



JUDICIAL STANDARDS COMMISSION
STATE OF NORTH CAROLINA

FORMAL ADVISORY OPINION: 2010-08

October 8, 2010

QUESTION:

Counsel in a personal injury action issues a subpoena duces tecum for medical records to a records custodian during discovery and submits a Health Insurance Portability and Accountability Act (HIPAA) order for a judge to sign so the records custodian may provide the records. May a judge enter such an order without the consent of the opposing party or without a motion and notice providing the opposing party an opportunity to be heard?

Counsel from another state, litigating a personal injury action outside of North Carolina, submits a subpoena along with a HIPAA order for the production of medical records. May a judge enter the order and/or sign the subpoena without the consent of the opposing party, without a motion and notice providing the opposing party an opportunity to be heard, or an order issued by a judge of the forum state requesting the issuance of an order in North Carolina?

COMMISSION CONCLUSION:

The Judicial Standards Commission determined, within the context of a civil proceeding, a judge may not ethically enter an *ex parte* order under HIPAA for the production of medical records by a records custodian, unless an *ex parte* procedure is expressly authorized by statutory or case law. An order is not considered to have been issued *ex parte* if it is entered with the consent of all parties, or all parties are provided proper notice and have an opportunity to be heard.

DISCUSSION:

In the current inquiry, the term *ex parte* refers to a judicial act taken for the benefit of one party without notice to, and an opportunity to be heard by all other parties to that case. Canon 3A(4) of the Code of Judicial Conduct provides: "A judge should accord to every person who is legally interested in a proceeding, or the persons's lawyer, full right to be heard according to law, and except as authorized by law, neither knowingly initiate nor knowingly consider *ex parte* or other communications concerning a pending proceeding."

The North Carolina State Bar has stated clearly in 2001 Formal Ethics Opinion 15, that a lawyer should not approach a judge with an *ex parte* request unless he/she is prepared to give the judge the specific legal authority for the *ex parte* relief. The opinion provides that the authorization for *ex parte* communication "may not be inferred by the absence in the statute or case law of a specific statement requiring notice to the adverse party or counsel to the *ex parte* communication."

In light of the above, it is incumbent upon a judge to determine whether HIPAA specifically authorizes an *ex parte* procedure for the release of medical records.

Reference:

North Carolina Code of Judicial Conduct
Canon 3A(4)

NC State Bar 2001 FEO 15