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DEFENDANTS RISKS COURT SANCTIONS BY CONDUCTING NON-HIPAA COMPLIANT EX-PARTÉ INTERVIEWS

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Considered by many to be a complex and burdensome federal statute, the Health Insurance Portability and Accountability Act (HIPAA) is also an ongoing hindrance to the defense of healthcare providers who are the target of litigation.


Buried within the voluminous details of HIPAA are requirements defendants cannot circumvent during the discovery process. In the recent case of *Belote v Strange* (No. 262591, rel'd 10/25/05)(unpublished), the Michigan Court of Appeals held that violations of HIPAA's requirements may result in sanctions as severe as default of the case.

In *Belote*, the plaintiff, who was attempting to avoid summary disposition, argued an affidavit obtained by one of her treating physicians should not be considered by the court because it was obtained in violation of HIPAA. The trial court refused to disregard the affidavit and granted summary disposition based on the plaintiff's failure to establish that the car accident she was involved in proximately caused her to sustain a threshold injury.

The Michigan Court of Appeals considered whether it was appropriate for the affidavit to be used as evidence by the trial court. To decide this issue, the court first discussed whether the ex-parte meeting between the defense counsel and the plaintiff's physician violated HIPAA. The appellate court held the ex-parte meeting violated HIPAA because any discussion of the plaintiff's medical history or condition clearly falls within HIPAA's definition of protected health information.

In obtaining the meeting, the defense counsel did not comply with any of HIPAA's provisions, which allow for the transmission of protected health information. The defense counsel argued his failure to do so was allowed under the Michigan Supreme Court's decision in *Domako v Rowe*, 438 Mich 345; 475 NW2d 30 (1991).

In *Damako*, the Supreme Court held ex-parte interviews are permitted once a plaintiff has waived her privilege by filing a lawsuit. The appellate court held that *Damako* did not allow the ex-parte meeting to take place because under HIPAA, a patient may not informally waive HIPAA protection by filing a lawsuit.



Under HIPAA, a physician may not disclose health information absent a court order, written permission from the patient, or assurance that the patient has been informed of the request and given an opportunity to object.

After determining a HIPAA violation occurred, the appellate court discussed the appropriate remedy for the violation. It stated that although there is no remedy specified under HIPAA for violation made in the discovery context, a trial court has the inherent authority to impose sanctions on the basis of the misconduct of a party or an attorney.

Consistent with this inherent authority, the appellate court held that trial courts may treat discovery obtained in violation of HIPAA as a discovery violation under MCR 2.313(B). This holding allows a trial court to impose any sanction it feels is appropriate for a HIPAA violation, including a default. In this case, the trial court decided not to sanction the defendant for his HIPAA violation.

For a complete copy of the Michigan Court of Appeals decision on *Belote v Strange*, [click here](#).