New York Law Journal

Access to Records of Psychiatric Care in the Defense of Medical Malpractice Cases

In his column on Medical Malpractice Defense, John L.A. Lyddane discusses access to the records of a patient's psychiatric treatment.

By **John L.A. Lyddane** | July 20, 2020

John L.A. Lyddane

At the trial of a medical malpractice lawsuit, the records of the patient's treatment constitute the central evidence which will be relied on by the parties, their attorneys, the expert witnesses, and the trier of fact. From the earliest discovery demand through the subpoenas issued for trial, there is a continuous effort to obtain, evaluate, weigh, and reconcile the information contained in the records of the patient's treatment. With the increasing complexity of the conditions treated and the spectrum of available treatment, information which is relevant to the determination of issues of liability, causation, and damages may be located in records forgotten or not appreciated by the patient or her caregivers. A thorough evaluation of the records as they are received is always revealing of other providers whose records have not been identified or

requested. Where the patient continues to obtain treatment related to the issues in the case, there are challenges related to obtaining complete information in time to assure that meaningful depositions and expert input can be obtained.

It is well established that a New York litigant who affirmatively places his physical or mental health in controversy thereby waives the statutory physician-patient privilege [*Dillenbeck v. Hess*, 73 NY2d 278 (1989)]. The patient's privilege must ultimately be waived in order for the case to be proved, so the waiver is effective during discovery as well [*Koump v. Smith*, 25 NY2d 287 (1969)]. The law in this area was firmly established before HIPAA constraints were imposed by federal statute [See *Arons v. Jutkowitz*, 9 NY 3d 393 (2007)]. CPLR Sec. 3101(a) requires full disclosure of all matter "material and necessary" in the prosecution or defense of an action, and the scope of what is material and necessary is liberally construed to include any facts bearing on the controversy [cf. *Allen v. Crowell-Collier*, 21 NY2d 403 (1968)]. Even where the facts themselves are not admissible, any matter which may lead to admissible evidence is discoverable [*Bigman v. Dime Savings Bank*, 153 AD2d 912 (2d Dept. 1989)]. Thus any party who has affirmatively placed her medical condition in controversy must provide written authorizations for the release of pertinent medical records under the liberal discovery provisions of the CPLR [*Cynthia B. v. New Rochelle Hospital*, 60 NY 2d 452 (1983)].

The mind and body do not exist independently, but a difference can be seen in how some courts approach the issue of access to records of psychiatric care as opposed to other types of medical care. Allowing the records of any medical care to be reviewed by strangers is intrusive, and the content will include sensitive information regardless of the medical specialty involved. However, the litigant who affirmatively places his health in controversy must allow sufficient access to the information to permit a fair resolution of the issues raised by his claim. Even where the records have no direct bearing on the claims of the plaintiff, they may well have relevance to the defenses available. Until there is equal access to this evidence by all parties, the courts are effectively allowing one party to the litigation to determine the scope of the evidence to be considered in adjudicating the rights of the other parties.

A basic illustration of this point may be found where there is a claim of permanent injury, as there is in virtually every significant medical malpractice case. The claim of permanent injury requires the jury to determine among other facts the likely life expectancy of the injured plaintiff. That in turn is used to determine the number of years into the future she should be compensated for future damages. Without evidence of factors that distinguish the plaintiff from other members of her age cohort, standard life expectancy tables are generally relied on at trial as evidence of life expectancy. If the case involves vascular surgery and a series of complications leading to the loss of the patient's leg, and plaintiff claims no psychiatric injury, there is legal precedent which could support the argument that the plaintiff has not placed her mental health in issue. Accordingly, she should not be required to authorize access to the records of her previous and ongoing psychiatric treatment [see *Valerto v. Staten Island Hospital*, 220 AD2d 580 (2d Dept. 1995)]. Without access to the psychiatric records, the jury would be unaware that the patient had a pre-existing psychiatric condition with suicidal tendencies. Suicide clearly affects life expectancy; moreover, statistics from the National Institutes of Health reflect that life expectancy in patients with significant psychiatric conditions is significantly reduced for multiple reasons unrelated to suicide.

Some courts have gone so far as to ignore the initial admission in the pleadings of the plaintiff that her psychiatric condition is relevant to the claim of damages because the claim of psychiatric damages has since been withdrawn [see *Goldberg v. Fenig*, 300 AD2d 439 (2d Dept. 2002), and *Kohn v. Fisch*, 262 AD2d 535 (2d Dept. 1999)], or even invite plaintiff to withdraw the psychiatric damages claim so that the records of the treating psychiatrist may be protected from disclosure. [see *Friedlander v. Morales*, 70 AD2d 501 (2d Dept. 1979)]. For an extreme case of manipulation, see *Vaupel v. Church Charity Foundation*, 49 AD2d 932 (2d Dept. 1975), in which the defendant hospital sought disclosure of the records of the three psychiatrists who had treated the plaintiff for a claimed "severe psychiatric disturbance." There the court permitted counsel for the plaintiff to select one of the three doctors to call as a trial witness, and then precluded any access by the defense to the records or opinions of the other two psychiatrists.

On the other hand, the same court has held in *St. Clare v. Cattani*, 128 AD2d 766 (2d Dept. 1987), that records of psychiatric care both before and after the alleged malpractice were discoverable by the defendant surgeon whose complication resulted in facial scarring and resultant impact on the patient's mental condition. Likewise, in *Figueroa v. Palmer*, 252 AD2d 539 (2d Dept. 1998), the court determined that the patient's entire medical history contained in psychiatric records dating back 20 years was material and necessary to the defense and ordered them to be disclosed. In *Leichter v. Cohen*, 124 AD2d 710 (2d Dept. 1986), the court permitted access to the patient's records of post-event breast surgery and treatment for a heart condition where the claim was for psychological injuries absent any claim regarding injury to the heart or breast. In *Kenyon v. Caruso*, 167 AD2d 966 (4th Dept. 1990), where the plaintiff had wide-ranging psychological problems and her treating neurologist suggested a connection between her long-standing depression and her current symptoms, the court gave much broader access to records of treatment including psychiatric care than the lower court had permitted.

The startling theme underlying these decisions, which tend to vary widely in approach and outcome, is the absence of any indication that the courts rendering these significant decisions have actually seen the records of the psychiatric care which are the subject of the rulings. Clearly the defense attorneys have not seen the records. The attorneys for the plaintiffs are the only ones who have had access to the content of the records, and it is not their duty to identify material which is relevant to defenses which may not have even been articulated during early discovery. It is a major insult to any system of jurisprudence to pretend that claims are being resolved in an evidence-based system while restricting the defendant's access to core evidence in a blind and arbitrary fashion. The defendant is forced to rely on the determination of a critical evidentiary issue, with the knowledge that her attorney is not in possession of important evidence which is only available to her adversary. The defendant is thus deprived of her very basic rights of equal treatment before the court and the effective assistance of counsel.

A reasonable solution to this glaring inequity, which would promote confidence in the system of justice and treat the parties more equally could be fashioned by protecting the confidentiality of the records after they are made available to all counsel for review. This would require the use of confidentiality agreements, nondisclosure orders, and the sealing of court files, instruments with which the courts and counsel are familiar. There are many areas of the law in which sensitive and potentially damaging information is needed as the evidence which allows justice to be done. In those situations, the litigants, their experts and consultants, the juries, and the employees of the court all have access to the most intimate details of the lives of the litigants.

It is obviously unproductive for defense counsel to explore irrelevant evidentiary avenues which lead to evidence that cannot be used, and all attorneys are accustomed to working in a system where they are ethically bound to refrain from disclosing confidential information. Perhaps because for many years in the past there was a social stigma against persons receiving psychiatric care, the courts have been reluctant to consult the content of psychiatric records to make evidentiary findings. However, if the parties had equal access to psychiatric records for persons who have affirmatively placed their condition in controversy, the determination of what is discoverable and admissible would be more appropriately based on evidence rather than surmise.

John L.A. Lyddane *is a partner at Dorf & Nelson who has extensive experience in jury trials of technically complicated liability matters, including professional liability cases and construction-related lawsuits.*