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A TROUBLING INVASION INTO THE ATTORNEY-CLIENT PRIVILEGE

In ***Dannemann v. Shands Teaching Hosp. and Clinic***, 14 So. 3d 246 (Fla. 1st DCA 2009), the 1st DCA reversed the trial court's denial of plaintiff's motion to prohibit pre-deposition conferences between non-party physicians and their counsel. The 1st DCA moved to quash the trial court's denial based on the theory that the Florida Patient Privacy Statute prohibited a physician from reviewing a patient's medical history with an attorney. The 1st DCA cited its prior decision in ***Hannon v. Roper,*** 945 So. 2d 534 (Fla. 1st DCA 2006), where it held that the plain language of the Florida Patient Privacy Statute prohibited a patient's confidential information from being revealed to a non-party physician's attorney.

The 1st DCA's decision has greatly affected a physician's ability to seek advice from an attorney before being forced to undergo a deposition or to testify in open court. This decision has allowed a statute to outweigh a physician's fundamental right to counsel.

The 1st DCA's decision was appealed directly to the U.S. Supreme Court and to the FDLA as amicus. Defendant argued that the right to be advised by counsel is a fundamental right. The U.S. Supreme Court in ***Hunt v. Blackburn***, 128 U.S. 464 (1888),

found that the right to counsel was "founded upon a necessity, in the interest and administration of justice, of the aide of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from consequences or the apprehension of disclosure."

The ***Dannemann*** decision is in direct contradiction of the decision in ***Hunt***. The 1st DCA has created the very apprehension that the U.S. Supreme Court warned of in ***Hunt***.

Additionally, the 1st DCA's decision was not limited in scope. The 1st DCA's decision allows for future statutes to be written that impede on the constitutional rights of all individuals to seek advice of counsel before being forced to offer evidence in a pending action.

By providing testimony in a tortious action, a physician without first consulting an attorney, risks being named as a ***Fabre*** defendant or added as a named defendant. These uncounseled physicians may unknowingly open themselves up to potential legal consequences such as future claims for contribution, indemnity or even potential punishment through their own certifying boards.

The 1st DCA's decision not only limits the ability of a physician to consult with an attorney, it also encompasses health care groups and the physician community as a whole. The decision essentially allows the plaintiff in an action to dictate when one can retain counsel in their own defense. It has also placed attorneys at risk of violating their own code of ethics by preventing them from being fully informed and prepared to represent their clients.

The Florida Supreme Court has denied the petition to review the 1st DCA's decision. It has been left to the Florida legislature to temper the effects of the ***Dannemann*** decision. Without a legislative intervention to protect attorney-client communication, statutes such as the Florida Patient Privacy

Statute, will effectively destroy a physician's fundamental right to seek the advice of counsel.

JLH/CQD/smm/tsr

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