

DO YOU KNOW WHO IS TALKING TO YOUR DOCTOR?

Testimony of Norm Newhall in Support of HB 533 (Medical Privacy)

In their current form subsection (3) of S.39-71-604 and subsection (5) of S.50-16-527 MCA authorize insurers and their agents "to communicate with a physician or other healthcare provider about relevant healthcare information . . . by telephone, letter, electronic communication, in person, or by other means . . . *without prior notice to the injured employee [or] to the employee's authorized representative . . .*"¹ This language was buried in a much larger workers compensation bill (SB 450) passed by the 2003 Legislature. While other parts of the bill fostered extensive discussion this singularly invasive provision avoided any significant scrutiny.

Until the passage of Senate Bill 450 in 2003, the ground rules for an insurer's access to relevant healthcare information regarding a workers' compensation claim were reasonably well established.

In *Jaap v. District Court* (1981) 191 Mont. 319, 623 P.2d 1389, defense counsel moved for an order of the trial court permitting private interviews between defense counsel and plaintiff's physicians. At hearing, the trial court observed that plaintiff, by filing an action which placed his medical condition in issue, waived the physician-patient privilege. In view of such waiver, the court concluded that all physicians treating the plaintiff for the injuries from the accident "are thereafter to be considered as any other witness who might have knowledge or information which might be relevant."² Since physicians were no different than other witnesses, it followed that defense counsel should be permitted to interview the physicians privately, and the trial court so ordered.

On application for writ of supervisory control, the Supreme Court agreed that under Rule 35(b)(2) M.R.Civ.P., Jaap had in fact waived the physician-patient privilege. Such waiver, however, did not mean that the trial court could order private interviews. Rather, the Supreme Court noted that Rule 26(a) permits discovery by certain very specific methods, namely, depositions; written interrogatories; production of documents or things; permission to enter upon land or for inspection of property or things; physical and mental examination; and requests for admission.

The Supreme Court held that an order requiring that defense counsel be permitted to conduct private interviews with plaintiff's physicians was not one of the "methods" of discovery permitted under the rules and that it was therefore beyond the power of the trial court to order such interviews.³

In support of its ruling, the court in *Jaap* noted that “protective provisions [in the rules] which in effect provide for a record upon which a district court” may regulate discovery are “especially important”.⁴ The obvious consequence of permitting a method of discovery such as a private interview to be ordered by the court is that the “sanctions and protections which are available under the Montana Rules of Civil Procedure for ordinary methods of discovery become unavailable for private interviews.” Thus, the trial court was limited to ordering only the methods of discovery provided for by the rules and is “without power to order a private interview” because “to do so would defeat open disclosure, a prime objective of the Rules of Discovery.”⁵

The *Jaap* rule was adopted in the context of a workers’ compensation case in *Linton v. City of Great Falls*, (1988) 230 Mont. 122, 749 P.2d 55. In *Linton*, the employer and insurer asserted that they should be permitted to communicate with Linton’s physicians “in order to determine the nature and extent of a workers’ injury for purposes of compensating him”.⁶ The Supreme Court cited numerous statutes and regulations which obviously permitted the insurer to obtain medical information regarding the claimant’s condition. However, the court rejected the contention that such statutes and regulations permitted the insurer to conduct private interviews with the physicians. Rather “a personal interview between defendant insurance company and claimant’s treating physician must be done openly to allay any suspicion that there is something available to one party and not to the other.”

Linton remained the law until the enactment of HB 450 in 2003. In the past year, under the aegis of the new law, insurance adjusters now have no qualms about contacting claimant’s physicians for healthcare information. Even more vexatious than these contacts are the contacts from “medical case managers”, often nurses, whom physicians mistakenly believe to be part of the healthcare fraternity even though they are clearly employed by the workers’ compensation insurer.

The uneasy relationship between the disclosure of healthcare information and the right to privacy guaranteed to individuals under Article 2, §10 of the Montana Constitution is discussed at length in *State v. Nelson*, (1997) 283 Mont. 231, 941 P.2d 441.

Nelson was convicted of driving under the influence of alcohol. The prosecutor had obtained Nelson’s blood alcohol level by means of an investigative subpoena issued to Nelson’s treating physician. Section 46-4-301 permitted a district court to issue an investigative subpoena upon affidavit of the prosecutor that the “administration of justice” so requires. Additionally, §50-16-535 permitted the disclosure of health care information “pursuant to an investigative subpoena issued under 46-4-301.” In appealing

his conviction, Nelson argued that issuance of the subpoena violated his constitutional right to privacy under Article 2, §10.

The Supreme Court first addressed whether Nelson had a protected privacy interest in his medical records. This analysis required satisfaction of a two part test, namely:

1. Whether the person involved had a subjective or actual expectation of privacy; and
2. Whether society is willing to recognize that expectation as reasonable.⁷

In considering whether medical records satisfy this test, the court noted that Montana “adheres to one of the most stringent protections of its citizens’ right to privacy in the country” and that the privacy right protected by the Montana Constitution “is more strict than that offered by the Federal Constitution.”⁸

Against this backdrop, the Supreme Court had little difficulty in holding that the right of privacy “is to have any meaning it must, at a minimum, encompass the sanctity of one’s medical records.” It went on to note that “medical records are quintessentially ‘private’ and deserve the utmost constitutional protection”.⁹

Under Article 2, §10 of the Montana Constitution the right of individual privacy may not be infringed without “the showing of a compelling state interest.” Having concluded that individuals have a constitutionally protected right to privacy with respect to their medical records, the court in *State v. Nelson* next considered the constitutionality of a statute which permitted the invasion of an individual’s right to privacy in his medical records by issuance of an investigative subpoena upon a showing that the “administration of justice” so requires.

Although §46-4-301 did not define the administration of justice threshold, the court observed it is “safe to conclude” such threshold is “considerably less exacting than the ‘compelling state interest’ test demanded by Article 2, §10 guarantee of privacy”.¹⁰ Therefore, the court held that the “administration of justice” standard in §46-4-301 was unconstitutional.^{11 12 13}

In considering the constitutionality of HB 450 passed in 2003, it is important to distinguish between the insurer’s right to access to medical information and the method of access. It is well settled that a claimant waives his statutory right to confidentiality with respect to medical information to the extent that he places his medical condition in issue in a civil lawsuit or by making a workers’ compensation claim.¹⁴ However, since

medical records are private and “deserve the utmost constitutional protection”, the waiver is not unlimited.¹⁵

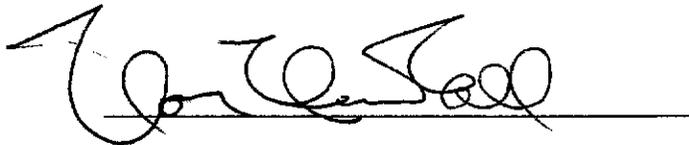
HB 450 passed in 2003 removed all limitations to the qualified waiver of privacy implied in the filing of a workers compensation claim and leaves the determination of extent of claimant's privacy rights to a private discussion between the insurer and the health care provider. The undersigned submits that access to medical information in this fashion violates the right to privacy under Article II, Section 10 of the Montana Constitution, not because it permits insurer access to medical information, but because it permits unfettered access by means of private communications with the claimant's physician without showing a compelling state interest in the need for such method of access. Indeed, in the legislative history, the sole justification in the “Fiscal Note” supporting Senate Bill 450 is that private contacts without notice to employees “will make the process more efficient, and thereby reduce costs [and] [t]he more quickly the insurer can receive information on the status of the claimant, the more quickly they [sic] can authorize certain procedures to hasten the process.”

In *Nelson v. State*, the administration of justice threshold for the issuance of an investigative subpoena of medical information was unconstitutional because the standard for issuance of the subpoena did not require the showing of a compelling state interest. Here, it seems self-evident that efficiency and administrative convenience of private insurers are insufficient to demonstrate a compelling state interest in permitting unfettered invasion of a claimant's right to privacy in his medical records by means of private communications with the claimant's physician. Such communications invade an individual's privacy solely in the interest of the insurer and without any of the safeguards associated with traditional methods for discovery of private information, e.g. notice and opportunity to object, in camera review, protective orders, etc.

However, regardless of the constitutionality of HB 450 under the right to privacy, there are even more compelling reasons for the passage of HB 533. Unfettered and uncontrolled access to medical information will foster unnecessary litigation over invasion of privacy rights. Conversely, access permitted under HB 533 will assure that claimant's have an opportunity to protect the disclosure of irrelevant medical information *before* it is disclosed and so that litigation will not arise thereafter.

Additionally, since medical information acquired from health care providers is routinely used by insurers to determine benefit entitlements, the fundamental fairness guaranteed under the Due Process clause of both the state and federal constitutions requires at a minimum that claimants be provided notice and opportunity to participate in the providing of unbiased and complete health care information. Such constitutional requirements are circumvented by the present law, but are fulfilled under HB 533.

Lastly, medical information is uniquely personal and highly sensitive (ie. "quintessentially private"). As such, HB 533 restores common courtesy, respect for individual privacy and civility to the information gathering process.



¹ This amendment to existing law was effected by adding subsection (3) to §39-71-604 and subsection (5) to §50-16-527. Subsections (3) and (5) are identical. Therefore, this article addresses the constitutionality of both amendments. However, for the sake of simplicity, the writer will refer exclusively to subsection (3) of §39-71-604.

² *Jaap* at 320-321

³ *Id.* at 324

⁴ *Id.* at 323

⁵ *Id.* at 324

⁶ *Linton* at 132

⁷ *State v. Nelson.* at 239

⁸ *Id.* at 239-240

⁹ *Id.* at 242

¹⁰ *Id.* at 242

¹¹ *Id.* at 242

¹² In *State v. Nelson*, the court nonetheless upheld the issuance of the subpoena because it found that the affidavit in support of the issuance of the subpoena established probable cause that an offense had been committed and that information relevant to the offense was in the possession of the doctor, thereby satisfying the compelling state interest test.

¹³ The standard in *State v. Nelson* has quickly become the benchmark in subsequent rulings regarding the privacy of healthcare information. See *Henricksen v. State*, 2004 MT 20, 319 Mont. 307, 84 P.2d 38; *St. James Hospital v. District Court*, 2003 MT 261, 317 Mont. 419, 77 P.3d 534; *State v. Ingraham*, 1998 MT 156, 290 Mont. 18, 966 P.2d 103; *Hulse v. State*, 1998 MT 108, 289 Mont. 1, 961 P.2d 75; *State v. Steinmetz*, 1998 MT 114, 288 Mont. 527, 961 P.2d 95; *State v. Newill*, (1997) 285 Mont. 84, 946 P.2d 134.

¹⁴ *Jaap*, supra; *Linton*, supra; Rule 35 M.R.Civ.P.; §39-71-604(1); §50-16-527(4)

¹⁵ *Henricksen v. State*, 2004 MT at 36