THE TENSION BETWEEN THE PHYSICIAN/PATIENT PRIVILEGE AND DISCLOSURE REQUIREMENTS IN THIRD PARTY AND UNINSURED MOTORIST CASES
The Defense Perspective

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Background

When it becomes time for a plaintiff in a personal injury suit to file Initial Disclosures under C.R.C.P. 26(a)(1), that person must provide to the other parties information about "each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings" as well as a listing of documents that are "relevant to disputed facts alleged with particularity in the pleadings". *See* C.R.C.P. 26(a)(1)(A) and (B). Additionally, the rule requires that plaintiff 'make available for inspection and copying" documents containing relevant information, "as though a request for production of those documents had been served pursuant to C.R.C.P. 34." See C.R.C.P. 26(a)(1)(B). Unfortunately, plaintiffs and defendants often disagree about what is "relevant", and thus what the scope of required disclosures are, particularly when it comes to the disclosure of medical records.

What Medical Records are "Relevant" For the Purposes of Disclosure?

The definition of "relevant evidence" in the Colorado Rules of Evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." C.R.E. 401. When a party alleges physical injury as a basis for a claim for damages, that party puts his or her physical condition an issue in that case. Plaintiff's medical records, which are arguably the best source of information about a person's physical condition, contain information that might reasonably lead to the discovery of admissible evidence on either plaintiff's claims or defendant's affirmative defenses. The parties often reasonably dispute the time period for which medical records may be "relevant". Are only medical records that post date a particular accident relevant? What about records for five years prior to the accident? Ten years? These questions are not resolved by any black letter law. The period of time for which medical records might be "relevant" depends largely on the facts of the case. The broader a plaintiff's claims of injury, the more medical records become relevant. For example, some plaintiffs claim that due to a particular accident they can no longer obtain "benefits such as health insurance, dental insurance and vision insurance which was previously affordable to plaintiffs". Defendants would argue that such a claim makes virtually all of plaintiff's medical records discoverable.

Can Plaintiffs Withhold Medical Records from Production?

In Colorado, a plaintiff has the right to claim a physician-patient privilege over certain documents and things in plaintiff's custody or control. Colorado's physician-patient privilege is codified in § 13–90–107 C.R.S., and it provides that a "physician, surgeon, or registered professional nurse ... shall not be examined without the consent of his or her patient as to any information acquired in attending the patient that was necessary to enable him or her to prescribe or act for the patient ...." § 13–90–107(1)(d). In *Weil v. Dillon Cos., Inc.*, 109 P.3d 127, 129 (Colo. 2005) the Colorado Supreme Court ruled that the privilege applies in the pretrial discovery setting. If such a privilege is to be used to withhold information from Initial Disclosure, C.R.C.P. 26(b)(5) requires that the party withholding information, "shall make the [privilege] claim expressly and shall describe the nature of the

documents, communications or things not produced in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."

Timing of Disclosures and Privilege Log

From the defense perspective, C.R.C.P. 26(b)(5) requires that a Privilege Log be submitted with the Initial Disclosures, within 30 days of the at issue date. From this defense perspective, because historical medical records virtually always contain information about plaintiff's physical and mental condition prior to an accident, such records must be obtained by plaintiff's counsel sufficiently in advance of commencing litigation to allow for a Privilege Log to be prepared for those records and submitted with the Initial Disclosures. From the defense perspective, if there are numerous delays associated with production of medical records and adequate privilege logs, the harsh remedy of waiver may be appropriate. *Atteberry v. Longmont United Hospital*, 221 F.R.D. 644 (D. Colo. 2004).

What Information Should the Privilege Log Contain?

In addition to the Rules of Procedure, case law gives guidance with respect to what must be produced with Initial Disclosures if privilege is being asserted as the basis to withhold information. Records for which a plaintiff contends a physician-patient privilege has been retained "must be listed document by document and described" so that the defendant and the trial court can assess the applicability of the privilege. *In re Alcon v. Spicer*, 113 P.3d 735, 742 (Colo. 2005). Medical records must be described with enough specificity that the defendant and, if necessary, the trial court, can assess whether the record is indeed protected by the privilege. *Id.*

The burden of proof with respect to whether a record is protected by privilege is on the party asserting that the privilege applies. *Hartmann v. Nordin*, 147 P.3d 43, 51 (Colo. 2006). Pursuant to Alcon, "the party asserting the privilege must expend the bulk of the effort by compiling the privilege log." *Alcon*, 113 P.3d at 742. From the defense perspective, a sufficient privilege log should include the following information:

1. the bates number of the document;
2. the date the document was prepared;
3. the identity of the document prepared, and individuals to whom it was sent and copied (not only might this impact whether the document is indeed privileged, but also identifying this information in the disclosure will often alert both parties to the presence of other health care providers whose records will need to be obtained and reviewed for privilege);
4. the medical specialty of the person preparing the document; and
5. the basis for withholding the document.

(From the defense perspective, medical records that include a comprehensive medical history, review of symptoms, or patient health questionnaire are likely to contain relevant and discoverable information.) Once a privilege log is produced that contains information sufficient to put the parties and court on notice as to what the basis is for plaintiff's privilege claim, the parties can confer about whether there is an argument that the documents should be produced.

What Waivers Might Apply?

A plaintiff who claims that they were injured in a particular event waives any right to claim a physician-patient privilege with respect to the medical conditions at issue in the case. *Samms v. District Court*, 908 P.2d 520, 527 (Colo. 1995). The scope of the waiver turns on the types of claims asserted by the plaintiff. *Id*. at 524. If a plaintiff makes claims that he or she was physically harmed due to the negligence of defendant, then the plaintiff waives the privilege as to the "the cause and extent of the injuries and damages claimed". *Cardenas v. Jerath*, 180 P.3d 415, 421 (Colo. 2008). If a party affirmatively asserts that a physical injury is the

basis for a claim for damages, to uphold a medical privilege with respect to that condition would be to allow the party to use the physician-patient "privilege as a sword rather than a shield." *Clark v. District Court*, 668 P.2d 3, 10 (Colo. 1983) (*quoting Koump v. Smith*, 25 N.Y.2d 287, 294, 250 N.E.2d 857, 861, 303 N.Y.S.2d 858, 864 (1969)). A plaintiff making a claim for personal injuries must be prepared to allow the defendant to examine and understand the plaintiff's alleged injuries. *See Tyler v. Denver Dist. Court*, 561 P.2d 1260, 1263 (Colo. 1977).

<u>What Happens After Production of the Privilege Log?</u>

Often even after a privilege log is produced, the parties may still dispute whether or to what extent the privilege applies over certain documents listed on the privilege log. Under these circumstances, the plaintiff may submit records to the Court for in camera review. In these circumstances plaintiff must be able to take the position that the record contains no information relevant to plaintiff's claims or defendant's affirmative defenses in the suit. The defendant must be able to take the position that the records are relevant in some way to plaintiff's claims. Sometimes a defendant may need to obtain information from medical experts to explain to the Court the relevance of a record listed on a privilege log when the information on the privilege log does not directly implicate the claims of injury made by a plaintiff. For example, in a closed head injury case a plaintiff may seek to withhold records relating to sleep complaints, evaluation for sleeping problems, diagnosis of sleeping disorder and treatment for the disorder. At first blush these records might not appear relevant to a closed head injury claim. However, consultation with a neuropsychologist should reveal that sleep difficulties often cause the same types of cognitive symptoms often associated with closed head injuries.

<u>Additional Requirements in First Party (UM/UIM Cases)</u>

When a plaintiff initiates a claim against his or her own insurance company, additional issues must be considered. Often insurance policies require cooperation from the insured seeking to recover benefits under a particular policy. The policy may specifically require that the plaintiff provide medical records, and medical records releases so that the insurer can fully evaluate plaintiff's claims.

<u>Conclusion</u>

While it is true that plaintiffs have a right to claim a physician patient privilege over medical records, plaintiffs can waive that privilege. From the defense perspective, it is difficult to fully evaluate a personal injury case if it appears that plaintiff's medical records are incomplete. Both parties have an interest in the efficient evaluation of personal injury cases. It may be most efficient for counsel for both parties to confer in the Rule 16 conference about the scope of medical record production so as to avoid drawn out and protracted Motions and Hearing practices on these issues.