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Fair Ex Parte Communication With Doctors In MDLs

Law360, New York (June 21, 2010) -- In drug and medical device cases, often the most important testimony for plaintiffs and defendants comes from the treating physicians. Understandably, counsel want to interview the treating physicians ex parte to learn their thoughts about plaintiff's medical condition, their experience with the drug or device at issue, causation, and damages.

Multidistrict litigation courts, however, have had difficulty ensuring that counsel for both parties receive fair ex parte access to plaintiffs' treating physicians. Typically, MDL courts enter umbrella orders to address the issue, but these orders usually do not address the nuances of the law governing ex parte communication, which varies from state to state.

Absent state-by-state rulings regarding ex parte contacts, the fairest solution may be to allow plaintiffs' counsel to discuss only the medical treatment of the plaintiffs, and allow defense counsel to discuss only general liability issues. This solution will allow both parties to discuss issues important to the case and to the physicians' testimony while safeguarding the physician-patient privilege and minimizing the risk of bias.

At first blush, allowing plaintiffs' counsel to discuss only the medical treatment of the plaintiffs, and allowing defense counsel to discuss only general liability issues may seem like an odd and unfair solution. But other, more intuitive solutions are unworkable given varying physician-patient privilege laws and plaintiffs' need to contact treating physicians to assess their cases.

Consider an umbrella order that allows both parties equal ex parte access to plaintiffs' treating physicians. As the NuvaRing MDL court noted, such an order is untenable because some states' laws forbid defendants to contact treating physicians ex parte, such that an order allowing this contact would be subject to challenge. In re: NuvaRing Prods. Liab. Litig., 4:08MD1964, 2009 WL 775442, at *1 (E.D. Mo. Mar. 20, 2009). Similarly, the Vioxx MDL

court found that allowing defendant to contact plaintiffs' treating physicians ex parte would run afoul of the physician-patient privilege. *In re: Vioxx Prods. Liab. Litig.*, 230 F.R.D. 473, 476-77 (E.D. La. 2005). Other MDL courts have reached the same conclusions. See *In re Kugel Mesh Hermia Repair Patch Litig.*, 07-1842ML, 2008 WL 2420997 (D.R.I. Jan. 22, 2008); *In re Baycol Prods. Litig.*, 219 F.R.D. 468 (D. Minn. 2003).

Consider an umbrella order that forbids both parties to contact plaintiffs' treating physicians ex parte. Although the Vioxx court initially entered this kind of order, it later found that the order's "practical effect has created unintended consequences that can cause more problems that it sought to solve." *Vioxx*, 230 F.R.D. at 475.

The court discussed at length how forbidding plaintiffs' counsel from contacting physicians could hinder counsel's ability to investigate plaintiffs' claims, and result in forum shopping, possible legal malpractice, and an MDL in which some physicians had been interviewed ex parte and others had not. *Id.*; see *In re: Ortho Evra Prods. Liab. Litig.*, No. 1:06-40000, 2010 WL 320064 (N.D. Ohio Jan. 20, 2010) (adopting the Vioxx court's reasoning in denying a motion to forbid both parties to contact plaintiffs' treating physicians ex parte).

Faced with these untenable courses, MDL courts most frequent solution is to allow plaintiffs' counsel to conduct ex parte interviews of plaintiffs' treating physicians and forbid defense counsel from doing the same. Given defense counsel's concern that a one-sided solution may bias the physicians, MDL courts have recently adopted alternative solutions.

First, courts have narrowed plaintiffs' ex parte conversations to the physicians' medical treatment of plaintiffs. See, e.g., *In re: NuvaRing Prods. Liab. Litig.*, 4:08MD1964, 2009 WL 775442 (E.D. Mo. Mar. 20, 2009). These courts seek to strike a balance between allowing plaintiffs to interview physicians ex parte so that they can assess the strengths of their claims and allaying defendants' fears that plaintiffs' unfettered ex parte contacts may include conversations about general corporate liability issues that could "poison the well." See, e.g., *Ortho Evra*, 2010 WL 320064, at *2 (noting that narrowing the scope of plaintiffs' ex parte contact would reduce the risk of "woodshedding or gaining an unfair advantage by ambush").

Other MDL courts have taken a different tack by allowing defendants to conduct ex parte interviews to assess the physicians' aptitudes to serve as consulting experts as long as the defendants do not discuss the treatment of specific patients. See, e.g., *In re Seroquel Prods. Liab. Litig.*, 6:06-md-1769, 2008 WL 821889 (M.D. Fla. Mar. 21, 2008).

Although in the context of consulting experts, the rationale holds true for contacting treating physicians: As long as the medical condition of the plaintiff is not discussed, the ex parte contact will not run afoul of the physician-patient privilege and defendant can still discuss issues important to the litigation with the physicians. See *id.* at **2-3.

To ensure that both parties have fair ex parte access to plaintiffs' treating physicians, the parties are limited to the seemingly odd and unfair solution discussed at the outset: combining the solutions devised by the NuvaRing and Seroquel courts to allow plaintiffs' counsel to discuss only the medical treatment of the plaintiffs, and allow defense counsel to discuss only general liability issues.

This solution will allow both parties to discuss issues important to the case and allow both parties to learn important aspects of the physicians' likely testimony, while also safeguarding the physician-patient privilege and minimizing the risk of bias. Absent state-by-state rulings regarding ex parte contacts, this may be the best way to ensure that both parties have fair ex parte access to plaintiffs' treating physicians in an MDL setting.

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