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CROSKY RE-VISITED - RESTRICTIONS TO EX PARTE MEETINGS REDUCED

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A recent federal court ruling has overturned a requirement established last February that plaintiff's counsel must be notified and consent given before an *ex parte* meeting with the plaintiff's treating physician can take place.

This latest ruling by U.S. District Court Judge Nancy Edmonds, in effect, provides defense counsel with much easier access to a plaintiff's subsequent treating physician(s). Prior to the judge's reversal, an opinion by the magistrate in the case of *Croskey v BMW of North America*, (No. 02-73747, rel'd 02/16/05), 2005 WL 1959452 (ED Mich) significantly handcuffed defense counsel when conducting *ex parte* meetings.

Following is a brief summary of select portions of the magistrate's opinion and how Judge Edmonds' order changed it.

In issuing his opinion last February, the magistrate held that the defendants could submit a protective order under 45 CFR 164.512(e)(1) to satisfy HIPAA's requirements and to obtain a meeting with the plaintiff's subsequent treating physicians. In addition to requesting a qualified protective order, the magistrate required the defendants to give notice to plaintiff's counsel of their desire to conduct an *ex parte* meeting with the plaintiff's treating physician(s) and to give notice to the treating physicians that such a meeting is not required.

The judge, in her new order, affirmed two parts of the magistrate's opinion. She held that the magistrate was correct in requiring the defendants to request a qualified protective order, as long as it met the following criteria: (1) The qualified protective order must prohibit the defendant from disclosing the plaintiff's protected information beyond the purposes of the litigation; (2) It must also mandate that the defendant return or destroy the protected information after the litigation has concluded.

Additionally, Judge Edmonds held that the magistrate was correct in requiring notice to the treating

physician that he or she need not answer the defendant's questions. Judge Edmonds ruled that the clear and explicit notice to the plaintiff's treating physician(s) requires both the purpose of the interview and the fact that the interview is not required.

The judge went on to reverse the magistrate's holding that plaintiff's counsel be notified and consent granted for *ex parte* meetings before they occur. Judge Edmonds held that the notice to plaintiff's counsel would be superfluous and is not required under HIPAA's guidelines.

In assessing the effect of the judge's order on the state of the law, it is important to note her opinion is not considered a binding precedent because *Croskey* is a federal court case. However, a federal court sitting in diversity pursuant to the Federal Rules of Evidence applies the state's rules of privilege. Therefore, Judge Edmonds' reasoning was based on Michigan case law and should be considered persuasive by Michigan's judiciary.

For a complete copy of the order by Judge Edmonds in *Croskey v BMW of North America*, [click here](#).

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