For as long as attorneys have had to rely on medical professionals in legal matters, there have been disagreements regarding the scope of records and testimony such professionals must provide. Such disagreements frequently concern the scope, timing and costs associated with legal requests. For example, attorneys who need medical records and testimony to prove elements of their client’s case or defense often issue subpoenas to treating health care providers to produce medical information and to testify. Yet, health care providers are prohibited by federal and state law from disclosing confidential health information without authorization, and may be booked far in advance to provide needed care to patients and want to be compensated for their time. The needs of a patient/litigant who requires medical testimony for their case and who may not have the ability to pay the requested compensation can conflict with a treating provider, whose time is valuable, has care obligations to other patients and who may not be comfortable testifying about matters beyond the specific care provided to the patient.

**Colorado Interprofessional Guidelines**

Accordingly, Colorado’s medical and legal communities have collaborated on guidelines to provide standards and suggestions to facilitate interaction between medical professionals and attorneys. The Colorado Interprofessional Guidelines were enacted in 2012 and set forth expectations and courtesies appropriate for legal and health care professionals, particularly in the course of litigation. The guidelines have been endorsed by the Colorado Bar Association, Denver Bar Association, Colorado Medical Society, Denver Medical Society, Boulder County Medical Society and the El Paso County Medical Society, and are available electronically at www.cobar.org/index.cfm/ID/20100/subID/28380/CITP/.

The purpose of the guidelines is to encourage cooperation and respect between the attorneys and health professionals, and to foster an understanding of the responsibilities of the professions. See guidelines §1.1. A predecessor interprofessional code was first enacted to assist with interprofessional disputes in 1986 and updated in 1997; however, the Denver Medical Society and Colorado Medical Society withdrew their endorsement of the code in 2011. The guidelines urge health care professionals to understand the necessity of medical testimony in court proceedings and to “engage in the legal process in a professional and responsible manner that demonstrates respect for an attorney’s duties, role and circumstances, as well as the needs and rights of their patients.” At the same time, attorneys are reminded of their corresponding duty to engage health care professionals in such a way as to show respect for that professional’s duties, roles and circumstances. Because a health care professional’s primary duty is to provide patient care, attorneys should try to minimize disruption to the health care professional, patients and health care practices.

The interprofessional guidelines establish a Medical/Legal Dispute Resolution Sub-Committee of the Interprofessional Committee as a mechanism for solving disagreements arising between health care providers and attorneys. The sub-committee is comprised of members of the plaintiff and defense bars and members or staff of the Colorado Medical Society. If a dispute arises between a health care provider and an attorney, both parties are encouraged to submit a summary of the dispute along with supporting documentation to the sub-committee. Members of the sub-committee may further investigate the dispute by interviewing those involved. Following such review, recommendations are made for resolving the problem. Such recommendations are reviewed by the full sub-committee, which issues a final written opinion. The goal is to have the final written report issued within 60 days of
the initial submission of the dispute. The sub-committee’s recommendations, however, are not binding unless both parties agree to them. Additionally, the operations of the sub-committee do not affect the availability of litigation or other avenues of alternative dispute resolution for parties that disagree.

Resolving fee disagreements

The guidelines aim to mitigate disputes that arise in connection with fees health care professionals charge for services in legal proceedings. Health care professionals may testify either as a treating expert witness, where testimony is based on facts gained from personal observation of a patient, or as a specially retained expert witness, where opinions are based upon facts furnished to the professional in the course of litigation outside their direct care and treatment of a patient. The guidelines provide that a health care professional is allowed to charge a reasonable fee when retained either as a treating or as a specially retained witness. For a fee to be reasonable, a health care provider generally should charge the same amount that he or she would have likely earned during the time required to render the testimony or other services provided. In the event of cancellation or postponement of scheduled medical testimony, the health care professional may be entitled to compensation, depending on the timeliness of the notice and amount of disruption to the professional’s practice.

The interprofessional guidelines urge attorneys and doctors to determine fee arrangements, cancellation fees and other financial arrangements in a formal written agreement executed before services are provided. If an attorney requests document review, medical reports, conferences or medical testimony from a health care professional, then it is conclusively presumed that the attorney has made definitive arrangements with the client for payment of all reasonable charges. The health care professional is encouraged to submit an itemized bill to the attorney for services, and the attorney must promptly compensate the health care professional for the services rendered. Health care professionals, however, should note that ultimately the patient, not the attorney, is responsible for payment of fees for services. Correspondingly, attorneys should take note that medical rules of ethics prohibit fees for medical testimony from being contingent upon the outcome of litigation.

Resolving common scheduling issues

Another area of disagreement between attorneys and health professionals is triggered by last-minute changes to arrangements for a health care professional’s testimony or services. Although such changes may be unavoidable in litigation, the guidelines urge all parties to determine in advance how scheduling disputes will be addressed to eliminate disagreements that could later arise. Attorneys are responsible for scheduling the services of a health professional with enough advance notice and in such a manner to minimize inconvenience to the professional, patients and the health practice. This includes the duty to notify the health care professional of any trial or hearing dates at the time the trial or hearing is set, and to promptly inform the professional of any schedule modifications.

Subpoenas and Rule 45

Another common area of contention...
involves the timing of subpoenas. The guidelines aim to resolve other problems caused by subpoenas between the legal and health professions, particularly in light of recent amendments to Rule 45 of the Colorado Rules of Civil Procedure.

At the outset, the guidelines provide that when serving a health professional with a subpoena, attorneys should schedule service of the subpoena so as to minimize inconvenience to health professionals and limit disruption to patients and to the practice. Attorneys are urged to explain, to the extent possible, the nature and subject of the subpoena as a matter of courtesy.

At the suggestion of the Colorado Supreme Court, Rule 45 of the Colorado Rules of Civil Procedure was amended to address issues that frequently arose in connection with subpoenas duces tecum for privileged documents. One particularly troublesome problem was the practice by attorneys to issue subpoenas to health providers for privileged medical records. Health care institutions that produce records in response to a subpoena without the knowledge or consent of a patient may violate patient privilege. Amendments to the rule aimed to solve this problem became effective Jan. 1, 2013. Rule 45 now protects the subject of a subpoena by requiring any subpoena for privileged records to include either a signed authorization from the privilege holder or a court order permitting production of the documents.

The interprofessional guidelines harmonize the policy objectives of the amended CRCP 45 with the obligations of the legal and medical professions. For example, the guidelines provide that “[a] health care professional or institution should not release medical records without a patient authorization or a court order, unless there is some statutory exception that allows the release of the records…” This language tracks closely with the new language in CRCP 45(c)(2)(B)(i) and highlights for health providers the importance of maintaining patient privilege and confidentiality in the litigation process.

Similarly, the guidelines and Rule 45 complement each other in advising those issuing subpoenas to health professionals and institutions to take reasonable steps to avoid imposing undue burden or expense, which provide that “[a] party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.”

**Conclusion**

By outlining the goals of interaction between legal and health care professionals, the interprofessional guidelines offer a workable standard for professional courtesies and responsibilities. The recommended approach to common areas of contention allow both attorneys and health care professionals to plan their relationships in a way that minimizes the potential for future disagreements. Further, by adopting language that conforms with amendments to CRCP 45, the guidelines give additional protection to patients and litigants who otherwise may be caught in the middle of professional disputes.

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