Mr. Decker declared that while the videotape of his interrogation contained nontestimonial evidence, this evidence could not be separated from the testimonial evidence that had been ruled inadmissible. The Iowa Supreme Court noted that before a jury, the limited probative value of the nontestimonial portion of the videotape would outweigh the prejudicial aspect of the testimonial evidence contained therein. It did not believe that an untrained jury could consider only the physical demeanor evidence and not consider the invocation of *Miranda* rights and related testimonial content. Relying on *Robinette v. State*, 741 N.E.2d 1162 (Ind. 2001), the court reasoned that a trial court's limiting instructions could not cure the wrongful admission of *Miranda* invocations in a jury trial. However, based on an earlier decision in *State v. Matheson*, 684 N.W.2d 243 (Iowa 2004), the court noted that legal training allows those in the legal profession to remain unaffected by matters that should not influence the determination. According to this supposition, judges are deemed capable of ruling on a case despite knowledge of evidence that is excluded during the course of a trial. Because Mr. Decker did not sit before a jury, and because inadmissible portions of the videotaped interrogation were not admitted into evidence at his bench trial, the court reasoned that the tape was properly admitted for limited purposes and was not wholly inadmissible. The court found no evidence that the trial court considered inadmissible aspects of the videotape.

Discussion

The protection against self-incrimination is a cornerstone of the United States judicial system, although the nuances of this right and its applicability to psychiatric examination have been unclear at times. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the U.S. Supreme Court held, "If the individual indicates in any manner, at any time before or during questioning, that he wishes to remain silent, the interrogation must cease" (*Miranda*, p 473). The role of the psychiatrist has also been limited. In *Estelle v. Smith*, 451 U.S 454 (1981), the U.S. Supreme Court held that a state may not use information from a pretrial evaluation at a later sentencing hearing when the defendant and his attorney have not been notified that information from that evaluation would be used in the sentencing hearing.

In order for the forensic psychiatrist to make a valid determination of the mental state of a person at the time of an alleged crime, it is critical that any information relevant to the person's mental state be available for review. When evidence of mental state such as a police interrogation video exists, it is imperative that the forensic psychiatrist be able to access this information; however, it is also important to recognize the rights afforded the accused. In this case, there is concern that the police continued an interrogation despite the repeated invocations of *Miranda* rights by the defendant. While this method may have yielded evidence useful to a forensic examiner, one does not want to encourage investigators to push the limits of interrogation techniques for the purposes of gaining insight into the accused person's mental state.

In this case, it is likely that the outcome would have been different had the trier of fact been a jury. It is well reasoned that a jury would not be able to separate testimonial evidence from demeanor evidence, as a layperson lacks the training and ability to disentangle the different forms of information. However, a judge is able to view the videotaped interrogation without error, due to specific training and experience in weighing different elements of evidence. Arguably, the forensic psychiatrist should also be able to discern testimonial evidence from demeanor evidence. Although this may limit the usefulness of a videotaped interrogation in determining sanity, it still affords some ability to augment the forensic psychiatric evaluation while continuing to protect Fifth Amendment rights.

Limitations of Attorney Work Product and Physician-Patient Privilege

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Attorney Work Product May Be Discoverable if the Requesting Party Establishes Substantial Need and Inability to Obtain Equivalent Materials Without Undue Hardship

In *Cardenas v. Jerath*, 180 P.3d 415 (Colo. 2008), the Supreme Court of Colorado ruled in two areas of confidentiality involving civil malpractice claims. In the first instance, the Colorado Supreme Court ruled that notes created by an attorney retained by the hospital for purposes of assessing the potential for liability on the part of the hospital could not be shielded by the usual attorney work product privilege. In this case where a child was born with severe neurological injuries, the Colorado Supreme Court recognized that the hospital had failed to conduct a standard risk management assessment, bypassing such a process by retaining an outside attorney. Since the attorney's work product represented the only available documentation of events during the alleged negligence, the plaintiff was able to establish substantial need and inability to obtain equivalent materials by an alternative process without creating an undue burden on the plaintiff. In the second instance involving confidentiality, the Colorado Supreme Court ruled that the mother, in filing on behalf of her child injured during birth, placed her own health at issue, thereby limiting her physician-patient privilege.

Facts of the Case

Mrs. Cardenas was admitted to St. Anthony Hospital at 11:00 p.m. on May 26, 2004, and delivered several hours later by emergency Caesarean section. Her daughter Isabelle suffered respiratory arrest and was born with severe neurological injuries. The day after her birth, the hospital's director of risk management engaged an attorney, Frank Kennedy, "to advise and represent the Hospital concerning the expected litigation." In his affidavit, Kennedy stated that he created notes regarding his interview with the labor and delivery nurse who took care of Mrs. Cardenas and child. He also stated that he created notes of his conversation with risk management personnel and of his review of relevant medical records. After initiating litigation two years later, Mrs. Cardenas attempted to discover documents that she presumed St. Anthony had compiled in routine investigation of her daughter's injuries. However, she was informed that no such investigation took place. Eventually, St. Anthony's counsel confirmed that Kennedy's notes were the only investigative report compiled concerning Isabelle's birth.

As part of the initial disclosure, Mrs. Cardenas authorized St. Anthony to access the medical records associated with her pregnancies and the births of Isabelle and her other child, born in 2000, also at St. Anthony. The hospital then requested the production of a list of all of Mrs. Cardenas's medical providers for the past 10 years and every mental health provider or facility that had ever provided her with services. The hospital also requested authorization to obtain records from these providers.

Mrs. Cardenas filed a motion for a protective order concerning her medical records and to compel production of the documents and information related to the investigation of Isabelle's birth, including Mr. Kennedy's notes. The trial court denied her motion to compel, citing that Mr. Kennedy's investigation was conducted in the context of probable litigation and thus constituted work product. The court also denied her motion for a protective order regarding her medical records. It ordered that Mrs. Cardenas execute waivers authorizing the release of her medical records from all providers who treated her in the five years before Isabelle's birth. It also ordered that she provide the hospital with a list of all of the providers whom she had seen since Isabelle's birth, along with the dates of these medical visits.

Mrs. Cardenas petitioned the Colorado Supreme Court asserting that the work product doctrine did not shield Mr. Kennedy's notes from discovery, as St. Anthony had retained him for the sole purpose of disguising a routine investigation as work product. She also contended that any medical records not associated with her pregnancies and the births of her children were protected by physician-patient privilege and were irrelevant to the claims of economic loss. Mrs. Cardenas asserted that she should be allowed to provide a log listing the records for which she claimed physician-patient privilege.

Ruling and Reasoning

The Colorado Supreme Court ruled that St. Anthony must produce the factual portions of Mr. Kennedy's notes from his investigation of Isabelle's birth. It cited *C.R.C.P. 26(b)(3)*, stating that materials prepared in anticipation of litigation were discoverable, except for "mental impressions, conclusions, opinions, or legal theories" of the attorney. The court cited *Hawkins v. District Court In and For Fourth*

Judicial Dist., 638 P.2d 1372, 1377 (Colo. 1982), noting that the work product doctrine does not shield materials prepared in the ordinary course of business. In *Hawkins*, an insurance adjuster's investigative reports were deemed to be part of ordinary business activity and thus were not shielded.

Mrs. Cardenas argued that Mr. Kennedy's investigation should not be shielded because he was retained to disguise a routine investigation as work product, and the report was not prepared in regard to specific litigation. The court noted that materials prepared in the context of litigation or trial may only be discovered if the requesting party can prove that there is a substantial need for the materials and that he or she would be unable to obtain equivalent materials without undue hardship. It found that because St. Anthony did not conduct a routine investigation, Mr. Kennedy's report was the only investigative documentation of events surrounding Isabelle's birth. Given the four years that had transpired since her birth and the lack of any other investigative report, the court ruled that Mrs. Cardenas demonstrated substantial need for the information and could not obtain this information by any other means. Thus, the notes were deemed unshielded, and the hospital was ordered to provide the trial court with an unredacted copy. The trial court would redact the mental impressions, conclusions, and legal theories from the notes and then allow Mrs. Cardenas to discover the redacted report.

The court then turned to the discoverability of Mrs. Cardenas' medical records. It noted that the physician-patient privilege is waived if the patient injects her "physical or mental condition into the case as the basis of a claim or an affirmative defense" *Clark v. Dist. Ct.*, 668 P.2d 3, 10 (Colo. 1983). It cited *Alcon v. Spicer*, 113 P.3d 735, 740 (Colo. 2005), noting that this waiver is limited to the cause and extent of the damages claimed. To confine the discovery of Mrs. Cardenas' records to the question of causation associated with Isabelle's claims of injury, the court confined discovery to the five years before Isabelle's birth and to the records relevant to the cause of her injuries since the time of her birth. Citing the precedent of *Alcon*, the court ordered Mrs. Cardenas to provide the hospital with a privilege log, identifying each record for which privilege is claimed and describing these records with sufficient detail to enable the trial court to ascertain the applicability of the physician-patient privilege. The court ruled that the trial court abused its discretion by issuing such a broad order regarding the release of Mrs. Cardenas' records.

Justices Coats and Eid concurred in part and dissented in part, finding that the plaintiff had not demonstrated the "substantial need or undue hardship" required to discover the documents prepared by Mr. Kennedy in anticipation of litigation and to overcome the usual protections afforded attorney work product.

Discussion

The concept of confidentiality between physicians and patients is ancient, first appearing in the Hippocratic Oath. However, as early as 1887, in *McKinney v. Grand Street P. P. & F. R. CO.*, 10 N.E. 544 (N.Y. 1887), the New York Court of Appeals opined:

> The patient cannot use this privilege both as a sword and a shield to waive when it inures to her advantage, and wield when it does not. . . . The nature of the information is of such a character that, when it is once divulged in legal proceedings, it cannot be again hidden or concealed" [*McKinney*, p 544]).

Other state courts have followed suit in ruling that a person waives physician-patient privilege when he places his medical condition at issue in the legal setting. Cases such as *Sibley by Sibley v. Hayes 73 Corp.*, 511 N.Y.S.2d 65 (N.Y. App. Div. 1987), heard by a New York appellate court, and *Burgos v. Flower and Fifth Avenue Hospital*, 437 N.Y.S.2d 218 (N.Y. Sup. Ct. 1980), heard by the New York Supreme Court, extended such waivers to mothers suing on behalf of injuries to infants. In the legal realm, physician-patient privilege is not absolute, and a balance must be obtained between the rights of the patient, the integrity of the medical profession, the importance of confidentiality in medical treatment, and the state's interest in justice.

In today's litigious environment, the forensic psychiatrist is not infrequently asked to participate in the risk management process. Knowledge pertaining to work product privilege is useful in this regard. It seems inherently unfair, however, for a medical facility to have the ability to shield from discovery the very information a plaintiff requires and otherwise has no access to. The present case suggests that framing a routine risk management investigation as attorney work product may not be a viable defensive strategy.