



*Navigating Ethical Traps:
Avoiding Prohibited Ex
Parte Communications with
Plaintiff's Treating
Physicians*





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Table of Contents

Contents

Table of Contents	4
Course Description	5
Course Learning Objectives and Outcomes	6
Timed Agenda:.....	7
Course Material	8
Navigating Ethical Traps: Avoiding Prohibited Ex Parte Communications with Plaintiff's Treating Physicians	8
Introduction.....	8
Petrillo Facts	9
Patient – Doctor Fiduciary Relationship.....	9
Physician Ethical Obligations.....	9
Attorney Ethical Obligations In Multiple Jurisdictions	10
Application To Cases.....	10
No Jury Instruction	12
Burden of Proof	12
No HIPAA Preemption	13
Out of State Physician	13
Statutory Exception Unconstitutional	14
Subpoena For Medical Records Cannot Circumvent Petrillo	15
Cannot Use Lawyer to Circumvent Petrillo	15
Sanctions	15
Extent of Waiver.....	17
Necessity of Objection.....	17
Exceptions	18
Treating Physician Cannot Serve As Defense Expert.....	18
Practice Tips for Plaintiffs' Attorneys	18
Program Transcript.....	20
Resources	20
Resources Specific to this Course.....	20
Resources for the Legal Professional	20



Course Description

Under Illinois law civil defense counsel are prohibited from having communications with treating physicians and staff of treating physicians. Years ago, I spoke on this subject at a seminar. I have recently updated the research with new cases summarized and addresses the caveats and specifics of the rule commonly known as the Petrillo doctrine.

Course Presentation

Under Illinois law, civil defense counsel are prohibited from having communications with treating physicians and staff of treating physicians. This course examines new cases that address the caveats and specifics of the rule commonly known as the Petrillo doctrine.

This course provides a base of skills, knowledge and perspectives regarding personal injury.

This course provides an in-depth examination in the primary practice area of personal injury for any attorney.

This course contains General Ethics and Professionalism information.

Course Material

This material is intended to be a guide in general and is not legal advice. If you have any specific question regarding the state of the law in any particular jurisdiction, we recommend that you seek legal guidance relating to your particular fact situation.

The course materials will provide the attendee with the knowledge and tools necessary to identify the current legal trends with respect to these issues. The course materials are designed to provide the attendee with current law, impending issues and future trends that can be applied in practical situations.



Course Learning Objectives and Outcomes

Participants will learn to avoid the ethical errors that may arise during communications with opposing party's expert witnesses.

Participant will learn the ethical duties, roles and responsibilities of counsel in situations involving ex parte contacts by civil defense counsel with medical providers of the plaintiff.

Participant will learn the following practice tips: what is prohibited and what is allowed when civil defense counsel wish to contact the office of a plaintiff's treating medical provider.

Participant will develop an understanding of the penalties and prohibitions associated with ex parte contacts by civil defense counsel with plaintiff's treating medical providers.

Upon completion of the course, participants should be able to apply the course material; improve their ability to research, plan, synthesize a variety of sources from authentic materials, draw conclusions; and demonstrate an understanding of the theme and concepts of the course by applying them in their professional lives.



Timed Agenda:

Presenter Name: Brian M. Wendler

CLE Course Title: Navigating Ethical Traps: Avoiding Prohibited Ex Parte Communications with Plaintiff's Treating Physicians

Time Format (00:00:00 - Hours:Minutes:Seconds)	Description
00:00:00	ApexCLE Company Credit Introduction
00:00:20	CLE Presentation Title: Navigating Ethical Traps: Avoiding Prohibited Ex Parte Communications with Plaintiff's Treating Physicians
00:00:32	CLE Presenter Introduction
00:00:50	CLE Substantive Material Presentation Introduction
00:01:49	Ex Parte Contacts
00:04:39	Growth of the Petrillo Doctrine
00:07:45	Application to Cases
00:08:09	Lewis v Illinois Central
00:13:39	Wakeford v Rodehouse
00:21:15	Use of a Third Party to Avoid the Petrillo Doctrine
00:26:49	University of Chicago Medical Center v. Flanagan
00:34:09	Proctor v Messina
00:38:51	Yates v El-Deiry
00:41:23	Legislation to Permit Access to the Doctor
00:49:48	Sanctions
00:52:39	Lewis v Illinois Central Railroad Co.
00:57:00	Nastasi v United Mine Workers of America Union Hospital
01:00:00	Ethical Violations, Sanctions and Disqualification
01:01:50	Necessity of Objection
01:03:47	Exceptions to the Petrillo Doctrine
01:08:22	de minimus exception
01:11:21	Treating Physician Cannot Serve As Defense Expert
01:13:12	Practice Tips to Avoid Ethical Traps Under the Petrillo Doctrine
01:15:26	ApexCLE Company Closing Credits
01:15:35	End of Video



Course Material

Navigating Ethical Traps: Avoiding Prohibited Ex Parte Communications with Plaintiff's Treating Physicians

Brian Wendler June 2020 presentation

Introduction

In Illinois defense counsel are prohibited from having any contacts with plaintiffs' treating medical providers outside of a deposition setting. If they violate that rule they risk being sanctioned.

"Why defense counsel persist in violating this basic proposition we do not know." *Lewis v Illinois Central Railroad Co.*, 234 Ill. App.3d 669, 600 N.E.2d 504, 511 (5th Dist. 1991).

The law is well settled in Illinois that defense counsel are not permitted to have any *ex parte* contact with a treating physician, to acquire medical records or otherwise, outside of a deposition setting. *Kunkel v. Walton*, 179 Ill.2d 519, 689 N.E.2d 1047 (1998); *Best v. Taylor Machine Works*, 179 Ill.2d 367, 689 N.E.2d 1057 (1997). The law is also well settled defense counsel violates this fundamental principle by sending letters to treating physicians instructing the physicians they may simply mail the medical records of the plaintiff to defense counsel directly to avoid a deposition. *Lewis v. Illinois Central*, 234 Ill.App.3d 669, 600 N.E.2d 504 (5th Dist. 1992). In Illinois these basic and fundamental principles are commonly known as the "*Petrillo* Doctrine."¹

The Illinois Supreme Court ruled in 1997 the *Petrillo* doctrine applies to cases pending in Illinois when it held unconstitutional a statute² requiring plaintiffs to execute medical authorizations like defendant typically seeks. *Kunkel v. Walton*, 179 Ill.2d 519, 689 N.E.2d 1047 (1998). It reiterated that same holding in *Best v. Taylor Machine Works*, 179 Ill.2d 367, 689 N.E.2d 1057 (1997).

¹ By this doctrine defense counsel may not communicate *ex parte* with plaintiff's treating physicians at the risk of sanctions *Petrillo vs. Syntex Laboratories, Inc.*, 148 Ill.App.3d 581, 499 N.E.2d 952 (1st Dist. 1986).

² 735 ILCS 5/2-1003, a provision in the Illinois Code of Civil Procedure.



Petrillo Facts

In *Petrillo v Syntex Laboratories*, 148 Ill. App.3d 581, 499 N.E.2d 952 (1st Dist 1986), defense counsel was precluded by court order from speaking with plaintiffs' treating doctors. He told the court he had already engaged in such and he refused to comply with the order. He was held in contempt. The court rejected defendant's waiver argument noting that a plaintiff who files suit and places his medical condition in issue waives only his medical information: a) relative to the lawsuit; and b) only pursuant to the methods of discovery authorized by Supreme Court Rule 201(a). The *Petrillo* court relied on cases from CO, MN and OH. Interestingly, the *Petrillo* Court did not impose sanctions. Instead, it merely affirmed the order holding defense counsel in contempt.

Patient – Doctor Fiduciary Relationship

It is well settled in Illinois (see, e.g., *Taber v. Riordan* (1980), 83 Ill. App.3d 900, 403 N.E.2d 1349; *Cannell v. Medical Surgical Clinic* (1974), 21 Ill. App.3d 383, 315 N.E.2d 278) and, indeed, throughout the United States (see *Hales v. Pittman* (1978), 118 Ariz. 305, 576 P.2d 493; *Stafford v. Schultz* (1954), 42 Cal.2d 767, 270 P.2d 1; *Henkin, Inc. v. Berea Bank Trust Co.* (Ky. App. Ct. 1978), 566 S.W.2d 420; *Warsofsky v. Sherman* (Mass. 1950), 93 N.E.2d 612; *Foshee v. Krum* (1952), 332 Mich. 636, 52 N.W.2d 358; *Henricks v. James* (Miss. 1982), 421 So.2d 1031; *State ex rel. Stufflebam v. Applequist* (Mo. App. Ct. 1985), 694 S.W.2d 882; *Demers v. Herety* (1973), 85 N.M. 641, 515 P.2d 645; *Estate of Leach v. Shapiro* (1984), 13 Ohio App.3d 393, 469 N.E.2d 1047) that there exists, between a patient and his treating physician, a fiduciary relationship founded on trust and confidence. As our supreme court has previously noted, a fiduciary relationship exists where:

"[T]here is a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence." (*Neagle v. McMullen* (1929), 334 Ill. 168, 175, 165 N.E. 605.), *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581, 594 (Ill. App. Ct. 1986).

Physician Ethical Obligations

The code of ethics for the medical profession is comprised of three separate "prongs": (1) the Hippocratic Oath; (2) The American Medical Association's (AMA) Principles of Medical Ethics; and (3) The Current Opinions of the Judicial Council of the AMA (1984 ed.). These three "prongs" underscore the highly confidential nature of the physician-patient relationship and, perhaps more importantly, affirmatively advertise to the public that a patient can properly expect his physician to protect those medical confidences which are disclosed



during the physician-patient relationship. *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581, 588 (Ill. App. Ct. 1986).

“These principles are the ethical guidelines of the physician and dictate that the physician owes his patient an obligation of honesty as well as confidentiality.” *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581, 589 (Ill. App. Ct. 1986).

Attorney Ethical Obligations In Multiple Jurisdictions

Formal and informal ethics opinions from other States (which have a physician-patient-privilege statute like Illinois) have consistently held that it is unethical for a defense attorney to engage in ex parte conferences with a plaintiff's treating physician. See, e.g., Committee on Professional Ethics of the Bar Association of Nassau County, Opinion 82-2 (January 6, 1982); Committee on Professional and Judicial Ethics of the State Bar Association of Michigan, Informal Opinion CI-587 (December 12, 1980); San Diego County Bar Association Legal Ethics and Unlawful Practices Committee, Opinion 1983-9 (1983); Akron Bar Association Ethics Committee, Opinion 11 (December, 1983). *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581, 600 (Ill. App. Ct. 1986).

Application To Cases

In *Kunkel*, supra., the Illinois Supreme Court declared the statute unconstitutional because it has “primary authority over court procedures” and the legislature overstepped its authority. *Id.* at 1051.

The *Petrillo* Doctrine has been applied to prohibit the following:

- a) **Sending letters to treating physicians** requesting the physicians send medical records directly to defense counsel in lieu of medical records depositions. *Lewis v. Illinois Central*, 234 Ill.App.3d 669, 600 N.E.2d 504 (5th Dist. 1992).
- b) **Use of corporate structure** to circumvent the *Petrillo* Doctrine. *Testin v. Dreyer Medical Clinic*, 238 Ill.App.3d 883, 605 N.E.2d 1070 (2nd Dist. 1992); *Ritter v. Rush-Presbyterian-St. Luke's Medical Center*, 177 Ill.App.3d 313, 532 N.E.2d 327 (1st Dist. 1988).
- c) Assigning a single attorney to defend a treating physician in a deposition where the same attorney represents the defendant



in the lawsuit. *Baylaender v. Method*, 230 Ill.App.3d 610, 594 N.E.2d 1317 (1st Dist. 1992).

- d) **Issuance of a subpoena duces tecum for medical records** requesting the transmission of the records directly to Defendant. *People v. Walley*, 215 Ill.App.3d 971, 575 N.E.2d 596 (2nd Dist. 1991).
- e) Communications with nurses including those who **volunteer information**. *Village of Arlington Heights v. Bartelt*, 211 Ill.App.3d 747, 570 N.E.2d 668 (1st Dist. 1991).
- f) Contacts with any individual that has **access to medical files** including those who review medical records to assist in **vocational rehabilitation** as well as government officials employed in vocational rehabilitation offices. *Wakeford v. Rodehouse Restaurants*, 223 Ill.App.3d 31, 584 N.E.2d 963 (5th Dist. 1991).
- g) Communications with **nurses** who assist in treatment. *Roberson v. Liu*, 198 Ill.App.3d 332, 555 N.E.2d 999 (5th Dist. 1990).
- h) Conducting interviews with treating physicians and **notifying plaintiff's counsel of same later**. *Karsten v. McCray*, 157 Ill.App.3d 1, 509 N.E.2d 1376 (2nd Dist. 1987).
- i) **Sending affidavits to treating physicians regarding venue** motions. *Burns v. Michelotti*, 237 Ill.App.3d 923, 604 N.E.2d 1144 (2nd Dist. 1992).
- j) Speaking with **physicians who volunteer information**. *Pourchot v. Commonwealth Edison Company*, 224 Ill.App.3d 634, 587 N.E.2d 589 (3rd Dist. 1992).
- k) Acquisition of medical records via subpoena without notice to plaintiff. *Pourchot*.
- l) Obtaining an affidavit from plaintiff's treating physician. *Pourchot*, supra.

- m) **Transmission of medical records or deposition transcripts to a treating physician** by defense counsel. *Nastasi v. United Mine Workers of America Hospital*, 209 Ill.App.3d 830, 567 N.E.2d 1358 (5th Dist. 1991).
- n) *Ex parte* communications by defense counsel in **workers compensation claims**. *Hydraulics, Inc. v. Industrial Commission*, 329 Ill.App.3d 166, 768 N.E.2d 760 (2nd Dist. 2002).
- o) Utilization of a “**risk manager**” to circumvent *Petrillo* requirements. *Testin*, supra. *Ritter*, supra.
- p) Defendant physician requesting other physicians telephone plaintiff’s medical expert. *Ruperd v. Ryan*, 291 Ill.App.3d 22, 683 N.E.2d 166 (2nd Dist. 1997).
- q) Attempting to persuade physicians to refrain from disclosing the extent of *ex parte* communications through improper objections. *Schlueter v. Barbeau*, 262 Ill.App.3d 629, 634 N.E.2d 1325 (5th Dist. 1994).
- r) Utilizing a **third party attorney** representing the medical provider to relay records or communications to bypass plaintiff’s counsel. *University of Chicago Med. Center v. Flanagan* (Doc. 119010 Ill. Sup. Ct. 4/24/15).
- s) **Mere verbal agreement among counsel to allow access to records** is not sufficient to overcome violation. *Hernandez v Schitteck*, 305 Ill.App.3d 925 (5th Dist. 1999).

No Jury Instruction

It is reversible error to issue an instruction to inform the jury that defense counsel is not allowed to speak with treating physicians *ex parte*. *Netto v. Goldenburg*, 266 Ill.App.3d 174, 640 N.E.2d 948 (2nd Dist. 1994).

Burden of Proof



Plaintiff does not have the burden to show the contents of *ex parte* communications invaded privileged areas. *Requena v. Franciscan Sisters Health Care Corp.*, 212 Ill.App.3d 328, 570 N.E.2d 1214 (3rd Dist. 1991); *Mondelli v. Checker Taxi Co.*, 197 Ill.App.3d 258, 554 N.E.2d 266 (1st Dist. 1990); *Wakeford v Rodehouse Restaurants*, 223 Ill. App. 31 (5th Dist. 1991); *Pourchot*, supra.

No HIPAA Preemption

The Illinois courts have held the *Petrillo* doctrine is not preempted by HIPAA. *Moss v. Amira*, 356 Ill.App.3d 701, 826 N.E.2d 1001 (1st Dist. 2005). Missouri courts have held to the contrary. See *State ex rel. Proctor v Messina*, 320 S.W.3d 145 (Mo banc 2010).³

A plaintiff who files suit for a medical condition does not forever waive privileges over medical records for that condition. Rather, the waiver, if any, applies only to that lawsuit and does not extend to any later or subsequent lawsuit for a different injury. *Reagan v. Searcy*, 323 Ill.App.3d 393, 751 N.E.2d 606 (5th Dist. 2001).

Out of State Physician

In Illinois a defendant may not engage in *ex parte* communications with a plaintiff's treating physician even if the doctor is located in and treatment was administered in another state. In *Yates v. El-Deiry*, 160 Ill.App.3d 198, 513 N.E.2d 519 (3d Dist. 1987) cert denied 118 Ill.2d 552 (1988), the defendant claimed there was no *Petrillo* violation because the physician that defendant's counsel spoke with was in Tennessee and the medical treatment occurred in Tennessee. The *Yates* Court expressly rejected that argument stating:

“Finally, we reject the Doctor's suggestion that the defense firm's conduct was justified because at the time of the *ex parte* communications there was no physician-patient privilege in Tennessee,

³ In *State ex rel Proctor v. Messina*, the Court vacated a trial court's order requiring the plaintiff to execute medical records authorizations because such is now prohibited by the Federal HIPAA regulations. The Missouri Supreme Court affirmed that holding. *State ex rel Proctor v. Messina*, 320 S.W.3d 145 (2010). Accord, *State ex rel Collins v. Roldan*, 289 S.W.3d 780 (Mo.App. 2009).

where the conference took place, and where the physician-patient relationship between the plaintiff and Dr. Shea was created. This case does not present a conflict of laws problem as the Doctor suggests. By our decision today, we have ruled that a plaintiff's legal adversary may not engage in ex parte communications with a plaintiff's treating physician. We have regulated the conduct of Illinois attorneys and enforced the Illinois public policy favoring the sanctity and confidentiality of the doctor-patient relationship. Whether or not a physician-patient privilege exists in Tennessee or anywhere else is immaterial." *Id.* at 523.

Yates has been cited and relied upon in many published decision by other courts. *Nastasi v. United Mine Workers of America Union Hosp.*, 209 Ill.App.3d 830, 567 N.E.2d 1358 (5th Dist. 1991); *Roberson v. Liu*, 198 Ill.App.3d 332, 555 N.E.2d 999 (5th Dist. 1990); *Mahan v. Louisville & Nashville Ry. Co.*, 203 Ill.App.3d 748, 561 N.E.2d 127 (5th Dist. 1990).

Statutory Exception Unconstitutional

The plaintiff's right to privacy is guaranteed by the Illinois Constitution as undeniably stated in *Kunkel v. Walton*, 179 Ill.2d 519, 689 N.E.2d 1047 (1997). In *Kunkel*, the Illinois Supreme Court specifically held 735 ILCS 5/2-1003(a), as amended, was unconstitutional and in violation of the Illinois Constitution's guarantee of the right to privacy for the reason that said amended statute mandated every plaintiff in litigation execute records authorizations for disclosure of medical records without limits on the scope of those records. *Id.* The *Kunkel* holding was reiterated in *Best v. Taylor Machine Works*, 179 Ill.2d 367, 689 N.E.2d 1057 (1997). The Fifth District Court of Appeals has carefully followed *Kunkel*. See *Hall v. Sprint Spectrum, L.P.*, 268 Ill.App.3d 820, 822-23, 858 N.E.2d 955 (5th Dist. 2006) and *Griffith v. Bower*, 319 Ill.App.3d 993, 747 N.E.2d 423, 426 (5th Dist. 2001). Since 1997 there is no question *ex parte* contacts by defense counsel with treating physicians and/or staff of treating medical providers are improper under Illinois law.

Defense counsel cannot serve or mail an Illinois subpoena to ask the medical provider to mail the records directly to defense counsel as such violates Illinois Supreme Court Rule 204(a)(4). The committee comments thereto specifically cite with approval *Lewis v. Illinois Central Railroad*, 234 Ill.App.3d 669 (5th Dist. 1992). In *Lewis*, a similar scenario occurred, and the actions by defense counsel were found to be sanctionable and in violation of the *Petrillo* Doctrine. That ruling was affirmed on appeal.



Subpoena For Medical Records Cannot Circumvent Petrillo

In *Lewis*, the defendant issued subpoenas and deposition notices to obtain the plaintiff's private and confidential records from his employer and his physicians. Defendant engaged in such actions without supplying plaintiff's counsel with copies of secret letters sent with the subpoenas requesting the recipients send the responsive documents directly to defendant's counsel to avoid the depositions. The Court found such behavior warranted sanctions, including the barring of defendant's cross-examination of plaintiff's treating physicians at trial and defendant was precluded from presenting its own medical testimony. The Illinois Supreme Court cited *Lewis* with approval in the Committee Comments to Rule 204, noting "existing law regarding privilege and permissible discovery in a given case is unaffected by the rule. See *Lewis v. Illinois Central Railroad Co.*..."

Cannot Use Lawyer to Circumvent Petrillo

Our courts have held defense counsel cannot use straw man lawyers who represent the physician as a conduit to communicate with physician under the guise of privilege. *Thompson v University of Chicago Med. Center*, 2012 L 10412, supervisory order denied, 119010 4/25/2015. The Illinois Supreme Court denied supervisory order in case where *Petrillo* violation was found where defense counsel sent copy of complaint to counsel for physician who then supplied the complaint to the doctor. See also *Smith Orthopedics Intern., Ltd.*, 244 P.3d 939 (Wash. 2010) ("If we were to hold otherwise we would be permitting defense attorneys to accomplish indirectly what they cannot accomplish directly.")

Sanctions

Sanctions and penalties available when a *Petrillo* violation has occurred covers a broad range and are discretionary with the trial court. Such penalties include:

- a) **Barring defense counsel's cross examination** of the treating physician. *Schlueter v. Barbeau*, 634 N.E.2d 1325, 262 Ill.App.3d 629, 199 Ill.Dec. 971 (Ill. App. 1994) ("...the trial court erred in refusing to impose sanctions. We reverse. On retrial defendant is not to be allowed to present Dr. Huddleston.")
- b) **Barring the defendant's medical testimony.** *Nastasi v. United Mine Workers of America Union Hosp.*, 567 N.E.2d 1358, 209 Ill.App.3d



830, 153 Ill.Dec. 900 (Ill. App. 1991) (“...sanctions should be imposed as follows: the court should bar the testimony of defendant's expert,...”);

- c) **Barring all defense medical testimony and awarding attorneys fees and costs.** *Ritter v. Rush-Presbyterian-St. Luke's Medical Center*, 532 N.E.2d 327, 177 Ill.App.3d 313, 126 Ill.Dec. 642 (Ill. App. 1988)(“the trial court barred Rush from calling plaintiff's treating physicians as witnesses in its case in chief and awarded plaintiff attorney fees of \$1,050 and \$164 in court costs.”);
- d) **Barring the use of medical records and cross examination of medical witnesses.** *Lewis v. Illinois Cent. R. Co.*, 600 N.E.2d 504, 234 Ill.App.3d 669, 175 Ill.Dec. 573 (Ill. App. 1992) (“Barring the Railroad from examining or cross-examining witnesses who were improperly contacted or from using records that were obtained through those improper contacts was an appropriate sanction for the Railroad's Petrillo violations.”);
- e) **Reversal of the judgment in favor of the defendant and the award of a new trial.** *Yates v. El-Deiry* (1987), 160 Ill.App.3d 198, 204, 513 N.E.2d 519, 523." *Nastasi v. United Mine Workers of America Union Hospital*, 209 Ill.App.3d 830, 838-39, 153 Ill.Dec. 900, 567 N.E.2d 1358 (1991). *Moss v. Amira*, 826 N.E.2d 1001, 356 Ill. App.3d 701, 292 Ill.Dec. 565 (Ill. App. 2005); *Schlueter*, supra; *Pourchot v. Commonwealth Edison Co.*, 587 N.E.2d 589, 224 Ill.App.3d 634, 167 Ill.Dec. 320 (Ill. App. 1992);
- f) **No sanction.** *Burns v. Michelotti*, 604 N.E.2d 1144, 237 Ill.App.3d 923 (Ill. App. 1992) (“where the communication is of a de minimis nature, a court may refuse to impose sanctions for a Petrillo violation.”); *Mahan v. Louisville & Nashville R.R. Co.* (1990), 203 Ill.App.3d 748, 148 Ill.Dec. 821, 561 N.E.2d 127; *Hernandez v Schitteck*, 305 Ill.App.3d 925 (5th Dist. 1999).
- g) **Permitting Plaintiff's counsel to voir dire the treating physician.** *Burns v. Michelotti*, 604 N.E.2d 1144, 237 Ill.App.3d 923 (Ill. App. 1992) (“the trial court allowed plaintiff's counsel to voir dire the treating physicians in order to determine if there were any other Petrillo violations. The trial court characterized this ruling as a sanction.”);
- h) **Barring defense expert, imposing monetary sanctions, barring cross examinations of treating physicians and allowing discovery deposition use.** *Nastasi v. United Mine Workers of America Union Hosp.*, 567 N.E.2d 1358, 209 Ill.App.3d 830, 153 Ill.Dec. 900 (Ill. App. 1991) (“...sanctions should be imposed as follows: the court should

bar the testimony of defendant's expert, Dr. Buettner; it should prohibit any examination by defendant's counsel of any of the treating physicians with whom defendant's counsel communicated; it should permit the opinions expressed by Dr. Binnington in his 1985 discovery deposition to be read to the jury as substantive evidence; and it should award plaintiff the attorney fees and costs he incurred in connection with taking the evidentiary depositions of Drs. Binnington, Longwell and Hoffman.”).

- i) **Barring Defendant’s expert.** *Cozad v. CHW Displays, Inc.*, 2015 IL App (4th) 140294-U (Ill. App. 2015) (“The trial court abused its discretion and committed reversible error by allowing Kohn to testify. Allowing him to testify in return for his hollow assurance that he would purge his mind of the depositions from Region 8 undervalued “the sanctity and confidentiality of the doctor-patient relationship.”)
- j) **Disqualification** has been suggested and ordered by various courts. *Pourchot*, supra, (ethical violation); *Mertz v Dial Corporation*, 942-01493 (St. Louis Circuit Court 1996)(Roberts Perryman firm disqualified and ordered to refrain from any communications with new defense counsel).

Extent of Waiver

A plaintiff who files suit for a medical condition does not forever waive privileges over medical records for that condition. Rather, the waiver, if any, applies only to that lawsuit and does not extend to any later or subsequent lawsuit for a different injury. *Reagan v. Searcy*, 323 Ill.App.3d 393, 751 N.E.2d 606 (5th Dist. 2001).

Necessity of Objection

Courts have stated it is important to object in the trial court, rather than waiting for the appeal to raise the *Petrillo* violation. See *Caldwell v Advocate Condell Medical Center*, 2017 IL App (2d) 160456 (“we will overlook Caldwell’s forfeiture” where *Petrillo* was first raised in post-trial motion)



Exceptions

Communications with treating physician's staff that are solely for scheduling depositions may not be violative of the *Petrillo* doctrine. *Morrow v. Pappas*, 2017 IL App (3d) 160393, 90 N.E.3d 501 (Ill. App. 2017) (“the communications with Bailey's staff were solely for the purposes of scheduling the depositions. Thus, any communications ... do not amount ex parte communications....The trial court properly declined to apply *Petrillo* or to extend the doctrine to include a nontreating physician and scheduling information.”)

Defense counsel are permitted to peak to treating physicians/staff who are employed by the defendant being sued if it is a hospital. *Burger v Lutheran General Hospital*, 198 Ill.2d 21 (2001); *Caldwell v Advocate Condell Medical Center*, 2017 IL App (2d) 160456; *McChristian v Brink*, 2016 IL App (1st) 152674. But such are prohibited if the defendant is merely a clinic and the defense attempts to speak to persons in the clinic who are not potential defendants. *Aylward v Settecase*, 409 Ill.App.3d 831 (1st Dist. 2011). The cases are reconciled by the fact that the exception for hospitals is statutory. 210 ILCS 85/6.17(d) and (e).

There is a “de minimus” exception where the conversation was brief. *Mahan v Louisville & Nashville R. Co.*, 203 Ill. App. 3d 748 (5th Dist 1990)(“brief discussion, lasting no more than 30 seconds... merely asked physician if he has seen the plaintiff's CT scan.”) *Hernandez v Schitteck*, 305 Ill.App.3d 925 (5th Dist. 1999)(defendant doctor counsel obtained mammogram films pursuant to verbal agreement of attorneys). Note, the continued validity of these cases can be questioned as the same court has held that “mere contact must be the standard against which a *Petrillo* violation is measured. This bright line test...” *Wakeford v Rodehouse Restaurants*, 223 Ill. App. 31 (5th Dist. 1991); Accord, *Pourchot*, *supra*.

Treating Physician Cannot Serve As Defense Expert

A treating physician cannot serve as a retained expert for the defense as such violates the *Petrillo* doctrine. *San Roman v Children's Heart Center, Ltd.*, 2010 IL App (1st) 091217, 954 N.E.2d 217 (Defense expert retained subsequently became treating physician on referral of other doctor).

Practice Tips for Plaintiffs' Attorneys

Do not waive objections to *Petrillo* violations. **Do not wait until post-trial motions** to raise the objection. **Do not permit your client to sign medical**



records authorizations. Ask treating doctor in deposition to confirm the communication and agree **he/she cannot recall everything that was stated** during the ex parte communication. **Send discovery** to defense counsel to establish the communications. Demand defense counsel **copy you on all letters to physicians.**



Program Transcript

The following is a computer generated voice recognition transcript of the video presentation. This is an automatically generated transcript and not a verbatim transcript of the program. This is provided only for general reference and there may be portions that have not been accurately computer generated. If there are any inconsistencies, please refer to the video for clarification. No transcript is currently produced.

Resources

Resources Specific to this Course

In addition, please see the resources cited within the material.

Resources for the Legal Professional

ABA Center for Professional Responsibility - www.abanet.org/cpr

Chicago Bar Association - www.chicagobar.org

Commission on Professionalism - www.2civility.org

Judicial Inquiry Board - <http://www.illinois.gov/jib>

Illinois Board of Admissions to the Bar - www.ilbaradmissions.org

Illinois Department of Financial and Professional Regulation - www.idfpr.com/default.asp

Illinois Lawyers' Assistance Program, Inc - www.illinoislap.org

Illinois State Bar Association - www.isba.org

Illinois Supreme Court - www.state.il.us/court

Lawyers Trust Fund of Illinois - www.ltf.org

MCLE Program - www.mcleboard.org

