



LONG TERM CARE & SENIOR LIVING BLOG

Be Careful What You Send

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It will happen to almost any medical malpractice, product liability, or personal injury defense attorney at some point. You are going to attend one of the plaintiff's treating medical provider's deposition, and the doctor's attorney has asked you to send the plaintiff's medical records and a copy of the Complaint for the attorney to review. This request seems harmless enough, right? Only as long as you have the proper authorization, according to the holding in *Thompson v. University of Chicago Medical Center*, No. 2012 L 010412 out of the First Judicial District, Cook County, Illinois.

In *Thompson*, after the parties completed fact witness depositions they began deposing the plaintiff's treating physicians. In preparation for one of the treating physician's depositions, the defense attorney sent the attorney for the treating physician the plaintiff's medical records and a copy of the Complaint, which contained the health care professional's report. Defense counsel obtained plaintiff's counsel's permission to send the medical records, but did not obtain permission to send the Complaint with the attached health care professional's report. Defense counsel copied plaintiff's counsel on the letter to the attorney for the doctor that stated both the complaint and the medical records were forwarded. When plaintiff's counsel saw the Complaint had been sent to the doctor's attorney, plaintiff's counsel filed a Motion to Bar the doctor's testimony. Judge Kathy Flanagan granted the Plaintiff's motion and entered sanctions against the defense attorney. Judge Flanagan ruled the defense attorney could not ask the doctor any opinion questions of the witness, either at the deposition or at trial. Judge Flanagan explained that any communication the defense attorney had with the doctor's attorney that had not been authorized by plaintiff's counsel was a violation of *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill.App.3d 581 (1st Dist. 1986). Defendant filed a petition for a supervisory order that is pending before the Illinois Supreme Court. The petition is still pending.

The *Thompson* ruling spells out that if defense counsel wants to send anything to a treating doctor's attorney in preparation of a deposition that he or she must obtain plaintiff's counsel's consent before hand. This rationale even applies to court pleadings, which are a matter of public record. We would caution that it would be prudent to obtain plaintiff's consent in writing so there is no question about what is proper to send. In the alternative, it may be better to have plaintiff's counsel to send the materials directly to the doctor's attorney. Whatever you do, be careful not to send something without ensuring that you obtained plaintiff's counsel consent. You would hate to obtain favorable deposition testimony only to later have it stricken as a discovery sanction.

Similarly, if you are a healthcare provider and the attorney for the doctor asked to obtain your facility's records, because the doctor does not have a set of his own, you need to advise plaintiff's counsel what the doctor or his attorney has requested. You do not want to be accused of a HIPAA violation, if you send records without the proper consent.

By Jamie Bracewell

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