

executed consent form affirming the patient's understanding of and consent to the procedure to be performed.

More and more, patients are recording discussions with their physicians using smartphones or mobile devices. The recorded discussion could impact the case significantly based upon its contents. These recorded discussions could obviously impact an informed consent claim where the content of a physician's conversation with a patient comprises the material facts.

An issue that has arisen is whether such a recording is admissible at trial. If a patient, who later files suit, has previously recorded a discussion with his or her physician, the patient may seek to use the recording to prove a fact or resolve a factual dispute.

In New Jersey and in the majority of other states, recording a conversation with an unwitting party is acceptable. However, there are requirements. The recorder of the discussion needs to be a party to the conversation. *Cacciarelli v. Boniface*, 737 A.2d 1170 (N.J.Super. 1999).

This allowance coupled with the fact that many people have a "smartphone" with a recording feature, presents unique and sometimes troublesome circumstances for medical providers, who are now being surreptitiously recorded by their patients. This can be problematic in a whole host of situations, especially where a medical provider makes an admission of wrongdoing, makes inappropriate comments, or fails to ensure that the patient provides a thorough informed consent. The question then becomes whether such recorded statements should be admissible at the time of trial. Not surprisingly, this area of the law is largely undeveloped and decidedly unclear in this context.

The issue of admissibility of surreptitiously recorded conversations is most often addressed in the context of criminal matters. One can imagine the classic scenario where the prosecution is trying to admit into evidence a recording of a conversation involving an unwitting criminal defendant making incriminating statements. In New Jersey, there are currently fewer examples in the civil arena. Nevertheless, the general rule regarding the admissibility of recorded conversations, when one party was not aware of the recording, requires a preliminary determination that the speakers can be identified and that: (1) the recording device is capable of taping the conversation or statement; (2) its operator was competent; (3) the recording is authentic and correct; and (4) no changes, additions or deletions have been made in the recording. *Cacciarelli v. Boniface*, 737 A.2d

1170 (N.J.Super. 1999) (citing, *State v. Driver*, 38 N.J. 255, 287-88 (1962)).

In many situations it may be argued that certain recorded statements are hearsay and that the out-of-court recorded statement is being used to prove the truth of the matter contained in the statement. Following this preliminary determination, a party seeking to have such a recorded statement admitted will likely argue that it falls under an exception. Depending on the factual circumstances of the case, a party may argue for admissibility under N.J.R.E. 803(a)(1), as a prior inconsistent statement; N.J.R.E. 803(b), as a statement by a party opponent; and possibly some of the 803(c) exceptions, including a present sense impression or statement against interest. If a party is seeking to admit a recorded statement of another party, the statement may fall under one of these categories.

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Under these circumstances, a Rule 104 hearing may resolve issues relating to the admissibility of recorded statements made by a party. It is anticipated that preliminary hearings on the admissibility of these recorded statements will be used more frequently. The court will make a determination as to the admissibility of the recorded statements based upon the arguments of counsel and the evidence put forth. However, discovery concerning the recording, including its authenticity, will be needed as a basis for the court's determination in this regard.

One of the few holdings that exist on this topic came from a discovery dispute in the Court of Appeals of Ohio, Eighth District, Cuyahoga County, in *Smith v. Cleveland Clinic*, 968 N.E.2d 41 (Ohio App. 2011). The case involved a medical malpractice action commenced after a plaintiff passed away after suffering a fatal heart attack following knee surgery, allegedly due to an unreported blood analysis that revealed critically high potassium levels in the plaintiff's blood.

Several days before the plaintiff's death, his three children met with the hospital's chief medical officer. The children recorded the meeting without his knowledge. During that recorded conversation, the chief medical officer made certain admissions with respect to errors made in their father's care and treatment.

During the discovery phase of the case, the existence of the recording was revealed. In response, the defendants filed a motion for a protective order, arguing that the information held by the chief medical officer during this meeting, who was not involved in the care and treatment of the plaintiff, was derived from peer-review activities, and thus not discoverable and ultimately inadmissible. However, the Appellate Court affirmed the trial court's holding that the recording was indeed discoverable. Their analysis turned on the fact that the defendants did not meet their burden in establishing that the information held by the chief medical officer was derived from any peer-review meeting. Unfortunately, a determination of the admissibility of the statements was not reached in this case.

Due to the uncertainty that exists in this area of the law, all parties in medical malpractice and other civil matters should take a proactive approach to dealing with recorded conversations. Requests for such recorded statements should be included in document production requests. Detailed questions about the recording should be asked of the person who made the recording at depositions and through written discovery, in order to establish the circumstances and reliability of the recording.

Pretrial motions in limine should also be considered, although grounds for the exclusion will largely depend on the context and substance of the recording.

Overall, parties should be aware that they can be recorded and that recordings of their conversations potentially exist. A proactive approach should be utilized until this area of law is more clearly defined. ■