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Client Alert

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Georgia Supreme Court Reaffirms and Clarifies Procedure for Conducting *Ex Parte* Meetings with Plaintiff's Treating Healthcare Providers

The Georgia Supreme Court's recent decision permits defense counsel to conduct *ex parte* meetings with a plaintiff's treating healthcare providers (*Baker et al. v. Wellstar Health Systems, Inc. et al.*, 2010 WL 2159372 (2010)). This decision reaffirms and clarifies the Supreme Court's finding in *Moreland v. Austin*, 284 Ga. 730 (2008), that defense counsel can informally interview a plaintiff's treating healthcare providers if they "obtain a valid authorization, or court order or otherwise comply with the provisions of 45 C.F.R. § 164.512(e)." There had been some confusion among trial courts regarding how the *Moreland* decision should be applied and the proper procedural requirements that must be satisfied for *ex parte* meetings to occur.

The *Baker* court explained that a qualified protective order that incorporates the procedural safeguards mandated by the Health Insurance Portability and Accountability Act (HIPAA) is a proper mechanism for permitting *ex parte* interviews with a plaintiff's treating healthcare providers. The court reasoned that the protective order must be narrowly tailored to "matters relevant to the plaintiff's medical condition which is at issue in the proceeding."

The court specifically noted that a protective order that permits the physician to discuss "any past, present or future care" of a plaintiff is too broad and would violate state law privacy rights. The court also specifically approved a qualified protective order that contained the following provisions:

1. the healthcare provider is advised that they are not required to engage in such meetings and that their decision to participate is voluntary
2. the disclosed health information may not be used for any non-litigation purpose
3. the health information must be destroyed or returned to the healthcare provider at the end of the litigation.

The court justified its decision permitting *ex parte* interviews by explaining that they diminish the cost of formal discovery, as both plaintiffs and defendants can have equal access to information through informal discovery. Otherwise, plaintiffs could conduct informal *ex parte* communications, but defendants would have to pursue formal discovery (i.e., depositions) to obtain the same information.

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The recent decision solidifies the defense bar's position that *ex parte* meetings with a plaintiff's healthcare providers can occur pursuant to a qualified protective order that complies with the procedural mandates of HIPAA.

Importantly, the court specifically referenced an example of a qualified protective order that meets the procedural safeguards required by HIPAA. This blessing by the Supreme Court of the specific language that should be included in a qualified protective order should help resolve any existing confusion regarding the issue of *ex parte* meetings. It is recommended that defense counsel move for a qualified protective order consistent with the *Baker* decision so that they can have equal access to important medical witnesses.