and preserve its money for working capital needs. In a refinance situation, up to 100% of the refinance need may be available.

How does it work? The transaction is typically structured as follows: A bank or nonbank lender gives a first mortgage loan for fifty (50%) percent of the project cost. The second mortgage loan for 40% is made by The Greater New York Development Co. (GNYDC), a nonprofit economic development group. GNYDC provides low cost financing to businesses and not-for-profit entities throughout NY, NJ and CT for capital projects. The term of the loan ranges from 20-25 years. The rate is fixed and current rates are historically low (under 6%).

Your business must occupy at least 35-51% of the space, depending upon the program. The

balance of the space may be leased out to provide additional revenue.

It is true that banks have tightened their lending requirements. However, they tend to be more comfortable providing financing when one of these subordinate loan programs is involved. Now may be the best time to seize the opportunities available in the real estate market and take advantage of these financing alternatives to purchase your own office building, condominium or cooperative. It will stabilize your costs, guarantee your location and build equity for you and your family. ■■

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MINIMIZE YOUR RISK *continued from page 1*

Once informed consent has been received, it is important that the physician or surgeon document in the chart that a conversation occurred where the risks and benefits of and the alternatives to the proposed treatment were discussed, and that after such discussion the patient consented to the surgery.

Most patients sign an informed consent form at the hospital prior to an operation. In addition, it would serve the doctor well to have a similar conversation in the doctor's office before the procedure, to document that conversation, and to have a consent form completed in the office. The hospital consent form is one typically drafted by the hospital, but a form prepared by a physician for use in his office may be tailored to that physician's practice.

While a pro forma checklist does not necessarily fully achieve informed consent, it is a valuable tool to help ensure that all bases are covered. At a minimum, the practitioner should review with the patient:

- Why the patient sought the services of the physician
- Reason for the surgery or procedure, including test results and diagnosis
- Risks and possible outcomes of non-treatment
- Description of the procedure
- Anticipated benefits of the procedure
- Possible risks and complications
- Alternatives to treatment and their risks
- Statement that success is not guaranteed
- Statement that unforeseen events could arise requiring treatment beyond the scope of the consent

Of course, a statement should be signed by the patient indicating that the informed consent discussion took place, that adequate time was provided to address all the issues and that the patient consents to the procedure understanding all the issues involved. One possible additional step would be to record each of the above elements, discuss them with the patient, and then have the patient initial each element. One client, whose informed consent form was drafted by an attorney, has the patient initial the standard paragraphs listed above, and even has the patient write in the type of procedure and the risks, benefits and alternatives discussed.

In the absence of a written consent form, claims citing lack of informed consent often become a "he said/she said" debate over events that may have taken place many years earlier. Defense attorneys are well aware that jurors tend to identify with the patient in such credibility contests. Direct, irrefutable evidence represented by an initialed and signed informed consent form is an important step to minimize this risk.

In the end, the physician has two obligations; first, to the patient, to ensure that the consent provided by the patient is informed; and second, to protect himself or herself by sufficiently documenting the conversation with the patient and creating documents that can be used in court to document those conversations. ■■

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"...there are still many benefits to acquiring real estate, especially for the small business owner."

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