



Arkansas Association of Defense Counsel

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Limited HIPAA Authorizations

In response to recent questions circulated regarding conditions placed on production of a medical authorization for a Plaintiff, below are excerpts from motions to compel we have filed regarding a Plaintiff's requirement to produce a HIPAA compliant medical authorization. We have seen conditions and restrictions placed on medical authorizations enumerating which records the provider could disclose- for what time periods and/or for what specific physical conditions or patient complaints could be disclosed. Some authorizations have also contained arguable inappropriate commentary regarding defense counsel's representation of the "at-fault party", as well as incorrect and misleading legal case citations.

Plaintiff's arguments to providing limited medical authorizations have included:

(1) The medical authorization provided by Defendant is a "blank check" authorization because there is no name or specific identification of the person(s) or class of persons authorized to make the requested disclosure. For this reason, the Defendant's requested authorization is not reasonably calculated to lead to the discovery of admissible evidence as required by Ark. R. Civ. P. 26(b)(1).

Response:

Under Arkansas law, persons who put their physical, mental or emotional condition in issue as part of a claim **must** execute an authorization for medical records and evidentiary privileges may not apply. Ark. R. Civ. P. 35(c)(1) (emphasis added). Circuit courts have jurisdiction to enter an order compelling discovery of medical records pursuant to this rule. *McGlothlin v. Kemp*, 314 Ark. 495, 863 S.W.2d 313 (1993) (writ of prohibition to prevent court from enforcing order would be improper). Where a Plaintiff claims the accident at issue has altered his/her ability to enjoy their life and

engage in hobbies, etc. arguably the Plaintiff's ability to function is generally in issue, and a defendant is entitled to all of his medical records. *See generally Coates v. Jurado*, 2:12-CV-15529, 2014 WL 545785 (E.D. Mich. Feb. 11, 2014) ("Plaintiff has clearly placed into contest all of his medical history"; and "records relating to treatment with other medical providers for other health reasons is reasonably calculated to lead to discovery of evidence regarding his ability to function"); *Hutton v. City of Martinez*, 219 F.R.D. 164, 167 (N.D. Cal 2003) (requiring release of all of plaintiff's medical records).

Arkansas law tries to find "an appropriate balance between the parties' ability to obtain all relevant information and the patient's right to have irrelevant medical information remain confidential." *See Harlan v. Lewis*, 141 F.R.D. 107, 111 (E.D. Ark. 1992), *aff'd* 982 F.2d 1255 (8th Cir. 1993). The intrusion, if any, to Plaintiff's privacy is minimal since he has placed his overall health directly in issue. Defendant is merely seeking to verify the basis, and veracity, of Plaintiff's claim. Moreover, disclosure is limited to defense counsel and is strictly limited and protected by rules regarding the filing and disclosure of such information in litigation. Defendant's need for the information greatly outweighs any remote concern on the Plaintiff's part.

(2) Plaintiff should know in advance from whom records are requested

Response:

Arkansas law provides Plaintiff will receive notice, pursuant to statutory requirements, of the identities of all providers from whom records have been received. Ark. Code Ann. § 16-46-403. Plaintiff knows which providers he/she has seen and, of course, if he/she has a specific concern about any provider he/she can come forward with that objection. Moreover, the rules regarding disclosure of trial exhibits continue to apply and Plaintiff, will have a full opportunity to object to the introduction of any records or other evidence he believes

is irrelevant or otherwise inadmissible at trial. *See* Ark. R. Evid. 401-403.

(3) Defendant’s requested authorization is not limited to the medical condition that is the subject of the lawsuit. Defendant’s position that Plaintiff waived any privilege he may have in how own medical records by filing a lawsuit is contrary to Arkansas law. (Typically citing Ark. R. Evid. 5030 and often citing Kraemer v. Patterson, 342 Ark. 481, 491, 29 S.W.3d 684, 690 (2000) or other cases addressing the subpart of the Rule pertaining to ex parte communication with medical providers).

Response:

The issue is not whether Plaintiff’s medical records will be admitted at trial. It is instead whether Defendant will be allowed meaningful discovery. Nonetheless, Plaintiff contends that the discovery requested somehow violates the healthcare privilege of Ark. R. of Evid. R. 503. However, that rule clearly provides that there is no privilege as to medical records relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which he relies upon that condition as an element of his claim, as here. *See also* Ark. R. Evid. R. 503(d)(3)(A). Rule 503(d)(3)(A) disposes of, rather than supports, any claim of privilege by Plaintiff.

(4) Defendant should not have access to Plaintiff’s psychotherapy records because Plaintiff’s mental health has not been placed in controversy to disregard the psychotherapist privilege.

Response:

Plaintiff has not claimed “garden variety” emotional distress. Instead, he/she has essentially claimed a life altering mental injury. Plaintiff not only alleges mental anguish over the alleged “loss of his quality of life” but also mental anguish experienced in the past and reasonably expected to be experienced in the future, based, in part, on the fact that the Defendant in causing needless injuries have shattered Plaintiff’s trust that others will follow safety rules, and causes Plaintiff to fear an accident will happen again. Plaintiff has defined his/her cause of action and his/her damage claim, not defendant. He/She has not alleged a minor accident

with minor injuries that have resolved or left small deficiencies.

The AADC thanks Kathryn Knisley of the Huckabay Law Firm for writing this article.



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