



## OUR OWN EMPLOYEES PROVIDED MEDICAL CARE AND HAVE CRITICAL INFORMATION ABOUT WHAT HAPPENED

Can We Ask Them about It?

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## NOT-SO-HYPOTHETICAL:

- Patient admitted to hospital for five days
- Seen daily by nurses
- Visited by four specialists
- Patient later files Complaint with IDOI against hospital and one specialist
- Complaint does not name some of the treating doctors
- Those treating doctors are employees of the hospital



## QUESTION?

- Can risk management and hospital counsel talk to the employed treating doctors?
- Legally it would be considered “ex parte” contact with a Plaintiff’s treating doctor



## ISSUE:

- General rule in Indiana does not allow ex parte communication with Plaintiffs' treating doctors
- Consolidation of medical care and hospitals employing doctors make this a very real problem



## OUR CASE:

- Patient with back pain presented in emergency room
- Admitted for surgery consult the next day
- Employed surgeon performed back surgery next day
- Patient filed IDOI Complaint against hospital
- Complaint did not name the employed surgeon as a Defendant
- Patient's counsel requested deposition of employed surgeon
- We notified counsel we would meet with the surgeon prior to deposition because he was an employee of our client – the hospital
- Patient's counsel objected



# INDIANA GENERAL RULE – EX PARTE COMMUNICATION WITH PLAINTIFF'S TREATING DOCTORS

- *Cua v. Morrison*
- Very clear, bright-line rule
- Any Ex Parte contact with Plaintiff's treating doctors is absolutely prohibited
- Based on the doctor-patient privilege
- BUT, this is primarily car accident type situation
- Should this apply when doctor is defendant's employee?



## OPTIONS – RISKS – PRACTICALITY:

- Depositions of employed doctors?
- Risk of exposing damaging or unfiltered information to Plaintiff's counsel
- Inability to properly review case with doctor and prepare for deposition
- Proceed with speaking with employed doctors
- Ethical risk for Ex Parte contact in violation *Cua* Rule
- Risk of objection by counsel and sanction by the court



## OPTIONS – RISKS – PRACTICALITY:

- Provide list of questions to Risk Manager to speak with doctors
- No opportunity for follow up discussion
- Unlikely to actually shield from ex parte issues
- Hire separate counsel for employed doctors
- Added expense multiplied by many providers who treated patient
- Unworkable that hospital's own counsel cannot talk to hospital employee without counsel present





## OUR APPROACH AND STRATEGY

- Filed a Motion for Preliminary Determination of Law
- Sought Court Order permitting ex parte contact because surgeon is employee of hospital
- No case law in Indiana addressing this issue
- Case law from other states showed definite progression of rulings allowing ex parte contact
- Focus is on agency law, rather than doctor-patient privilege



## 2005 – *STEPHENS V. GALEN HEALTH CENTER* - FLORIDA

- Patient died while at hospital
- Claim was against nursing and staff of hospital
- Claim did not name any of the treating doctors
- Defendants sought Court Order permitting ex parte contact
- Trial Court permitted contact and on appeal it was upheld:
- [W]hen a patient reveals confidential information to a health care provider who is *employed by* or is an *agent of* a hospital corporation, a doctor is not disclosing that information in violation of doctor/patient privilege by discussing the patient information with the hospital's risk manager, for example.



## 2010 – *LEE MEMORIAL HEALTH SYSTEM* *V. SMITH* - FLORIDA

- Patient was an infant and parents claimed permanent injuries
- Complaint named hospital, but not treating doctors employed by hospital
- Patient counsel actually went to Court first to prevent ex parte communications
- Court gave counsel a protective order prohibiting the hospital from communicating with its own employed doctors based on doctor-patient privilege
- Court of Appeals relied on prior *Stephens* case and reversed:
- Does not apply to communications between a hospital and its employee physicians because no ‘disclosure’ occurs when a hospital and its employees discuss information obtained in the course of employment



## 2011 – *PHOENIX CHILDREN'S HOSPITAL, INC. V. GRANT- ARIZONA*

- Patient was infant at hospital for many months
- Claim was only against hospital and its nurse related to placement of feeding tube in lung
- Claim did not name any of her treating doctors employed by the hospital
- Again, counsel went to court first
- Obtained Court Order precluding any ex parte contact with treating doctors
- Patient's counsel then asked to depose one of those doctors
- Hospital filed motion with Court to permit ex parte communication
- Court denied, AND ordered hospital to hire separate counsel for employed treating doctors
- On appeal, the Court referred to the prior cases of *Stephens* and *Lee*
- Importantly noted that a privilege does not automatically apply
- Privileges prevent facts from disclosure and are to be carefully applied
- Court made very important point that knowledge of an employee is imputed to the employer
- Appeals Court followed prior cases and allowed ex parte communication:
- The treating physicians are employees of [the hospital]. Their knowledge of [plaintiff] exists because they are treating her as agents and employees of the hospital, and that knowledge is presumptively shared with their employer.



## 2013 – *BOULA V. UNITED STATES* – NORTH CAROLINA FEDERAL COURT

- Medical institution was the Defendant
- A number of treating doctors were not named as parties
- Patient's counsel objected to email communications to treating doctors about testifying
- No North Carolina case law addressing this issue
- Federal Court must apply state law as it believes State Court would
- Court cited to *Phoenix* case and held North Carolina would adopt that reasoning
- [t]he privacy and confidentiality concerns are substantially, if not completely, eliminated when the treating physician is employed by the defendant medical center.



## 2014 – *HALL V. CRENSHAW* - TENNESSEE

- Wrongful death related to care at clinic
- Claimed named clinic only
- Wanted to depose the treating physicians owners who were also employees of the clinic
- Physicians were not Defendants in the case
- Counsel for the clinic asked the Court for permission to speak with treating doctors
- Trial Court denied AND entered protective order precluding ex parte contact
- On Appeal, the Court cited to *Phoenix*, *Stephens*, and *Boula* cases
- Focused on the ability of corporations to communicate with its own employees, and not doctor-patient privilege:
- A corporate defendant has an independent right to speak freely with its own employees, springing from the employer-employee relationship, and the fact that the plaintiff had filed a lawsuit does not serve to bar communications that are otherwise allowed.



## ONE STATE OUTLIER

- **Washington**
- 1988 case – *Louden v. Mhyre*
- Court reviewed all the other case law from other states but rejected it based on doctor-patient privilege
- 2014 case – *Youngs v. Peacehealth*
- Severely chipped away at prior rule
- Modified their prior rule and allowed ex parte communications when the attorney represents the employer of the doctor, and the communication is strictly limited to facts of the alleged negligence



## APPLICATION OF RULE TO INDIANA

- In our case we argued that doctor-patient privilege is created by statute and must be strictly applied
- Focused on Indiana corporate law that an employer is presumed to have the knowledge of employees
- Hospital is presumed to have knowledge its employed doctors gain by treating patients
- Trial Court granted our Motion and permitted ex parte contact with hospital's employed surgeon
- Unfortunately, Plaintiff's counsel did not appeal this issue
- Still no definitive case law on this question in Indiana





# PRACTICAL CONSIDERATIONS AND OPEN QUESTIONS

- Most likely this will only be an issue in litigation situation
- Normal Root Cause Analysis and Peer Review should not be implicated
- Indiana has strong Peer Review statutory protections for these investigations
- Other states' case law appears to favor ex parte communications
- Safest to seek Court permission first because it is contrary to existing rules on communicating with treating doctors
- Unclear if this would apply to medical staff who is not employed
- Unclear if nurse practitioner is PRN vs. full time
- Unclear if treating doctor is employed and represented by different counsel
- Unclear if locum tenens would be considered employee or ex parte purposes
- If uncertain consult with hospital counsel

