James "Jay" Ludlow

Obtaining A Tortfeasor's Drug & Alcohol Treatment Records

In a recent motor vehicle case in which liability on behalf of the defendant was strongly contested, I discovered that the defendant had a long history of DUI/OWI offenses before the accident in question. This fellow had also been arrested for a DUI/OWI offense 6 weeks before my client's accident and again two months afterward. Although his driver's license had been suspended at the time of my client's accident for a previous DUI/OWI offense, unfortunately the investigating police officers were unaware of this license suspension and consequently did not perform any type of drug or alcohol testing on the defendant. As a result, there was no evidence that the defendant had been drinking or was intoxicated at the time of the accident.

When I took this defendant's deposition, he admitted that he had undergone treatment for alcoholism at an outpatient substance abuse clinic within the 12 months prior to my client's accident. However, he steadfastly denied that he had been drinking on the day of my client's accident. As I strongly believed that the drug and/or alcohol treatment records from this facility would benefit my case, the question was how could I convince the trial court to order the production of these records pursuant to a non-party request to this clinic? The first hurdle of course was to convince the trial court that these records were relevant for purposes of discovery, and the next that these records were not privileged.

In addressing the issue of relevancy, I successfully argued that since the defendant had admitted to having undergone treatment for alcohol dependency in the 12 months prior to the accident with my client, these records were relevant[1] because they likely contained information regarding the frequency and amount of alcohol that the defendant customarily consumed. These records likely also described how this consumption and/or possible withdraw therefrom may have affected the defendant's cognitive abilities and behavior during the time period of my client's accident. Thus, these records were clearly relevant to the defendant's ability to safely operate a motor vehicle.

The next question was whether these records were protected from discovery by a recognized privilege. In researching this question, I was surprised to learn that the physician-patient privilege does not apply to hospital or clinic records. In Ley v. Blose, 698 N.E. 2d 381 (Ind. Ct. App. 1998), in the context of a medical negligence claim, a patient had requested the production of his physician's substance abuse records from several facilities that his physician had attended both before and after the time period during which he treated the patient. Id., 698 N.E. 2d 382-383.

In considering whether these records were protected from disclosure by any type of privilege, our Court of Appeals first noted that while the physician-patient privilege does apply to treatment with a specific physician, this "privilege did not normally apply to hospitals and other medical facilities but solely to physicians." Consequently, Dr. Ley's substance abuse records were not privileged. Ley, 698 N.E. 2d at 383.

Dr. Ley also contended that his records were "mental health records" that were protected from disclosure by Indiana Code 16-39-3-3 et. seq. This statute states that a person seeking the release of a patient's mental health records must file a specific petition, that a confidential hearing must then be held, and that prior notice of the hearing on the disclosure request must be provided to the patient's mental health care providers who could then object to the disclosure of these records. However, in rejecting this argument, the Court noted that alcohol and/or drug treatment records are not considered to be "mental health records" which are protected from disclosure. Ley, 698 N.E. 2d at 384; Indiana Code 16-18-2-226.

Lastly, Dr. Ley contended that the disclosure of his records was prohibited by federal law, specifically by the federal Public Health Service Act, which is found at 38 USCS 7332. Under this federal statute, drug and/or alcohol treatment records can only be disclosed upon the patient's consent, or "[i]f authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefore." 8 USCS 7332(b)(2)(D).

However, this federal statute "is not applicable unless the individual seeking to protect against the disclosure of the medical records presents evidence that the records were obtained from a program 'which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States...' Id. Because the record fails to contain any evidence that the health care providers involved had any connection with the federal government, we must conclude that this statute affords Ley no protection." Ley, 698 N.E. 2d at 383.

In my case, the defendant, as in Ley, was unable to show that his outpatient treatment program had any connection to any department or agency of the federal government. Consequently, this federal law did not apply. However, even if he had made such a showing, this federal statue does authorize the disclosure of such records upon a showing of good cause.

When I received a court order for the production of the defendant's alcohol records, these documents noted that the defendant had a long history of blackouts, inattentiveness, lying, deceitfulness, and daily consumption of alcohol. Shortly after the disclosure of these records, the defendant's insurer's offer of settlement went from an offer of zero to that of policy limits. Clearly then, the relatively modest time

1 Of course, "relevancy for the purposes of discovery is not the same as relevancy at trial. [Citation omitted]. A document is relevant to discovery if there is the possibility the information sought may be relevant to the subject matter of the action." Cigna-Ina/Aetna v. Hagerman-Shambaugh, 473 N.E. 2d 1033, 1036 (Ind Ct. App. 1985); Accord: Bishop v. Goins, 586 N.E. 2d 905, 907, ft. nt. 2, (Ind. Ct. App. 1992).

involved in obtaining these records was well worth the effort.

One other lesson that I learned from my case is that alcoholics and/or those who have a significant drug abuse history often have permanent residual brain damage because of the abuse. Indeed, there is a considerable body of medical research which indicates that alcoholics have permanent changes to their brain that are objectively seen on an MRI which adversely affects their cognitive abilities, even when they have remained sober for many years[2]. The use of a physician/expert who specializes in addiction medicine is likely to be helpful when you have such a defendant.

JAMES F. "Jay" LUDLOW born Corydon, Indiana, November 18, 1959; admitted to bar, 1987, Indiana and U.S. District Court, Southern District of Indiana.

Education: Indiana State University (B.S., with honors, 1982; M.B.A., with honors, 1984); Indiana University School of Law (J.D., cum laude, 1987).

Member: Indianapolis, Indiana State and American Bar Associations; Association of Trial Lawyers of America; Board member Indiana Trial Lawyers Association.

Practice Areas: Automobile Accidents and Injuries; Catastrophic Injury; Products Liability; Truck Accidents; Explosions; Aviation Accidents; Severe Burns; Wrongful Death.

2 See, e.g., Fein, G., Torres, J., Price, L.J., Di Sclafani, V., "Cognitive performance in long-term abstinent alcoholic individuals", Alcohol Clin. Exp. Res. 2006 Sept.; 30(9):1538-44.

The Mission of the Indiana Trial Lawyers Association

- To uphold and defend the Constitution of the United States of America and the Constitution of the State of Indiana;
- To promote and advance high standards of professional ethics, competency and demeanor in the administration of justice in the State of Indiana by the bench and the bar;
- To encourage and promote, by moral, social and educational influence, by study and the dissemination of educational materials, and by all lawful action, the progress and development of the law of Indiana and the practice of the law in all courts in the State of Indiana;
- To educate and train in the art of advocacy by the holding of seminars, supplying lecturers to universities and to other groups interested in the development of the art of advocacy; and by encouraging the publication of articles and other writings, teaching and effective presentation of cases in trial before courts and juries;
- To encourage and promote changes in the Indiana law by legislative or court action, and to oppose injustice in existing or contemplated legislation and to seek to correct harsh, unjust and oppressive legislation or judicial decisions;
- To recognize and make appropriate meritorious awards to outstanding persons who have made distinctive contributions to the progress of Indiana law or the teaching of the art of advocacy.