MONTHLY LUNCHTIME SEMINAR SERIES

41ST Session:

PETRILLO + HOSPITAL LICENSING ACT = LAWYERS BEWARE

Judge Lynn M. Egan
Judge William E. Gomolinski

June 24, 2016

JUDGE LYNN M. EGAN

Judge Lynn M. Egan became a Cook County Circuit Court judge in 1995 and has served in the Law Division for over 18 years. She has presided over high volume motion calls, an Individual Commercial Calendar, an Individual General Calendar and bench and jury trials. She is currently the only Cook County judge assigned to a General Individual Calendar in the Law Division, which includes every type of case filed in the Division, specifically including personal injury actions such as medical & dental malpractice, product liability, infliction of emotional distress, defamation/slander, premises liability, construction & motor vehicle accidents, as well as commercial disputes such as breach of contract, fraud, conspiracy, breach of fiduciary duty, wrongful termination, employment discrimination and legal & accounting malpractice. She manages these cases from time of filing until final disposition, including all motion practice, case management, settlement conferences and trials. Additionally, Judge Egan is committed to assisting parties with the voluntary resolution of cases. As a result, hundreds of cases pending on other judges' calls in the Law & Chancery Divisions & the Municipal Districts are transferred to Judge Egan each year for settlement conferences and she has helped facilitate settlements totaling over 250 million dollars.

Judge Egan has also served as a member of several Illinois Supreme Court Committees, including the Executive Committee, Discovery Procedures Committee, Civil Justice Committee and Education Committee. She has also been a faculty member at dozens of judicial seminars throughout the state, including the annual New Judges' Seminar, regional conferences and the mandatory Education Conference. She has authored numerous articles on subjects such as discovery, requests to admit, restrictive covenants, Day-In-The-Life films, directed verdicts, jury selection & instructions, Dead Man's Act, Supreme Court Rule 213, expert witnesses, reconstruction testimony, court ordered medical exams, attorney-client/work product privileges, sanctions and damages. She also serves as a mentor for new judges and was recently appointed to the Illinois Courts Commission, a seven-member panel responsible for rendering final decisions on matters of judicial discipline.

Judge Egan has served on Bar Association committees and Boards of Directors and has been a frequent speaker at Bar Association seminars. She has taught law school classes and judged trial & appellate advocacy competitions. In 2012, she became a registered CLE provider through the Illinois MCLE Board and provides free CLE seminars for attorneys and judges every month. Since her monthly seminar series began in August 2012, Judge Egan has awarded over 7,500 hours of CLE credit to Illinois attorneys.

Prior to joining the bench, Judge Egan was an equity partner at Hinshaw & Culbertson, where she focused her practice on medical negligence cases. In addition to trial work, she argued before the Illinois Supreme Court on a matter of first impression in the country in *Cisarik v. Palos Community Hospital*. Similarly, during her earlier career in the Cook County State's Attorney's Office, she worked in the criminal and juvenile divisions and argued before the Illinois Appellate and Supreme Courts on matters of first impression in Illinois.

JUDGE WILLIAM E. GOMOLINSKI

Judge Gomolinski has been a judge since 2007 and is currently assigned to the Circuit Court of Cook County – Law Division (Motion Call) where he presides over 1,500 active files for case management and rules daily on contested motions ranging from summary judgment to discovery issues in the largest unified court system in the nation. Prior to his judicial service he was the litigation and managing partner in a four-attorney law firm representing client interests in civil litigation and consumer rights, culminating in numerous jury and bench trials or evidentiary hearings. He graduated from the John Marshall Law School in 1986 and from Loyola University in 1981 with a double major in finance and public accounting. He was previously a licensed stationary engineer and a licensed real estate broker for over 20 years. Judge Gomolinski is a frequent speaker, lecturer, author and participant in community, bar and legal associations.

COMMUNITY INVOLVEMENT

- *November 19, 2015, Guest Speaker, Law Bulletin Annual Symposium with Judge;*
- *November 2, 2015, Guest Speaker, Chinese Delegation, Arbitration in The Law Division*
- *May 29, 2015, Guest Speaker, Law Division Motion Practice, Advocates Bar Association*
- *May 27, 2015, Guest Speaker, CBA, YLS, Seminar on Service of Summons*
- *April 7, 2015, Guest Speaker, CBA, Solo/Small Firm Committee, Judge's Round Table*
- *April, 2015, Published Article, Illinois Bar Journal, re: Illinois Supreme Court Rule 216;*
- *January 22, 2015, Guest Speaker, CBA, Motion Practice in Cook County Circuit Court's Law Division, CLE Program;*
- *November 7, 2014, Guest Speaker, CBA, "Persuasiveness in Court", CLE Program*
- *May 14, 2014, Guest Speaker, Jones College Preparatory, The Illinois Court System;*
- *May 2, 2014, Guest Speaker, Perspective from the Bench, IITLA Seminar;*
- *March 17, 2014, Judge for Citywide Mock Trial Competition, Chicago Coalition for Law-Related Education;*
- *January 9, 2014, Guest Speaker, CBA, 2-619 Motions;*
- *November 21, 2013, Guest Speaker, Law Bulletin, Annual Symposium with Judges;*
- *November 12, 2013, Guest Speaker, CBA, Litigation Section, Motion Practice in Cook County Illinois;*
- *October, 2013, Member Judicial Exchange representing Cook County Judges in Poland;*
- *March, 2013, Judge for Citywide Mock Trial Competition;*
- *May, 2013, Judge for Lyons Township High School Mock Trial;*
- *May, 2012, Guest Speaker for First Municipal District Teenage Driving Crash Program for high school students;*
- *Director, Amateur Hockey Association of Illinois (AHAI) since 2003.*

SECTION A

- *"Petrillo + Hospital Licensing Act = Lawyers Beware," by Judge Lynn M. Egan, June 2016.*

"PETRILLO + HOSPITAL LICENSING ACT = LAWYERS BEWARE"

by
Judge Lynn M. Egan
June 2016

I. Why Should You Care?

Every lawyer handling a case that includes medical testimony (civil, criminal, workers' compensation, domestic & arbitration) should care about the *Petrillo* doctrine because it dictates the permissible method of eliciting evidence from healthcare providers and authorizes sanctions for virtually all violations. Additionally, the doctrine presents ethical issues for practitioners who seek such testimony, as well as those who represent medical providers. Importantly, failure to understand and comply with the *Petrillo* doctrine may result in critical evidence being barred at the time of trial or a lawyer being fined or even reported to the ARDC.

NOTE: As with any privilege, the party asserting it must provide specific facts that support application of the privilege. As recently noted by the Supreme Court, in order "to create a privilege, the plain language of the statute must explicitly state that the information that is confidential is also privileged, nondiscoverable or inadmissible." *Kiaine v. Southern Illinois Hospital Services, 2016 IL 118217, ¶ 19.*

II. What's the Bottom Line?

Quite simply, the *Petrillo* doctrine precludes communication between defense counsel and a plaintiff's medical providers unless undertaken through formal discovery methods outlined in the Illinois Supreme Court rules. *Petrillo v. Syntex Laboratories, 148 Ill.App.3d 581 (1st Dist., 1986), PLA denied 113 Ill.2d 571.*[1]

NOTE: Under the *Petrillo* doctrine, the concept of medical providers is not limited to physicians. *Roberson v. Liu, 198 Ill.App.3d 332, 338 (5th Dist., 1990)("Just as 'no man is an island' (John Donne), no physician acts alone in the discharge of professional, fiduciary duties to a patient. To note this reality and apply rules consistent with those applied to physicians gives practical effect to Petrillo. This assures and strengthens the public policies of confidentiality and fiduciary duty in the physician-patient relationship*

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[1] *Although Petrillo arose in a civil context and is expressly aimed at defense attorneys, prosecutors in criminal cases should also have a thorough understanding of the doctrine as it may be argued in a variety of criminal contexts. For instance, criminal defendants have argued that Petrillo mandates that all medical information be reported directly to the court, rather than police officers or prosecutors, a position that has been rejected in the DUI context following the 1997 amendment to the DUI statute (625 ILCS 5/11-501.4). People v. Ernst, 311 Ill.App.3d 672, 678 (2d Dist., 2000). Accord, People v. Bauer, 402 Ill.App.3d 1149, 1157 (5th Dist., 2010).* Cases that hold to the contrary, such as *People v. Nohren, 283 Ill.App.3d 753 (4th Dist., 1996),* were decided prior to the statutory amendment and, therefore, lack current vitality. However, prosecutors must remain mindful of the permissible scope of such requests, as "few would disagree that a request for all medical records is overbroad." *People v. Popeck, 385 Ill.App.3d 806, 810 (4th Dist., 2008).*

and disclosure of information by the regulated and supervised discovery process rather than uncontrolled and surreptitious ex parte conferences.").

Thus, *Petrillo* applies to nurses, therapists, and other non-physician health care providers who assist the physician in the treatment of the patient. *See, e.g. House v. SwedishAmerican Hospital, 206 Ill.App.3d 437, 446 (2d Dist., 1991)(nurses' notes "were intended to be used by the physicians in rendering medical treatment to the patient...and were thus protected under the physician-patient privilege."); People v. Kaiser, 239 Ill.App.3d 295 (1992); Mondelli v. Checker Taxi Company, 197 Ill.App.3d 258, 263 (1st Dist., 1990).* It also applies to dentists. *People v. Manos, 202 Ill.2d 563, 571-572 (2002).*

III. Purpose & Basis of the Prohibition.

The purpose behind the prohibition is to encourage full and candid communication between a physician and a patient and "to protect the patient from an invasion of privacy." *Tomczak v. Ingalls Memorial Hospital, 359 Ill.App.3d 448, 452 (1st Dist., 2005).*

The basis of the prohibition is the "modern public policy [which] strongly favors the confidential and fiduciary relationship existing between a patient and his physician." *Petrillo, supra at 587.*

Although this public policy was not previously articulated in statutes, rules or the constitution, the *Petrillo* court explained that the reach of public policy should extend to "conduct which tends to harm an established and beneficial interest of society the existence of which is necessary for the good of the public." *Id.* This definition clearly captures the physician-patient relationship given the ethics adopted by the medical profession and the fact that numerous courts recognize a fiduciary duty running from physician to patient. *Id. at 588.* These ethics and duty are premised on the understanding that the nature of the physician-patient relationship is "highly confidential." *Id.* Therefore, *ex parte* communications between defense counsel and a treating physician "jeopardize the sanctity of the physician-patient relationship and, therefore, are prohibited as against public policy." *Id.* As a result, *ex parte* conferences are contrary to Illinois public policy. *Id. at 593.*

This means that patient consent is an absolute prerequisite before confidential information is divulged to third parties. *Id. at 590.* Indeed, the *Petrillo* court declared, "confidentiality and patient consent are inextricably tied together." *Id.*

IV. Statutory Codification.

The physician-patient privilege which forms the basis of the *Petrillo* doctrine has been codified at *735 ILCS 5/8-802.* This section of the Code of Civil Procedure also details the following numerous exceptions to the privilege:

"Physician and patient.

No physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient, except only

1) *In trials for homicide when the disclosure relates directly to the fact or immediate circumstances of the homicide,*
2) *In actions, civil or criminal, against the physician for malpractice,*
3) *With the expressed consent of the patient, or in case of his or her death or disability, of his or her personal representative or other person authorized to sue for personal injury or of the beneficiary of an insurance policy on his or her life, health, or physical condition, or as authorized by Section 8-2001.5 [735 ILCS 5/8-2001.5],*
4) *In all actions brought by or against the patient, his or her personal representative, a beneficiary under a policy of insurance, or the executor or administrator of his or her estate wherein the patient's physical or mental condition is an issue,*
5) *Upon an issue as to the validity of a document as a will of the patient,*
6) *In any criminal action where the charge is either first degree murder by abortion, attempted abortion or abortion,*
7) *In actions, civil or criminal, arising from the filing of a report in compliance with the Abused and Neglected Child Reporting Act,*
8) *To any department, agency, institution or facility which has custody of the patient pursuant to State statute or any court order of commitment,*
9) *In prosecutions where written results of blood alcohol tests are admissible pursuant to Section 11-501.4 of the Illinois Vehicle Code [625 ILCS 5/11-501.4],*
10) *In prosecutions where written results of blood alcohol tests are admissible under Section 5-11a of the Boat Registration and Safety Act [renumbered as 625 ILCS 45/5-11a],*
11) *In criminal actions arising from the filing of a report of suspected terrorist offense in compliance with Section 29D-10(p)(7) of the Criminal Code of 2012 [720 ILCS 5/29D-10],*
12) *Upon the issuance of a subpoena pursuant to Section 38 of the Medical Practice Act of 1987 [225 ILCS 60/38]; the issuance of a subpoena pursuant to Section 22 of the Nursing Home Administrators Licensing and Disc8iplianary Act [225 ILCS 70/22]; or the issuance of a subpoena pursuant to Section 25.5 of the Workers' Compensation Act [820 ILCS 305/25.5],*
13) *Upon the issuance of a grand jury subpoena pursuant to Article 112 of the Code of Criminal Procedure of 1963 [725 ILCS 5/112-1], or 914) to or through a health information exchange, as that term is defined in Section 2 of the Mental Health and Developmental Disabilities Confidentiality Act [740 ILCS 110/2], in accordance with State or federal law.*

Upon disclosure under item (13) of this Section, in any criminal action where the charge is domestic battery, aggravated domestic battery, or an offense under Article 11 of the Criminal Code of 2012 [720 ILCS 5/11-0.1 et seq.] or where the patient is under the age of 18 years or upon the request of the patient, the State's Attorney shall petition the court for a protective order pursuant to Supreme Court Rule 415.

In the event of a conflict between the application of this Section and the Mental Health and Developmental Disabilities Confidentiality Act to a specific situation, the provisions of the Mental Health and Developmental Disabilities Confidentiality Act shall control."

V. Patient Consent.

While patient consent is unquestionably necessary before disclosure of confidential information, such consent can be either express or implicit. Petrillo, *supra at 591.* Express consent typically takes the form of a written waiver. Implied consent, however, can take several forms and can be more challenging to define.

A. Filing Suit.

When a patient files suit, implicit consent is provided for healthcare providers to disclose relevant medical information. Importantly, however, this consent has limitations. Specifically, it is limited to information related to the specific mental or physical condition the patient placed at issue in the suit.

CAUTION: Even if the implicit consent is unquestioned, it does NOT negate the need for compliance with formal discovery rules! Id. Instead, disclosure may still only occur *"pursuant to the methods of discovery authorized by Supreme Court Rule 201(a)."* Id. *(emphasis in original).*

As expressly noted in Petrillo, "a patient certainly does not, by simply filing suit, consent to his physician discussing...medical confidences with third parties outside court-authorized discovery methods, nor does he consent to his physician discussing the patient's confidences in an *ex parte* conference with the patient's legal adversary." Id. Instead, the confidential relationship between physician and patient continues after suit is filed and the physician remains ethically obligated to protect that relationship. As a result, a patient has an "*affirmative right* to rely on his physician to faithfully execute...ethical obligations." Id. *at 592.*

For attorneys representing health care providers who have been contacted for information, it is essential to understand that a physician's disclosure outside formal discovery channels has already been deemed "unethical." Consequently, it is not difficult to imagine a scenario where an attorney's conduct could also be deemed "unethical" if he facilitates disclosure of confidential medical information outside formal discovery channels. Id.[2] *See also,* Baylaender v. Method, *230 Ill.App.3d 610 (1st Dist., 1992)(transmitting confidential patient information via attorneys retained by insurance carrier that insured both defendant doctor and subsequent treating physician violated* Petrillo *and justified barring order as a sanction.).*

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[2] *The* Petrillo *court noted that many jurisdictions recognize the existence of a cause of action for breach of confidence when the patient's physician reveals medical confidences without consent or outside authorized means of disclosure.* Id. *at 595. See also,* Kim v. St. Elizabeth's Hospital, *395 Ill.App.3d 1086 (5th Dist., 2009)(trial court dismissal of patient's suit alleging violation of Illinois law by disclosing mental health records without express written consent reversed.).*

B. "At Issue"

The "at issue" exception to the physician-patient privilege is found in subsection (4) of the statute, *735 ILCS 5/8-802(4).* In order to fall within the exception, the party seeking the information must be able to demonstrate that the *patient* placed the medical condition or information "at issue." *Pritchard v. SwedishAmerican Hospital, 191 Ill. App.3d 388, 404-405 (2d Dist., 1989). See also, Kraima v. Ausman, 365 Ill.App.3d 530, 536 (1st Dist., 2006)("In order for this exception to apply, the patient,...not plaintiff, must have affirmatively placed his physical condition in issue.").* Importantly, an opposing party's relevance arguments will be unavailing if the patient has not "affirmatively placed his condition in issue..." *Id. at 405.* Indeed, even if the patient has a medical condition that gives color to the allegations of the complaint, the privilege protects the information unless the patient placed the information in issue. *Kraima, supra.(Defendant surgeon who was sued for malpractice was not required to produce his disability claim file even though it established that he had to stop performing surgery due to an arthritis problem.).* Merely denying the allegations of a complaint does not put a defendant's medical condition at issue for purposes of *Petrillo. But see, Doe v. Weinzweig, 2015 IL App (1st) 133424-B, ¶ 23 (defendant placed his physical condition at issue for purposes of a Rule 215 exam by filing a section 2-619 motion supported by his own affidavit attesting that he tested negative for herpes.).*

The cases make clear that the patient must introduce the condition or treatment as an element of a claim or defense before the privilege will yield; and the starting point for this determination is always the pleadings. *See generally, El-Amin v. Dempsey, 329 Ill.App.3d 800 (1st Dist., 2002); Kunz v. South Suburban Hospital, 326 Ill.App.3d 951 (1st Dist., 2001).*

NOTE: Whether something is actually "at issue" for purposes of *Petrillo* is not always as simple as it might initially seem, particularly in relation to mental health information. Merely making a claim for "pain and suffering" does not place mental health "at issue" under *Petrillo. Reda v. Advocate Health Care, 199 Ill.2d 47, 57-58 (2002)(mental health is not placed at issue by alleging neurologic injury such as stroke or other brain damage.). See also. Tylitzki v. Triple X Service, Inc., 126 Ill.App.2d 144, 149 (1st Dist., 1970)("The privilege is too important to be brushed aside when the mental condition of the plaintiff may be only peripherally involved.").*

C. One Suit Only.

Although the physician-patient privilege and right to confidentiality that is currently codified by *735 ILCS 5/8-802* can be waived, either expressly or implicitly, any such waiver is limited to the specific suit in which it arose.

Thus, merely because the patient consents to disclosure in one suit does not obviate the need to obtain consent in subsequent suits. *Reagan v. Searcy, 323 Ill.App.3d 393, 397 (5th Dist., 2001)("When a patient waives the privilege by filing a lawsuit, he or she*

*waives it for that lawsuit only." ***"We recognize the holding in Gleason and now overrule it.").*

CAUTION: Do not rely on *Gleason v. St. Elizabeth Medical Center, 135 Ill.App.3d 92 (5th Dist., 1985)* for the concept of waiver. It has been expressly overruled. *Reagan, supra.*

D. Authorized Means of Disclosure.

The *Petrillo* court noted that a deposition is not the only authorized means by which opposing counsel can obtain information from a treating physician. Indeed, the court detailed the following additional alternatives:

- Written questions pursuant to Supreme Court Rule 210. *See, Holman v. DePhillips, 405 Ill.App.3d 1190 (1st Dist., 2011)(Appellate court suggests obtaining affidavits from plaintiff's healthcare providers via Rule 210 in order to support a forum non conveniens motion.)* If this option is pursued, the questions must obviously be served upon all other parties with proper notice. Within 14 days thereafter, the other parties can serve cross-questions. Within 7 days after service of cross-questions, a party can serve redirect questions. Within 7 days after service of redirect questions, a party can serve re-cross questions. **NOTE**: Although answers to such questions shall be obtained in accordance with Rules 206(f) and 207, "no party, attorney, or person interested in the event of the action (unless he is the deponent) shall be present during the taking of the deposition or dictate, write, or draw up any answer to the questions." *Supreme Court Rule 210(b).*

- Obtain copies of all relevant medical records pursuant to Supreme Court Rule 214.

Petrillo, supra at 596.

VI. Reach of the Prohibition.

The reach of *Petrillo* is extensive and sometimes surprising. The following examples provide helpful guidance for practitioners in a variety of settings:

- The physician-patient privilege applies to regulatory investigations and cannot be overcome by the broad investigatory powers granted to the Department of Professional Regulation. *People v. Manos, 202 Ill.2d 563, 569-570 (2002)("investigations conducted by the Department are not listed as an exception under the physician-patient privilege to compel physicians and surgeons to produce confidential patient records.").*
- The physician-patient privilege applies to worker's compensation claims pending before the Industrial Commission. *Hydraulics, Inc. v. The Industrial Commission, 329 Ill.App.3d 166, 170 (2d Dist., 2002)(the confidentiality of the physician-*

patient relationship "has a constitutional dimension that cannot be left at the door of the courthouse.").

- The physician-patient privilege also applies to mental health professionals who are not physicians. *People v. Kaiser, 239 Ill.App.3d 295, 303 (2d Dist., 1992)("the same principle would apply to the therapist-patient relationship"); accord, Cozad v. CHW Displays, Inc., 2015 IL App (4th) 140294-U, ¶ 99 ("the appellate court has applied Petrillo to the relationship between a mental-health therapist and his or her patient.").*
- The privilege protects the medical records of siblings even though the parent filed a birth injury claim on behalf of another child. *Kunz v. South Suburban Hospital, 326 Ill.App.3d 951 (1st Dist., 2001)("A reading of the Illinois cases, particularly Kunkel, Parkson, and D.H., leads us to conclude that filing a medical malpractice lawsuit on behalf of a child, even when a genetic cause independent of medical malpractice may become an issue, does not thereby waive the physician-patient privilege in favor of the child's siblings.")* **CAUTION**: Plaintiffs & their attorneys need to be alert during depositions for questions that may trigger a waiver of this protection. In *Kunz*, the mother testified about her earlier pregnancies & how they compared to that of plaintiff, which constituted a waiver of the privilege as to those pregnancies and deliveries. However, her testimony that the health of her other children was "excellent" did not constitute waiver because it was "akin to the 'facts and circumstances of medical history. 'Facts and incidents of medical history' are distinguishable from communications to a physician. Communications are privileged; facts are not."
- The physician-patient privilege does not allow defense counsel to utilize an expert at trial who became plaintiff's treating physician after being retained as defendant's expert. In reversing the judgment for defendant and entering a barring order on remand, the appellate court noted that it was "irrelevant to this court how [the doctor's] unusual, dual affiliation came about and it makes no difference whether he deliberately or inadvertently accepted [plaintiff] as a new patient." *San Roman v. Children's Heart Center, Ltd., 2010 IL App (1st) 091217, ¶ 32.*
- The physician-patient privilege prohibits letters from opposing counsel outside formal discovery. Thus, sending the patient's physician a letter that included a copy of the physician's discovery deposition and the defendant's answers to Rule 213 interrogatories violated *Petrillo and* justified a new trial and barring order. *Moss v. Amira, 356 Ill.App.3d 701, 709 (1st Dist., 2005)("this was not a de minimus communication regarding incidental matters preliminary to a deposition, such as scheduling. Here, the communication...could be interpreted as an attempt...to alert Dr. Moser as to what his future testimony should be. This is clearly improper"). Accord, Natasi v. United Mine Workers of America Union Hospital, 209 Ill.App.3d 830, 838-839 (1991)(sending the treating physician articles that supported the defense theory of the case was improper.).*
- Sending a letter and affidavit to the treating physician violated *Petrillo even* though the affidavit merely reflected opinions provided by the physician during an informal meeting with the doctor and counsel for both plaintiff and defendant. *Glassman v. St. Joseph Hospital, 259 Ill.App.3d 730, 744 (1st Dist., 1994)(the*

original meeting did not violate Petrillo because "the presence of plaintiff's attorney was sufficient to protect plaintiff's interests," but the letter was sanctionable because it was "an improper effort to procure an affidavit.").

- The physician-patient privilege does not apply to Rule 215 examinations or reports, even those concerning litigants in unrelated cases. *Moore v. Centreville Township Hospital, 246 Ill.App.3d 579, 586-587 (5th Dist., 1993), rev'd on other grounds, 158 Ill.2d 543 (1994).* Because a Rule 215 examination is legal, rather than medical, in nature, the relationship between a Rule 215 examiner and the party being examined is adversarial and without any expectation of confidentiality. "Therefore, one of the elements of the privilege, that the communication will be kept confidential, is absent from Rule 215 examinations. We conclude that the physician-patient privilege does not apply to reports obtained by defense counsel under the provisions of Supreme Court Rule 215." *Salingue v. Overturf, 269 Ill.App.3d 1102, 1105 (5th Dist., 1995); accord, Doe v. Weinzweig, 2015 IL App (1st) 133424-B, ¶ 32.*[3]

VII. De Minimus

Although best practice is to restrict communications with a party's physicians to those authorized by formal discovery rules, there are a number of cases that find some contact to be "de minimus" and without prejudice such that no sanctions are justified. Importantly, the body of case law in this area is not consistent so the more prudent practice is to limit communications to formal discovery. A brief survey of the case law on this issue illustrates the practical problems.

- *Yates v. El-Deiry, 160 Ill.App.3d 198, 203 (3d Dist., 1987)("Prejudice and improper conduct can be implied from the fact that the plaintiff's treating physician has violated his ethical and fiduciary obligations...to his patient by engaging in ex parte conferences.").*
- *Mahan v. Louisville & Nashville Railroad Company, 203 Ill.App.3d 748, 754 (5th Dist., 1990).* No violation because defense attorney's *ex parte* communication with plaintiff's physician lasted no more than 30 seconds prior to the doctor's deposition and was limited to asking the doctor to review plaintiff's CT scans after learning the doctor had never previously done so. The appellate court emphasized the point that plaintiff could not establish that the communication

[3] *Interestingly, even though the courts have been consistent in holding that the physician-patient privilege does not apply to Rule 215 exams or reports, they have been less than enthusiastic about production of such reports from unrelated cases. For instance, in Moore, supra, the court acknowledged that Rule 215 reports could properly be used to impeach the examiner, but noted that "physician-examiners should not blithely disclose information gathered under a court-ordered examination to those not involved in the litigation." Id. at 587. Similarly, in Salingue, supra, the court acknowledged that Rule 215 reports from unrelated cases are not privileged, but declared, "we are still reluctant to require their disclosure" and ultimately held that "the preferred procedure in such cases is for plaintiff's counsel to contact other plaintiffs' counsel in an attempt to secure copies of the desired reports.***We see no need to require defense counsel to produce reports when an alternate means of obtaining the same information is readily available." Id. at 1105-1106.*

resulted in any prejudice to him, was *de minimus* and did not result in the disclosure of any confidential information.

- *Requena v. Franciscan Sisters Health Care Corporation, 212 Ill.App.3d 328, 331-332 (3d Dist., 1991).* Reversible error mandating a new trial and barring order occurred due to defense counsel's hour long discussion with plaintiff's subsequent treating physician prior to his deposition. During the conversation, defense counsel advised the doctor of possible questions that would be asked by plaintiff's attorney and gave the doctor medical records and the defense theory of the case. Although the appellate court distinguished *Mahan* based on the length of the *ex parte* discussion and type of information disclosed, it cited *Yates, supra,* with approval, expressly holding that "prejudice to the plaintiff can be implied from the facts and circumstances of the improper ex parte communication."
- *Natasi v. United Mine Workers of America Union Hospital, 209 Ill.App.3d 830, 839-840 (5th Dist., 1991).* Judgment for defendant reversed and sanctions imposed because defense attorney in a medical malpractice case sent letters to plaintiff's subsequent surgeon, along with 2 other treating physicians, providing depositions of treating physicians and defendant's retained expert, along with hospital records. After receipt of these materials, the surgeon gave his evidence deposition, during which he changed the testimony previously given in his discovery deposition. Notably, the appellate court held it was immaterial that no confidential information had been disclosed during the ex parte contacts, finding that "what matters is the potential harm to the physician-patient relationship." On remand, the trial court was directed to impose the following sanctions: bar defendant's retained expert, preclude defense counsel from examining any of the treating physicians he contacted ex parte, allow use of the surgeon's discovery deposition to be read to the jury as substantive evidence & award attorney's fees and costs incurred in taking 3 evidence depositions.
- *Burns v. Michelotti, 237 Ill.App.3d 923, 930 (2d Dist., 1992).* The appellate court expressly disagreed with *Mahan*, noting that it "strays from the general trend which finds a *Petrillo* violation regardless of the nature of the contact..." The *Burns* court declared that all *ex parte* communications between defense counsel and a treating physician violate public policy, "regardless of what information is actually revealed," and "should be sanctioned in the discretion of the trial court." Surprisingly given the nature of the above language, the appellate court in *Burns* found that sending affidavits to plaintiff's treating physicians in order to support a motion to transfer was "minimal" in nature, irrelevant to the substance of the case, thereby rendering it "relatively harmless, minimally improper and hardly prejudicial." Because the contact did not taint the physician's subsequent testimony, the trial court decision not to bar the testimony was affirmed.
- *Schlueter v. Barbeau*, 262 Ill.App.3d 629, 633-634 (5th Dist., 1994). Judgment for defendant reversed due to *Petrillo* violation after defense counsel engaged in an *ex parte* telephone conversation with plaintiff's treating physician the night before his evidence deposition. During the deposition, the physician opined that plaintiff's heart attack was not caused by the accident for which defendant was

sued. Prior to this deposition, defendant had not disclosed any causation witnesses. The appellate court distinguished *Mahan* even though the nature and duration of the *ex parte* communication was unknown. In so doing, the court noted that "the communication went to an essential element of the case," which was causation. As a result, the contact was not de minimus. In addition to reversing the verdict, defendant was barred at retrial from calling that doctor as a witness.

- *Hernandez v. Schittek, 305 Ill.App.3d 925, 932 (5th Dist., 1999).* The appellate court relied on *Mahan* in finding a *Petrillo* violation de minimus. In a medical negligence case, the defense attorney obtained plaintiff's original mammogram films from the hospital without her authorization or a subpoena. Although defense counsel did not deny the improper method of obtaining the films, he argued that he verbally informed plaintiff's attorney that he intended to use the films the day before they were to be used at trial. Although the appellate court found that "an unspecific verbal communication between the attorneys is insufficient to authorize the means by which Dr. Schittek obtained the films," it concluded that the contact was de minimus and did not divulge any confidential information. Thus, the lack of sanction was affirmed.
- *Fakes v. Eloy, 2014 IL App (4th) 121100, ¶ 115-116.* Defense counsel's *ex parte* contact with plaintiff/decedent's treating physicians did not warrant sanctions because it was de minimus. The contact consisted of letters and trial subpoenas notifying the doctors of the trial date and the date their testimony was anticipated. It also advised them that they could contact defense counsel's office to discuss the date their testimony would be required. A second letter to one of the doctors advised him that the law firm would provide him with a copy of his deposition, if requested, which occurred. One of the doctors also had a conversation with an office assistant about scheduling his testimony. Plaintiff was sent copies of all letters at the same time they were sent to the doctors. In affirming the trial court conclusion that the contact was de minimus, the appellate court relied on *Mahan*. However, it also rejected the argument that *Petrillo* bars all contact with healthcare providers, finding that "a bright-line prohibition against any contact...would diminish the important public policy issues the *Petrillo* court specifically addressed."

VIII. Nonparty Information

The applicability of the physician-patient privilege to nonparty medical information has been considered in numerous cases, both as substantive evidence and for impeachment purposes. Although the cases are generally consistent in applying the privilege, there is inconsistency on the issue of redacting certain types of nonparty medical information. In fact, the Supreme Court recently modified its approach toward redacting nonparty medical records in *Klaine v. Southern Illinois Hospital Services, 2016 IL 118217.*

By way of background, the physician-patient privilege recognizes an exception in malpractice actions (*735 ILCS 5/8-802(2)*). However, this exception only applies to

patients who are parties to the lawsuit; the records of nonparty patients remain privileged and nondiscoverable. *Ekstrom v. Temple, 197 Ill.App.3d 120, 130 (2d Dist., 1990)*. This is true even if the nonparty records are relevant and material. *House v. SwedishAmerican Hospital, 206 Ill.App.3d 437, 444 (2d Dist., 1991)*. Indeed, it is true even if the information is necessary in order for plaintiff to establish an element of the cause of action. *Id. See also, Glassman v. St. Joseph Hospital, 259 Ill.App.3d 730 (1st Dist., 1994)*.

However, the privilege is not absolute. *Giangiulio v. Ingalls Memorial Hospital, 365 Ill.App.3d 823, 832 (1st Dist., 2006)*. Its applicability depends on the nature of the information and whether it relates to treatment such that it is necessary for the performance of the physician's professional duty or provides insight into the patient's medical condition. Tomczak v. Ingalls Memorial Hosptital, *359 Ill.App.3d 448, 453 (1st Dist., 2006)*. Thus, courts will determine whether the production request seeks general information or treatment information. *Giangiulio, supra at 832.* For example, in *Tomczak*, the appellate court characterized nonparty patients' triage and treatment times as "mere incidents of facts" unnecessary to a physician's professional responsibilities, thereby rendering them discoverable. *Id. at 454. But see, In re D.H. v. Chicago Housing Authority, 319 Ill.App.3d 771, 776 (1st Dist., 2001)("The case law is perfectly clear that medical records of nonparties are privileged, and that there is no distinction between the communications and the facts contained therein.")*.

Importantly, some early cases held that redacting nonparty patient names and identifying information was insufficient to protect the rights of nonparty patients. *Ekstrom v. Temple, 197 Ill.App.3d 120, 130 (2d Dist., 1990)(redaction of patient names "may not sufficiently protect the confidentiality to which the nonparty patients are entitled."). Accord, Glassman v. St. Joseph Hospital, 259 Ill.App.3d 730, 746 (1st Dist., 1994)("We believe Ekstrom correctly interprets the physician-patient privilege in Illinois.")*.[4] In fact, the Illinois Supreme Court reached the same conclusion in *People v. Manos, 202 Ill.2d 563, 578 (2002)* when it found that "merely deleting the patient names and other identifying information from patient records would violate the physician-patient privilege."

Yet, in *Klaine v. Southern Illinois Hospital Services, 2016 IL 118217*, a negligent credentialing case, the Court allowed a discovery request that required disclosure of a doctor's applications for staff privileges even though the information contained "procedure summaries and case histories" relative to the surgical procedures performed by the doctor on unrelated patients. Although the Court cited *In re D.H., supra*, with approval for the principle that "medical records of nonparties are protected by the

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[4] *But see, House v. SwedishAmerican Hospital, 206 Ill.App.3d 437, 444-445 (2d Dist., 1990), wherein the court noted that "simply deleting the patient's name from the medical records will not protect the confidentiality to which the patient is entitled," but nevertheless held that "simply revealing the patient's identity, in and of itself, will not result in the disclosure of confidential communications. It is evident that disclosure of the patient's name does not violate the physician-patient privilege." Accord, Geisberger v. Willuhn, 72 Ill.App.3d 435, 438 (1979) & Giangiulio v. Ingalls Memorial Hospital, 365 Ill.App.3d 823, 833 (1st Dist., 2006)(no bar to disclosing the nonparty's name, address and telephone number because such information was not necessary to enable her physician to care for or treat her.)*

physician-patient privilege with regard to both the facts and communications contained therein," it nonetheless authorized the request because "individual patient identifiers have either not been included or have already been redacted pursuant to the appellate court's judgment." *Id. at ¶ 42.*

IX. Waiver.

The physician-patient privilege can be waived by voluntary disclosure "if the patient shared the privileged information at issue with persons other than the physician." *In re Detention of Kish, 395 Ill.App.3d 546, 559 (3d Dist., 2009)(patient discussed privileged information in group therapy sessions & with parole officer.). Accord, Kunz v. South Suburban Hospital, 326 Ill.App.3d 951 (1st Dist., 2001)(Mother waived privilege as to medical records concerning earlier pregnancies by comparing them to pregnancy with plaintiff.). See also, Gottemoller v. Gottemoller, 37 Ill.App.3d 689 (3d Dist., 1976)*(wife waived privilege by directing her psychiatrist to make her records available to husband's attorney)

X. Morgan Exception

In the medical malpractice context, the treating physician is often an employee of the defendant hospital, which may be vicariously liable for the physician's negligence. Under these circumstances, the defendant's right to fully defend itself may conflict with *Petrillo's* prohibition on *ex parte* communications. As a result, Illinois decisions recognize a distinction between so-called Morgan and non-Morgan treaters, stemming from the decision in *Morgan v. County of Cook, 252 Ill.App.3d 947 (1st Dist., 1993).* The ultimate holding in *Morgan* was foreshadowed in two earlier cases, with which practitioners should be familiar.

In *Ritter v. Rush-Presbyterian-St. Luke's Medical Center, 177 Ill.App.3d 313 (1st Dist., 1988),* the plaintiff filed a medical malpractice claim seeking to hold the hospital vicariously liable for its non-physician employee. The hospital risk manager interviewed plaintiff's treating physicians who were also hospital employees, but not named in the suit. Although the appellate court rejected the argument that *Petrillo* should not be applied in this context, it emphasized the fact that the hospital's liability was premised on the negligence of a non-physician. Importantly, it noted that the result would be different if the physician's conduct gave rise to defendant's liability because "exclusion of the hospital from the physician-patient privilege would...effectively prevent the hospital from defending itself by barring communication with the physician for whose conduct the hospital is allegedly liable. *Id. at 317.*

This rationale was adopted by the Second Appellate District in *Testin v. Dreyer Medical Clinic, 238 Ill.App.3d 883 (2d Dist., 1992),* when plaintiff named not only the medical clinic but also its employed physicians. Defendant argued that by naming employed physicians in the suit, plaintiff waived the physician-patient privilege as to those employed physicians not named in the suit. The appellate court disagreed and adopted

the *Ritter* conclusion that the privilege applies to treating physicians whose conduct does not give rise to the lawsuit, even if they are also employed by the defendant.

In *Morgan v. County of Cook*, 252 Ill.App.3d 947 (1st Dist., 1993), the court affirmatively held what had been implied in *Ritter* and *Testin:* if a plaintiff attempts to hold a hospital vicariously liable for the conduct of its own treating physician, the patient is deemed to have impliedly consented to the release of his medical information to the defendant hospital's attorneys. *Id. at 952.* In such a situation, the issue of confidentiality does not outweigh the defendant's right to effectively defend itself. *Id. at 956.* Thus, a bright-line test for *ex parte* communications between treating physicians and defendant employers was established: if the physician's conduct gives rise to the employer's liability ("*Morgan*" treater), then *ex parte* communications are permissible; if the physician's conduct does not give rise to the employer's liability ("non-*Morgan* treater), then *ex parte* communications are prohibited under *Petrillo*. *Id. at 954-955.*

This approach continues to be strictly applied, even where the physician's conduct *may* form the basis for a vicarious liability claim in the future. *See, Aylward v. Settecase, 409 Ill.App.3d 831, 837 (1st Dist., 2011)(unless and until the actions of defendant's employees are alleged to be a basis for plaintiff's injuries, defendant cannot engage in ex parte communications with them.)*[5]

XI. Hospital Licensing Act

Following *Morgan*, the Illinois legislature carved out statutory exceptions to the *Petrillo* doctrine as it applies to hospital defendants communicating with their employees. On January 1, 2000, section 6.17 of the Hospital Licensing Act was enacted and provides in relevant part that:

> (b) all information regarding a hospital patient gathered by the hospital's medical staff and its agents shall be the property and responsibility of the hospital and must be protected from inappropriate disclosure as provided in this section...
>
> (d) no member of a hospital medical staff and no agent or employee of a hospital shall disclose the nature or details of services provided to patients, except that the information may be disclosed to...those parties responsible for peer review, utilization review, quality assurance, risk management or defense of claims brought against the hospital arising out of the care...
>
> (e) the hospital medical staff and the hospital's agents and employees may communicate, at any time and in any fashion, with legal counsel for the hospital concerning the patient medical record privacy and retention requirements of this section and any care or treatment they provided or assisted in providing to any patient within the scope of their employment or affiliation with the hospital.

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[5] *Aylward was decided after 210 ILCS 85/6.17 (Hospital Licensing Act) was enacted, but the Act did not apply because defendant was a multi-specialty clinic, rather than a hospital.*

210 ILCS 85/6.17 (b), (d), (e)(West 2000).

A. Burger

The Illinois Supreme Court upheld the constitutionality of section 6.17 in *Burger v. Lutheran General Hospital, 198 Ill.2d 21 (2001)*, specifically finding that the statutory provisions did not violate a patient's right to privacy. *Id. at 51.* The Court also rejected the argument that the intrahospital communications allowed under subsections (d) and (e) violated the *Petrillo* doctrine because a hospital is not a third party with respect to its own medical information pursuant to subsection (b). *Id. at 58.* Moreover, the Court held that nothing in those subsections infringed upon a trial court's inherent power to manage discovery and enter protective orders where appropriate. *Id. at 47.* As a result, subsections (d) and (e) properly permit counsel for a hospital to communicate with the hospital's agents or employees about the medical care they provided to a patient, regardless of pending litigation.

Following *Burger*, several plaintiffs in medical malpractice cases filed motions for protective orders seeking to prohibit communication between attorneys for hospital defendants and its employees and medical staff members who rendered care to the plaintiffs, but whose treatment was not alleged to be the cause of plaintiff's injuries, i.e., non-*Morgan* treaters. The cases were consolidated in *Szfranski v. Azaran (In re Medical Malpractice Cases Pending in the Law Division), 337 Ill.App.3d 1016 (1st Dist., 2003)* and presented several certified questions for review, one of which generated the following holding:

- "After a medical negligence case has been filed against a hospital, the defendant hospital's counsel and those of its employees and agents responsible for peer review, defense of claims, quality assurance, utilization review, and risk management may communicate *ex parte* with the plaintiff's non-*Morgan* health care providers who, in the course of their employment or affiliation with the defendant hospital, provided or assisted in providing care or treatment to the plaintiff." *Id. at 1025.* Thus, where the Hospital Licensing Act applies, its exception to the *Petrillo* doctrine governs *ex parte* communications rather than the distinction between *Morgan* and non-*Morgan* treaters."

B. Protective Orders

Despite the holding in *In re Medical Malpractice Cases*, the courts narrowly construe the statutory exception and continue to broadly apply the *Petrillo* doctrine. *See, Hall v. Flowers, 343 Ill.App.3d 462, 467 (4th Dist., 2003)(subsections (d) and (e) permit communications between hospital defense counsel and treating physicians only where (1) the communications are strictly limited to the intrahospital setting, (2) there is no disclosure of plaintiff's medical information to outside third parties, (3) the communications are narrowly circumscribed to include only medical care and treatment rendered to the patient at the hospital, by the hospital's own medical staff, agents or*

employees, and (4) the communications involve only information already known to the hospital by virtue of subsection 6.17(b).).

C. Amendment 6.17(e-5) & Post-Suit Communications.

After Burger held that *ex parte* communications pursuant to 6.17(d) and (e) did not violate the Petrillo doctrine, the legislature amended the Hospital Licensing Act in 2004 in order to limit post-suit communications. Currently, subsection 6.17(e-5) provides as follows:

> Notwithstanding subsections (d) and (e), for actions filed on or after January 1, 2004, after a complaint for healing art malpractice is served upon the hospital or upon its agents or employees, members of the hospital's medical staff *who are not actual or alleged agents, employees, or apparent agents of the hospital* may not communicate with legal counsel for the hospital or with risk management of the hospital *concerning the claim alleged in the complaint for healing art malpractice* against the hospital except with the patient's consent or in discovery authorized by the Code of Civil Procedure or the Supreme Court rules.

210 ILCS 85/6.17 (e-5)(emphasis added).

To date, there is no Illinois case applying the amended section 6.17(e-5). However, the federal district court addressed the statute in E.Y. v. United States, *2012 U.S. Dist., LEXIS 58756 (N.D. Ill. April 26, 2012),* and considered the relevant time period for prohibiting *ex parte* communications with non-employees. The hospital defendant argued that subsection 6.17(e-5) prohibited *ex parte* communications with medical staff who were not agents or employees of the hospital *at the time they delivered medical care to the plaintiff.* Id. *at *15.* Conversely, plaintiff argued that subsection 6.17(e-5) prohibited ex parte communications with medical staff who are not hospital agents or employees *at the time of the proposed ex parte discussions.* Id. *at *14.*

The court found both arguments problematic as plaintiff's position would essentially overrule *Morgan* and defendant's position ignored the plain language of the statute, particularly the phrase, "are not agents or employees," which the court found generally implies the present tense. Id. *at *15.* Regrettably, the court declined to resolve the timing issue, finding that subsection 6.17(e-5) did not apply at all due to the particular circumstances. As a result, the issue of when a treater has to be an "agent or employee" of the defendant hospital in order to trigger the prohibition against *ex parte* communications remains unresolved.

SECTION B

- *"Petrillo Doctrine and the Hospital Licensing Act, by Judge William E. Gomolinski, June 2016.*

- *Survey of Petrillo cases, by Judge William E. Gomolinski, June 2016.*

Petrillo Doctrine and the Hospital Licensing Act

Honorable William E. Gomolinski

A legal offshoot of the patient-physician privilege is the Petrillo doctrine. Petrillo v. Syntex Laboratories, Inc, 148 Ill. App. 3d 581 (1st Dist. 1986). The Petrillo doctrine forbids any ex parte communication between plaintiff's treating physician and defense counsel. Ex parte communication is any communication by defense counsel that is not done pursuant to discovery procedures, i.e., deposition or interrogatories. The doctrine has been applied not only to treating physicians, but to nurses and staff who treat the plaintiff. See Lewis v. Illinois Central, 234 Ill. App. 3d 669, 679 (5th Dist. 1992). It applies to a conversation with a doctor after he gave a deposition (see Young v. Makar, 207 Ill App. 3d 337,345 (2d Dist. 1991)), as well as before a deposition (see Requena v. Franciscan, 212 Ill. App. 3d 328, 330 (3d Dist. 1991).) It applies to nurses. See Robberson v. Liu, 198 Ill App. 3d 332,336 (5th Dist. 1990). It applies to a vocational rehab counselor employed by the State of Illinois. See Wakeford v. Rodehouse, 223 Ill. App. 3d 31, 46 (5th Dist. 1991).

Under Ritter v. Rush, a hospital may not interview treating physicians who are employees of hospital. 177 Ill. App. 3d 313 (1st Dist. 1988). However, this decision was subsequently abrogated by an amendment to the Hospital Licensing Act. 210 ILCA 85/6-17(b)(d)(e); see also Burger v. Lutheran, 198 Ill. 2d 21, 55-58 (2001).[1] Where a hospital defendant is being sued for malpractice and its

[1] The Petrillo doctrine has been altered by amendments to the Hospital Licensing Act ("HLA") in 2000 and 2004. In 2000, section 6.17(e) seems to provide a broad exception to the Petrillo doctrine, that permits a "hospital's medical staff member" to "communicate, at any time in any fashion, with

communication with its medical professional employees, the hospital has the right to communicate with the employees for whose conduct it is allegedly liable. It may not communicate with employees whose conduct is not the alleged basis for liability as provided in the compliant.[2] See Ritter, 177 Ill. App. 3d at 317-18; Testin v. Dreyer, 238 Ill. App. 3d 883, 889 (2d Dist. 1992); Morgan v. County of Cook, 252 Ill. App. 3d 947, 954 (1st Dist. 1993).[3] Effective January 2004, HLA section 6.17 was amended with the addition of subsection (e-5), which limited the scope of permissible communications. It states that "members who are not actual or alleged agents, employees, or apparent agents of the hospital may not communicate with legal counsel for the hospital or with risk management of the hospital concerning the claim alleged."[4] 210 ILCS 85/6.17(e-5).

It is not a violation of Petrillo to speak to a physician who took a medical history that you plan to put on as an admission. See Tomasovic v. American, 171 Ill. App. 3d 979, 991 (1st Dist. 1988). Merely writing a letter to a doctor, serving a subpoena, or advising that no deposition is needed if records are sent directly have

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legal counsel for the hospital concerning... care or treatment they provide or assisted..." Burger affirmed the constitutionality of the HLA.

[2] In Szfranski v. Azaran, the Appellate Court held that communication with a non-Morgan physician (whose acts are not the basis for the plaintiff's claim) may be allowed. 337 Ill. App. 3d 1016 (1st Dist. 2003). In Hall v. Flowers, the Appellate Court held that it is not a Petrillo violation when ex parte communication occurred after the treating physician joined the hospital. 343 Ill. App. 3d 462 (4th Dist. 2003). These opinions might be affected by the 2004 amendments but no negative treatment is indicated in Shepard's.

[3] Although Ritter and Morgan were both decided prior to the 2000 and 2004 HLA amendments, their holdings and analyses were consistent with the updated HLA.

[4] After the 2004 amendments, no case directly addresses HLA section 6.17(e-5) and its application to the Petrillo doctrine, but in Aylward v. Settecase, the First District held that it is a Petrillo violation to communicate with a treating physician whose actions are not the potential basis for the hospital's liability. 409 Ill. App. 3d 831 (1st Dist. 2011). Aylward still cited to Petrillo, Ritter, Testin and Morgan.

all been held to be Petrillo violations. See Lewis, 234 Ill. App. 3d at 677, 679. A plaintiff can waive a Petrillo violation by failing to object until the time of trial. See Sottile v. Carney, 230 Ill. App. 3d 1023, 1028 (1st Dist. 1992). The sanction for a Petrillo violation is to bar the physician from testifying. See Requena, 212 Ill. App. 3d at 332; Moss v. Amira, 356 Ill. App. 3d 701, 709 (1st Dist. 2005). Another possible sanction is to award a new trial. Moss, 356 Ill. App. 3d at 706; Nastasi v. United Mine Workers of America Union Hosp., 209 Ill. App. 3d 830, 840 (5th Dist. 1991). There is no need to demonstrate prejudice in order to impose sanction. See Pourchot v. Commonwealth Edison, 224 Ill. App. 3d 634, 637 (3d Dist. 1992).

If the plaintiff's attorney is present at time of the interview with the doctor, there is no Petrillo violation. See Glassman v. St. Joseph Hosp., 259 Ill. App. 3d 730, 744 (1st Dist. 1994). Sending material to a doctor and telling him what you expect his opinions to be is a Petrillo violation. See Moss, 356 Ill. App. 3d at 709. It is also a Petrillo violation for defense counsel to hire as a consultant a physician who treated the plaintiff, even if the plaintiff agrees to this. Court should not have allowed his to testify. See San Roman v. Children's Heart Center, 2010 IL App (1st) 091217, P26 (Court should not have allowed the consultant to testify.) The same rules regarding the application of Petrillo in a hospital setting apply in the case of a medical corporation. See Testin, 238 Ill. App. 3d at 865.

Case name	Reporter	Court	Violati	Year	HLA related	Med mal case	Nature of communication
Petrillo v. Syntex Laboratories, Inc.	148 Ill. App. 3d 581 (1986)	Ill. App. 1st Dist.	Yes	1986	no	no	Forbids any ex parte communication
Ritter v. Rush-Presbyterian-St. Luke's Medical Center	177 Ill. App. 3d 313 (1988)	Ill. App. 1st Dist	Yes	1988	Yes	yes	Ex parte communication with staff p
Tomasovic v. American Honda Motor Co	171 Ill. App. 3d 979 (1988)	Ill. App. 1st Dist	No	1988	no	no	Doctor testify as admission of record
Roberson v. Liu	198 Ill. App. 3d 332 (1990)	Ill. App. 5th Dist.	Yes	1990	no	yes	Communication with a nurse is also
Nastasi v. United Mine Workers of America Union Hosp.	209 Ill. App. 3d 830 (1991)	Ill. App. 5th Dist.	Yes	1991	no	yes	Ex parte communication with forme
Requena v. Franciscan Sisters Health Care Corp	212 Ill. App. 3d 328 (1991)	Ill. App. 3d Dist	Yes	1991	no	yes	Ex parte communication with treatir
Wakeford v. Rodehouse Restaurants of Mo	223 Ill. App. 3d 31 (1991)	Ill. App. 5th Dist.	Yes	1991	no	no	Communication with a rehabilitatior
Young v. Makar	207 Ill. App. 3d 337 (1991)	Ill. App. 2d Dist.	Yes	1991	no	yes	Talking to a treating pyhician after fc
Lewis v. Illinois C. R. Co	234 Ill. App. 3d 669(1992)	Ill. App. 5th Dist.	Yes	1992	no	no	Defendant attorney sending letters t
Pourchot v. Commonwealth Edison Co	224 Ill. App. 3d 634 (1992)	Ill. App. 3d Dist.	Yes	1992	no	no	Ex parte communication which is ha
Scott v. Carney	230 Ill. App. 3d 1023 (1992)	Ill. App. 1st Dist	No	1992	no	yes	Patient waived his objection to an ex
Testin v. Dreyer Medical Clinic	238 Ill. App. 3d 883 (1992)	Ill. App. 2d Dist.	Yes	1992	maybe	yes	Employee was not the allegedly negl
Morgan v. County of Cook	252 Ill. App. 3d 947 (1993)	Ill. App. 1st Dist.	No	1993	no	yes	Communication with supervisor of t
Almgren v. Rush-Presbyterian-St. Luke's Medical Ctr.	162 Ill. 2d 205 (1994)	ILSC		1994	no	yes	Healthcare provider's motion to con trial court's orders
Glassman v. St. Joseph Hosp.	259 Ill.App. 3d 730 (1994)	Ill. App. 1st Dist.	No	1994	no	no	Plaintiff's attorney is present at the t
Best v. Taylor Mach. Works	179 Ill. 2d 367 (1997)	ILSC		1997	no	no	Portions of Civil Justice Reform Amer the privacy right
Kunkel v. Walton	179 Ill. 2d 519 (1997)	ILSC		1997	no	yes	Statute that compelled patient to pr described in Petrillo
Neade v. Portes	193 Ill. 2d 433 (2000)	ILSC		2000	no	maybe	Whether a doctor breached his fiduc
Burger v. Lutheran Gen. Hosp.	198 Ill. 2d 21 (2001)	ILSC	No	2001	yes	yes	Limited intrahospital communicatior agents, including counsel, irrespectiv
Hall v. Flowers	343 Ill. App. 3d 462 (2003)	Ill. App. 4th Dist.	No	2003	Yes	yes	Hospital was entitled to limited com
Szczanski v. Azaran (In re Med. Malpractice Cases Pending)	337 Ill. App. 3d 1016 (2003)	Ill. App. 1st Dist.	No	2003	Yes	yes	Communication with non-Morgan h
Moss v. Amira	356 Ill. App. 3d 701 (2005)	Ill. App. 1st Dist.	Yes	2005	no	no	Letter between Dr. and Defendant's
San Roman v. Children's Heart Ctr., Ltd.	2010 IL App (1st) 091217	Ill. App. 1st Dist.	Yes	2010	maybe	yes	Plaintiff's treating physician was also
Ayward v. Settecase	409 Ill. App. 3d 831 (2011)	Ill. App. 1st Dist.	Yes	2011	maybe	yes	Treating physician was hospital emp become a basis for liability later
Holman v. DePhillips	2011 Ill. App. Unpub. LEXIS 49	Ill. App. 1st Dist.	No	2011	no	no	Forum discovery does not violate Pe deposition questions.
Cozad v. CHW Displays, Inc.	2015 IL App (4th) 140294-U	Ill. App. 4th Dist.	Yes	2015	no	no	Defendants expert witness reviewec

PETRILLO + HOSPITAL LICENSING ACT = LAWYERS BEWARE

Judge Lynn M. Egan
Judge William E. Gomolinski

June 24, 2016

WHAT DOES IT MEAN?

Petrillo precludes communication between defense counsel and plaintiff's medical providers unless undertaken through the formal rules of discovery.

Petrillo v. Syntex Laboratories, 148 Ill.App.3d 581 (1st Dist., 1986), PLA denied 113 Ill.2d 571.

PURPOSE & BASIS

Purpose: To encourage full & candid communication between the physician & patient and to protect the patient's right to privacy.

Basis: Illinois public policy which strongly favors the confidential & fiduciary relationship that exists between a patient & his physician.

STATUTORY CODIFICATION

The physician-patient privilege has been codified in Illinois at *735 ILCS 5/8-802* & provides as follows:

"No physician or surgeon shall be permitted to disclose any information he or she may have acquired *in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient*…."

DOCTORS ONLY?

ABSOLUTELY NOT!

Petrillo applies to any healthcare provider responsible for the discharge of professional, fiduciary duties to a patient, including:

- Nurses - *Roberson v. Liu*, *198 Ill.App.3d 332* (5th Dist., 1990)
- Therapists - *People v. Kaiser*, *239 Ill.App.3d 295 (1992)*
- Dentists - *People v. Manos*, *202 Ill.2d 563 (2002)*
- And More...

WHY CARE?

Because *Petrillo* dictates the permissible method of obtaining evidence from healthcare providers & authorizes the following sanctions for violations:

- Barring evidence at trial
- Reversing verdicts
- Imposing monetary sanctions on attorneys
- Reporting attorneys to the ARDC

WHO CARES?

Everyone SHOULD!

Every case that includes medical testimony is subject to the *Petrillo* doctrine, including:

- Civil cases alleging personal injury
- Criminal cases
- Workers' Compensation
- Domestic Relations
- Arbitration

PATIENT CONSENT

"Confidentiality & patient consent are inextricably tied together."

Petrillo v. Syntex Laboratories, 148 Ill.App.3d 581, 593 (1st Dist., 1986).

- Although consent is a prerequisite to the disclosure of confidential information, it can be express or implied.
- Express consent usually involves a written waiver, but implied consent can take several forms. *Id. at 591.*

IMPLIED CONSENT

Two common examples of implied consent include:

- Filing suit
- By placing the medical condition "at issue."

IMPLIED CONSENT

Even though filing suit or putting a condition "at issue" provides implicit consent for healthcare providers to disclose medical information, there are important limitations.

- Disclosure is limited to relevant information, which means information related to the *specific* mental/physical condition the patient put at issue in the suit.
- Even if consent is undisputed, disclosure can only occur pursuant to formal discovery methods. *Ex parte* contact still verboten.

WAIVER

The privilege can also be waived by voluntary disclosure.

EXAMPLES

- Patient discussed information in group therapy sessions & with parole officer. *In re Detention of Kish, 395 Ill.App.3d 546 (3d Dist., 2009).*
- Wife directed her psychiatrist to give her records to her husband's attorney. *Gottemoller v. Gottemoller, 37 Ill.App.3d 689 (3d Dist., 1976).*
- Mother compared pregnancies/deliveries of siblings. *Kunz v. South Suburban Hosp., 326 Ill.App.3d 951 (1st Dist., 2001).*

ETHICS

It is unethical & a breach of the physician's fiduciary duty to the patient to disclose confidential information outside formal discovery methods. May be actionable – *Kim v. St. Elizabeth Hospital, 395 Ill.App.3d 1086 (5th Dist., 2009).*

- It is also unethical for an attorney to facilitate such disclosure. *Baylaender v. Method, 230 Ill.App.3d 610 (1st Dist., 1992).*

AT ISSUE

This is a specific exception to the physician-patient privilege. (*735 ILCS 5/8-802(4)*)

- Must be placed at issue by the *patient*, no exceptions.
- Determination starts with review of the pleadings.
- A claim for "pain & suffering" does not place mental health records "at issue." *Reda v. Advocate Health Care, 199 Ill.2d 47, 57-58 (2002).*
- A claim of brain injury does not place mental health records "at issue." *Id.*

ONE SUIT ONLY

Any waiver, whether express or implied, is limited to the specific suit in which it arose. *Reagan v. Searcy, 323 Ill.App.3d 393, 397 (5th Dist., 2001).*

CAUTION: Do not rely on *Gleason v. St. Elizabeth Medical Center.* It has been expressly overruled.

DON'T WANT TO TAKE A DEPOSITION?

- Obtain copies of medical records.

- Written questions pursuant to S.Ct.Rule 210.
  Holman v. DePhillips, 405 Ill.App.3d 1190 (1st Dist., 2011)(Rule permits cross-questions, redirect questions & re-cross questions. No parties, attorneys or interested parties can be present.).

REACH OF THE PRIVILEGE

Regulatory agencies. *People v. Manos, 202 Ill.2d 563 (2002)*

Worker's Comp claims. *Hydraulics, Inc. v. Industrial Comm., 329 Ill.App.3d 166 (2d Dist., 2002)*

- Non-physician therapists. *People v. Kaiser, 239 Ill.App.3d295 (2d Dist., 1992)*
- Sibling records, even if genetics a plausible defense. *Kunz v. South Suburban Hosp., 326 Ill.App.3d 951 (1st Dist., 2001)*
- Defense counsel sending records/depositions/R.213 answers to M.D. *Moss v. Amira, 356 Ill.App.3d 701 (1st Dist., 2005)*
- Defense counsel sending FNC affidavit to M.D. *Glassman v. St. Joseph Hosp., 259 Ill.App.3d 730 (1st Dist., 1994)*

AGREEMENTS MAY NOT MATTER

Defendant cannot use treating physician as trial expert even though doctor retained as expert *before* plaintiff sought care from him and all attorneys aware.

It is "irrelevant to this court how [the doctor's] unusual, dual affiliation came about & it makes no difference whether he deliberately or inadvertently accepted [plaintiff] as a new patient." *San Roman v. Children's Heart Center, Ltd., 2010 IL App (1st) 091217.*

NONPARTY INFO

As a general proposition, medical information about nonparty patients is privileged & nondiscoverable. *Ekstrom v. Temple, 197 Ill.App.3d 120 (2d Dist., 1990).*

The privilege doesn't yield even if the information is relevant & material to the pending suit. *House v. SwedishAmerican Hosp., 206 Ill.App.3d 437 (2d Dist., 1991).*

Doesn't even matter if the information is necessary in order to establish an element of the cause of action. *Glassman v. St. Joseph Hosp., 259 Ill.App.3d 730 (1st Dist., 1994).*

NONPARTY INFO

However, the privilege is not absolute. *Giangiulio v. Ingalls Memorial Hosp., 365 Ill.App.3d 823, 832 (1st Dist., 2006).* Caution is advised because the case law is not entirely consistent, particularly as it relates to redacting information.

May depend on the nature of the information & whether it relates to treatment, i.e., necessary for the performance of M.D.'s professional duty or provides insight into the patient's medical condition. *Tomczak v. Ingalls Memorial Hosp., 359 Ill.App.3d 448 (1st Dist., 2006).*

NONPARTY INFO

Facts unnecessary to a physician's professional responsibilities may be discoverable, such as

- Triage times
- Treatment times
- Triage acuity levels

Tomczak v. Ingalls Memorial Hospital, 359 Ill.App.3d 448 (1st Dist., 2006).

REDACTING

Early case law was mixed on the issue of whether redacting nonparty patient names & other identifying information was sufficient to protect the nonparty's right to privacy.

Insufficient	Sufficient
Ekstrom	*House*
Glassman	*Geisberger*
People v. Manos	*Giangiulio*

REDACTING: THE FINAL WORD?

In 2016, the Illinois Supreme Court upheld a production request for surgical "procedure summaries & case histories" concerning nonparty patients because "individual patient identifiers have either not been included or have already been redacted pursuant to the appellate court's judgment."

Klaine v. Southern Illinois Hospital Services, 2016 IL 118217, ¶ 42.

NOT PRIVILEGED

The physician-patient privilege does NOT apply to Rule 215 exams or reports. *Moore v. Centreville Township Hosp., 246 Ill.App.3d 579 (5th Dist., 1993).*

The information disclosed in the course of a Rule 215 exam can be used substantively or for impeachment purposes.

However, reluctant approach on production of Rule 215 reports from unrelated cases. *See, Moore & Salinque.*

DE MINIMUS

- Best practice is to confine all communications with treating physicians to methods authorized by the formal discovery rules.
- Rely on *de minimus* as a last resort & at your own risk!
- *Mahan* case is not a talisman. In fact, it has been characterized as "strays from the general trend which finds a *Petrillo* violation regardless of the nature of the contact." *Burns v. Michelotti, 237 Ill.App.3d 923, 930 (2d Dist., 1992).*

1. Ritter v. Rush-Presbyterian-St. Luke's Medical Center, 177 Ill. App. 3d 313 (1st Dist. 1988)

Summary: Ritter

- Patient filed malpractice action against hospital after she fell off a gurney. The case involves only the alleged negligence of non-physician employees. The hospital only contested damages. Hospital interviewed four treating physicians and defense counsel interviewed the treating physicians to prepare for trial.
- Plaintiff moved for sanctions at the start of trial. The trial court held Rush in contempt and barred Rush from calling five physicians as witnesses. Rush appealed.

Should the court affirm the trial court's ruling?

A. Yes
B. No

Answer

- Agency principles cannot abrogate the physician-patient privilege;
- Except malpractice of an employee-physician;
- Specifically excludes – nonphysician-employee of a hospital

2. Morgan v. County of Cook, 252 Ill. App. 3d 947 (1st Dist. 1993)

Summary: Morgan

- Plaintiff patient filed a medical malpractice action against a defendant hospital and doctor. Both doctor and doctor's supervisor tried to convince plaintiff to consent to surgery. The case involves only the conduct of a physician-employee. Defense counsel for the hospital and the doctor both made ex parte communication with the supervisor.
- Plaintiff filed a motion to bar the hospital and doctor from calling the doctor's supervisor to testify. The trial court granted the motion on the grounds that defendants engaged in improper ex parte conferences with a treating physician in violation of Petrillo. The jury returned a verdict in favor of the plaintiff. Defendants filed a motion for a new trial which was denied.

Should the court affirm the trial court's ruling?

A. Yes

B. No

Answer

- Physician-patient privilege does not apply when the medial entity wishes to communicate with the allegedly negligent physician
- In cases of vicarious liability for conduct of the treating physician the defendant hospital is included within the physician-patient privilege and the patient has implicitly consented to the release of his medical information to the defendant hospital's attorneys.

3. Burger v. Lutheran Gen. Hosp., 198 Ill. 2d 21 (2001)

Summary: Burger

- Plaintiff patient filed a medical malpractice suit naming four doctors, the hospital and the hospital's parent corporation as defendants. Plaintiff filed a motion to bar ex parte communication between the hospital's counsel and those members of its medical staff, agents, and employees who provided health care to plaintiff but were not named as defendants.

Burger (Cont.)

- The trial court barred any ex parte communication between hospital defense counsel or risk managers and any health-care provider of plaintiff for whose conduct plaintiff does not seek to hold the hospital vicariously liable. In addition, it entered a judgment order in favor of plaintiff, finding that (1) parts of 210 Ill. Comp. Stat. 85/6.17(d), (e), and all of 210 Ill. Comp. Stat. 85/6.17(h) violated the separation of powers doctrine; (2) 210 Ill. Comp. Stat. 85/6.17(d), (e) unreasonably invaded patients' constitutional privacy interests; (3) § 6.17(d), (e) was not impermissible special legislation in violation of Ill. Const. art. IV, § 13; and (4) the invalid parts of the HLA were severable.

How should the court rule on the constitutional challenges?

A. Constitutional
B. Unconstitutional

Answer

- Subsections (d), (e) and (h) of section 6.17 of the Hospital Licensing Act do not violate the separation of powers clause; and subsections (d) and (e) of section 6.17 do not violate a patient's right to privacy
- The provisions of the Act, including subparagraphs (d) and (e) of section 6.17, do not regulate "discovery."
- Instead, the Act provides standards and regulations intended to safeguard the public's health and welfare.
- The plain language of section 6.17 establishes that the communications allowed under subsections (d) and (e) are not triggered by litigation.

4. Hall v. Flowers, 343 Ill. App. 3d 462 (4th Dist. 2003)

Summary: Flowers

- Plaintiff filed a motion for a protective order to prevent counsel for defendants, a hospital and a radiological technician, from communicating ex parte with one of plaintiff's treating physicians, the surgeon. The surgeon performed carpal tunnel surgery on plaintiff and had staff privileges at the hospital. The trial court denied plaintiff's motion and granted defendants' motion for summary judgment.

Should the court affirm the summary judgment?

A. Yes

B. No

Answer

- The hospital was entitled to limited communications with the surgeon under an exception to the Petrillo doctrine found in 210 Ill. Comp. Stat. Ann. 85/6.17(b), (d), (e) (2000) of the Illinois Hospital Licensing Act.
- Where a patient institutes a legal action against a hospital, "the hospital is not a third party with respect to its own medical information, which is compiled by the hospital's own caregivers." Burger, 198 Ill. 2d 21 at 57.
- Summary judgment was appropriate because the plaintiff would not be able to carry his burden on the issue of causation without expert testimony

5. Szfranski v. Azaran (In re Med. Malpractice Cases Pending), 337 Ill. App. 3d 1016 (1st Dist. 2003)

Summary: Szfranski

- Plaintiffs, malpractice claimants in separate suits, filed motions for protective orders to prohibit communications between attorneys and agents of defendant hospitals and plaintiffs non-Morgan health care providers.
- The trial court ruled that the hospitals' counsel and its employees and agents could communicate ex parte with plaintiff's non-Morgan health care providers (those whose treatment was not alleged to have caused plaintiffs' injuries), but risk managers could not.

Should the court uphold the trial court's ruling?

A. Yes

B. No

Answer

- Under the HLA, after a medical negligence case has been filed against a hospital, the defendant hospital's counsel and those of its employees and agents responsible for peer review, defense of claims, quality assurance, utilization review, and risk management may communicate ex parte with the plaintiffs' non-Morgan health care providers who, in the course of their employment or affiliation with the defendant hospital, provided or assisted in providing care or treatment to the plaintiff
- If the hospital was able to access the patient's information prior to litigation because it was hospital information, it remains hospital information after litigation ensues.

6. Aylward v. Settecase, 409 Ill. App. 3d 831 (1st Dist. 2011)

Summary: Aylward

- Plaintiff patient filed suit against defendant doctor and his doctor's employer, co-defendant multi-specialty clinic. The clinic sought permission to communicate ex parte with various members of its staff who were involved in the patient's care but who were not named as defendants in the lawsuit, but whose actions may later become the basis for liability. The trial court prohibited the clinic from engaging in any such contact.

Should the court affirm the trial court's order?

A. Yes

B. No

Answer

- The clinic was prohibited from engaging in ex parte communications with the patient's treating physicians whose actions were not a potential basis for the clinic's liability.
- While the physician-patient privilege did not bar a the clinic from communicating with the allegedly negligent physician through whom it could be held vicariously liable, the privilege still protected the patient from disclosures by the physician-employees whose conduct was not a basis for the clinic's potential liability.

7. Cozad v. CHW Displays, Inc., 2015 IL App (4th) 140294-U

Summary: Cozad

- Defendant's attorney took depositions from three persons who provided mental-health services to plaintiff. In so doing, defendant's attorney failed to provide notice to plaintiff's counsel. At a subsequent jury trial, defendant introduced an expert who had reviewed the defense attorney's ex parte communications.
- The trial court allowed admission of the expert's testimony with the expert's assurance that he had not relied upon the ex parte communications in formulating his own opinions.

Should the court accept the trial court's admission of the evidence?

A. Yes

B. No

Answer

- Defendant's attorney failed to comply with Illinois Supreme Court Rule 206(a) requiring written notice in a reasonable time in advance be given to plaintiff's counsel. Failure to comply with this rule of discovery therefore constituted a violation of Petrillo for all three communications
- Defendant expert's opinion regarding plaintiff was "tainted" by the ex parte communications provided to him defendant's attorney
- Barring the evidence depositions themselves was an insufficient sanction
- Allowing him to testify in return for his hollow assurance that he would purge his mind of the depositions the sanctity and confidentiality of the physician-patient relationship
- Because the violations of Petrillo did not appear to be willful, a new trial (without the expert's testimony) would be a sufficient sanction