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Subject: Supreme Court Rule 218 Amendment
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Attachments: CFR-2004-title45-vol1-sec164-512.pdf
GDPR Comment.pdf

I write in opposition of the amendment, and in opposition of the proposed HIPAA Order. The proposed amendment is not limited to the medical condition "at issue" and assumes that an injured victim is placing his or her entire medical history at issue. This pits the plaintiff's constitutional right to privacy guaranteed by the Illinois Constitution S.H.A. Const. Art. 1, § 6, against the plaintiff's right to a remedy, also guaranteed by the Illinois Constitution. S.H.A. Const. Art. 1, § 12. It also violates the patient-physician privilege by forcing a plaintiff to "waive" his or her medical privacy even for conditions that are not at issue.

An injured plaintiff under this rule will give unfettered access – forever - of his or her entire medical information, to the defendants, their insurers, and anyone else with whom the insurance chooses to share this information. The plaintiff's information includes also family information, implicating even more peoples' privacy. Under the proposed rule, a woman with a broken arm for example, will have to waive her privacy and allow the defendants, their attorneys and insurers to pry into her medical records that may reveal such private information as gender transition operation or medications, blood pressure, family history, family medical history, birth control, abortions, birth records, medications, incontinence, genetic conditions, menstrual records, etc. Not a week goes by without my office receiving subpoenas for "any and all medical records" since birth, even if the plaintiff may be 60 years old. We have filed a number of motions to quash, which makes the process very inefficient and costly. The rule 1) must require the court to make a finding what is the condition "at issue", 2) must limit the time period for medical records, so that a defendant cannot seek a 60-year-old's birth records, (no more than 5 years of prior records, and only for specific medical condition unless specifically found by a court otherwise); 3) and must require the destruction or return to the plaintiff of the medical records at the end of the litigation, so that the HIPAA order is HIPAA in substance, and not just in name. 45 C.F.R. § 164.512(e).

The rule must be amended in a way to provide fairness to both sides. Currently it does not require the defendants to limit subpoenas to medical condition "at issue" or to limit invasive requests for disproportionate access to medical information. For example, in *Palm v. Holocker*, the Illinois Supreme Court found that a defendant had not placed his medical condition "at issue" where the plaintiff sought the defendant's medical records that could have shown that the defendant had vision impairment. *Palm v. Holocker,* 2018 IL 123152, ¶ 39, reh'g denied (Feb. 28, 2019) ("…the physician-patient privilege does not apply in any action in which the patient's physical or mental condition is "an issue." We agree with the appellate court that "an issue" for purposes of this section means placed in issue by the patient.") Just like the defendant had the privilege to drive even with impaired vision and be protected by the fact that he had not placed his condition "at issue", a plaintiff with a broken arm or leg, should not be coerced to abandon her constitutional right to privacy to the rest of her body, and most certainly should not be required to abandon her right to require destruction or return of her

medical records at the end of the litigation, just as HIPAA mandates.

In addition, the rule forces the plaintiffs to sign a waiver of her constitutional right to privacy, and forces the plaintiff's attorney to sign such waiver, which is an interference in the attorney-client relationship, since it does not allow much room for attorney's advice against the "take-it-or-else-dismissal" proposed order. Such coercive prerequisite – to waive plaintiff's medical information without restriction under the threat of dismissal, violates the right to remedy guaranteed by the Illinois Constitution.

The retention of medical data for plaintiffs who live in Europe creates further need for inquiry. The General Data Protection Regulation gives a subject the right to be forgotten, but once the insurance receives medical information, the proposed HIPAA order does not provide for destruction or return of the medical information, which violates the GDPR as well as HIPAA. (see attached further comment)

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General Data Protection Regulations apply to handling personal data of personal injury clients residing in Europe.

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Europe recently passed strict General Data Protection Regulation[1] governing processing of personal data and rules relating to the free movement of personal data by all companies, public authorities and other undertakings. Article 3 of the GDPR expressly states that it applies "to the processing of personal data…. regardless of whether the processing takes place in the Union or not."[2] This means that any organization in the United States, including law firms, that collect personal data or behavioral information from someone in an EU country, will be subject to the requirements of the GDPR. The law applies any time a company collects "personal data" (European label for what here we call personally identifiable information).[3] Lawyers who are outside the EU, and who represent clients that are located in the EU, are subject to the GDPR if they collect "personal data". This includes personal injury lawyers who collect "data concerning health" of EU-based clients injured in the United States.

The GDPR defines "data concerning health" as "all data pertaining to the health status of a data subject which reveal information relating to the past, current or future physical or mental health status of the data subject. This includes…. information derived from the testing or examination of a body part or bodily substance, including from genetic data and biological samples; and any information on, for example, a disease, disability, disease risk, medical history, clinical treatment or the physiological or biomedical state of the data subject independent of its source, for example from a physician or other health professional, a hospital, a medical device or an in vitro diagnostic test."[4]

As personal injury lawyers, we handle sensitive data about clients every day. What the GDPR describes as "data concerning health" is the core data we use to prove the damages prong of a negligence claim. Thus, even a small personal injury case involves handling of sensitive data, which if the client resides in an EU country, extends the GDPR's reach to the collectors of this data.

Important aspect of the GDPR is giving to individuals ("data subjects") to control what happens to their personal data, including the right of access, right of erasure and correction, data portability rights and the right to object to automated decision making.[5] The GDPR also gives the right to remedies, including significant penalties. A violator may be subject to "administrative fines up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher."[6]

Personal injury firms with clients that reside in Europe should review the GDPR, and the resources on the GDPR EU site, and carefully review the compliance requirements. The GDPR regulations apply to businesses in the United States that collect personal data from EU citizens who reside within the EU. An EU citizen that suffered injury in Illinois during a visit to the United States, who is sending medical records from abroad, can rely on GDPR that his or her data will be handled in compliance with the GDPR, and must seek a court order to ensure that any handling of data complies with the GDPR. It is important to note that the current HIPAA Protective Order to be entered in every personal injury case in Cook County, Illinois, pursuant to General Order 18-1[7] is not GDPR complaint.

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[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) became effective from May 25, 2018. Available aat https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0679 (Last accessed Jan. 13, 2019).
[2] General Data Protection Regulation, *Art. 3(1)*
[3] General Data Protection Regulation, *Art. 3(1)*
[4] General Data Protection Regulation, *Introductory Paragraphs (35); See also Art 4, Definitions*
[5] General Data Protection Regulation, *See. Generally, CHAPTER III, Rights of the data subject. See specifically, . Art 15 (right to access), Art 16(right to rectification), Art. 17 (right to be forgotten), Art. 20 (right to portability)*
[6] General Data Protection Regulation, *Art. 83(6)*
[7] General Administrative Order 18-1, Standard HIPAA Qualified Protective Order, entered Oct. 29, 2018, by Presiding Judge, Law Division, Judge James P. Flannery, Jr., posted at http://www.cookcountycourt.org/Portals/0/Law%20Divison/General%20Administrative%20Orders/hippa18-1-10292018114411%20v2.pdf