

CONTACTING A DEFENDANT'S EMPLOYEE

By Ted Babbitt

Lee Memorial Health Systems v. Smith, 36 Fla. L. Weekly D212 (Fla. 2nd DCA, Jan. 28, 2011) was a medical malpractice case in which the hospital sought a protective order to prohibit plaintiff's counsel from having communication with the plaintiff ward's treating physicians who were employed by the hospital. None of the physicians in question were involved in the underlying malpractice and were simply subsequent treating physicians. The trial court denied the requested protective order and the hospital sought certiorari.

The Court reviewed Florida Bar Disciplinary Rule 4-4.2(a) which provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer."

The hospital contended that the above rule has no exceptions and the plaintiffs countered that because the hospital employed physicians in question were not involved with the facts from which liability arose, the above quoted rule would not apply.

In denying the petition for certiorari, the appellate court cited to the comment to the above disciplinary rule at Page 213 as follows:

. . . . as the comment to rule 4-4.2 explains, the prohibition against communicating with members of a represented organization is applicable only to three categories of persons or employees: (1) those who supervise, direct, or regularly consult with the organization's lawyer *concerning the matter*; (2) those who

have the authority to obligate the organization *with respect to the matter*; or (3) those whose act or omission *in connection with the matter* may be imputed to the organization for purposes of civil or criminal liability. *See also Barfuss v. Diversicare Corp. of Am.*, 656 So. 2d 486, 488 n. 4 (Fla. 2d DCA 1995), *disapproved on other grounds by H.B.A. Mgmt., Inc. v. Estate of Schwratz*, 693 So.2d 541 (Fla. 1997); *Browning v. AT & T Paradyne*, 838 F.Supp. 1564, 1567 (M.D.Fla. 1993).

The Second District found that the rule was not intended to shield employees of the defendant who were not actually involved in the underlying liability issues. None of the treating physicians had any reason to consult with the hospital lawyers concerning the issues involved in the lawsuit other than as to their subsequent treatment nor did these doctors have the authority to bind the hospital corporation in any way in the lawsuit. The Court quoted from HBA Management, supra, at 544 – 545, concerning the rule:

[I]t means an attorney cannot ethically communicate with an employee whose actions may impute negligence or criminal liability to the corporation or whose *statements* may constitute admissions at that time, i.e., at the time the current employee is acting or speaking. These categories clearly identify certain persons whose statements or actions, by virtue of their present status as employees or agents, may directly affect their employer's legal position.

. . . This is because the “purpose of Communication rule is not to protect a corporate party from revelation of prejudicial facts, but rather to preclude interviewing of employees who have authority to bind the corporation.”

The compelling argument accepted by the Court was that a plaintiff's attorney has the right to speak with a corporate employee of the defendant who was not involved in the underlying liability issues in the lawsuit or has the authority to bind the corporation on those issues. The Court bottomed its opinion on the necessity for plaintiff's counsel to consult with treating physicians in a malpractice case. However, the underlying theory of the opinion would be equally applicable to any action. The Court indicated that this was a case of first impression and if followed by other District and sustained by the Supreme Court would make a sea change in the ability of counsel to contact current employees of a party.

Parenthetically, it should be noted that the same case was reviewed by the same Court on the issue of whether the hospital could speak ex parte with plaintiff ward's treating physicians and not be in violation of Fla. Stat. 456.057(6) which has been held by numerous Courts to preclude ex parte contact with a patient's physicians.

In Lee Memorial Health System v. Smith, 40 So. 3d 106 (Fla. 2nd DCA 2010), the same appellate court relied upon its opinion in Estate of Stephens ex rel. v. Galen Health Care, Inc., 911 So. 2d 277 (Fla. 2d DCA 2005), which case held that a hospital did not violate the above statute when it discussed with its own employed physicians the underlying allegations of medical malpractice against the hospital. In what seems a departure from the logic used in the second Lee Memorial Health System v. Smith case, the Second District in the

first case rejected the Circuit Court's conclusion that the Estate of Stephens case did not apply because the physicians in question were not involved in the underlying lawsuit and were merely subsequent treating physicians.

While the final word on the subject raised by this case has not been heard, this most recent pronouncement of the Second District is authority for contact a current employee of a party who was not involved in the underlying liability issues in a lawsuit nor has authority to bind the corporation regarding those issues.

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