WASHINGTON STATE SUPREME COURT LIMITS ATTORNEY-CLIENT PRIVILEGE FOR HEALTHCARE-PROVIDER CORPORATIONS

by Todd Presnell, Esq.

In a major decision that affects healthcare-provider corporations, the Washington State Supreme Court significantly limited attorneys' ability to engage in privileged conversations with the provider corporation's employed physicians and other medical staff. The court held that, except in narrowly tailored circumstances, the State's common-law prohibition of defense attorneys' ex parte communications with a plaintiff-patient's non-party physicians supersedes the corporation's attorney-client privilege with its employed physicians. Youngs v. Peacehealth, 316 P.3d 1035 (Wash. 2014).

Battle of the Privileges

Washington's physician-patient privilege statute precludes a physician from revealing her patient's communications, but the patient automatically waives this privilege "as to all physicians or conditions" 90 days after filing a personal injury or wrongful death case. RCW § 5.60.060(4)(b). In Loudon v. Mhyre, 756 P.2d 138 (Wash. 1988), the Washington State Supreme Court prohibited defense attorneys from holding ex parte communications with a plaintiff-patient's non-party treating physicians.

But Washington also follows the corporate attorney-client privilege adopted by the U.S. Supreme Court in Upjohn Co. v. United States, 449 U.S. 383 (1981), which provides that a corporation's attorneys may have privileged communications with a corporate employee regardless of the employee's position in the corporate hierarchy. And when healthcare-provider corporations employ physicians, the Upjohn rule allows the provider-corporation's attorneys to have privileged communications with its physicians.

The Loudon no-contact rule (derived from the physician-patient privilege) and the corporate attorney-client privilege conflict in medical practice actions against the provider-corporations. When a patient sues a provider-corporation, the attorney-client privilege protects the corporate attorney's communications with employed treating physicians, but Loudon simultaneously prohibits the corporate attorney from having ex parte interviews with these same treating physicians.

The Victor

The court resolved this privilege battle largely in favor of patient confidentiality. Wanting to avoid forcing the injured plaintiff-patient "to suffer the additional injury of privacy invasion," the court rejected the argument that the corporate attorney-client privilege completely trumps the physician-patient privilege. The court instead adopted a so-called "modified version of the Upjohn test," ruling that, in medical malpractice actions, a provider-corporation's attorneys may have ex parte communications with non-party treating physicians so long as:

1. The communications meet the general prerequisites for establishing the privilege (confidential and for purposes of rendering legal advice);

2. The communication is with a physician who has direct knowledge of the event triggering the malpractice action; and

3. The communications concern the facts of the alleged negligent incident.

To the Victor Goes the Spoils

The court's decision greatly affects the provider-corporation attorney's ability to communicate with (non-party) employed physicians who treated the plaintiff-patient either before or after the negligent event. The court prohibited ex parte communications with employed physicians concerning the plaintiff-patient's pre-event medical condition or post-event recovery. Under this ruling, a hospital sued for malpractice cannot have its attorney interview its own employees without plaintiff's counsel's presence.

PoP Post-Battle Analysis

The court's decision provides an unsatisfying analysis of the interaction between the two evidentiary privileges in medical professional liability actions.

In the Upjohn decision, the U.S. Supreme Court held that the corporate attorney-client privilege covers the company lawyer's communications with company employees, regardless of their employment position. In the Youngs decision, the Washington State Supreme Court identified silent topics to parse the Upjohn decision, stating that Upjohn "did not articulate a fixed set of criteria by which to determine what specific conversations with lower-level employees must remain privileged." And seizing upon Upjohn's purported failure to detail "specific conversations," the Youngs decision

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RAND STUDY: AFFORDABLE CARE ACT COULD CHANGE COSTS FOR MPL, OTHER LINES OF LIABILITY INSURANCE

The expansion of health insurance accomplished under the Patient Protection & Affordable Care Act may alter costs for several major types of liability insurance, although any such changes are likely to be modest, according to a new report issued by RAND Corp., a nonprofit global policy think tank.

Automobile, workers' compensation and general business liability insurance costs may fall under the Affordable Care Act, while costs for medical malpractice coverage could be higher, according to the study *How Will the Affordable Care Act Affect Liability Insurance Costs?*

Researchers say the changes could be as much as 5 percent of costs in some states, but caution there is considerable uncertainty surrounding such estimates.

"The Affordable Care Act is unlikely to dramatically affect liability costs, but it may influence small and moderate changes in costs over the next several years," said David Auerbach, the study's lead author and a policy researcher at RAND Corp. "For example, auto insurers may spend less for treating injuries, while it may cost a bit more to provide physicians with medical malpractice coverage."

RAND researchers examined how the Affordable Care Act might operate across different liability lines and how the impacts might vary across states given existing laws, population demographics and other factors.

Liability insurance companies reimburse tens of billions of dollars each year for healthcare related to auto accidents, workplace injuries and other types of claims. For example, auto insurers collectively paid $35 billion for medical costs associated with accidents in 2007, about 2 percent of all U.S. healthcare costs in that year. But some of those costs may be covered by regular health insurance as more Americans become newly covered under the Affordable Care Act, according to the study.

As that happens, the cost of providing automobile insurance, workers compensation and homeowners insurance may decline. Ultimately, any cost changes experienced by insurance companies could be passed on to consumers through changes in premiums and coverage options.

Meanwhile, an increase in the number of people using the healthcare system may trigger a corresponding increase in the number of medical malpractice claims made against healthcare providers, according to the study. Such a shift could drive malpractice costs modestly higher.

Researchers say there are many state-level variables that will influence any effects on liability costs created by the Affordable Care Act. This includes items such as whether states require medical costs to be deducted from liability awards or whether they choose to implement the Affordable Care Act's optional Medicaid expansion.

Costs of liability insurance could be reduced further if reforms aimed at driving down healthcare costs are successful, for example. Other potential long-run changes include modifications of tort law, shifts in pricing of medical services, changes in the number of practicing physicians and increased efforts by Medicaid to recover a portion of injury payments.

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limited the corporate attorney-client privilege to specific conversations about the negligent event at issue.

The court's handling of the common-law, at-issue waiver doctrine, reinforced by the physician-patient privilege statute that automatically waives the privilege "as to all physicians or conditions," is not reassuring. A plaintiff-patient's medical condition, including pre- and post-event conditions, becomes relevant when she files suit, but the court essentially said that the Loudon no-contact rule applies despite this waiver.

The Youngs decision significantly limits the corporate attorney-client privilege for provider corporations that employ physicians. The privilege effectively does not exist unless the employed physician has direct knowledge of the medical event giving rise to the malpractice action. It will be interesting to see how the new Youngs rule applies in practice and how this decision affects other state courts that have yet to address this battle-of-the-privileges issue.

Todd Presnell is a trial lawyer with Bradley Arant Boult Cummings LLP in Nashville, Tenn. He blogs about evidentiary privileges and related issues at www.presnellonprivileges.com.

INDUSTRY NEWS BRIEFS

Last month, Wisconsin Gov. Scott Walker signed into law Act 242, which allows a healthcare provider to have full and frank conversations with patients or a patient's relatives that may include apology, benevolence, compassion, condolence, fault, liability, remorse, responsibility or sympathy without risk of admissibility in civil action, administrative hearing, disciplinary proceedings, mediation or arbitration as evidence of liability.

Coverys has partnership with Academic Medical Professional Insurance RRG to provide professional liability insurance coverage to domestic medical professionals, foreign physicians temporarily in the United States and visiting students. Coverys will provide financial stability, reinsurance support and enhance the medical professional liability program offered through AMPI RRG.

In response to the Florida Supreme Court recent rejection of the state's noneconomic damage cap in medical negligence cases resulting in wrongful death, the task force that crafted the 2003 law is calling for an amendment to the Florida Constitution that would reinstate the cap. State legislators say it is too late in the legislative session to act on the group's recommendations in 2014. The amendment would ultimately have to be approved by voters.

Kansas lawmakers passed SB 311, which would gradually increase the state's noneconomic damage cap on medical professional liability awards to $350,000 by 2022. The existing, 25-year-old noneconomic cap is $250,000. The legislation was in response to a 2012 Kansas Supreme Court ruling that upheld the constitutionality of the cap, but questioned why it had not been adjusted for inflation during the past quarter century. The bill is awaiting Gov. Sam Brownback's signature.

Last month, the Alaska Legislature passed a bill that would make expressions of apology or compassion inadmissible as evidence in medical professional liability lawsuits. If an expression of apology or sympathy were to be made with an admission of liability or negligence, the admission of liability or negligence could still be admissible.