

Don't Ask the Doctor: The Prohibition on Ex Parte Communications with Non-Party Treating Physicians

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For my entire legal career, I have known that when I am defending a case in Mississippi, I cannot have *ex parte* communications with plaintiff's treating physicians, i.e., I cannot speak with plaintiff's treating physicians about plaintiff's condition and/or treatment without plaintiff or his representative being present. I often get puzzled looks from out-of-state lawyers, who cannot imagine properly defending a personal injury case without having candid conversations alone with plaintiff's doctors. Recently, I was called upon to give out-of-state counsel a better answer than my standard "just 'cause." She wanted to know *why*. So I took a minute to look up the answer again. Here is the explanation for the folks out there (like me) who know this rule of law, but who have forgotten the exact details of "why."

Scope of Physician-Patient Privilege and Waiver

Discovery is only allowed of relevant, non-privileged information. Miss. R. Civ. P. 26(b)(1). Certain medical information, such as communications between a patient and his medical providers, are deemed to be privileged. Therefore, even if the information is relevant, it ordinarily is not discoverable. An examination of the physician-patient privilege is the starting point to explain the prohibition on *ex parte* communications with treating physicians.

In Mississippi, the scope of the physician-patient privilege and the conditions under which it can be waived were concepts originally governed by statute. *See*

Miss. Code Ann. § 13-1-21 (Rev. 2002). Effective January 1, 1986, Mississippi adopted formal Rules of Evidence, including Rule 503 which governs this privilege and its waiver. There currently appears to be a conflict in the case law as to whether the Rules of Evidence supercede prior evidentiary statutes such as Miss. Code Ann. § 13-1-21, or whether both the rule and the statute govern issues of privilege. *See Franklin Collection Service, Inc. v. Kyle*, 955 So. 2d 284, 288 (Miss. 2007) ("Because Section 13-1-21 is an evidentiary statute, its provisions are subject to, and superseded by, provisions of the Mississippi Rules of Evidence."). *But see Thornton v. Statcare, PLLC*, 988 So. 2d 387, 390 (Miss. Ct. App. 2008) (applying both the statute and the rule to privilege issue and citing *Kyle* as support). There is at least an argument that either or both can apply to any issue of privilege, so both are briefly examined below.

Miss. R. Evid. 503 and Waiver

The privilege created by Rule 503 allows a patient to refuse to disclose (and to prevent others from disclosing): 1) knowledge derived by the treater by virtue of his professional relationship with the patient; and 2) confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional condition. Miss. R. Evid. 503(b).

Knowledge derived by the treater has been held to include such things as test names and results. *Kyle*, 955 So. 2d at 289. A communication is deemed

confidential if it was not intended to be disclosed to a third person except in the context of facilitating treatment. The third persons to whom disclosures can be made without destroying confidentiality include not only the treaters themselves, but also other persons needed to facilitate the treatment or the communication, such as family members. Miss. R. Evid. 503(a)(4); *Roman Catholic Diocese of Jackson v. Morrison*, 905 So. 2d 1213, 1219 (Miss. 2005) (disclosure to Diocese of priests' counseling for sexual molestation of children did not waive privilege). The privilege applies to communications with licensed physicians treating physical, mental or emotional conditions, as well as licensed or certified psychologists, and is more properly referred to as the "Physician and Psychotherapist – Patient Privilege." Miss. R. Evid. 503(a)(1) and (2). The privilege also applies to communications with any person a patient reasonably believes to be such a treater. *Id.* The privilege does not apply to communications with licensed social workers. *Touchstone v. Touchstone*, 682 So. 2d 374, 376 (Miss. 1996).

The privilege belongs only to the patient. *Scott v. Flynt*, 704 So. 2d 998, 1004-05 (Miss. 1996). It can be claimed by a living patient, by a living patient's guardian or conservator, or by the personal representative of a deceased patient. Miss. R. Evid. 503(c). A treater may claim the privilege, but only on behalf of the patient. *Id.*

Miss. R. Evid. 503(d) sets forth four specific instances when the privilege is held not to exist: 1) commitment proceedings; 2) court-ordered physical or mental examinations; 3) a breach of duty dispute between the physician/psychotherapist and the patient (i.e., a malpractice claim or a medical fee dispute); and 4) communications that a court, in its discretion, deems relevant to certain custody, visitation, adoption or termination actions. *Id.*

Because the privilege belongs to the patient, only the patient can waive it. Miss. R. Evid. 503(c). The rule describes two

specific actions by a patient that constitute waiver: 1) delivery of written notice or the filing of a claim against a person for professional services rendered (i.e., a malpractice claim); and 2) placing any aspect of his physical, mental or emotional condition at issue in his pleadings (such as by a request for damages). Miss. R. Evid. 503(e) and (f). Waiver of the privilege, however, is limited and conditional in both personal injury actions and medical malpractice actions. *Scott*, 704 So. 2d at 1000-01, 1003. The party is deemed to have waived the privilege only to the extent he places his condition at issue, and thus, only information relevant to that specific condition is discoverable. Any aspect of his condition that is not placed at issue in his pleadings remains privileged. *Id.* Statements about non-medical issues, such as the cause of the accident that led to the condition at issue, also remain privileged. *Sessums v. McFall*, 551 So. 2d 178 (Miss. 1989) (filing of suit for injuries sustained in motorcycle accident did not waive privilege as to statements made to physician about cause of accident).

Miss. Code Ann. § 13-1-21 and Waiver

The physician-patient privilege originally created by the statute is somewhat more narrow. It applies only to communications made to certain treaters during their course of care of the patient. Miss Code Ann. § 13-1-21(1); *Kyle*, 955 So. 2d at 289. The statute specifically enumerates a variety of treaters providing physical care: physicians, osteopaths, dentists, hospitals, nurses, pharmacists, podiatrists, optometrists, and chiropractors. Miss. Code Ann. § 13-1-21(1). No privilege is enumerated, however, for mental health professionals. *Id.* Further, the statute unlike the rule does not protect communications to persons reasonably believed to be treaters or communications to other third parties needed to facilitate treatment.

The statute provides that a living person and the personal representative or legal heirs of a deceased person may waive the privilege created by the statute. *Id.* The statute provides three specific instances in which the privilege will be deemed to be waived. First, waiver will be implied as to the release of medical information to health

care personnel, the State Board of Health or local health departments to comply with certain public health regulations such as those pertaining to the reporting of communicable diseases. Second, delivery of written notice of a claim or commencement of an action against a treater for professional services rendered constitutes waiver of the privilege as to all medical information relevant to the allegations. Miss. Code Ann. § 13-1-21(4). Lastly, waiver – except as to information identifying the plaintiff – is implied in any disciplinary action commenced against a treater. Miss. Code Ann. § 13-1-21(5). Again, however, the waiver is limited to only the condition placed at issue. *Scott*, 704 So.2d at 1003.

The Prohibition On Ex Parte Physician Communication

So where does this conditional waiver of the privilege leave us as far as the ability to talk with plaintiff's treating physicians without the plaintiff (or his representative) being present? It would seem that if the privilege is waived at least in part, an attorney could speak directly with the doctor about those now unprivileged issues. The Mississippi Courts have not agreed.

Miss. R. Evid. 503(f), which recognizes the conditional waiver made when a party places his physical, mental or emotional condition at issue, expressly states: "This exception does not authorize *ex parte* contact by the opposing party." *Id.* This sentence, however, has resulted in as much confusion as clarification about whether *ex parte* contacts are actually *prohibited* under Mississippi law. Lack of authorization is not the equivalent of an actual prohibition.

Even without an express prohibition in the rule, however, the Mississippi Supreme Court has stretched Rule 503 to effectively prohibit *ex parte* contacts. *Scott*, 704 So.2d at 1007. In *Scott*, the Supreme Court noted that Rule 503 expressly declares the patient as the holder of the privilege and the comment to the rule expressly provides that only the patient can waive the privilege. *Id.* at 1004-05; Miss R. Evid. 503(c) and comment. The Court reasoned that to allow a physician to speak *ex parte* with opposing counsel would place

the physician, rather than the patient, in control of determining what information is or is not privileged and thus is or is not able to be disclosed. *Id.* at 1005.

To protect the patient's privilege, the Court held it necessary for a patient to be given notice of any *ex parte* contacts with his physicians and the right to prevent them. *Id.* at 1006. The Court further held that even though the privilege may be conditionally waived (e.g., by a request for damages in a lawsuit), the relevant medical information will only be admissible if it is acquired through: 1) a voluntary and consensual disclosure by the patient; or 2) the formal discovery mechanisms provided in the Rules of Civil Procedure. *Id.* at 1007. *Ex parte* communications are not a formal discovery mechanism. By erecting this evidentiary barrier to evidence gathered through *ex parte* communications, the Court has effectively used an evidentiary rule to prohibit *ex parte* contacts even though they occur outside a courtroom. *Scott*, 704 So.2d at 1006-1007 (reaffirmed in *Johnson v. Mem. Hosp. at Gulfport*, 732 So. 2d 864 (Miss. 1998)). *But see, Griffin v. McKenney*, 877 So. 2d 425, 442 (Miss. Ct. App. 2003) (holding that the *Scott* opinion does not prohibit *ex parte* communications but simply makes them inadmissible.)

Authorization of Ex Parte Physician Communication by Plaintiff

The evidentiary barrier to evidence gathered through *ex parte* communications applies only to *ex parte* contacts without prior patient consent. *Scott*, 704 So. 2d at 1007. Thus, a patient himself can authorize such contacts. This rarely, if ever, happens. In fact, I have never had a plaintiff agree to allow me to speak to his physicians without his attorney present. But it is permissible, and thus, perhaps worth asking the plaintiff.

Conclusion

So there you have it. The physician-patient privilege is treated with great importance in Mississippi. For the most part, the patient is the master of the privilege. *Ex parte* communications with the plaintiff's treating physician are not permitted unless the plaintiff consents to them. ■