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Appellate Court Allows Ex Parte Meetings with Qualified Protective Orders

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Plaintiffs can no longer argue that defendants are not entitled to Qualified Protective Orders from trial courts thanks to a recent Michigan Court of Appeals ruling. Defense counsel can now meet with a plaintiff's treating physician(s) once a Qualified Protective Order is obtained from a trial court.

In *Holman v Rasak*, ___ Mich App ___ (2008), the appellate court ended the debate on whether *ex parte* meetings with a plaintiff's treating physician(s) are permissible under HIPAA. The appellate court held that the defendant could conduct *ex parte* meetings with a plaintiff's physician(s) if a qualified protective order, consistent with 45 CFR 164.512 (E) (1), is entered by the trial court.

In reaching this conclusion, the appellate court noted that HIPAA supersedes Michigan law to the extent that its protection and requirements are more stringent than those provided by state law. However, *ex parte* meetings can take place if the defendant obtains:

- written consent or an agreement for the disclosure of confidential health information from the plaintiff; or
- a qualified protective order is obtained in accordance with HIPAA.

Additionally, the appellate court eliminated the argument that the meetings should not be allowed because the section of HIPAA addressing qualified protective orders does not mention "oral communications." The court held although the HIPAA section dealing with qualified protective orders does not specifically address oral communications, another HIPAA provision allows for the release of oral communications, and it should be applied in this situation.

The court also addressed the plaintiff's argument that depositions were sufficient and *ex parte* meetings with the treating physicians were not necessary. The court held, in accordance with the Michigan Supreme Court's ruling in *Damako v Rowe,* 438 Mich 347 (1991), that the "routine practice . . . to talk with each witness before trial to learn what the witness knows about the case and what testimony the witness is likely to give" should still be permitted and "there is no justification for requiring costly depositions without knowing in advance the testimony would be useful."