SOUTH DAKOTA SUPREME COURT ADOPTS MEDICAL RECORD PRIVACY RULE PROPOSED BY SDTLA

By Jim Leach

On August 30, 2010, the South Dakota Supreme Court adopted a new Rule 10-07, which provides:

> "Medical Privacy. The production of a record of a health care provider, whether in litigation or a claim, does not waive any privilege which exists with respect to the record, other than for use in the litigation or claim in which it is produced. Any person or entity receiving such a record may not reproduce, distribute, or use it for any purpose other than the litigation or claim for which it is produced."

The rule was proposed by SDTLA, first in 2009, when the Court did not adopt it, then again this year successfully. It is effective October 1, 2010. The rule responds to the practice of State Farm, and probably other insurers, of creating a data bank of medical records of people who bring claims or lawsuits against them or their insureds.

This practice came to light as a result of *A.T. v. State Farm*, 989 P.2d 219 (Colo. App. 1999). A.T., a chiropractor, claimed uninsured motorist benefits from State Farm, her insurer, after she was injured in a motor vehicle accident. She was required to produce records of her medical and psychological treatment. After her claim was arbitrated, she was called as an expert witness on behalf of one of her patients who had a completely separate claim against State Farm. On cross-examination, State Farm's attorney confronted her with her psychological history shown in the records she had given State Farm in her own claim. She sued State Farm for damages for several torts including invasion of her right of privacy. The trial court dismissed the case and the court of appeals affirmed. The Colorado Supreme Court denied review.

A similar issue was litigated in *Brende v. Hara*, 153 P.3d 1109 (Hawaii 2007). The attorneys for an injured plaintiff obtained a ruling that a trial court should grant a protective order to prevent disclosure of health information produced in discovery outside the litigation. State Farm, the insurer in the case, refused to agree to such a protective order, and unsuccessfully fought this issue through the Hawaii Supreme Court.

The plaintiff's privacy rights should not, SDTLA believes, depend on whether the plaintiff's attorney brings a motion seeking to prevent an insurer from doing what it should not be doing in the first place: using the plaintiff's limited waiver of medical privacy as an excuse to stockpile medical records to use for unrelated purposes in the future. A plaintiff waives medical privacy only for purposes of a specific claim, not for all purposes. *Maynard v. Heeren*, 1997 SD 60 ¶ 18, 563 N.W.2d 830 ("waiver of the [medical] privilege for litigation purposes does not waive the privilege in its entirety.")

With the adoption of Rule 10-07, a party's use of medical records produced in discovery, or disclosed in an attempt to settle a claim without filing suit, is limited to the purpose for which the disclosure was made, without the need for a separate protective order in each case. Our Supreme Court is the first in the country to address this problem by rule. The new rule is available online at http://www.sdjudicial.com/Uploads/sc/rules/SC_Rule_10-07.pdf.