

Ethics Advisory Opinion Committee

Ethics Opinion 22-05

Issued August 11, 2022

Withdraws Adv. Op. 99-03

ISSUE

1. May a defense attorney engage in *ex parte* communications with a plaintiff's treating medical provider? This is the identical question addressed in Adv. Op. 99-03.

OPINION

2. Issued in 1999, Adv. Op. 99-03 stated “[n]o ethical rule prohibits *ex parte* contact with plaintiff's treating physician when plaintiff's physical condition is at issue.” In the case of *Sorensen v. Barbuto*, 2008 UT 8, ¶ 25, 177 P.3d 614, 621, the Utah Supreme Court expressly vacated this Opinion, however Adv. Op. 99-03 remains in the published opinion of the Ethics Advisory Opinion Committee (the “Committee”). The Committee now formally withdraws Adv. Op. 99-03.

BACKGROUND

3. In 2008, and in the case of *Sorensen v. Barbuto*, the Utah Supreme Court determined that a physician who has *ex parte* communications with an attorney adverse to that physician's patient is a violation of a physician's fiduciary duty of confidentiality. The Court went further and expressly vacated Adv. Op. 99-03 and instructed lawyers to confine their contact and communications with a “physician or therapist” who treated their adversary to formal discovery methods. The Court re-affirmed its holding on the matter in the 2012 case of *Wilson v. IHC Hospitals, Inc.*, provided additional guidance on this issue, and concluded that an attorney who violated this prohibition would be subject to sanctions. Finally, in the 2018 case of *Lee v. Williams*,

the Utah Court of Appeals clarified that the admonition against opposing counsel, or their offices, from engaging in *ex parte* communications applied, not only to the topic of a patient's healthcare, but also to any topic related to the merits or substance of the patient's case.

ANALYSIS

4. The 1999 Adv. Op. 99-03 stated “[n]o ethical rule prohibits *ex parte* contact with plaintiff's treating physician when plaintiff's physical condition is at issue.”

5. Notwithstanding the existence and language of Adv. Op. 99-03, *Sorensen v. Barbuto*, 2008 UT 8, ¶ 25, 177 P.3d 614, 621 held that a physician violates his or her fiduciary duty of confidentiality to a patient by engaging in *ex parte* communications with an opposing attorney regarding that patient's healthcare. The physician in question who participated in the *ex parte* communication argued that he should be immune from liability because, as to attorneys at least, *ex parte* communications of the type were expressly permitted under Adv. Op. 99-03. *See id.* at ¶ 26. The *Sorensen* court recognized the clear incongruity between its holding and the language of the advisory opinion and stated: “Because it would be illogical to permit attorneys to lead physicians into breaching their duty of confidentiality, we vacate Utah State Bar Ethics Advisory Opinion Committee Opinion 99-03 and instruct lawyers to confine their contact and communications with a physician or therapist who treated their adversary to formal discovery methods.” *Id.* The Court did not foreclose opposing counsel “from obtaining relevant medical information from a treating physician [...] through traditional forms of formal discovery.” *Id.* at ¶ 24.

6. The issue came up again in the case of *Wilson v. IHC Hosps., Inc.*, 2012 UT 43, 289 P.3d 369, and the Utah Supreme Court re-affirmed its position. In *Wilson*, attorneys for the hospital met *ex parte* with three treating physicians who were all employed by IHC (a defendant

in the case), and with a fourth treating physician who was not an IHC employee. Applying its *Sorensen* analysis, the Court determined that the *ex parte* communication with the *non-employed* physician was improper, but that the communications between IHC counsel and the three *employed* treating physicians *were* proper because the plaintiff was seeking to hold IHC vicariously liable for those three physicians' tortious acts. *See id.* at ¶¶ 8. This case also confirmed that an attorney's violation of the *Sorensen* prohibition would subject the attorney to possible sanctions as may be imposed by the trial judge.

7. Finally, in the case of *Lee v. Williams*, 2018 UT App 54, 420 P.3d 88, the Court dealt with the issue of a defense attorney holding an *ex parte* discussion with a nurse who provided medical treatment to the patient. *Id.* at ¶ 62. A hotly disputed issue was whether the treating doctor did or did not inform the patient about a medical injury which occurred during the doctor's management of the patient's pregnancy, and which might impact the mother's future pregnancies. *Id.* at ¶ 64. The issue of the patient's doctor's treatment habits was therefore an important issue in the case, and evidence suggested that the defense attorney and the nurse, despite allegedly not directly discussing the patient's healthcare, *did* discuss that doctor's habits. *Id.* Dismissing the defense counsel's argument to the contrary, the Court clarified that the prohibition first articulated in *Sorensen*, applied to *ex parte* discussions relating to *both* the patient's healthcare *and* the substance or merits of the patient's case saying:

Accordingly, we conclude that *any ex parte* communication between a defense attorney and a plaintiff's treating physician that is related to the merits or substance of the plaintiff's case in any respect violates the rule set forth in *Sorensen*, regardless of whether the confidential details of the patient's care are in fact discussed and regardless of whether actual prejudice results.

Id. at ¶ 67. Nonetheless, the Court conceded that conversations between a defense counsel and a treating provider about neither topic but simply about items such as "setting a date for scheduling

a deposition, or a friendly conversation in a grocery store about the weather or the local football team's fortunes," would not violate the *Sorensen* prohibition. *Id.* at ¶ 66.

APPLICATION

8. Rule 11-522 permits the Committee to withdraw prior opinions.

9. Based on the above analysis and the guidance provided in *Sorensen*, *Wilson*, and *Lee*, the Committee sees a clear conflict in its prior opinion as articulated in 99-03 and therefore a withdrawal of opinion 99-03 is required.

10. These appellate decisions clearly articulate rules and guidance regarding *ex parte* communications between defense attorneys and an adverse patient's treating medical providers and the limits on those types of communications. This opinion therefore withdraws Advisory Op. No. 99-03.