

Ruling threatens essential physician attorney-client privilege

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In an era when a rising number of physicians are employed by companies affiliated with hospitals, a court ruling in Washington state threatens to upend the important guarantee of privileged conversations between physicians and hospital attorneys.

If a lower-court decision is allowed to stand, physicians and their employers would not be able to enter a joint defense agreement with the hospital where they practice. Additionally, hospital attorneys would be unable to have any contact with physicians whose conduct is at the center of a case unless opposing counsel is in the room.

The decision by the Court of Appeals would have “a serious negative impact” on physicians and hospitals, argues an amicus brief filed in the Washington Supreme Court by the Litigation Center of the American Medical Association and State Medical Societies, the Washington State Medical Association and the Washington State Hospital Association.

The brief urges the court to overturn the Washington Court of Appeals ruling in *Hermanson v. MultiCare Health System* that would take away the attorney-client privileged communication, also known as “ex parte.”

“In the health care setting, many hospitals and health systems in Washington employ physicians through separate but affiliated entities. Most often these affiliated physician groups receive legal services from the same lawyers who advise the hospital or system. They may also have the same insurance,” the AMA Litigation Center brief explains.

The appellate court decision allows “plaintiffs to name hospitals as the sole defendant and thereby to preclude the involved parties from effectively defending themselves,” the brief says.

Find out more about the cases in which the AMA Litigation Center is providing assistance and learn about the Litigation Center’s case-selection criteria.

Ruling ignores case law

Rulings from the Washington Supreme Court have acknowledged the attorney-client privileges in situations like the one in the *Hermanson* case.

In a 2014 decision in the case of *Youngs v. PeaceHealth*, the state's highest court established a rule that struck a balance when it comes to attorney-client privilege, allowing the privilege when the communication is "with a physician who has direct knowledge of the event or events triggering the litigation, and the communications concern the facts of the alleged negligent incident." The ruling did not allow *ex parte* communications with treating physicians when it comes to care provided before or after the event.

In the *Hermanson* case, surgeon David Patterson, MD, was working at MultiCare Tacoma General Hospital as an employee of Trauma Trust, a nonprofit corporation formed to provide emergency medical services at MultiCare Tacoma General and St. Joseph's hospitals. A patient alleged employees and agents of MultiCare Tacoma General Hospital improperly disclosed health care information to the police. Those involved, including Dr. Patterson, jointly retained counsel.

But the lower court said the hospital's counsel could not have privileged communications with Dr. Patterson because the physician's employer is a corporation affiliated with the hospital rather than the hospital itself. The ruling gave Dr. Patterson the same status as a former employee who cannot enjoy attorney-client privilege.

The AMA Litigation Center brief says that is not the correct interpretation of the high court's 2014 ruling.

"Dr. Patterson was at all times the hospital's admitted agent and an employee of an entity of which MultiCare has considerable control," the brief says. "There is no evidence MultiCare lacked authority to require him to disclose information its lawyers, or of any divergence of interests between him and MultiCare. ... [He] was an admitted agent of MultiCare with a continuing ongoing duty of loyalty."

Learn more with the AMA about the rising trend of physicians being sued by patients they have never treated.

Corporate norms at risk

The state appellate court ruling also is an "unwarranted and harmful departure from national precedent," the AMA Litigation Center brief tells the Washington Supreme Court.

The brief cites a widely-followed 8th U.S. Circuit Court of Appeals ruling that states “too narrow a definition of ‘representative of the client’ will lead to attorneys not being able to confer confidentially with nonemployees who, due to their relationship to the client, possess the very sort of information that the privilege envisions flowing most freely.”

The *Hermanson* ruling’s “rejection of this well-reason and widely adopted approach threatens to make Washington an outlier in the corporate world,” says the AMA Litigation Center brief, which urges the Washington Supreme Court justices to overturn the decision.