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Court of Appeals Parses Intersection of Doctor-Patient and Attorney-Client Privileges in Medical Malpractice

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Division I of the Washington Court of Appeals recently issued an opinion parsing the difficult intersection of the doctor-patient and attorney-client privileges in medical malpractice cases. In *Snyder v. Virginia Mason Medical Center*, 2024 WL 419279 (Wn. App. Feb. 5, 2024) (unpublished), the plaintiff alleged medical negligence during surgery at Virginia Mason Medical Center. Virginia Mason and the lead surgeon were the only defendants. Three other doctors were involved in the surgery but had since left Virginia Mason. Virginia Mason provided the latter three with separate counsel, but they were not parties to the case.

During discovery, a dispute arose over the extent, if any, Virginia Mason's counsel could contact the three non-party doctors outside the presence of Snyder's lawyer. Under *Loudon v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1998), defense counsel in medical malpractice cases are generally prohibited from contacting a claimant's treating physicians *ex parte* to protect the physician-patient privilege as applied to medical information beyond the treatment at issue. *Youngs v. PeaceHealth*, 179 Wn.2d 645, 316 P.3d 1035 (2014), tempered *Loudon* in the corporate context by holding that defense counsel for a corporate entity like a hospital could contact its employee-physicians directly about the treatment at issue and those conversations would fall within the corporate

employer's attorney-client privilege. *Hermanson v. MultiCare Health Sys., Inc.*, 196 Wn.2d 578, 475 P.3d 484 (2020), extended *Youngs* to independent contractor physicians who, while not direct employees of a hospital, are the functional equivalent.

In *Snyder*, however, the doctors were former employees by the time they were contacted. In *Newman v. Highland School District No. 203*, 186 Wn.2d 769, 381 P.3d 1188 (2016), the Supreme Court found that the contacts between corporate counsel and former employees are not generally protected by the attorney-client privilege. *Snyder* argued, therefore, that Virginia Mason's contacts with the former employee-doctors did not fall within *Youngs* and instead were prohibited by *Loudon*. On discretionary review of that narrow question, the Court of Appeals concluded that because the non-party doctors were former employees, they could not be contacted *ex parte* under *Loudon* and instead defense counsel would either need to take their depositions as fact witnesses or conduct informal interviews with *Snyder*'s counsel present.

Snyder merits close review by counsel on both sides of the aisle in medical malpractice litigation as it succinctly summarizes the key decisions at the complicated interface between the doctor-patient and attorney-client privileges.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms and legal departments throughout the Northwest on professional responsibility and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author and the editor-in-chief for the WSBA *Legal Ethics Deskbook* and is a contributing author and principal editor for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.860.2163 and Mark@frllp.com.