

EVIDENCE AND EXPERT TESTIMONY BEST PRACTICES: ETHICS, EVIDENCE, AND EXPERTS

By:

Jennifer Dominelli Lecakes
Flink Smith LLC

(A) Confidentiality and Privileged Communications with Experts

(1) Background

Attorneys should be cautious communicating with physician-experts in order to protect patient-physician rights. It is also important because the Court of Appeals has emphasized the importance of “avenues of informal discovery of information that [might] serve both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes.” *Arons v. Jutkowitz*, 850 N.Y.S.2d 345, 350 (2007) (citing *Niesig v. Team I*, 559 N.Y.S.2d 493 (1990)). The Court of Appeals also emphasized the “importance of informal discovery practices in litigation – in particular, private interviews of fact witnesses.” *Arons*, 850 N.Y.S.2d at 350 (2007). The Court looked to cases involving non-physician experts and held that “[w]e see no reason why a non-party treating physician should be less available for an off-the-record interview.” *Arons*, 850 N.Y.S.2d at 351.

As the Court of Appeals noted in *Dillenbeck v. Hess*, that at common law, “confidential communications between physicians and patients received no protection against disclosure in a legal proceeding, however unethical such disclosure may have been viewed when occurring outside the courtroom. *Dillenbeck v. Hess*, 73 N.Y.2d 278, 283 (1989). New York State was the first to depart from the common law rule in 1828, when New York adopted the physician-patient privilege statute. *Id.* at 284. The Court of Appeals cited itself, when noting that “the disclosure by a physician, whether voluntary or involuntary, of the secrets acquired by him while attending upon a patient in his professional capacity, naturally shocks our sense of decency and propriety, and this is one reason why the law forbids it.” *Dillenbeck*, 73 N.Y.2d at 285, citing *Davis v. Supreme Lodge, Knights of Honor*, 165 N.Y. 159 (1900).

In response to concerns of overreaching in *ex-parte* interviews of adversary's physicians, the Court of Appeals offered a cautionary note: "it is of course assumed that attorneys would make their identity and interest known to interviewees and comport themselves ethically." *Arons*, 850 N.Y.S.2d at 350 (2007) (citing *Niesig*, 559 N.Y.S.2d 493).

(2) Court Orders and HIPAA Requirements for Ex Parte Interview of Adversary's Treating Physician

(a) A court order is not required for *ex parte* interview of adversary's treating physician in New York State courts

A court order is not required for *ex parte* interviews of an adversary's treating physician; a litigant is "deemed to have waived the [physician-patient] privilege when, in bringing or defending a personal injury action, that person has affirmatively placed his or her mental or physical condition in issue." *Arons*, 850 N.Y.S.2d at 351 (citing cases). The Court of Appeals rationale is that a "party should not be permitted to affirmatively assert a medical condition in seeking damages or in defending against liability while simultaneously relying on the confidential physician-patient relationship as a sword to thwart the opposition in its efforts to uncover facts critical to disputing the party's claim." *Arons*, 850 N.Y.S.2d at 351-352, (citing *Dillenbeck v. Hess*, 73 N.Y.2d 278, 287 (1989)).

(b) HIPAA authorizations requirement for *ex parte* interview of adversary's treating physician

Although a court order is not required, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) imposes procedural prerequisites unique to the informal discovery of health care professionals. *Arons*, 850 N.Y.S.2d at 347. See 45 C.F.R. §160 *et seq.* See also 45 C.F.R. §164 *et seq.* The HIPAA privacy rule "forbids an organization subject to its requirements (a "covered entity") from using or disclosing an individual's health information ("protected health information") except as mandated or permitted by its provisions." *Arons*, 850 N.Y.S.2d at 354. See 45 C.F.R. §164.502[a]. A "covered entity" includes, but is not limited to "health plans, health care clearinghouses and health care providers, such as physicians, hospitals and HMOs." *Arons*, 850 N.Y.S.2d at 354. See 45 C.F.R. §160.103. 45 C.F.R. §160.103 defines "protected health information" as "any individually identifiable health information held or transmitted by a covered entity in any form or medium, whether electronic, paper or oral." *Discussed in Arons* 850, N.Y.S.2d at 354.

An attorney must comply with HIPAA; a valid HIPAA authorization must be signed expressly permitting the physician to conduct the interview. An authorization is valid if it comports with the provisions of 45

C.F.R. §164.508(b)(1). As the plaintiff has waived the patient-physician privilege when they brought their medical condition into controversy, there is “no basis for their refusal to furnish the requested HIPAA-compliant authorizations.” *Arons*, 850 N.Y.S.2d at 356.

If the attorney does not have a valid HIPAA authorization, the attorney may alternatively seek a court or administrative order, issue a subpoena, make a discovery request, or use other lawful processes “with satisfactory assurances relating to either notification or a qualified protective order.” *Arons*, 850 N.Y.S.2d at 356. Note that under 65 Fed. Reg. 82462, 82657, “nothing in the rule requires covered entities to act on authorizations that they receive, even if those authorizations are valid. A covered entity presented with an authorization is permitted to make the disclosure authorized, but is not required to do so.” *Discussed in Arons*, 850 N.Y.S.2d at 355.

(3) Ethical Guidelines for *Ex Parte* Interview with Adversary’s Treating Physician

Although there is no across-the-board ban on *ex parte* communication in New York State courts, it is important for attorneys to be cautious when preparing for and conducting an *ex parte* interview with an adversary’s treating physician.

(a) Advise physician of your interest in the litigation and whom you represent

The adversary’s treating physician should be immediately notified of your interest in the litigation and whom you represent. This is an important preliminary step, as communications must cease with the adversary’s treating physician if they are represented by counsel or are also a party to the litigation. See *Niesig v. Team I*, 559 N.Y.S.2d 493 (1990). In *Niesig*, the New York Court of Appeals held that if the physician is represented by counsel, subsequent communication must be directed through the physician’s attorney.

(b) Direct interviewee to not disclose privileged or confidential information or answer questions that would lead to disclosure of privileged or confidential information

If the *ex parte* interview occurs, the physician should be directed not to disclose privileged or confidential information. Making this clear is important for the attorney as well as the physician; the physician may face civil liability if he or she improperly reveals medical information that was not at issue in the current litigation. To avoid improperly disclosing confidential or privileged information, the doctor may consult with their

own attorney to determine the exact scope of the waiver, so as to avoid exceeding its scope.

Courts have recognized that doctors may be susceptible to revealing medical information not at issue in the current litigation. A physician is not likely trained to know what information can be disclosed under the waiver of patient-physician privilege and what information remains protected by the fiduciary duty of confidentiality between the physician and his patient. See *Sorenson v. Barbuto*, 177 P.3d 614, 620 (Utah 2008) (discussing how physicians are not likely trained to know what information can be disclosed under the waiver). Despite the some risk of disclosure of privileged or confidential information, the New York Court of Appeals held that the “subject matter of the interview or discussion – a patient’s contested medical condition – will be readily definable and understood by a physician or other health care professional.” *Arons*, 850 N.Y.S.2d at 352. The Court assumed that awareness of the subject matter will minimize the risk of improper disclosure.

Not all states follow New York State rules on *ex parte* communication with adversary’s treating physicians. For instance, the Supreme Court of Utah in *Sorenson* reasoned that because the physician was not trained to know what information can be disclosed, the opposing counsel is not in a position to be a reliable advocate for the patient’s best interests. *Sorenson*, 177 P.3d at 620. Ultimately, the Utah Court held that it was “necessary to prohibit *ex parte* communications between a treating physician and opposing counsel in litigation with the physician’s patient.” *Sorenson*, 177 P.3d at 620.

(c) Advise physician that his communication is entirely voluntary

The Court of Appeals has directed that in addition to revealing the client’s identity and interest, the attorney must make clear that “any discussion with counsel is entirely voluntary.” *Arons*, 850 N.Y.S.2d at 352 (2007). The physician may refuse to be interviewed. See Tips, *infra*. See also *When Ex Parte Interview with Adversary’s Treating Physician Should Occur*.

(d) Obtain written acknowledgment from interviewee that he understood your directions and confirm that he did not disclose confidential or privileged information

Although there is no across-the-board ban on *ex parte* communication with an adversary’s treating physician in New York, it is important for attorneys to take steps to protect themselves from penalties improperly conducting the interview. See *Penalties for Improperly Conducting and Ex Parte Interview, infra*.

One step an attorney can easily take is to receive *written* acknowledgment at the time of the interview. This document acknowledges that the physician; (1) understood whom you represent and your interest in litigation, (2) that the physician did not disclose privileged or confidential information or answer any questions that would lead to disclosure of privileged or confidential information, and (3) the physician understood that the interview was voluntary.

(4) When *Ex Parte* Interview with Adversary's Treating Physician Should Occur

(a) *Ex Parte* Interviews May Be Conducted Post-Note of Issue

The Court of Appeals in *Arons* held that *ex parte* interviews “may still take place post-note of issue.” *Arons*, 850 N.Y.S.2d at 353. However, “if a treating physician refuses to talk with an attorney and the note of issue has already been filed, it would normally be too late to seek the physician’s deposition or interrogatories as an alternative.” *Arons*, 850 N.Y.S.2d at 353. In the event that the physician refuses to talk with an attorney post-note of issue, the attorney may still subpoena the physician’s records. The attorney may also subpoena the physician “in preparation for trial.” However, the court may not necessarily sign the subpoena.

In *Browne v. Horbar*, the Supreme Court for New York County did not sign the subpoena, holding that “nothing requires the Court to authorize what amounts to *ex parte*, post-note-of-issue discovery” and the defendant’s motion “is denied in the interests of justice and as an exercise of discretion.” *Browne v. Horbar*, 792 N.Y.S.2d 314,316 (2004). Notably, the plaintiff argued that “no matter what language is added to a subpoena, the recipient, a non-lawyer will feel compelled to comply, even though what is sought here is alleged not to require mandatory compliance.” *Id.* at 315. The court stated that the defendant has not “explained how the information sought here is necessary for “preparation of trial” as distinct from information that would have been available and should have been obtained during the period for disclosure... all disclosure is intended to ‘assist preparation for trial.’” *Id.* at 320-321.

(b) *Ex Parte* Interviews Should be Attended by only the Defendant's Counsel

In *Kleeschulte v. Blair*, 2008 WL 2636952 (*Sup. Ct. Ulster Co. 2008*), the plaintiff’s attorney wanted to sit in on the meeting with the defendant and plaintiff’s treating physician. The court held that the defendants were “entitled to privately interview plaintiff’s treating physicians, without interference from plaintiff’s counsel.” *Id.* The Court awarded reimbursement of \$350.00 for the disrupted interview

appointment and attorney's fees in the amount of \$1,000.00. *Id.* The complaint was not dismissed and no further sanctions were applied. *Id.*

(5) Penalties for Improperly Conducting of Ex Parte Interview

There are significant penalties for improperly conducting an *ex parte* interview of the adversary's treating physician. There are penalties for both the attorney and the physician that may arise.

(a) Attorney Penalties for Improperly Conducting *Ex Parte* Interview

Attorney's risk significant penalties for improperly conducting an *ex parte* interview of the adversary's treating physician. The penalties include disqualification from the matter, the denial of the fee, and possible discipline before an attorney grievance committee.

The plaintiff's counsel also can be sanctioned if they intimidate the physician into not participating. *See Prindle v. Aronowitz*, Index No. 2005-0690 (Sup. Ct., Schenectady Co., 2008).

(b) Physician Penalties for Improper Disclosure during *Ex Parte* Interview

Physicians risk sanctions for improper disclosure of privileged or confidential information during *ex parte* interviews with the adversary's counsel. Improper disclosure can lead to sanctions within the medical profession. In addition, the physician may be liable in civil suit if one is brought against him or her. An example of where a plaintiff's physician was exposed to civil liability was in the Utah Supreme Court case, *Sorenson v. Barbuto*. *Sorenson*, 177 P.3d at 616.

(6) The Code of Professional Responsibility, New Rules of Professional Conduct, and Federal Rules of Civil Procedure

(a) Distinguishing between the Code of Professional Responsibility and new Rules of Professional Conduct

The former Code of Professional Responsibility and new rules of Professional Conduct are approved by the New York State Bar Association and subsequently enacted by the Appellate Divisions. The rules are "essentially the legal profession's document of self-governance, embodying principles of ethical conduct for attorney's as well as rules for professional discipline." *See Niesig v. Team I*, 76 N.Y.2d at 369 (for a discussion of the Code of Professional Responsibility). The Court of Appeals stated that when a disciplinary rule is invoked in litigation, "we are not constrained to read the rules literally or effectuate the intent of the

drafters, but look to the rules as guidelines to be applied with due regard for the broad range of interests at stake.” *Id.* at 369-370.

The former DR 7-104(A)(1) of the Code of Professional Responsibility, provided:

“A. During the course of his representation of a client, lawyers shall not:

1. Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.”

The new §4.3, “Communicating with Unrepresented Persons,” in the Rules of Professional Conduct, provide:

“In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have reasonable possibility of being in conflict with the interests of the client.”

Section 4.3 of the Rules of Professional Conduct is different from §7-104(A)(1) of the Rules of Professional Responsibility, but it has been interpreted by the Court of Appeals in the same way. §7-104(A)(1) states that the lawyer shall not communicate with a represented party unless given consent by the adversary’s attorney. In § 4.3 of the Rules of Professional Conduct, it outlines the role of the attorney when they *do communicate* with the unrepresented person. It further states that the lawyer must make it clear to the interviewee that the lawyer is not disinterested. The former rule has been interpreted to allow a lawyer to properly interview witnesses or prospective witnesses for opposing sides in any civil or criminal action without consent of opposing counsel – unless such person is a party. See New York State Bar Association (NYSBA) Committee on Professional Ethics Opinion 578 (1986). See *also* NYSBA Committee on Professional Ethics Opinion 735 (2001) (A lawyer in civil

litigation may properly communicate with independent contractor of adverse corporate party unless lawyer knows independent contractor has retained counsel in the matter. A lawyer may not knowingly elicit information protected by attorney-client privilege or work-product doctrine that the accountant has an obligation to keep confidential). The Committee on Professional Ethics also did not distinguish between ordinary witnesses and a retained expert witness. See NYSBA Opinion 578.

The NYSBA Committee on Professional Ethics in 1986, as the Court of Appeals echoed in *Aron* in 2007, stated that “it would be unethical for the lawyer to attempt to discovery through such communication matters protected by an evidentiary or work product privilege. See NYSBA Ethics Opinion 578. See also *Aron*, 850 N.Y.S.2d at 350 (Holding that it is assumed that attorneys would make their identity and interest known to interviewees and comport themselves ethically).

(b) The Federal Rules of Civil Procedure Not Permitting *Ex Parte* Interviews When in Federal Court

In federal court, rules of discovery of *ex parte* witnesses are governed by FRCP 26. Specifically, the courts have referred to FRCP 26 (b)(4)(A), which provides that:

“(A) *Expert Who May Testify*: A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.”

The United States Court of Appeals, for the Ninth Circuit has held that the defense counsel’s *ex parte* contact with the plaintiff’s expert, while the witness was still retained by plaintiffs, was a “flagrant violation” of expert discovery rules, which require the court’s permission for oral discovery of experts, and deserved strong sanction. *Gemini Enterprises v. Campbell Industries*, 619 F.2d 24, 26 (9th Cir. 1980). A district court has broad discretion under FRCP 26 and 28 to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial. See *Id.* at 27 (citing cases). The district court has the power to exclude or admit expert testimony and to exclude the testimony of witnesses whose use at trial is in bad faith or would unfairly prejudice an opposing party. See Rule 26(b)(4) of the Federal Rules of Civil Procedure. The Court held that the “district court’s ruling, which was carefully fashioned to deny Gemini the fruits of its misconduct yet not interfere with Gemini’s right to produce other relevant expert testimony, [did not constitute] an abuse of discretion.” *Gemini Enterprises*, 619 F.2d at 27.

(B) Work Product Doctrine

(1) Background

In New York State civil cases, the work product doctrine is governed by CPLR §3101(c) and CPLR §3101(d). With the introduction of computers and word processors, attorneys should be aware of the risks of intentionally disclosing work product, but also inadvertently disclosing work product. The courts have held that attorney communications and correspondence with potential expert witnesses in connection with underlying actions could not be withheld from discovery. See *e.g. Getman v. Petro*, 266 A.D.2d 688 (3d Dept. 1999) (finding no basis upon which to conclude that attorney communications and correspondence with potential expert witnesses in connection with the medical malpractice action should be withheld pursuant to CPLR 3101(d)(1)(i) since they are being sought in this action for legal malpractice based upon defendants' alleged wrongdoing.)

As these communications and correspondences are increasingly transmitted via email and the internet, attorneys should be aware of the risks of unintentionally transmitting confidential client information and work product.

(2) Metadata

Metadata is hidden data in computer documents, which is generated when users create and edit the document. Metadata in Microsoft Word, for instance, saves attributes such as the title, author, content, location, and date of document creation. This metadata may contain confidential client information and potentially embarrassing information, which may be inadvertently disclosed to your adversary if attorneys do not exercise caution.

Attorney's sending documents without "scrubbing" the document of metadata may be transmitting confidential information. To protect against sending metadata in word documents, attorneys should scrub the metadata from the documents before sending. For instance, Workshare is a program that automatically scrubs metadata from word documents whenever they are transmitted via email. See <http://www.workshare.com/go/metadata-word.aspx>. Other alternatives to protecting against the transmission include: sending word documents as a PDF or, when saving revised documents, creating new documents rather than saving a new version. Note, a PDF comes with its own metadata and the new word document would come with its own metadata. The advantages of a PDF document is that it does not keep the metadata from the original word document, as it only copies the actual text from the word document (and

not the hidden information). The PDF can generate its own metadata trail if a user of the PDF edits the words on the PDF itself.

(3) Metadata, Ethics, and the Law

Attorneys should actively take steps to avoid transmitting work product through metadata. The New York State Bar Association, Committee on Professional Ethics addressed this question: Does a lawyer who transmits documents that contain “metadata” reflecting client confidences or secrets violate DR 4-101(B) [now Rule 1.6] See NYSBA Opinion 782 (2004).

The New Code of Professional Conduct, Rule 1.6, governs Confidentiality of Information. Under 1.6(a), a lawyer shall not knowingly reveal confidential information. Confidential information is defined as “gained during or relating to the representation of a client, whatever its source, that is: (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to a client if disclosed, or (c) information that a client has requested be kept confidential. Rule 1.6(c) states that “a lawyer shall exercise reasonable care to prevent the lawyer’s employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.

NYSBA Committee on Professional Ethics cites an example, where a lawyer transmits a document via email to someone who is not a client. The lawyer transmitted the document without realizing the recipient is able to view prior edits and comments to the document that would be protected as privileged communication. See NYSBA Opinion 782 (2004). The Committee also cited an example where “a lawyer who has received the final draft of a contract from counsel for a party with whom the lawyer is negotiating would be able to see prior drafts of the contract, and perhaps, learn the identity of those who made the revisions, without the knowledge or consent of the sending lawyers. See NYSBA Opinion 749 (2001).

The Committee on Professional Ethics opined that a lawyer must exercise reasonable care in such circumstances, but what constitutes reasonable care will vary with the circumstances. NYSBA Opinion 782 (2004). Some of these circumstances include but are not limited to “[1] the subject matter of the document, [2] whether the document was based on a ‘template’ used in another matter for another client, [3] whether there have been multiple drafts of the document with comments from multiple sources, [4] whether the client has commented on the document, and [5] the identity of the intended recipients of the document.” *Id.*

Not only should a lawyer exercise reasonable care, but a lawyer may not use technology to “surreptitiously obtain information that may be protected by the attorney-client privilege, the work product doctrine or that may otherwise constitute a ‘secret’ of another lawyer’s client.” NYSBA Opinion 749 (2001). Using technology to exploit the receiving lawyer is not carelessness on the part of the sending lawyer that would lead to disclosure of client confidences and secrets. *Id.* The Committee opined that “prohibiting the intentional use of computer technology to surreptitiously obtain privileged or otherwise confidential information is entirely consistent with these ethical restraints on uncontrolled advocacy.” *Id.* The Committee did not opine on whether unauthorized interception of e-mail content is a violation of state or federal laws.

Metadata may be discoverable in certain circumstances. For instance, the Albany County Supreme Court held that the Freedom of Information Law trade secret exception did not apply to metadata, record layouts, and documentation related to database tables. *Hearst Corp. v. State of New York Office of the State Comptroller*, 882 N.Y.S.2d 862 (2009). The FOIL request was submitted for employee payroll tables, but was denied because “(1) the information sought by petitioners constitutes trade secrets or proprietary material, the release of which would injure a company’s competitive position in the marketplace; and (2) the release of such information could compromise OSC’s ability to protect the security of its information technology assets.” *Hearst Corp.*, 882 N.Y.S.2d at 865.

Petitioners in *Hearst Corp.* commenced an Article 78 proceeding, where the court held that for the FOIL exception for trade secrets to apply, “it must be established that the commercial enterprise that provided the data is in actual competition with other entities, and that the release of the information would likely cause it substantial competitive injury.” *Hearst Corp.* 882 N.Y.S.2d at 877. While the Court was satisfied that the respondents established that the information sought by petitioners would be of value to competitors, they failed to establish that providing the data from the tables would constitute a break of the company proprietary rights or cause it to suffer substantial competitive injury. *Id.* at 877-878.

(C) Fees and the Expert Opinion

(1) Background

Current regulations allow attorneys to advance client court costs and expenses of litigation as a matter of convenience. Attorneys are also allowed to offer their services on a contingent fee basis. The contingent fee is usually required when there are impoverished or disabled client, who might not otherwise be able to afford representation. Despite the

contingency fee arrangement, lawyers are not allowed to provide their client with financial assistance to clients, despite their sometimes desperate need.

The New York State Bar Association Committee on Professional Ethics has distinguished between physician's services in treating a patient-client's injuries and a physician's assistance in connection with litigating a pending claim. See New York State Bar Association (NYSBA) Opinion 37 (1966), overruled to the extent inconsistent with Opinion 37(a) (1968), and re-explored in Opinion 288 (1973). In New York State Bar Association, Committee on Professional Ethics, Opinion 37, the Professional Ethics Committee discussed whether it is ethically proper for an attorney to assume personal responsibility for physician's fees for issuing a medical report concerning sustained injuries, physician's fees for examination of claimant prior to testifying, the physician's fees for pre-trial conference with the attorney regarding trial testimony, and paying the physician for his or her testimony at trial.

The Committee opined that it is *not ethically proper* for an attorney to assume "personal responsibility" for physician's fees in the circumstances discussed.

(2) Ethical Guidelines for Attorney Advancing Fees for Experts

Whereas it is not ethically proper for an attorney to assume personal responsibility for physicians services in treating a client's injuries, there is "not ethical impropriety in a lawyer assuming personal responsibility for payment of experts, including medical experts, employed by him to assist in the preparation of a lawsuit, provided that he does so subject to reimbursement by his client." NYSBA Opinion 37(a). Although the physician is entitled to compensation for all his services, an attorney may only assume responsibility for those services related to litigation.

Prior to the adoption of the new Rules of Professional Conduct, advanced payment of experts was governed by DR 5-103(b), which stated:

(B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:

- 1) A lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client;
- (2) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

- (3) A lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred.

Under the new NY Rules of Professional Conduct, DR 5-103(b) has been replaced by Rule 1.8(e).

(E) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:

- (1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
- (2) A lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; and
- (3) A lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred.

When comparing both the old DR 5-103(b) and the new Rule 1.8(e), the rules are virtually identical except in the ordering of subparts (1) and (2) have been reversed in the new rule. The applicable provision for the advanced payment of experts is governed by subpart (1) of Rule 1.8(e), which states that "lawyers may advance court costs and expenses of litigation, the payment of which may be contingent on the outcome of the matter."

Find official form UCS-575 for guidance at www.nycourts.gov.
<http://nycourts.gov/forms/criminal/pdfs/HIPAA.pdf>

TIP: HIPAA-compliant authorizations and HIPAA court orders cannot force a health care professional to communicate with anyone; they merely signal compliance with HIPAA and the Privacy Rule as is required before any use or disclosure of protected health information may take place.

TIP: If the treating physician refuses to conduct the *ex parte* interview post note of issue, it is still possible to depose them. Seek a subpoena for the purposes of trial preparation in order to be ready to cross-examine the witness.

TIP: An official form, UCS-575, should be given to expert witnesses prior to conducting *ex parte* interviews. See <http://nycourts.gov/forms/criminal/pdfs/HIPAA.pdf>