Legally Speaking

The Confidentiality of Medical Records

What's in your medical records is generally confidential. It's covered by the doctor/patient privilege. A patient can agree to release this information. But what happens if the patient doesn't agree and the information is released anyway?

In 1999, in a case called Biddle v. Warren General Hospital, the Ohio Supreme Court created a tort for breach of patient confidentiality. A tort is an injury for which the injured party can seek monetary damages.

What happened in Biddle was this. A law firm talked the Warren General Hospital into a deal to reduce uncollectable bills by finding and contacting patients eligible for social security disability. If the patients did receive disability money to pay the bills, the law firm received a contingent payment from the Hospital. But in order to do its job, the law firm needed patient records. The Hospital turned those patient records over to the lawyers, even though the Hospital's patient release form only authorized release to the patient's insurance company or third party payor, and only for the express purpose of completing hospital claims. In

Biddle, the Ohio Supreme Court held it was a tort to disclose this patient information to a third party without patient authorization to do so. The public policy underscored in Biddle is that confidentiality of patient records is strongly to be valued, and releases are to be strictly construed in accordance with their terms.

In a case just decided this past term of the Ohio Supreme Court, a lawyer was found to have committed the same tort. The case is Hageman v. Southwest General Health Center. Here's what happened.

Plaintiff Kenneth Hageman was receiving psychiatric treatment. During the course of this treatment Hageman's wife sued him for divorce. She was represented in these proceedings by attorney Barbara Belovich. Hageman countersued his wife for custody of the couple's minor child. While the divorce case was pending, Hageman was charged with assaulting his wife at their home. She received a civil protection order against him and got temporary custody of their child pending a full hearing.

Attorney Belovich subpoened Hageman's psychiatric records, which she received without protest by the doctor or by Hageman. The parties then settled their divorce by agreement, so Hageman's medical records

were never admitted into evidence in the divorce or protection-order proceedings. But attorney Belovich also gave Hageman's records to the prosecutor in the criminal case against Hageman. For this, Hageman sued Belovich for the improper disclosure of his medical records without his authorization.

There are times when the medical records of a party to a lawsuit are relevant to that lawsuit and may be ordered to be produced as evidence in that case. When that occurs, the confidentiality of those records is waived. For example, if a person is injured in a car crash, and is suing for money damages, that person's medical records relating to that injury will be a part of that case. And in a contested custody case, a person's medical history may have a bearing on that person's fitness to have custody of the child.

Hageman admitted that he had made his health an issue in the divorce case by seeking custody of his child. He was required to show he was capable of caring for the child in order to get custody. But he argued that he had waived the confidentiality of his health records just for the divorce and related civil protection cases, and not for all purposes. Belovich argued that Hageman had waived the confidentiality of his

medical records for all purposes, including for use in the criminal case against him.

The high court, in a 5-2 decision authored by Chief Justice Thomas Moyer, sided with Hageman. The Court held that an attorney may be liable in tort to an opposing party for the unauthorized disclosure of the party's medical information beyond the specific limited purpose for which the records were obtained through litigation.

Moyer wrote that creating an expansive, rather than a limited waiver of confidentiality would be bad policy, because it could discourage people from seeking treatment and telling the truth to their doctors, and especially so where psychological conditions were involved. Quoting from the Biddle decision, the Chief wrote, "it is for the patient—not some medical practitioner, lawyer, or court—to determine what the patient's interests are with regard to personal confidential medical information."

Justice Terrence O'Donnell dissented in the case, joined by Justice Evelyn Stratton. O'Donnell would find that when Hageman waived the confidentiality of his records in the divorce case, the waiver was valid across the boards. He would find that an attorney who lawfully came into possession of no-longer-privileged records, as Belovich did, was under no

duty to preserve the confidentiality of those records, basically taking the view that once the information is out, that bell cannot be "unrung."