

From: Don Drinko
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Gallagher Sharp Shop Talk: Workers' Compensation

Question: Can a physician's own medical information ever become discoverable in a civil action?

The physician-patient privilege is a creature of statute which protects most "communications" between a physician or dentist and a patient from discovery in civil cases. The Supreme Court of Ohio was recently presented with a novel question: Can a physician assert this privilege to prevent discovery of his own medical information?

Ward v. Summa Health Sys., Slip Opinion No. 2010-Ohio-6275, concerned a patient who allegedly contracted Hepatitis B during a hospital stay for a surgical procedure. The patient filed a malpractice suit against the hospital, then sought to conduct the deposition of his surgeon (who was not a party), but the surgeon's attorney informed the patient that while he would discuss the procedure, he would not discuss his own personal medical information. Plaintiffs refused to limit the scope of the deposition, prompting the surgeon to seek a protective order from the trial court. Citing the physician-patient privilege, the trial court granted the surgeon's motion for protective order. On appeal, the Ninth District Court of Appeals reversed, finding that the information was clearly relevant and that nothing in the privilege statute [R.C. 2317.02(B)(1)] prohibited an inquiry into a deponent's own personal medical history, and that the surgeon was not acting as a "physician" in this context, but as a "patient." The Supreme Court of Ohio granted a discretionary appeal, and the issue was briefed.

The Supreme Court affirmed, finding that physicians may not assert "physician-patient" privilege to prevent inquiry into their own personal medical histories. While the physician was not a party, he clearly could be compelled to give a deposition in a civil case, and the scope of the discoverable information is governed by Civ. R. 26(B)(1). However, in this case, the physician was a "patient," not a "physician," in applying that statute. Relevance was not in dispute in this case, and nothing in R.C. 2317.02(B) grants a patient the right to refuse to testify about his or her own medical information. The Court also distinguished several other cases cited by the surgeon because those cases involved requests for medical information from providers, not from patients. The Court also left open the possibility that a protective order can be sought if the information is arguably outside the scope of Civ. R.26(B)(1).

While admittedly rare, one can envision scenarios where treating a physician's medical or psychiatric records may become relevant in workers' compensation cases, such as the case of a physician whose use of drugs impaired his opinion, or where a physical condition impaired a doctor's ability to examine patients. *Ward* stands for the proposition that this personal information is not protected by privilege.

Donald G. Drinko, Esq.
Certified Workers' Compensation Specialist,
Ohio State Bar Association
Gallagher Sharp
1501 Euclid Avenue
Cleveland, OH 44115
Direct: 216.522.1326
ddrinko@gallaghersharp.com
www.gallaghersharp.com