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Navigating the Law of Defense Counsel Ex Parte Interviews of Treating Physicians

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INTRODUCTION

The rising costs of litigation have impacted those involved in healthcare-related cases—including patients, providers, the courts, and lawyers.[1] Litigation costs have increased malpractice insurance rates for providers, and have increased the risk for malpractice attorneys on both sides of the aisle.[2] Not surprisingly, there is debate about how to control these rampant expenses.[3] The situation has even caused legislatures to craft statutory cost-cutting solutions, many of which have been arguably ineffective.[4]

One practice that may mitigate rising costs and save money for all parties involved is to allow ex parte interviews of treating physicians.[5] Scheduling formal depositions in complex healthcare-related cases often composes a substantial portion of the litigation expenses.[6] Ex parte interviews allow attorneys to reduce the number of formal depositions and gather relevant information and thereby lower costs significantly.[7] While these interviews could be helpful in any civil case where a medical condition is at issue, ex parte interviews are most important in medical malpractice cases where lawyers use physician testimony both to explain issues of medical causation and damages, and to determine whether the defendant conformed to the applicable professional standard of care.[8]

Any time ex parte is mentioned, controversy ensues. Ex parte interviews of treating physicians are no exception. Courts are split on the question of regulating these interviews, which has created a confusing legal framework

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1. John Angle, *GOP-Proposed Tort Reform Would Reduce HealthCare Cost, Analysts Say*, FOXNEWS (Mar. 3, 2010), http://www.foxnews.com/politics/2010/03/03/gop-proposed-tort-reform-reduce-health-care-costs-analysts-say/.

2. *Id*.

3. *Id*.

4. *See* Mitchell J. Nathanson, *It's the Economy (and Combined Ratio), Stupid: Examining the Medical Malpractice Litigation Crisis Myth and the Factors Critical to Reform*, 108 PENN ST. L. REV. 1077, 1077-78 (2004) (discussing how statutory fixes to medical malpractice have been ineffective in cutting litigation costs); Judd v. Drezga, 103 P.3d 135, 139-40 (Utah 2004) (discussing medical malpractice cost-cutting solutions).

5. *See* John Jennings, Note, *The Physician-Patient Relationship: The Permissibility of Ex-Parte Communications Between Plaintiff's Treating Physicians and Defense Counsel*, 59 MO. L. REV. 441, 458 (1994).

6. *Id*. at 476; Rebecca White Berch, *A Proposal to Amend Rule 30(b) of the Federal Rules of Civil Procedure: Cross-Disciplinary and Empirical Evidence Supporting Presumptive Use of Video to Record Depositions*, 59 FORDHAM L. REV. 347, 382 (1990) (discussing costs of depositions in general).

7. Jennings, *supra* note 5, at 458.

8. Tim Cramm et al., *Ascertaining Customary Care in Malpractice Cases: Asking Those Who Know*, 37 WAKE FOREST L. REV. 699, 700-01 (2002).

at both the state and federal level.[9] Nearly every state and many federal courts differ in how to regulate ex parte interviews with physicians—or whether they are even permitted.[10] Some state and federal courts completely ban the practice, while other courts allow ex parte interviews only in certain circumstances—and still other courts impose no special restrictions.[11] About half of the states permit ex parte interviews of treating physicians while the other half generally disallow the practice.[12] Federal courts are similarly conflicted.[13] Careful review of relevant case law, state statutes, and legislative records is needed to determine if a defense lawyer may interview or contact a treating physician for a formal deposition; and even then, the answer may still be unclear.

Additionally, the unresolved legal issues create challenges for treating physicians who must respond to interview requests.[14] Plaintiffs also have an

9. Jennings, *supra* note 5, at 454.

10. *Id.* at 454-56.

11. *See* Wade v. Vabnick-Wener, 922 F. Supp. 2d 679, 691 (W.D. Tenn. 2010) (applying Tennessee law and holding that defense counsel ex parte contacts are prohibited); Horner v. Rowan Cos., 153 F.R.D. 597, 598 (S.D. Tex. 1994) (banning ex parte contact unless plaintiff is given reasonable notice); Benally v. United States, 216 F.R.D. 478, 480 (D. Ariz. 2003) (banning all ex parte contacts by defense counsel with treating physicians); Domako v. Rowe, 475 N.W.2d 30, 35-36 (Mich. 1991) (referring to ex parte interviews as "routine practice" and facilitating litigation); Flamma v. Atlantic City Fire Dep't, 573 A.2d 158, 161 (N.J. 1990) (noting that no rule exists prohibiting an attorney in a disciplinary hearing from communicating with an adverse witness); Stempler v. Speidell, 495 A.2d 857, 862, 864 (N.J. 1985) ("Personal interviews . . . are an accepted, informal method of assembling facts and documents in preparation for trial."); *Ethics Digest*, 16 PA. LAW. 10 ¶ 94-48 (Sept. 1994) (commenting that the Model Rules of Professional Conduct do not prohibit an attorney representing a seller in litigation to communicate with a witness subpoenaed by the other party so long as the subpoenaed witness is not represented by counsel).

12. Melissa Phillips Reading & Laura Marshall Strong, *Has HIPAA Really Changed the Landscape?*, 53 FOR THE DEF. 30, 31-33 (2011).

13. For example, two three-judge panels in the Ninth Circuit held that ex parte contact with an adverse expert is impermissible. *See* Erickson v. Newmar Corp., 87 F.3d 298, 302 (9th Cir. 1996); Campbell Indus. v. M/V Gemini, 619 F.2d 24, 27 (9th Cir. 1980); *see also* Amarin Plastics, Inc. v. Md. Cup Corp., 116 F.R.D. 36, 40 (D. Mass. 1987) (noting that even a "critical" witness may be interviewed ex parte); United States *ex rel.* O'Keefe v. McDonnell Douglas Corp., 961 F. Supp. 1288, 1293-94 (E.D. Mo. 1997). However, some courts have also found ex parte communications with treating physicians permissible. *See, e.g.*, Felder v. Wyman, 139 F.R.D. 85, 91 (D.S.C. 1991) ("Private interviews by attorneys have been recognized as a 'time-honored' method for conducting discovery."). The District of Columbia permits ex parte communication. Sklagen v. Greater Se Cmty. Hosp., 625 F. Supp. 991, 992 (D.D.C. 1984); Doe v. Eli Lilly & Co., 99 F.R.D. 126, 129 (D.D.C. 1983).

14. *See* Jennings, *supra* note 5, at 457.

obvious interest in a solution as ex parte interviews clearly involve the patient privilege and other rights.[15]

This article explores the issue of defense counsel ex parte interviews[16] with treating physicians, and proposes a resolution to standardize the practice that is equitable for all parties involved. Courts and legal scholars have commonly recognized that treating physicians in personal injury litigation are usually fact witnesses, albeit with special expertise, and allow plaintiffs unfettered access while defendants are relegated to a formal deposition which creates a fundamental imbalance in informational power.[17] Moreover, there are significant arguments raised by the defense bar concerning efficiency and fairness.[18] However, allowing defense counsel unlimited and unregulated access to treating physicians creates clear risks—particularly the danger that doctors might inadvertently disclose privileged information.[19]

Section I explores the threshold question of whether the interviews are outright prohibited by existing laws. Many courts and litigants suggest certain statutes or common law principles restrict or prohibit ex parte defense interviews altogether. Most notable are the patient-physician privilege and other confidentiality rules, as well as the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[20] Section I concludes that, while these doctrines may be relevant to *regulate* ex parte interviews, they certainly *do not prevent* courts and legislatures from permitting them.

Section II discusses the law regulating ex parte defense interviews across both the federal and state systems. The current state of the law across jurisdictions is inconsistent and often confusing. Jurisdictions vary widely

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15. *Id.* at 465 (discussing the effect of waiver on the privilege relationship).

16. This article uses the term "ex parte defense interviews" to refer to defense counsel ex parte interviews of treating physicians.

17. *See* Jennings, *supra* note 5, at 475; *see also* Thomas v. 1156729 Ontario Inc., 979 F. Supp. 2d 780, 785 (E.D. Mich. 2013).

18. Horner v. Rowan Cos., 153 F.R.D. 597, 600 (S.D. Tex. 1994).

19. *See* Petrillo v. Syntex Labs., Inc., 499 N.E.2d 952, 960 (Ill. App. Ct. 1986):

> [T]he public…has the right to rely on physicians to adhere to medical ethics and thereby protect the confidential relationship existing between a patient and his physicians . . .[and] *ex parte* conferences between a patient's treating physician and the patient's legal adversary threaten that confidential relationship in that they involve the discussion of a patient's medical confidences without the patient's consent. That being the case, it is apparent that *ex parte* conferences are contrary to public policy for they place in jeopardy an established and beneficial interest of society, namely, the confidential relationship existing between a patient and his physician.

Id.

20. HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 26, 29, and 42 U.S.C.).

on whether ex parte interviews are allowed and jurisdictions that permit ex parte communications often have unclear rules for litigants.[21] Inconsistency and confusion emerge from assumptions made about the effects of the doctrines discussed in Section I, or from arguments based on conflicting policy grounds.[22] For example, many jurisdictions prohibit ex parte communications based on assumptions concerning the patient-physician privilege. Section II ends by using Nevada as an example of a jurisdiction with a confusing maze of rules based on unclear and potentially inapplicable grounds.

Section III attempts to wade through the policy arguments raised by various authorities in support of the methods each has used to regulate ex parte defense interviews. The purpose of analyzing the policies behind different approaches is for courts and legislatures to make informed decisions when regulating defense counsel treating physician interviews. Finally, the authors propose a comprehensive, uniform approach to regulating ex parte defense interviews. This solution attempts to balance the policy arguments raised by both sides of the bar as well as the courts.

Ultimately, this article does not suggest a perfect means of regulating these interviews. Rather, the authors urge legislatures and courts to consider the policy arguments raised by both sides of the bar when crafting a solution. Finally, and most important, legislatures and courts should create a measure of uniformity and clarity in this area by adopting a balanced, consistent mechanism for regulating ex parte defense counsel interviews.

A. The Current State of the Law on Ex Parte Defense Interviews

State courts, federal courts, and legislatures, all approach ex parte defense interviews in a myriad of ways—leaving litigants lost when determining whether to conduct one of these interviews.[23] Moreover, it is often unclear what policy rationale courts and legislatures use when making their regulatory decisions in this area.[24]

Choice of law implications[25] complicate the issue as federal courts disagree about whether a state's application of its substantive privilege law

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21. Weaver v. Mann, 90 F.R.D. 443, 444-45 (D.N.D. 1981); Stempler v. Speidell, 495 A.2d 857, 862-64 (N.J. 1985).

22. *See* Jennings, *supra* note 5, at 454-59.

23. Ronald A. Parsons, Jr. & Shannon R. Falon, *Ex Parte Contacts Revisited*, 58 S.D. L. REV. 273, 273-74 (2013).

24. J. Christopher Smith, *Recognizing the Split: The Jurisdictional Treatment of Defense Counsel's Ex Parte Contact with Plaintiff's Treating Physician*, 23 J. LEG. PROF. 247, 251-52 (1999); Jennings, *supra* note 5, at 456-59.

25. Depending on a court's jurisdiction, the applicable privilege law will vary. *See* FED. R. EVID. 501. Under Federal Rule of Evidence 501, federal courts should permit testimonial privilege governed by the principles of the federal common law "as they may

binds federal courts hearing a case under diversity jurisdiction.[26] Some federal courts interpret state privilege law as either prohibiting or permitting the interviews.[27] Even when federal courts apply federal law, they treat ex parte defense counsel interviews inconsistently.[28] Most federal courts allow ex parte defense counsel interviews when applying federal law largely because informal discovery techniques are well-accepted and no federal rule specifically prohibits the activity.[29] However, some federal courts have held the opposite: that the absence of a rule permitting the interviews prohibits them.[30]

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be interpreted by the courts of the United States in the light of reason and experience." *Id.* Interviews can arise within a federal question case, where federal common law under Rule 501 provides the applicable privilege law. *Id.*; *see also* H.R. REP. 93-650, at 8 (1974) (Conf. Rep.) (stating that "privileges shall . . . be developed by the courts of the United States under a uniform standard applicable both in civil and criminal cases."); H.R. REP. 93-1597, at 7 (1974) (Conf. Rep.) (explaining that "[i]n nondiversity jurisdiction civil cases, federal privilege law will generally apply"). Thus, in a federal question case, because there is no rule explicitly permitting or prohibiting an ex parte defense interview, whether such an interview is permitted is a question of federal common law. Reed v. Baxter, 134 F.3d 351, 355 (6th Cir. 1998). Alternatively, an ex parte defense interview may occur in a diversity case, where the federal court must apply state privilege law. FED. R. EVID 501 cmt. (requiring "state privilege law will usually apply in diversity cases."); Weiss v. Astellas Pharma, US, Inc., No. 05-527 JMH, 2007 WL 2137782, *3-4 (E.D. Ky. July 23, 2007) (discussing interplay of state and federal law regarding ex parte defense interviews).

26. In federal diversity cases where courts must apply state privilege law, courts disagree about whether ex parte defense interviews should be banned even if interviews are not statutorily banned under state law, but where the state common law has affirmatively banned ex parte defense interviews. *See generally* Filz v. Mayo Found., 136 F.R.D. 165, 167, 174 (D. Minn. 1991); Felder v. Wyman, 139 F.R.D. 85, 87–91 (D.S.C. 1991) (interpreting South Carolina privilege law to allow ex parte interviews).

27. Benally v. United States, 216 F.R.D. 478, 480-81 (D. Ariz. 2003) (prohibiting ex parte defense interviews as the court interpreted the physician-patient privilege to exclude interviews as a matter of public policy).

28. *See* Michael Duvall, *Resolving Intra-Circuit Splits in the Federal Courts of Appeal*, 3 FED. CTS. L. REV. 17, 17 (2009). *Compare* State *ex rel*. Proctor v. Messina, 320 S.W.2d 145, 154-55 (Mo. 2010) (en banc) *with* Holmes v. Nightingale, 158 P.3d 1039, 1047 (Okla. 2007).

29. *Benally*, 216 F.R.D. at 480 (citing *Filz*, 136 F.R.D. 165); *see Felder*, 139 F.R.D. at 91 (stating that the Federal Rules of Civil Procedure do not prohibit ex parte communication).

30. *E.g.*, Neubeck v. Lundquist, 186 F.R.D. 249, 251 (D. Me. 1999) (holding that defendants must remain within the strictures of the "formal mechanisms of discovery provided by the Federal Rules of Civil Procedure absent the express consent of a plaintiff").

States use a variety of mechanisms to control ex parte defense interviews. Some states explicitly ban the practice,[31] while others explicitly permit the practice with certain limitations.[32] For example, Michigan permits a defendant (or his representative) in a medical malpractice action to "communicate" with persons or entities with respect to whom the plaintiff has waived the physician-patient privilege "in order to obtain all information relevant to the subject matter of the claim or action and to prepare the person's or entity's defense to the claim or action."[33] The statute also clarifies that a person who discloses such information "does not violate [the statutory patient-privilege] or any other similar duty or obligation created by law and owed to the claimant or plaintiff."[34] However, even these statutory schemes can be ambiguous. For example, litigants argue that the Michigan disclosure rule was only meant to reach written disclosures.[35] Even in jurisdictions with apparently clear patient-disclosure rules[36] on point, confusion exists about when ex parte interviews are permitted, if at all.[37]

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31. *E.g.*, IOWA CODE § 622.10(1)-(3) (2012) (not allowing disclosure of confidential communication unless privilege holder voluntarily waives the confidentiality privilege); MINN. STAT. § 595.02(1)(d), (5) (2010) (prohibiting physicians from disclosing information relating to patient treatment or their medical opinion unless the patient files suit against a healthcare provider for malpractice, error, mistake, or failure to cure, then a patient waives privilege).

32. Idaho's Rules of Civil Procedure Rule 26(b)(4), explicitly prohibits ex parte contact with an adverse expert retained or specially employed to provide expert testimony. IDAHO R. CIV. P. 26.b.4(A)(1)(v)(3). However, a treating physician does not fall under Rule 26.b.4(A)(3) as the rule prohibits or limits discovery of expert opinion developed for litigation and the rule does not explicitly exclude expert opinion not developed for litigation. Clark v. Raty, 48 P.3d 672, 674-75 (Idaho Ct. App. 2002). The New York legislature proposed a similar rule:

> Ex-parte interviews: In any action involving personal injury, medical, dental, or podiatric malpractice or wrongful death, no party or anyone acting on behalf of a party may either directly or indirectly conduct ex-parte interviews with the treating physicians or other health care providers of any other party. Nothing in this subdivision shall prohibit an attorney or the agent or employee of an attorney who represents the patient, the estate of the patient, or the natural or duly appointed guardian of the patient whose condition is at issue in the action from conducting ex-parte conversations with a treating physician or other health care provider of the patient.

N.Y. Gen. Assemb. A00964A, 234th Reg. Sess. (N.Y. 2011). .

33. MICH. COMP. LAWS § 600.291f(2) (2014).

34. *Id.* § 600.291f(3).

35. Gibson v. Bronson Methodist Hosp., 517 N.W.2d 736, 737-38 (Mich. 1994) (citing MICH. CT. R. 2.314(B)(1)).

36. *See* Jennings, *supra* note 5, at 461 n.106 (naming the states that have statutes allowing for disclosure after a lawsuit has been filed).

37. It also remains unclear what information is "relevant" in terms of medical history under the Michigan Statutory scheme. Nevada law, discussed in detail *infra*, has a legislative scheme permitting disclosure of patient information during an ongoing

Other courts use non-statutory methods to regulate ex parte defense interviews, such as common-law or general discovery principles.[38] In these states, such non-statutory regulation is often poorly defined.[39] For instance, the Washington Supreme Court held that defense counsel ex parte interviews with treating physicians in personal injury cases are prohibited.[40] However, a recent decision held that there is an exception where the treating physician is employed by the defendant.[41] In *Youngs v. PeaceHealth*, the Supreme Court of Washington examined the intersection of the corporate attorney-client privilege and the state's long established ban on ex parte defense interviews.[42] In consolidated appeals of two cases involving claims against a corporate health provider based on alleged medical malpractice of its employed physicians, the court held that defense counsel for the institution could conduct ex parte interviews of physician employees whose treatment of the plaintiff patient had been placed into issue, or who otherwise has direct knowledge of the treatment at issue in the litigation.[43] However, the court limited the scope of such ex parte interviews to the "facts of the alleged negligent incident."[44] The court explained: "[w]e emphasize that 'the facts of the alleged negligent incident' do not encompass health care that was provided before or after the event triggering the litigation, such as care for preexisting conditions or post-event recovery. This is true even where such care bears on the issue of damages."[45] The dynamic state of the common law in Washington on this one aspect of ex parte contacts with treating physicians illustrates some of the uncertainty a common law approach creates.

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lawsuit—and it has been subject to litigation regarding whether it was meant to reach non-written disclosures. *See infra* Section III.

38. *See, e.g.*, Benally v. United States, 216 F.R.D. 478, 480-81 (D. Ariz. 2003) (applying discovery principles); Felder v. Wyman, 139 F.R.D. 85, 91 (D.S.C. 1991) (applying discovery principles); Kraemer v. Patterson, 29 S.W.3d 684, 690 (Ark. 2000) (applying common law displacement principles to hold other statutes restrict interviews); Lemieux v. Tandem Health Care of Fla., Inc., 862 So. 2d 745, 751 (Fla. Dist. Ct. App. 2003) (court order allowing ex parte communication violated statutory physician-patient privilege); Ruperd v. Ryan, 683 N.E.2d 166, 172 (Ill. App. Ct. 1997) (noting that the trial court did not abuse its discretion in finding that the defendant had violated the *Petrillo* doctrine by engaging in ex parte communication which violated the physician-patient privilege); Petrillo v. Syntex Labs. Inc., 499 N.E. 2d 952, 962-63 (Ill. App. Ct. 1986) (applying general discovery principles to regulate).

39. Parsons, *supra* note 23, at 273.

40. Loudon v. Mhyre, 756 P.2d 138, 140 (Wash. 1988).

41. Youngs v. PeaceHealth, 316 P.3d 1035, 1039 (Wash. 2014).

42. *Id.* at 1038.

43. *Id.* at 1039-40, 1045.

44. *Id*. at 1048.

45. *Id*.

Other states have ignored the issue leaving all parties involved without guidance about what is permitted in these ex parte communications.[46] Regardless of the approach a state or federal court chooses, it is clear that the state of law is fragmented.[47] An analysis of the underlying law and policy issues is critical in developing an informed, balanced approach to the regulation of ex parte treating physician interviews.

B. PATIENT PRIVILEGE, CONFIDENTIALITY, AND HIPAA: NOT AUTOMATIC BARS TO EX PARTE DEFENSE INTERVIEWS

1. The Patient Privilege's Interplay with Ex Parte Interviews

Patient privileges impact the ex parte treating physician issue because, at bottom, defense counsel are generally not permitted to gather information which is privileged.[48] Because states vary widely in structuring and applying the patient privilege, it is difficult to determine whether, when, and to what extent defense counsel may interview treating physicians.[49] Courts focused on protecting patient privilege sometimes feel compelled to disallow the practice altogether.[50]

Although the patient-physician privilege did not exist in English common law,[51] all states today afford their citizens with some sort of privilege that prevents others from accessing or disclosing the private information shared between a patient and physician.[52] New York became the first state to

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46. Nevada is an example, with no explicit statutory language either permitting or banning the practice, and no common law addressing all aspects of the issue as binding precedent. Leavitt v. Siems, 330 P.3d 1, 7 (Nev. 2014).

47. *See* Smith, *supra* note 24, at 255-56.

48. *See* Daniel W. Shuman, *The Origins of the Physician-Patient Privilege and Professional Secret*, 39 SW. L. J. 661, 680-81 (1985) (discussing the prohibition on collecting privileged information).

49. *See generally* Smith, *supra* note 24.

50. *See, e.g.*, Loudon v. Mhyre, 756 P.2d 138, 140-42 (Wash. 1988).

51. *See* Quarles v. Sutherland, 389 S.W.2d 249, 251 (Tenn. 1965) (citation omitted); Shuman, *supra* note 48, at 674-76 (noting that the United Kingdom does not recognize the physician-patient privilege and many of its commonwealths have followed suit); Jennings, *supra* note 5, at 445 n.39.

52. Including the District of Columbia, all but six states have a physician-patient privilege statute. 2 EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES app. D (2d ed. 2010) (noting that Alabama, Maryland, Massachusetts, South Carolina, Tennessee, and West Virginia do not recognize the privilege); Jennings, *supra* note 5, at 447-48 n.471. Some scholars have argued that the physician-patient privilege is an anachronism because society's reliance on medical treatment outweighs patient's confidentiality concerns. *See* Cynthia Ford, *Doctor, Doctor, Mr. M.D.: Dr./Patient privilege in MT*, MONT. LAW., at 22 (Sept. 2014) (quoting Callahan v. Burton, 487 P.2d 515, 518-20 (Mont. 1971) ("The physician- patient

institute a patient-privilege statute in 1828.[53] New York's legislature noted two driving purposes behind the new privilege. First, that protecting confidentiality between doctor and patient would promote public health by encouraging candor.[54] Second, the legislature analogized to the attorney-client privilege, reasoning that a patient has just as much of an expectation of confidentiality as does an attorney's client.[55]

Generally, the patient-privilege is evidentiary and applies only to testimony.[56] Moreover, almost uniformly, the privilege can only be invoked by the patient—not the physician, unless the physician is wielding the

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privilege is an anachronism which has come under considerable criticism."); Zechariah Chafee Jr., *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand*, 52 YALE L. J. 607, 609 (1943) (stating that except for a few highly disgraceful illnesses, "medical treatment is so valuable that few would lose it to prevent facts from coming to light in court.").

53. Robert A. Wade, *The Ohio Physician-Patient Privilege: Modified, Revised, and Defined*, 49 OHIO ST. L. J. 1146, 1147 (1989) (citing N.Y. REV. STAT. 406 § 73 (1828)); Jennings, *supra* note 5, at 445 n.40 ("No person duly authorized to practice physic or surgery, shall be compelled to disclose any information which he may have acquired in attending any patient, in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him, as a surgeon.") (quoting N.Y. REV. STAT. 1829 II, 406, part III, tit. 3, ch. VII, art. VIII, § 7).

54. Jennings, *supra* note 5, at 445 n.41 (citation omitted); *see* Kenneth S. Broun, Et Al., MCCORMICK ON EVIDENCE § 105 (7th Ed. 2013).

55. Jennings, *supra* note 5, at 445-46; *see* Broun, *supra* note 54.

56. Jennings, *supra* note 5, at 448 ("[p]rivilege statutes are generally evidentiary in nature and usually govern only testimony . . . ."). The physician-patient privilege limits "judicial truth-seeking." Raymond F. Miller, *Creating Evidentiary Privileges: An Argument for the Judicial Approach*, 31 CONN. L. REV. 771, 783 (1999). Protection of privileged communication is the purpose of testimonial privileges. *See* James H. Feldman & Carolyn Sievers Reed, *Silences in the Storm: Testimonial Privileges in Matrimonial Disputes*, 21 FAM. L.Q. 189, 192 (1987). While most courts today treat the patient-privilege as a purely evidentiary shield to prevent privileged testimony, there are a variety of cases 1) distinguishing between an evidentiary privilege and extra judicial confidentiality borne out of a fiduciary duty, 2) lumping both protections together, and 3) not recognizing a privilege for testimony. *See* Jennings, *supra* note 5, at 444, 448 n.49, 455 n.77, 459, 469, 477. The patient-*confidentiality* doctrine, not to be confused with the patient *privilege*, is not analyzed in this Note because it has so rarely been brought into the ex parte analysis, but there are some courts which find a patient-confidentiality duty to be the central factor in ex parte interview cases. *Id.* at 448, n.49; Manion v. N.P.W. Med. Ctr. of N.E. Pa., Inc., 676 F. Supp. 585, 593 (M.D. Pa.1987) ("The prohibition against unauthorized *ex parte* contacts between defense counsel and a plaintiff's treating physician is, moreover, completely separate and distinct from the statutory physician-patient privilege . . . ."). *But cf.* Domako v. Rowe, 475 N.W.2d 30, 34 n.8 (Mich.1991) (stating that any patient-confidentiality duty was "subsumed by the physician-patient privilege").

privilege on behalf of the patient.[57] Finally, every state qualifies the patient-privilege either with common law waiver doctrines[58] or privilege-exception statutes,[59] which require waiver of the patient-privilege in certain circumstances.

In most jurisdictions, a plaintiff affects some sort of waiver of the patient-privilege by voluntarily disclosing privileged information.[60] However, this waiver may or may not be triggered by the institution of a lawsuit—leaving defense counsel uncertain when a waiver is in effect absent a specific court ruling.[61] Even if a waiver is triggered, this does not end the privilege quandary. There are then questions regarding the scope of subject matter waived and whether it extends to informal discovery such as ex parte interviews.[62] A court may also require the plaintiff to affirmatively waive his or her privilege in order to bring suit.[63]

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57. *See, e.g.*, NEV. REV. STAT. § 49.235 (2012) (" 1. The privilege may be claimed by the patient, by the patient's guardian or conservator, or by the personal representative of a deceased patient. 2. The person who was the doctor may claim the privilege but only on behalf of the patient. The person's authority so to do is presumed in the absence of evidence to the contrary."); Sarphie v. Rowe, 618 So.2d 905, 908 (La. Ct. App. 1993) (noting that the privilege is held by the patient); Jennings, *supra* note 5, at 448-49 n.50.

58. *See* David L. Woodard, *Shielding the Plaintiff and Physician: The Prohibition of Ex Parte Contacts with a Plaintiff's Treating Physician*, 13 CAMPBELL L. REV. 233, 238-39 (1991).

59. Jennings, *supra* note 5, at 449 n.51 (discussing how states statutorily allow for waiver of the physician-patient privilege); Shuman, *supra* note 49, at 678 (stating that different jurisdictions have statutorily imposed an exception to the physician-patient privilege). For examples of statutory waivers of the physician-patient privilege, *see e.g.* GA. CODE ANN. § 24-12-1 (2013); HAW. R. EVID. § 504-1. For case law waiving the physician-patient privilege, *see* Jordan v. Sinai Hosp. of Detroit, Inc., 429 N.W.2d 891, 899-00 (Mich. Ct. App. 1988); Loudon v. Mhyre, 756 P.2d 138, 140 (Wash. 1988) (cited in Jennings, *supra* note 5, at 449 n.51).

60. Shuman, *supra* note 49, at 685; *see, e.g.*, Loudon, 756 P.2d at 140 ("A patient may waive this privilege by putting his or her physical condition in issue."); Smith v. Am. Home Prods. Corp. Wyeth-Ayerst Pharm., 855 A.2d 608, 623 (N.J. Super. Ct. Law Div. 2003) (stating that when a patient files a personal injury suit there is a waiver of the physician-patient privilege).

61. Jennings, *supra* note 5, at 461.

62. *Id.* at 461-62; *see, e.g.*, Weiss v. Astellas Pharma, US, Inc., No. CIVA 05-527-JMH, 2007 WL 2137782, *5 (E.D. Ky. 2007) (allowing treating physicians to participate in ex parte conferences with counsel for the patient's adversary in litigation because of waiver); Holzle v. Healthcare Servs. Grp., Inc., No. 110376, 2005 WL 1252597, at *7-8 (N.Y. Sup. Ct. May 24, 2005) (applying the waiver defense to allow a personal injury plaintiff's treating physicians to participate in ex parte conferences with defense counsel).

63. *See* Filz v. Mayo Found., 136 F.R.D. 165, 175 (D. Minn. 1991) (applying federal procedural law to compel the plaintiff to authorize ex parte interviews); *see also* Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128 (D.D.C. 1983) (holding the Federal Rules of Civil Procedure do not prohibit ex parte interviews with treating physicians once patient waives the privilege by filing a lawsuit).

As a practical matter in most states and cases, defense counsel will have the ability to access the information held by a treating physician because the plaintiff filed a lawsuit and thus waived privilege, at least partially.[64] Therefore, as long as defense counsel does not seek information related to medical conditions outside the scope of the current litigation, the patient privilege should not act as an automatic bar to ex parte defense interviews.[65]

The patient privilege does not appear to constitute an automatic bar to ex parte defense counsel interviews.[66] However, that is not to say that the privilege should not be considered when courts or legislatures regulate interviews. The concerns raised by courts, such as those in Arizona, should

64. *See* Jennings, *supra* note 5, at 474; *see, e.g.*, Morgan v. Cnty. of Cook, 625 N.E.2d 136, 140 (Ill. App. Ct. 1993).

65. *See* Brandt v. Med. Def. Assocs., 856 S.W.2d 667, 674-75 (Mo. 1993) (stating that a physician cannot disclose confidential information outside of what is at issue in the lawsuit); Jennings, *supra* note 5, at 470. It should be noted that a small number of courts prohibit ex parte interviews because of a perceived risk that the physician will disclose more information than the privilege-waiver reaches. *See* Jacqueline M. Asher, *Ex Parte Interviews With Plaintiff's Treating Physicians-The Offensive Use Of The Physician-Patient Privilege,* 67 U. DET. L. REV. 501, 513 (1990) (quoting Karsten v. McCray, 509 N.E.2d 1376, 1384 (Ill. Ct. App. 1987)) ("Discussion of the patient's confidences under circumstances other than through formal discovery is potentially harmful to the interests of the patient in that the physician might disclose intimate facts regarding the patient which are unrelated and irrelevant to the mental or physical condition placed at issue in the lawsuit."). For example, Arizona courts have interpreted the patient privilege as prohibiting ex parte interviews "as a matter of public policy and as a means to preserve the integrity of the privilege." Benally v United States, 216 F.R.D. 478, 480 (D. Ariz. 2003); *see also* Roosevelt Hotel Ltd. P'ship v. Sweeney, 394 N.W.2d 353, 356 (Iowa 1986) ("[W]e cannot accept . . . that the plaintiff's suit totally waives the confidential nature of the physician-patient relationship. It only waives the application of the privilege, which is confined by the statute to a testimonial setting, and does not speak to ex parte communications in a nontestimonial setting."). However, the source of these courts' power to ban defense counsel interviews based solely on a theoretical risk that a physician may disclose information is unclear. *But see* Benally, 216 F.R.D. at 480-81 (presenting public policy considerations as supporting the prohibition of defense counsel ex parte interview with treating physician). Moreover, these courts do not appear to be holding that the patient-privilege prohibits the interviews—the courts are simply choosing to exert their discretionary power to regulate informal discovery based on a perceived policy risk. *See id.* It should also be noted that the authors could locate no empirical study investigating the extent to which physicians have revealed privileged information to defense counsel.

66. *In re* Zimmer NexGen Knee Implant Prods. Liab. Litig., 890 F. Supp. 2d 896, 902 (N.D. Ill. 2012) (noting that "state law banning *ex parte* communications between defense counsel and a plaintiff's treating physician merely governs the method of discovery, not the operation of the privilege"); Manion v. N.P.W. Med. Ctr. of N.E. Pa., Inc., 676 F. Supp. 585, 590, 594-95 (M.D. Pa. 1987) (discussing the extent of physician-patient privilege and recognizing that the physician-patient relationship did not serve as an absolute bar to ex parte interviews).

be addressed within a framework that balances the competing policy interests. Thus, uncertainty about the scope of the privilege requires clear rules regarding what defense counsel is permitted to discuss with treating physicians.

2. HIPAA, Patient Confidentiality, and Ex Parte Defense Interviews of Treating Physicians

HIPAA has fed uncertainty about the permissibility of ex parte treating physician interviews prompting some courts to outright ban the practice.[67] HIPAA addresses the extent to which a "covered entity," practically speaking a health care professional or health care institution, may disclose a patient's Protected Health Information (PHI).[68]

HIPAA created a detailed scheme permitting patient information disclosure in a wide variety of circumstances including during an ongoing lawsuit.[69] Specifically, HIPAA permits disclosure of PHI "in the course of any judicial or administrative proceeding" either "[i]n response to an order of a court or administrative tribunal" or "[i]n response to a subpoena, discovery request, or other lawful process."[70] For the latter method, HIPAA requires the provider receive assurance that "reasonable efforts have been made … to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or … that reasonable efforts have been made by such party to secure a qualified protective order."[71] As a result, HIPAA's plain language permits

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67. *See, e.g.*, Weiss v. Astellas Pharma, US, Inc., No. CIVA 05-527 JMH, 2007 WL 2137782, *5 (E.D. Ky. July 23, 2007) (allowing ex parte interviews only if plaintiff's physician agrees to be interviewed); Moreland v. Austin, 670 S.E.2d 68, 72 (Ga. 2008) (holding that HIPAA prohibits ex parte defense interviews without a court order); *see also* Beverly Cohen, *Reconciling the HIPAA Privacy Rule with State Laws Regulating Ex Parte Interviews of Plaintiffs' Treating Physicians: A Guide to Performing HIPAA Preemption Analysis*, 43 HOUS. L. REV. 1091, 1092-94 (2006) (discussing state laws governing discovery in ex parte interviews and the confusion caused by varying interpretations of HIPAA's privacy accommodations); Angela T. Burnette & D'Andrea J. Morning, *HIPAA and Ex Parte Interviews—The Beginning of the End?*, 1 J. HEALTH & LIFE SCI. L. 73, 81-85 (2008) (analyzing HIPAA's effect ex parte interviews).

68. *See generally* 45 C.F.R. §§ 160.103, 164.512 (2013); *see, e.g.*, H.R. Rep. No. 104-736, (1996).

69. *Id.* § 164.512(e)(1)(i)-(ii).

70. *Id*.

71. *Id.* § 164.512(e)(1)(iii)-(iv). The seeking party must establish that:

> (A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);
>
> (B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit

disclosure of a patient's medical information by any "lawful process" once a lawsuit is ongoing in litigation.[72] Moreover, neither the Act, nor its legislative history, expressly prohibits defense counsel ex parte interviews.[73] The language of the statute appears to have no effect on ex parte defense counsel interviews—if the jurisdiction allows the process then HIPAA does not interfere.[74]

Shortly after HIPAA's enactment, many commentators predicted that HIPAA signaled the death knell for defense counsel ex parte interviews with treating physicians.[75] Yet, this has generally not been the case.[76] Many

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> the individual to raise an objection to the court or administrative tribunal; and
>
> (C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:
>
> (1) No objections were filed; or
>
> (2) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.
>
> (iv) For the purposes of paragraph (e)(1)(ii)(B) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:
>
> (A) The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or
>
> (B) The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.

Id. § 164.512(e)(1)(iii)-(iv).

72. *Id.* § 164.512(e)(1)(ii).

73. *See generally* 45 C.F.R. § 164.512 (2014).

74. *See* Reading & Strong, *supra* note 12, at 31 (stating that "HIPAA does not bar the disclosure of protected health information, [but instead] the statute and regulations establish procedural requirements that someone must meet before obtaining protected health information").

75. *See* Burnette & Morning, *supra* note 67, at 82; *see, e.g.*, Law v. Zuckerman, 307 F. Supp. 2d 705, 711 (D. Md. 2004) (decided shortly after HIPAA was enacted, and stating that the "statute has radically changed the landscape of how litigators can conduct informal discovery in cases involving medical treatment").

76. *See* Reading & Strong, *supra* note 12, at 31 ("It appears that HIPAA is not the weapon that plaintiffs' attorneys try to make it out to be."). HIPAA's ineffectiveness is certainly true in states that prohibit the ex parte contacts because the state laws are thus more restrictive than HIPAA and not preempted. Nat'l Abortion Fed'n v. Ashcroft, No. 04 C 55, 2004 WL 292079, at *2 (N.D. Ill. 2004). Some jurisdictions that prohibited ex parte defense interviews with the treating physician now permit them under HIPAA. *Compare* Valentino v. Gaylord Hosp., No. CV 90 0266784, 1992 WL 43134, at *2 (Conn. Super. Ct. Feb. 19, 1992) (banning ex parte defense interviews with defense counsel under state law) *with* Santaniello v. Sweet, No. 3:04CV806 (RNC), 2007 WL 214605, at *3 (D. Conn. 2007) (now allowing the contact after the enactment of HIPAA).

courts have continued to either allow or prohibit ex parte defense interviews on some other basis without addressing HIPAA's applicability.[77] Some courts accept the argument that HIPAA prohibits ex parte defense interviews.[78] However, in three jurisdictions that allowed ex parte communications before HIPAA, courts analyzing the applicability of the statute in detail each found that ex parte defense interviews were still permitted.[79] Other courts have entered protective orders before finding that ex parte defense interviews may proceed.[80] Generally, courts hold that HIPAA permits defense counsel ex parte contacts in the absence of state or

77. *See* Reading & Strong, *supra* note 12, at 31-33. For examples of courts considering whether to permit defense counsel ex parte contacts, while ignoring HIPAA, *see* Benally v. United States, 216 F.R.D. 478, 480 (D. Ariz. 2003); *In re* Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig., No. 3:09-MD-02100-DRH-PMF, 2011 WL 9996459, at *1 (S.D. Ill. Mar. 4, 2011); *In re* Collins, 224 S.W.3d 798, 801 (Tex. App. 2007); Drechsel v. Narby, 873 N.Y.S.2d 408, 409 (App. Div. 2009); Sorensen v. Barbuto, 177 P.3d 614, 619 (Utah 2008); *In re* Ortho Evra Prods. Liab. Litig., No. 1:06-40000, 2010 WL 320064, at *1 (N.D. Ohio Jan. 20, 2010).

78. There are some examples of courts finding that HIPAA implicitly prohibits ex parte defense counsel interviews with treating physicians. *See, e.g.*, Piehl v. Saheta, No. CCB-13-254, 2013 WL 2470128, at *2 (D. Md. June 5, 2013) (quoting 45 C.F.R. § 165.512(e)(1)(i) (2012)) (finding that HIPAA prohibits ex parte defense counsel interviews with treating physicians, in part, because HIPAA allows only "'expressly authorized,' limited, and specifically identified protected health information" which would likely be violated in an ex parte interview; and because Congress created a heightened privacy interest in medical information).

79. Kentucky, New Jersey and Texas have determined that HIPAA does not preempt and state law. *See, e.g.*, *In re* Diet Drug Litigation, 895 A.2d 493, 501-02 (N.J. Super. Ct. 2005) ("HIPAA and . . . ex parte interview[s] can co-exist"); *In re* Collins, 286 S.W.3d 911, 920 (Tex. 2009) (holding that authorized disclosure as permitted by a state law is not preempted by HIPAA). This perspective is bolstered by the fact that HIPAA explicitly leaves state privilege law untouched. Reading & Strong, *supra* note 12, at 31; Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82596 (Dec. 28, 2000) (to be codified at 8 C.F.R. §§ 160, 164) (stating that Federal Rules of Evidence and states' rules of evidence dealing with privileges were meant to remain untouched by HIPAA).

80. Reading & Strong, *supra* note 12, at 33; *see, e.g.*, Nicholas v. City of Binghamton, No. 3:10-CV-1565, 2013 WL 773328, at *1 (S.D.N.Y. Feb. 28, 2013) ("By commencing this litigation and claiming personal injuries, Plaintiff has put her medical condition at issue. Accordingly, Defendants are entitled to explore her medical condition as part of their defense . . . the Court finds that, provided an appropriate protective order is put in place (which Defendants shall supply to the Magistrate Judge for approval), Defendants may speak with Plaintiff's treating physicians on an *ex parte* basis."); Holman v. Rasak, 761 N.W.2d 391, 395 (Mich. Ct. App. 2008) (allowing interviews "'[i]f a qualified protective order, consistent with [Health Insurance Portability and Accountability Act (HIPAA) regulations] was in place then an *ex parte* discussion with the [treating physician] would be appropriate'") (citation omitted); Wade v. Vabnick-Wener, 922 F. Supp. 2d 679, 690 (W.D. Tenn. 2010).

federal law to the contrary.[81] However, some courts state that HIPAA has created further privacy protections, inferring that Congress intended to prohibit ex parte treating physician interviews.[82] Clients and attorneys are often uncertain about HIPAA's import because of the lack of precedent on point.[83]

That HIPAA has induced further uncertainty for courts, attorneys, and clients concerning when ex parte interviews are permitted further demonstrates the need for a standardized approach. As we have seen, the statute's plain language, as recognized by courts considering the matter, does not support the notion that HIPAA creates an automatic bar to ex parte defense interviews.[84]

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81. The clear majority considering the question has found that HIPAA alone does not prevent ex parte defense counsel contact with treating physicians. Reading & Strong, *supra* note 12, at 33; *see, e.g.*, Santaniello v. Sweet, No. 3:04CV806 (RNC), 2007 WL 214605, at *3 (D. Conn. 2007) (ex parte communication with hospitals' employees permitted under HIPAA as disclosure of medical records during judicial proceeding); Lowen v. Van Christi Hosps. Wichita, Inc., No. 10-1201-RDR, 2010 WL 4739431, *3 (D. Kan. 2010) (allowed for ex parte communication after obtaining a protective order); Lee v. Sup. Ct., 177 Cal. App. 4th 1108, 1135-36 (2009) (California statute allowing to a district attorney to obtain certain confidential health information which complied with HIPAA); Reutter v. Weber, 179 P.3d 977, 983-84 (Colo. 2007) (ex parte communication permitted under the exception to the physician-patient privilege under Colorado law); Baker v. Wellstar Health Sys., 703 S.E.2d 601, 604 (Ga. 2010) (holding that protective order obtained by hospital allowed for ex parte communication under HIPAA, but that under Georgia law was too broad); Holman v. Rasak, 761 N.W.2d 391, 395 (Mich. Ct. App. 2008), *aff'd* 785 N.W.2d 98, 105 (Mich. 2010) (HIPAA does not preempt Michigan law that permits defense counsel to engage in ex parte communication with plaintiff's treating physician provided there is a protective order in place); Robeck v. Lunas Constr. Clean-Up, Inc., No. 53576, 2011 WL 2139941, at *1 (Nev. May 27, 2011) (ex parte communication with the treating physician does not contravene HIPAA); *In re* Diet Drug Litigation, 895 A.2d 493, 501-02 (N.J. Super. Ct. 2005) (stating that HIPAA and ex parte communications can coexist); Smith v. Am. Home Prods. Corp. Wyeth-Ayerst Pharma., 855 A.2d 608, 621-22 (N.J. Super. Ct. 2003) (holding that ex parte treating physician interviews, like other informal discovery mechanisms in general, are not addressed by HIPAA, and thus such interviews are in no way preempted by the statute); Arons v. Jutkowitz, 880 N.E.2d 831, 842 (N.Y. 2007) (HIPAA privacy rules does not prevent informal discovery through ex parte communication under New York law); Holmes v. Nightingale, 158 P.3d 1039, 1043 (Okla. 2007) (protective order allowing ex parte communication with health care providers does not contravene HIPAA); Law v. Zuckerman, 307 F. Supp. 2d 705, 713 (D. Md. 2004); *Wade*, 922 F. Supp. 2d at 690.

82. *See, e.g.*, Moreland v. Austin, 670 S.E.2d 68, 70 (Ga. 2008); *see generally* Cohen, *supra* note 67.

83. Parsons, *supra* note 23, at 273.

84. *Am. Home Products Corp.*, 855 A.2d at 623-24 (holding that ex parte treating physician interviews, like other informal discovery mechanisms in general, are not addressed by HIPAA, and thus such interviews are in no way preempted by the statute).

C. The Policy Interests Raised by Both Sides of the Bar

Not surprisingly, the absence of clear guidance in the various statutes and federal and state cases about whether ex parte defense interviews should be permitted has fueled an ongoing spirited debate among interested parties and commentators.[85] This article examines persuasive arguments raised by both sides of the bar with the hope that legislatures and courts will balance these concerns in regulating ex parte interviews.

1. Plaintiffs' Position: Defense Counsel Cannot be Trusted to Behave While in Private Interviews with Treating Physicians

Courts prohibiting ex parte defense interviews cite various supporting rationales.[86] First, the federal, or a given state's, rules of civil procedure, do not expressly permit ex parte defense interviews.[87] Some courts suggest that the "official" discovery options open to defense counsel are sufficient to gather relevant medical information and that depositions should be the "exclusive" path to substantive communication with a treating physician.[88] Some courts expressing this view emphasize the sanctioning and supervisory powers available to the court during the course of formal discovery which

85. *See* Jennings, *supra* note 5, at 454-59.

86. *See id.* at 456-58.

87. *See* King v. Ahrens, 798 F. Supp. 1371, 1373 (W.D. Ark. 1992), *aff'd* 16 F.3d 265 (8th Cir. 1994) (noting that cases prohibiting ex parte communication point to the rules that authorize deposition of treating physicians and thus only permit formal discovery); Weaver v. Mann, 90 F.R.D. 443, 445 (D.N.D. 1981) (stating that the federal rules of civil procedure allow for several methods "by which discovery of examining physicians may be obtained"); Roosevelt Hotel Ltd. P'ship v. Sweeney, 394 N.W.2d 353, 356 (Iowa 1986) ("Our rule speaks only to depositions, interrogatories, production of documents, inspection, physical and mental examination, and requests for admissions . . . The addition of a new discovery method, the court enforced waiver of privilege leading to ex parte informal interviews with physicians, should be accomplished by a change in the Rules of Civil Procedure, rather than by judicial fiat."); State *ex rel.* Woytus v. Ryan, 776 S.W.2d 389, 392 (Mo. 1989) (noting that Missouri rules do not expressly forbid ex parte communication, but also do not expressly authorize communication); Jaap v. Dist. Ct. of the Eighth Jud. Dist., 623 P.2d 1389, 1392 (Mont. 1981) (holding that methods of discovery not permitted by the Montana Rules of Civil Procedure cannot be enforced by the court); Stoller v. Moo Young Jun, 499 N.Y.S.2d 790, 791 (N.Y. App. Div. 1986) (holding that defendants are not entitled to conduct unauthorized private interviews with nonparty treating physicians); Anker v. Brodnitz, 413 N.Y.S.2d 582, 584 (N.Y. Sup. Ct. 1979) ("[T]he better rule denies defendant the right to question plaintiff's doctors outside formal discovery procedures."); State *ex rel.* Klieger v. Alby, 373 N.W.2d 57, 60-61 (Wis. App. 1985) (stating that the definition of discovery under Wisconsin law does not include ex parte conferences).

88. *See, e.g.*, Garner v. Ford Motor Co., 61 F.R.D. 22, 23-24 (D. Alaska 1973); *King*, 798 F. Supp. at 1373; Weaver v. Mann, 90 F.R.D. 443, 445 (D.N.D. 1981); Roberson v. Liu, 555 N.E.2d 999, 1002 (Ill. App. Ct. 1990); Petrillo v. Syntex Labs., Inc., 499 N.E.2d 952, 956 (Ill. App. Ct. 1986).

would be unavailable in informal ex parte interviews[89] and lead to an unwelcome loss of judicial control.

Judicial decisions barring ex parte defense interviews rely on other policies. Some courts observe that allowing a defendant unfettered access to treating physicians may discourage patients from openly discussing their health concerns, which is a rationale similar to that underlying the patient privilege.[90] Other courts hold that physicians have a fiduciary-type duty that is not waived merely because their patients filed lawsuits.[91] Similarly, courts interpret their state patient-privilege statutes as implicitly banning ex parte defense counsel interviews.[92] Some courts hold that the contact will

89. State *ex rel*. Proctor v. Messina, 320 S.W. 2d 146, 156 (Mo. 2010) (en banc); Horner v. Rowan Cos. Inc., 153 F.R.D. 597, 601 (S.D. Tex. 1994) ("[T]he potential for breaches in confidentiality can have a chilling effect upon the critically important underlying relationship."); *Roberson*, 555 N.E.2d at 1002; *Petrillo*, 499 N.E.2d at 959.

90. "[C]ourts in New Mexico, North Carolina, Ohio, and Washington have held that public policy, separate and apart from a patient privilege, prohibits defense counsel from engaging in ex parte interviews with treating physicians." Reading & Strong, *supra* note 12, at 32; Smith v. Ashby, 743 P.2d 114, 115 (N.M. 1987) (quoting *Petrillo*, 499 N.E.2d at 957) (stating that ex parte communication may threaten the "sanctity" of the physician-patient relationship); Crist v. Moffatt, 389 S.E.2d 41, 46-47 (N.C. 1990) (noting that patient's expectation that physicians will comply with the Hippocratic oath outweigh the practical advantages of ex parte interviews and physicians may expose themselves to professional misconduct by breaching the oath); Loudon v. Mhyre, 756 P.2d 138, 141 (Wash. 1988) (stating that it is difficult to imagine that a physician would engage in ex parte communication without endangering the truth and faith that patients invest in physicians). Some cases hold that doctors have a duty of confidentiality. *See* Horne v. Patton, 287 So. 2d 824, 830 (Ala. 1973) ("[T]he preservation of the patient's privacy is no mere ethical duty upon the part of the doctor; there is a legal duty as well.") (citation omitted); *Smith*, 743 P.2d at 115; *Crist*, 389 S.E.2d at 46; *Loudon*, 756 P.2d at 141.

91. First Interstate Bank of Oregon v. Nat'l Bank & Trust Co. of Norwich, 127 F.R.D. 186, 188 (D. Or. 1989) (noting that the privilege is not waived under Oregon state law until a party offers up the physician as a witness who testifies to the condition). One court stated that treating physicians have an affirmative duty to never help defense counsel unless ordered to do so by the court. Alexander v. Knight, 177 A.2d 142, 146 (Pa. Super. Ct. 1962); *see* Manion v. N.P.W. Med. Ctr. of N.E. Pa., Inc., 676 F. Supp. 585, 594 (M.D. Pa. 1987) ("Physicians owe a fiduciary duty to their patients not to disclose their patients' confidences. . . .").

92. *See, e.g.*, Smith v. Orthopedics Int'l, Ltd., P.S., 244 P.3d 939, 948-949 (Wash. 2010); *Petrillo*, 499 N.E.2d at 956-57. Some states have interpreted the privilege to prohibit ex parte interviews by defendant's counsel of plaintiff's treating physicians, as a means to preserve the integrity of the privilege. *See* Duquette v. Sup. Ct., 778 P.2d 634, 640 (Ariz. Ct. App. 1989).

unfairly defeat the public's expectation of confidentiality[93] while yielding no significant gain.[94]

Another policy concern for courts is the physicians' lack of legal training.[95] Courts justify this concern by reasoning that in this unsupervised and informal setting doctors are likely to inadvertently disclose prejudicial or privileged information that is outside of the boundaries of the given litigation.[96]

Then there is the unscrupulous defense attorney that might, in this unmediated forum, use some nefarious tactic to unfairly coerce a treating physician,[97] such as invoking the threat of increased malpractice insurance rates.[98] Still, other courts have barred ex parte interviews because it would unfairly expose doctors to either tort liability for breach of the patient's right to privacy, or professional discipline for unprofessional conduct.[99]

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93. *See, e.g.*, *Petrillo*, 499 N.E.2d at 957 (stating that society possess an established and beneficial interest in the sanctity of the physician-patient relationship).

94. *See, e.g.*, Karsten v. McCray, 509 N.E.2d 1376, 1384 (Ill. App. Ct. 1987) (stating that a party can obtain the same information through formal discovery as can be obtained through informal methods which supports the use of discovery to protect a privileged communication); *Petrillo*, 499 N.E.2d at 956 (stating that formal discovery reveals the same information that informal methods reveals); Anker v. Brodnitz, 413 N.Y.S.2d 582, 583 (N.Y. Gen. Term 1979) (noting that the defendant did not demonstrate that formal discovery procedures were inadequate to uncover the specific information sought by ex parte communication).

95. *See, e.g.*, *Duquette*, 778 P.2d at 641 ("A physician may lack an understanding of the legal distinction between an informal method of discovery such as an *ex parte* interview, and formal methods of discovery such as depositions and interrogaties, and may therefore feel compelled to participate in the *ex parte* interview."); *Manion*, 676 F. Supp. at 594-95.

96. *See, e.g.*, *Duquette*, 778 P.2d at 641; *Manion*, 676 F. Supp. at 595 (discussing concerns about defense counsel practices in medical malpractice context of ex parte defense interviews*); In re* Zimmer NexGen Knee Implant Prods. Liab. Litig., 890 F. Supp. 2d 896, 906-07 (N.D. Ill. 2012) (citation omitted) (discussing policies behind ban on ex parte contacts with treating physicians, and stating that such contacts are thought to be "potentially harmful to the interests of the patient in that the physician might disclose intimate facts of the patient which are unrelated and irrelevant to the mental or physical condition placed at issue in the lawsuit").

97. *See Anker*, 413 N.Y.S.2d at 585 (stating that physicians may be wrongfully pressured into revealing privileged information); *Manion*, 676 F. Supp. at 595; Horner v. Rowan Cos., 153 F.R.D. 597, 600 (S.D. Tex. 1994).

98. *See Manion*, 676 F. Supp. at 591.

99. Courts have also banned contact to reduce the number of lawsuits physicians face for breaching patient privilege. *See, e.g.*, *Anker*, 413 N.Y.S.2d at 585; *Horner*, 153 F.R.D. at 600-01.

2. Defendants' Position: Ex Parte Defense Interviews Simply Level the Playing Field

Some courts, when permitting ex parte defense interviews, reason that allowing defendant's counsel to contact treating physicians is more equitable to the parties,[100] and may be beneficial.[101] Some courts see treating physicians as important fact witnesses (albeit fact witnesses with special expertise) with no loyalties after suit has been filed and the patient-privilege waived.[102] These courts often reason that "no party to litigation has anything resembling a proprietary right to any witness's evidence. Absent a privilege, no party is entitled to restrict an opponent's access to a witness . . . by insisting upon some notion of allegiance."[103] *Doe v. Eli Lilly & Co* championed this perspective:

> Even an expert whose knowledge has been purchased cannot be silenced by the party who is paying him on that ground alone. Unless impeded by privilege an adversary may inquire, in advance of trial, by any lawful manner, to learn what any witness knows if other appropriate conditions the witness alone may impose are satisfied, [such as] compensation for his time and expertise or payment of reasonable expenses involved.[104]

A defendant's counsel is no more likely than a plaintiff's counsel to misuse contact with a treating physician and there are many sound policy reasons supporting these interviews.[105] For but one example, the Federal

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100. *See Weiss v. Astellas Pharma, US, Inc.*, No. CIVA 05-527 JMH, 2007 WL 2137782, at *4-5 (E.D. Ky. July 23, 2007); Morrison v. Brandeis Univ., 125 F.R.D. 14, 19 (D. Mass. 1989) (stating that "the function of interviewing witnesses without the presence of opposing counsel in order to gain information" is an "important function[] which counsel traditionally play[s] in litigation . . .").

101. Shots v. CSX Transp., Inc., 887 F. Supp. 206, 208 (S.D. Ind. 1995) ("We encourage counsel for the parties to arrange informal conferences with the physicians in lieu of depositions when possible to reduce expenses in this case, and we likewise encourage counsel to offer to opposing counsel the opportunity to be present when informal communications take place.").

102. For cases holding that physicians are to be treated like all other fact witnesses: *see, e.g.*, Thomas v. Four Season Nursing Ctr. Inc., 206 F.R.D. 294, 296 (N.D. Okla. 2002) ("In the absence of any physician-patient privilege, a party may conduct *ex parte* interviews with any doctor just as one could do with any other fact witness."); *In re* Pelvic Mesh/Gynecare Litig., 43 A.3d 1211, 1230 (N.J. Super. Ct. App. Div. 2012). The American Medical Association's ethical rules do not even prohibit the practice. Michael S. Goldrich, *Report of the Council on Ethical and Judicial Affairs: Medical Testimony*, CEJA Report 12-A-04, AM. MED. ASSOC. 4 (2004).

103. Doe v. Eli Lilly & Co. Inc., 99 F.R.D. 126, 128 (D.D.C. 1983).

104. *Id*.

105. *Id*. ("The potential for influencing trial testimony is inherent in every contact between a prospective witness and an interlocutor, formal or informal, and what a litigant

Rules of Civil Procedure are to be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[106] In furtherance of this policy, federal courts commonly encourage parties to utilize informal and alternative means of discovery, including witness interviews.[107] Some commentators attack the argument that ex parte physician interviews should be prohibited because they are not expressly permitted by the rules as being counterintuitive, counterproductive, and contrary to the spirit of the rules.[108] In short, these courts recognize that "to disallow a viable, efficient, cost effective method of ascertaining the truth because of the mere possibility of abuse, smacks too much of throwing out the baby with the bath water."[109]

Some commentators believe that allowing interviews might encourage open communication and actually increase the likelihood that all relevant information is disclosed.[110] One commentator summed this up stating: "[b]y allowing a free exchange of communication between a treating physician and a defense attorney, a court actually opens a line of communication, thus allowing for full and fair disclosure of pertinent facts."[111]

Courts favoring ex parte defense interviews point out the inequality caused by allowing the plaintiff unfettered access to important witnesses at any time, while the defendant is allowed a single, monitored, adversarial session of questioning.[112] One court summed up this view:

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may justifiably fear is an attempt by an adversary at *improper* influence for which there are sanctions enough if it occurs.").

106. Fed. R. Civ. P. 1.

107. *See, e.g.*, Franks v. Nat'l Dairy Prods. Corp., 41 F.R.D. 234, 237 (W.D. Tex. 1966) (stating that "unless the position of each party is known along with the basis for taking such position, no intelligent evaluation can be made for settlement purposes" via formal discovery); *see also* Trans-World Invs. v. Drobny, 554 P.2d 1148, 1152 (Alaska 1976) ("In our opinion . . . informal methods are to be encouraged, for they facilitate early evaluation and settlement of cases, with a resulting decrease in litigation costs, and represent further the wise application of judicial resources.").

108. *See* Felder v. Wyman, 139 F.R.D. 85, 90-91 (D.S.C. 1991) (stating that the cases banning ex parte defense counsel interviews with treating physicians based on a lack of rules permitting the practice are senseless); *Trans-World Invs*., 554 P.2d at 1152 ("the intended purpose of our discovery process is to simplify trials, not complicate them . . . information should be exchanged and requests complied with in a manner demonstrating candor and common sense."); Weiss v. Astellas Pharma, US, Inc., No. CIVA 05-527 JMH, 2007 WL 2137782, at *4-5 (E.D. Ky. July 23, 2007).

109. Langdon v. Champion, 745 P.2d 1371, 1375 n.8 (Alaska 1987).

110. Scott Aripoli, *Hungry Hungry HIPAA: Has the Regulation Bitten Off More Than It Can Chew by Prohibiting Ex Parte Communication with Treating Physicians?*, 75 UMKC L. REV. 499, 504 (2006).

111. *Id*.

112. *See, e.g.*, Green v. Bloodsworth, 501 A.2d 1257, 1259 (Del. Super. Ct. 1985); Frantz v. Golebiewski, 407 So. 2d 283, 285 (Fla. Dist. Ct. App. 1981); Covington v. Sawyer, 458 N.E.2d 465, 470-71 (Ohio Ct. App. 1983).

> Although the rules are silent on informal methods of discovery, prohibition of all ex parte interviews would be inconsistent with the purpose of providing equal access to relevant evidence and efficient, cost-effective litigation. The omission of interviews from [] court rules does not mean that they are prohibited, because the rules are not meant to be exhaustive . . . Their absence from the court rules does indicate that they are not mandated and that the physician cannot be forced to comply, but there is nothing in the court rules precluding an interview if the physician chooses to cooperate.[113]

3. Some Defense Attorneys Have Even Argued that Refusing to Allow Defense Counsel Ex Parte Contacts Creates Due Process Concerns[114]

Commentators have also noted that refusing to allow defendant's counsel private interviews with treating physicians threatens the confidentiality of counsel's work-product because the defense is unable to avoid revealing his or her strategy in a deposition, while the plaintiff is under no similar constraint.[115]

Ex parte communications are also less burdensome on witnesses.[116] Physicians have challenging schedules, and allowing an attorney to conduct an informal interview makes efficient use of the physician and attorney's time.[117] Therefore, commentators suggest that allowing contact only through depositions is therefore unfair to treating physicians.[118]

The two camps in this national debate appear firmly divided with no clear resolution on the horizon. Some courts believe that defense counsel interviews with a plaintiff's treating physician create significant risks that cannot be alleviated through any procedure or protection and outweigh any benefit derived from the practice.[119] Other courts find that defense counsel have the right to contact treating physicians, who are in essence merely fact witnesses, and furthermore, that the benefits from this informal discovery technique outweigh any potential harms.[120] What this means is that there is

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113. Domako v. Rowe, 475 N.W.2d 30, 36 (Mich. 1991).

114. *See, e.g.*, Weiss v. Astellas Pharma, US, Inc., No. CIVA 05-527 JMH, 2007 WL 2137782, at *1 (E.D. Ky. July 23, 2007).

115. Burnette & Morning, *supra* note 67, at 93; Cohen, *supra* note 67, at 1121.

116. Aripoli, *supra* note 110, at 521.

117. *Id*.

118. *Id*.

119. *See, e.g.*, Horner v. Rowan Cos., 153 F.R.D. 597, 600-01 (S.D. Tex. 1994) (prohibiting contact unless the plaintiff gives express authorization); Manion v. N.P.W. Med. Ctr. of N.E. Pa., Inc., 676 F. Supp. 585, 589, 594-95 (M.D. Pa. 1987).

120. In some instances, ex parte physician contact is permitted by defense counsel, but only after certain restrictions or requirements are met, or if the plaintiff approves ex parte

no clear national majority to join. There are reasonable policy arguments both supporting and opposing ex parte defense interviews.

D. WHY LEGISLATURES AND COURTS NEED TO REVISIT THE REGULATION OF EX PARTE DEFENSE INTERVIEWS

There are several compelling reasons courts and legislatures should address the way ex parte defense counsel interviews are regulated. First, physicians are placed at a severe disadvantage under the current fractured scheme.[121] Physicians lack extensive training in rules surrounding patient privilege and defense counsel interviews, and they are rarely given any state-specific training.[122] As each state, and each individual federal and state court, may currently apply different rules, it is impossible for physicians to receive training regarding patient privacy and defense counsel interviews.[123] If courts or legislatures create a uniform scheme that consistently regulates these interviews, physicians could institute training programs that would enable practitioners to properly respond to interview requests.

Second, existing approaches to regulating interviews do not always appear to balance the important policy interests raised by all the parties involved.[124] As explained above, some states allow interviews and some states prohibit them. Regulations should take a more balanced approach when considering the important interests on both sides of the debate. Unfortunately, the narrow approach taken by many legislatures and courts suggests they have listened to only one side of the policy debate, or they have based their regulations on existing statutes such as HIPAA or the patient privilege, even where these laws are silent on the practice. Finally, the laws regulating these interviews in many jurisdictions are vague and thus create costs for both plaintiffs and defendants in litigating over whether interviews are permitted. The lack of bright line regulations is particularly challenging for defense counsel who are left in the dark as to what the law is.

To illustrate the problems plaguing the current regulatory approach taken by many states, Nevada is used as a case study.[125] The regulation of ex parte defense counsel interviews in Nevada exhibits each of the above issues:

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communication. *See Horner*, 153 F.R.D. at 601 (prohibiting "private ex parte interviews between defense counsel and plaintiff's treating physician unless, with advance notice thereof, plaintiff specifically and unconditionally authorizes same").

121. *See* Jennings, *supra* note 5, at 457.

122. *Id.*; Woodard, *supra* note 58, at 246.

123. *See generally* Jennings, *supra* note 5, at 444-54 (discussing jurisdictional split and various policy arguments).

124. For the factual background for this analysis, see section IV.b.

125. NEV. REV. STAT. § 49.215-.245 (2014); *see* Parker v. Upsher-Smith Labs., Inc., No. 3:06-CV-518-ECR-VPC, 2009 U.S. Dist. LEXIS 126565, at *9-13 (D. Nev. Aug. 27, 2009).

doctrines such as the patient privilege are blindly relied upon, policy interests have not been expressly balanced, and the vague state of the law leaves physicians and attorneys unsure about whether interviews are permitted.

1. A Case Study of What is Wrong with Many Current Regulatory Regimes: the State of Nevada

Nevada's law on ex parte defense interviews is perhaps the ultimate illustration of why reform is needed. It is plagued with a lack of binding precedent in a framework which fails to properly balance policy interests.[126]

Like other states, Nevada vests patients with the privilege to prevent the disclosure of confidential medical information shared between doctor and patient.[127] Nevada law contains a waiver of this privilege which operates similarly to waivers in most states.[128] For example, if an individual voluntarily discloses privileged information to a significant degree, such as the disclosure which occurs when placing physical or mental condition at issue in personal injury litigation, the information is no longer privileged.[129] Unlike other states, however, the Nevada statute creates an automatic exception to the physician-patient privilege for "written medical or hospital records relevant to an . . . element of a claim or defense,"[130] known as the privilege-exception statute.[131]

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126. *See generally Parker*, No. 3:06-CV-518-ECR-UPC, 2009 U.S. Dist. LEXIS 12652; *see also* NEV. REV. STAT. § 49.215-.245 (in Nevada, there are several separate privilege statues, waiver statues, as well as very relevant amendments to the question of whether ex parte defense counsel interviews with treating physicians are permitted).

127. "A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications among the patient, the patient's doctor or persons who are participating in the diagnosis or treatment under the direction of the doctor, including members of the patient's family." *Id.* § 49.225.

128. *Id.* § 49.385(1); *see* OR. REV. STAT. § 40.280 (2014) (declaring the privilege waived when a party offers up the physician as a witness in litigation).

129. "A person upon whom these rules confer a privilege against disclosure of a confidential matter waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter." NEV. REV. STAT. § 49.385(1).

130. "There is no privilege . . . [a]s to written medical or hospital records relevant to an issue of the condition of the patient in any proceeding in which the condition is an element or a claim or defense." *Id.* § 49.245. This statute also provides a variety of other exceptions, such as disclosures made in the course of "hospitaliz[ing] the patient for mental illness." *Id.*

131. Steven J. Klearman, *Patient-Doctor Privilege Doesn't Cover Doctor's Testimony, Says Judge*, THE LEGAL EXAM'R (Feb. 18, 2009 12:28 PM), http://reno.legalexaminer.com/wrongful-death/patientdoctor-privilege-doesnt-cover-doctors-testimony-says-judge/.

An earlier amendment to Nevada's privilege-exception statute raises questions about whether the state legislature intended to target ex parte defense interviews.[132] Before it was amended in 1989, the statute prohibited all "communications" relevant to a claim or defense.[133] After the amendment, the statute excludes from the privilege only relevant communications memorialized in "written . . . records."[134] There is no relevant legislative history evincing the legislature's reasoning behind this change,[135] but the record contains testimony from a member of the Nevada Trial Lawyers Association—a plaintiff's bar organization.[136] This speaker urged the change in the statute's language to address the problem of defendants who attempt to take advantage of the privilege by talking about anything with a doctor, and the problem of doctors being forced to "unilaterally" waive the patient physician privilege.[137] In short, the speaker urged the legislature to prevent defense counsel from conducting ex parte defense interviews.[138]

This partisan testimony notwithstanding, the statute's intended purpose is unclear. The *plain language* of the privilege-exception statute, even as amended, does not bar defense ex parte contact with a plaintiff's treating doctor;[139] rather the statute merely provides an additional means of avoiding the patient-privilege in certain circumstances.[140] The Nevada Supreme

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132. NEV. REV. STAT. § 49.245. The single federal district court case which prohibited ex parte defense counsel contacts in Nevada relied on the 1987 amendment as the primary basis for its holding even though there is no specific statutory language banning ex parte defense counsel contact. Parker v. Upsher-Smith Labs., Inc., No. 3:06-CV-518-ECR-UPC, 2009 U.S. Dist. LEXIS 126565, *9-13 (D. Nev. Aug. 27, 2009).

133. *See* Nev. Assemb. B. 809, 64th Leg. Sess. (Nev. 1987), *available at* http://www.leg.state.nv.us/Divison/Research/Library/LegHistory/LHS/1987/ab809,1987.pdf (the Nevada Senate and House' preamble discussion and summary, in which the original text of the statute is preserved).

134. *See* NEV. REV. STAT. § 49.245.

135. Nev. Assemb. B. 809, 64th Leg., Sess. (Nev. 1987), *available at* http://www.leg.state.nv.us/Divison/Research/Library/LegHistory/LHS/1987/ab809,1987.pdf.

136. *Id.* The Nevada Trial Lawyers Association (since renamed the Nevada Justice Association) is an organization of "independent lawyers who represent consumers and share the common goal of improving the civil justice system." *See* Nev. Justice Ass'n, *Our Mission*, http://www.nevadajustice.org/NV/index.cfm?event=showPage&pg=mission (last visited Apr. 25, 2012). The Association commonly sends representatives to speak at meetings of the Nevada legislature. *Id.*; *see also* Nev. Assemb. B. 809, 64th Leg., Sess. (Nev. 1987), *available at* http://www.leg.state.nv.us/Divison/Research/Library/LegHistory/ LHS/1987/ab809,1987.pdf.

137. Nev. Assemb. B. 809, 64th Leg. Sess. (Nev. 1987), *available at* http://www.leg.state.nv.us/Divison/Research/Library/LegHistory/LHS/1987/ab809,1987.pdf.

138. *Id*.

139. *See generally* NEV. REV. STAT. § 49.385.

140. *Id*.

Court adheres to the rule that if a statute's language "is clear on its face, a court *can not* go beyond the [language] in determining legislative intent."[141] It is difficult to see how the statute's language could be ambiguous as to the specific question of whether it bans ex parte defense interviews—considering the statutory language is straightforward and makes no mention of any such contact.[142] The words the legislative body chose to include in a statute embody the legislature's intent.[143]

Despite the statute's clear language and Nevada's "plain meaning rule," the legislature's amendment of the exception statute's language cannot escape notice, and arguments can be made that the amendment was aimed at ex parte defense interviews.[144] However, given the language of the statute and the context of the common law, the legislature could have meant only to ensure that defense counsel received no unregulated authority to conduct informal interviews.[145] The legislature may have been concerned that in wording the original exception statute broadly to cover any and all "communications," they had actually usurped the courts' default supervisory power over informal interviews.[146] Additionally, the legislature could have

141. State v. Lucero, 249 P.3d 1226, 1228 (Nev. 2011) (emphasis added and citation omitted); *see* Beazer Homes Nevada, Inc. v. Eighth Judicial Dist. Ct. *ex rel.* Cnty. of Clark, 97 P.3d 1132, 1135 (Nev. 2004) (citation omitted) ("'If the plain meaning of a statute is clear on its face, then [this court] will not go beyond the language of the statute to determine its meaning.'"); State v. Catanio, 102 P.3d 588, 590 (Nev. 2004) ("We must attribute the plain meaning to a statute that is not ambiguous. An ambiguity arises where the statutory language lends itself to two or more reasonable interpretations. Legislative intent is the controlling factor in statutory construction."); Hotel Emps. & Rest. Emps. Int'l Union, AFL-CIO v. State *ex rel.* Nevada Gaming Control Bd., 747 P.2d 878, 879 (Nev. 1987) ("When a statute is clear on its face a court may not go beyond the language of the statute in determining the legislature's intent.").

142. NEV. REV. STAT. § 49.245.

143. *See generally* Yule Kim, CONG. RESEARCH SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 2-5 (2008), *available at* http://fas.org/sgp/crs/misc/97-589.pdf (discussing the Supreme Court's approach to statutory interpretation).

144. *See* Assemb. B. 809, 1987 Leg. 64th Sess. (Nev. 1987), *available at* http://www.leg.state.nv.us/Divison/Research/Library/LegHistory/LHS/1987/ab809,1987.pdf. (discussing the supposed dangers of ex parte defense interviews).

145. State, Dep't of Ecology v. Campbell & Gwinn, L.L.C., 43 P.3d 4, 9-10 (Wash. 2002) (discussing the interpretation of legislative intent based on a statute's language and the plain meaning of key phrases); *see also* Chadha v. Charlotte Hungerford Hosp., 865 A.2d 1163, 1174 n.21 (Conn. 2005) ("[T]he legislature is presumed to be aware of prior judicial decisions involving common-law rules.").

146. It is notable that the automatic waiver of all relevant "communications" in Nevada's exception statute, pre-amendment, was worded more liberally than many statutes in other states. Nev. Assemb. B. 809, 64th Leg., Sess., 10 (Nev. 1987), available at http://www.leg.state.nv.us/Divison/Research/Library/LegHistory/LHS/1987/ab809,1987.pdf (showing the pre-amendment language); *see, e.g.*, IOWA CODE § 622.10(3)(a)(2)

plausibly meant to ensure that courts would have the power to regulate and supervise informal discovery procedures on a case-by-case basis.[147] Other states with similar exception statutes have narrower language than Nevada's pre-amendment statute.[148] The current narrowly-worded version of Nevada's patient privilege-exception statute is similar to other states' statutes excepting medical information from privilege—suggesting the statutory revision may not have been intended to outright ban ex parte contact, but only to narrow the blanket waiver like other states have.[149]

Although Nevada courts consider legislative history, courts also make decisions based on "reason and public policy" when interpreting legislative intent.[150] Considering that states have generally moved towards permitting ex parte defense interviews, reason and public policy suggest that Nevada would not interpret the exception statute as prohibiting ex parte defense counsel interviews without the legislature unequivocally articulating such a ban.[151]

In line with general principles of statutory interpretation, Nevada courts will not refer to the legislative record to interpret the statute if they find the privilege-exception statute unambiguous.[152] Even if there were no "plain meaning rule" in Nevada, a court would struggle in determining that the

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(2014) (explicitly excepting medical records and other specific materials); FLA. STAT. § 394.4615(2) (2014) (identifying specific situations where medical records may be disclosed during a lawsuit); FLA. R. CIV. P. 1.360 (2014) (explicitly regulating scope of medical information disclosed during lawsuits); CAL. CIV. CODE § 56.10(b)(1) (2014) (explicitly requiring a court or administrative order describing information to be disclosed).

147. *See* King v. Ahrens, 798 F. Supp. 1371, 1373 (W.D. Ark. 1992), *aff'd* 16 F.3d 265 (8th Cir. 1994) (discussing court powers to manage discovery process).

148. *See supra* note 146.

149. *Compare* NEV. REV. STAT. § 49.245 *with* IOWA CODE § 622.10(3)(a)(2) (2005) (explicitly excepting medical records).

150. State v. Lucero, 249 P.3d 1226, 1228 (Nev. 2011) (stating that "legislative history . . . and reason and public policy" are the primary rules of construction for ambiguous statutes); Hotel Emps. & Rest. Emps. Int'l Union, AFL-CIO v. State *ex rel.* Nevada Gaming Control Bd., 747 P.2d 878, 880 (Nev. 1987) ("Pursuant to another rule of statutory construction, an ambiguous statute can be construed 'in line with what reason and public policy would indicate the legislature intended." (quoting McKay v. Bd. Of Supervisors, 730 P.2d 438, 442 (Nev. 1986))); *see* Beazer Homes Nevada, Inc. v. Eighth Jud. Dist. Ct. *ex rel.* Cnty. of Clark, 97 P.3d 1132, 1135 (Nev. 2004) ("In construing an ambiguous statute, we must give the statute the interpretation that 'reason and public policy would indicate the legislature intended.'" (quoting State, Dep't Mtr. Vehicles v. Vezeris, 720 P.2d 1208, 1211 (Nev. 1986))); Robert E. v. Justice Ct. of Reno Twp., Cnty. of Washoe, 662 P.2d 957, 959 (Nev. 1983) (looking to legislative history, reason, and public policy to determine legislative intent behind ambiguous statute).

151. Smith, *supra* note 24, at 248; *see also* Woodard, *supra* note 58, at 236.

152. *Robert E.*, 662 P.2d at 959 (citing White v. Warden, 614 P.2d 536, 537 (Nev. 1980)).

legislature intended by this statute to outright ban ex parte defense counsel contact.[153] Thus, if courts want to ban ex parte defense interviews outright, they will most likely have to look beyond the privilege-exception statute.[154]

Finally, under Nevada's limited precedent on patient-physician privilege waiver, a plaintiff no longer has control over defense counsel's access to treating physicians after filing a lawsuit.[155] Plaintiffs do not appear to have any right to narrow their privilege waiver once there has been a waiver:

> The patient cannot use this privilege both as a sword and a shield, to waive when it inures to her advantage, and wield when it does not . . . no further injury can be inflicted upon the rights and interests which the statute was intended to protect, and there is no further reason for its enforcement . . . [once the patient has released this information] the patient can never be restored to the condition which the statute, from motives of public policy, has sought to protect . . . The object of the statute having been voluntarily defeated by the party for whose benefit it was enacted, there can be no reason for its continued enforcement in such cases.[156]

Despite years of controversy, only three Nevada cases touch on the issue: a non-precedential federal district court opinion, an unpublished decision of the Supreme Court of Nevada, and a Supreme Court of Nevada published decision. In 2010, a federal district court reached the issue of ex parte defense interviews in *Parker v. Upsher-Smith*, applying Nevada state law in invalidating ex parte interviews.[157] In 2011, the Supreme Court of Nevada took on ex parte defense interviews for the first time in *Robeck v. Lunas*, and appeared to validate the practice under HIPAA.[158] However, the Nevada Supreme Court left the decision unpublished which prohibits the decision from being used as binding precedent.[159] In *Leavitt v Siems*, the Supreme Court of Nevada spoke in a unanimous en banc published decision, arguably invalidating ex parte contact by defense counsel.[160] The treating physician

153. Parker v. Upsher-Smith Labs., Inc., No. 3:06-CV-518-ECR-UPC, 2009 U.S. Dist. LEXIS 126565, at *13 (D. Nev. Aug. 27, 2009).

154. *See id*.

155. *See, e.g.* Leavitt v. Siems, 330 P.3d 1, 7-8 (Nev. 2014).

156. State v. Depoister, 25 P. 1000, 1003 (Nev. 1891) (quoting McKinney v. Grand St., P.P. & F.R. Co., 10 N.E. 544, 544-45 (N.Y. 1887)).

157. *Parker*, No. 3:06-CV-518-ECR-UPC, 2009 U.S. Dist. LEXIS 126565, at *13; *see* Foster v. Dingwall, 228 P.3d 453, 456 (Nev. 2010) (stating that federal interpretations are only persuasive authority); NEV. SUP. CT. R. 123 ("An unpublished opinion or order . . . shall not be regarded as precedent and shall not be cited as legal authority.").

158. Robeck v. Lunas Const. Clean-Up, Inc., No. 53576, 2011 WL 2139941, at *1 (Nev. May 27, 2011).

159. NEV. SUP. CT. R. 123.

160. *Leavitt*, 330 P.3d at 9.

witness in *Leavitt*, however, was also designated as an expert.[161] The question of whether defense counsel is permitted to contact the percipient treating physician witness, who is not also designated as a trial expert for the plaintiff in a case, has not yet been answered.

a. The Federal District Court Case: Parker v. Upsher-Smith

In *Parker v. Upsher-Smith Labs., Inc.*,[162] the plaintiff filed a lawsuit against a drug manufacturer, Upsher-Smith Laboratories ("Upsher- Smith"), claiming her husband died after ingesting Upsher-Smith's antiarrhythmic drug, amiodarone.[163] Defense counsel sent a letter informing the plaintiff that they intended to interview some of the treating physicians in the case.[164] The plaintiff moved to prevent the defense from conducting the interviews, arguing that such contact would violate Nevada's patient-physician privilege.[165]

A magistrate judge found in favor of Upsher-Smith.[166] The judge found first that many federal circuits allow ex parte interviews for sound policy reasons, and second the plaintiff had waived her patient-privilege when she filed suit and consequently there was nothing to prevent an ex parte interview.[167] The magistrate judge ordered the parties to confer to ensure that information outside the scope of the litigation, which may still be privileged, would not be discussed in the interviews.[168] Later, one of the plaintiff's attorneys wrote to the treating physicians encouraging them to refuse defense counsel's requests to speak with them.[169] Defense counsel

161. *Id*. at 3.

162. No. 3:06-CV-518-ECR-VPC, 2009 U.S. Dist. LEXIS 12652 (D. Nev. Feb. 18, 2009) [hereinafter *Parker (magistrate)*].

163. *Id.* at *1-2.

164. *Id*. at *5-6.

165. Parker v. Upsher-Smith Labs., Inc., No. 3:06-CV-518-ECR-VPC, 2009 U.S. Dist. LEXIS 122770, *2 (D. Nev. Feb. 2, 2009) [hereinafter *Parker (case conference)*].

166. *Id*.

167. *Id.* at *3. The magistrate permitted defense counsel to interview, ex parte, all six of the plaintiff's treating physicians in the case. *Id.* at *4-5.

168. The court further directed counsel "to meet and confer concerning reasonable limitations on the scope of the *ex parte* physician interview", and if they could not resolve this issue, they were directed to file notices with the court, and a hearing would be scheduled to decide this matter. *Id.* at *4-5.

169. Plaintiff's counsel, faxed letters to the treating physicians stating in relevant part:

> (1) that there was litigation between the parties; (2) that defense counsel sought to have ex parte communications with the physicians regarding their treatment of Mr. Parker; (3) that the Court had permitted defense counsel to contact the physicians on an ex parte basis to discuss Mr. Parker's care and treatment; (4) that the physician was free to decide whether or not to meet privately with defense counsel; and (5) that if the doctor decided to meet privately with defense counsel, that Parker's counsel would like to meet privately as well.

reported the behavior and the magistrate sanctioned plaintiff's counsel for the interference.[170]

A federal district court vacated the magistrate's ruling.[171] Judge Edward Reed consulted the amendment's legislative history which he read as indicating the legislature's intention to bar defendant ex parte contact with treating physicians.[172] The court acknowledged that a plaintiff indisputably waives the privilege during deposition and trial testimony, and that filing a lawsuit in Nevada effects a much broader waiver of the privilege than merely the "written records" referenced in the "privilege-exception" statute.[173] But the court nevertheless interpreted the amended statute as imposing a complete ban on ex parte defense interviews, even though the statute makes no mention of such a prohibition.[174]

Parker ignored the lack of specific statutory language in holding that the legislature intended to create a specific ban on defense counsel contacting treating physicians regardless of whether a privilege is in effect.[175] As previously discussed, the plain meaning of the statute's language does not indicate a ban on ex parte defense counsel contact.[176] If the legislature intended to ban ex parte contact, it would have explicitly done just that when drafting its amendment like other states that unambiguously prohibit such contact.[177] Potential abuse during ex parte interviews can be prevented by pre-interview policing as capably interposed by the magistrate in *Parker*,

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Parker v. Upsher-Smith Labs., Inc., No. 3:06-CV-518-ECR-VPC, 2009 U.S. Dist. LEXIS 126565, at *6 (D. Nev. Aug. 27, 2009) [hereinafter *Parker (District Court)*]. There is legal authority which provides that neither HIPAA-compliant authorizations nor a court order can force a healthcare professional to communicate with the attorneys. *Parker (magistrate)*, No. 3:06-CV-518-ECR-UPC, 2009 U.S. Dist. LEXIS 12652, at *2.

170. *Parker (magistrate)*, No. 3:06-CV-518-ECR-VPC, 2009 U.S. Dist. LEXIS 12652, at *21-23.

171. *Parker (District Court)*, No. 3:06-CV-518-ECR-VPC, 2009 U.S. Dist. LEXIS 126565, at *13-15.

172. *Id.* at *10-14 (accepting plaintiff's position that the amendments to the privilege-exception statute created an affirmative ban on ex parte defense counsel treating physician interviews).

173. *Id.* at *10-11.

174. *Id.* at *14; *see* NEV. REV. STAT. § 49.245 (2014).

175. *Parker (District Court)*, No. 3:06-CV-518-ECR-VPC, 2009 U.S. Dist. LEXIS 126565, at *12-14.

176. *See generally* NEV. REV. STAT. § 49.245.

177. *See, e.g.*, *id.* § 49.235 ("1. The privilege may be claimed by the patient, by the patient's conservator, or by the personal representative of a deceased patient. 2. The person who was the doctor may claim the privilege but only on behalf of the patient. The person's authority so to do is presumed in the absence of evidence to the contrary.").

which is a method used in many other jurisdictions that permit defense ex parte interviews.[178]

Neither the amendment's language to the exception statute nor the limited legislative history behind it, nor the *Parker* court's interpretation of legislative intent are dispositive of whether ex parte defense interviews are permitted. However, while there arguably remains no binding precedent, in an unpublished opinion the Supreme Court of Nevada provided some illumination on the ex parte debate.[179]

b. Robeck v. Lunas *and* Leavit v. Siems*: The Supreme Court of Nevada's First Foray into Defense Counsel Ex Parte Interviews*

In 2011, the Supreme Court of Nevada adjudicated *Robeck v. Lunas Const. Clean-Up, Inc.* which contemplated the defense counsel ex parte contact issue.[180] This decision is unpublished,[181] but still offers important insight into the Court's perspective.[182]

In *Robeck*, the plaintiff appealed a trial court's dismissal of his medical malpractice suit.[183] The plaintiff argued that the defendant's insurance company improperly contacted the plaintiffs treating physicians.[184] The defendant admitted contacting, ex parte, the plaintiff's treating physician, but only for the purpose of requesting medical documents and to coordinate a deposition.[185] Notably, the plaintiff did not dispute defendant's intentions which concerned only logistical matters.[186] Legally relevant written

178. *Parker (District Court)*, No. 3:06-CV-518-ECR-VPC, 2009 U.S. Dist. LEXIS 126565, at *4-6.

179. Robeck v. Lunas Const. Clean-Up, Inc., No. 53576, 2011 WL 2139941, at *1 (Nev. May 27, 2011).

180. *Id*.

181. *See* NEV. SUP. CT. R. 123 (stating that "[a]n unpublished opinion or order . . . shall not be regarded as precedent and shall not be cited as legal authority").

182. The decision is a valid order from the Supreme Court which presented the reasoning of the justices and contains probative value for purposes of predicting Nevada law on this issue. It is also common practice to cite unpublished opinions as persuasive notice of the Nevada Supreme Court's thinking, although it cannot be used as the basis for rulings. NEV. SUP. CT. R. 123. Whether *Robeck* was indeed a harbinger of things to come depends on how one interprets the Supreme Court's second trip into the discussion described below. *See generally* Leavitt v. Simms, 330 P.3d 1 (Nev. 2014).

183. *Robeck*, No. 53576, 2011 WL 2139941, at *1.

184. In addition to the allegation that defense counsel wrongfully contacted the plaintiff's treating physicians ex parte, the plaintiff also argued that Robeck's treating physicians gave false testimony, and that defense counsel made improper statements in his opening and closing arguments. *Id*.

185. *Id*.

186. *Id*.

documents constituted the only substantive information that changed hands as specifically permitted by the privilege-exception statute.[187]

When the court referred to Nevada's privilege-exception statute, it stated that "[b]ecause Robeck's condition was an element of his claim against [the defendant], [the defendant] did not violate Robeck's medical privacy by contacting his physicians to obtain *information* regarding Robeck's condition."[188] In stark contrast from the court in *Parker*, the court in *Robeck* held that defense counsel was permitted to secure "information regarding Robeck's condition" through an ex parte interview.[189] In short, *Robeck's* language, although perhaps dictum because the disclosure during the interview contained no substantive information, suggested the Supreme Court of Nevada would permit ex parte interviews as long as the defendant is "contacting . . . physicians to obtain information . . ." about a "condition [that is] an element of [the plaintiff's] claim against [the defendant]."[190]

The Nevada Supreme Court created more ambiguity about ex parte contact when deciding *Leavitt v. Siems*.[191] In *Leavitt*, a plaintiff designated a treating physician as an *expert*.[192] The defendant's attorney contacted the treating physician to "schedule and coordinate the trial testimony."[193] On appeal, the Nevada Supreme Court, now in a published decision, held that ex parte communications with a plaintiff's treating physician, *where the treating physician is designated as an expert*, is improper.[194]

The court reviewed case law from around the country, noting that authorities disagree about the propriety of ex parte contacts with treating physicians.[195] The court then turned to Nevada's expert-discovery case law, noting that the "Nevada Rules of Civil Procedure affirmatively allow only formal depositions of experts."[196] The court determined that "ex parte communication with an opposing party's *expert* witness is improper."[197] Notably, the court carefully limited the holding's scope to treating physicians designated as experts and relied heavily on expert-discovery case law and rules in its decision.[198] However, *Leavitt* did not answer the

187. *Id*.
188. *Robeck*, No. 53576, 2011 WL 2139941, at *1 (emphasis added).
189. *Id.* (making no mention of a distinction between substantive and non-substantive information).
190. *Id*. (quoting NEV. REV. STAT. § 49.245(3) (2012)).
191. Leavitt v. Simms, 330 P.3d, 1 8 (Nev. 2014).
192. *Id.* at 4 (emphasis added).
193. *Id*. at 6.
194. *Id.* at 3 (emphasis added).
195. *Id*. at 7.
196. *Id*. at 7.
197. *Leavitt*, 330 P.3d at 3 (emphasis added).
198. *See generally id*.

question of whether ex parte contact with a treating provider who is merely a percipient witness is in fact permitted.

Despite the limitation of its holding to contact with physicians who are designated as experts, the court in dicta expressed its disapproval of ex parte contacts with treating physicians.[199] The court mused, for example, that "ex parte discussions tend to place the physician in the position of having to make legal conclusions about the scope of the privilege and the relevancy of the material requested".[200] The court also recognized that ex parte discussions expose treating physicians to tort liability.[201] The court also notes the potential that "defense counsel may seek to improperly influence . . . or may discourage the physician from testifying."[202] Additionally, the court did not discuss any benefits that could result from controlled, proper ex parte interviews—stating simply that "it is undisputed that ex parte conferences yield no greater evidence, nor do they provide any additional information, than that which is already obtainable through the regular methods of discovery."[203]

Neither *Leavitt* nor *Robeck* answer the ex parte interview question definitively. *Robeck*, even if it were binding precedent, leaves open the possibility that these interviews could be restricted to the discussion of document production, scheduling, or other logistical matters.[204] Nor does *Robeck* appear to foreclose the possibility that even if permitted, ex parte defense interviews must be preceded by some form of agreement by the parties or court order regarding the permissible scope of the contact.[205] *Leavitt* contains strong language indicating that the court dislikes ex parte treating physician interviews—and where the treating physicians are designated as experts, the law is now clear that contacts are prohibited. But, the court appears to have carefully restricted its holding to the expert context, and thus the area of law remains uncertain.[206]

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199. *Id.* at 7-8.

200. *Id.* at 8 (quoting King v. Ahrens, 798 F. Supp. 1371, 1373 (W.D. Ark. 1992), *aff'd* 16 F.3d 265 (8th Cir. 1994)).

201. *Id*.

202. *Leavitt*, 330 P.3d at 8.

203. *Id.* (quoting Alsip v. Johnson City Med. Ctr., 197 S.W.3d 722, 727 (Tenn. 2006)).

204. Even though, as discussed in note 189, the court does not address the substantive/non-substantive distinction, it can be argued that the holding would be dictum as to the question of substantive communications. However, the court's reasoning would seem to apply to all communications. *See generally Leavitt*, 330 P.3d at 3.

205. If there was substantive information changing hands, the court may have applied reasoning in line with the magistrate in the *Parker* case, finding that some agreement as to permissible scope should be reached prior to any interviews. *See Parker (District Court)*, No. 3:06-CV-518-ECR-UPC, 2009 U.S. Dist. LEXIS 126565, at *5-6.

206. *Leavitt*, 330 P.3d at 3.

Nevada law is a perfect example of the two reasons a more comprehensive solution to ex parte interviews with treating physicians is needed. First, the law is unclear.[207] Litigators cannot determine if interviews are permitted and, considering the negative language in the few decisions on point, more attorneys will likely avoid such contacts. Second, and perhaps more importantly, courts fails to acknowledge policy interests that recognizes the benefits of a system where reasonably controlled ex parte contact is permitted.[208]

E. AN ATTEMPT AT A UNIFORM APPROACH THAT BALANCES THE IMPORTANT POLICY ARGUMENTS AND BRINGS NEEDED CONSISTENCY

1. Critical Components to a Solution

Any effort to reform the standards for ex parte treating physician interviews must address three aspects of the problem. First, the procedural mechanism for reform should be carefully selected. Second, the optimal solution will balance the competing policy interests of the plaintiff and defense bars, and also account for the interests of physicians. Third, reform should result in definitive standards so that attorneys and physicians know how to conduct themselves in requesting, scheduling, and conducting ex parte defense interviews.[209]

First, at least two potential mechanisms are available for creating new ex parte interview standards. Legislatures could enact statutes explicitly dealing with the ex parte interview issue by defining the extent to which the patient privilege is waived by the initiation of a lawsuit. A model statute is offered at the conclusion of this article which attempts to balance the competing policy perspectives.[210] Legislative solutions offer certainty and are the most binding form of legal standard.[211] However, legislative fixes may be difficult to accomplish due to political challenges.[212]

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207. *See* NEV. REV. STAT. §§ 49.215-.245 (2014).

208. *Id*.

209. *See generally* Philip H. Corboy, *Ex Parte Contacts Between Plaintiff's Physician and Defense Attorneys: Protecting the Patient-Litigant's Right to a Fair Trial*, 21 LOY. U. CHI. L. J. 1001, 1012-19 (1990) (discussing the balancing necessary within a statute.)

210. *See infra* pp. 38-39.

211. *See* Gibbons v. Ogden, 22 U.S. 1, 19 (1824); Robert Hajdu & Bruce E. Rosenblum, *The Process of Constitutional Amendment*, 79 COLUM. L. REV. 106, 161-62 (1979).

212. Michael D. Sant' Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 70 GEO. WASH. L. REV. 1381, 1391 (2011).

Another option would be to adopt local rules or practices on point.[213] Likely, the best approach would involve a model standard that could be adopted into local rules.[214] The benefit of this approach would be to give discretion to local authorities to craft a solution tailored to their locale.[215] However, local judicial rulemakers' freedom to vary the terms of the standard might undermine the effort to achieve uniformity.[216] If politically viable, a legislative fix therefore is arguably a superior solution.

2. A Proposed Statutory Solution to the Ex Parte Defense Interview Issue

Whether by legislation or court rule, the solution must balance the policies outlined in Section II.[217] The solution should give defense counsel meaningful ex parte access to treating physicians in order to provide equal access to relevant information without incurring the expense, delay and strategic disadvantage of depositions. At the same time, the solution should protect the plaintiff's privileged medical information from inadvertent—or purposeful—disclosure beyond that inherent in and necessary to the litigation process.[218] The solution also should include protections for the physician, by preventing defense counsel from exerting undue influence on the treating physician during the interview process, and giving the doctor a clear answer to her questions about whether the requested interview is required or permitted at all, the permissible scope of the interview, and the extent to which she may inform her patient or the patient's lawyer about the interview request. The solution should ensure not only that lawyers for both sides have easy access to the treating physician for ministerial matters such as verifying data and scheduling depositions but also should permit defense

213. *Id*.

214. Janet Napolitano, *A Comment on Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. LEV. 2063, 2065 (1989).

215. *See* Jodi S. Balsam, *The New Second Circuit Local Rules: Anatomy and Commentary*, 19 J. L. & POL'Y 469, 538 (2011) (discussing the nature of local rules).

216. Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through A Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1171 (2005) (discussing the "balkanization" of procedural rules as a result of modifications made through local rules and court orders).

217. *See supra*, Section IV.

218. The authors have been unable to find any reliable evidence regarding the extent of purposeful defense counsel abuse of treating physician interviews. Moreover, most commentators and judges do not raise significant concerns over purposeful abuse. Thus, this policy concern is not included in the predicates for reform. *See* Barbara P. Berens, *Defendant's Rights to Conduct Ex Parte Interviews with Treating Physicians in Drug or Medical Device Cases*, 73 MINN. L. REV 1451, 1452, 1474 (1989).

counsel a fair opportunity, with the physician's knowledge and consent, to ask substantive questions about the case during the interview.[219]

We offer the following proposal to address these fundamental needs. First, we propose an explicit privilege waiver. This ensures that defense counsel will not be liable under a privilege theory for contacting treating physicians.[220] Second, defense counsel are explicitly given authority to interview treating physicians on substantive matters—subject to the procedural safeguards discussed below. This explicit authority to conduct interviews removes any doubt that the practice is allowed; a problem for counsel in jurisdictions that regulate ex parte defense interviews without a statute—such as Nevada.[221] Third, even where a plaintiff has legitimate concerns about a defense counsel interviewing a treating physician, our proposed solution carves out a safe harbor to save costs by allowing counsel to discuss non-substantive issues such as scheduling. Finally, a safe harbor is given to the treating physicians to ensure they may speak with defense counsel without fear of exposure to liability or censure from their licensing authorities. Our proposed solution focuses on ensuring adequate safeguards protect plaintiffs' interests.[222] This is achieved by enumerating the steps defense counsel must comply with in order to carry out the interview.[223]

One provision allows the plaintiff to seek a protective order specifically delineating what topics the treating physician may discuss—upon the plaintiff making a sufficient showing that there is a "significant likelihood" of inadvertent disclosure of privileged information. A protective order is available where plaintiff demonstrates reasonable concerns that the treating physician may have trouble figuring out what information she is permitted to disclose even after the defense counsel complies with the procedural safeguards.[224] Our proposed solution incorporates a number of provisions ensuring that the treating physician is informed of the proper topics of the interview and of her option not to participate. The statute also requires proper notice to the plaintiff so that in the event there is a reasonable basis to restrict ex parte contact, plaintiff's counsel has an adequate opportunity to seek protection from the court. One provision also requires that defense counsel memorialize the topics that were discussed so that plaintiff's counsel will be able to review the interview record if needed.

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219. Samms v. Dist. Ct., 908 P.2d 520, 526 (Colo. 1995) (en banc).

220. *See supra* section III.A.

221. *See generally supra* section V.A.

222. *See supra* section IV.A.

223. Stempler v. Speidell, 495 A.2d 857, 864-65 (N.J. 1985) (discussing court supervision of ex parte interviews).

224. Whitney B. Hayes, *Physician-Patient Confidentiality in Health Care Liability Actions: HIPAA'S Preemption of Ex Parte Interviews with Treating Physicians Through the Obstacle Test*, 44 U. MEM. L. REV. 97, 108 (2013).

To address these concerns, the authors propose the following model statute:

> Waiver of the patient-physician privilege when asserting claims or defenses.
>
> > Subject to subsection (b), a person waives the patient-physician privilege by asserting a claim or defense in which the person's medical condition is placed at issue.
> >
> > The scope of the waiver in section (a)(1) is not unlimited but shall extend only to the subject matter relevant to the person's claims or defenses.
>
> Ex parte interviews of a party's treating physician by opposing party; protective orders; exceptions.
>
> > In general.— In any case in which a party has placed his or her medical condition at issue, the opposing party shall be permitted to contact the party's treating physician if the opposing party first does each of the following:
> >
> > > informs the treating physician of the specific subject matter that is not privileged, such as by waiver, and therefore permissible to discuss;
> > >
> > > informs the treating physician that any personal medical information, other than that pertaining to the non-privileged subject matter identified in subsection a, should not be discussed;
> > >
> > > informs the treating physician that the physician may refuse to speak in the non-testimonial setting to the party or his or her counsel for any reason;
> > >
> > > informs the treating physician of his or her right to be compensated for his or her time;
> > >
> > > informs the treating physician of his or her right to notify the patient and his or her attorney of the interview in advance;
> > >
> > > provides notice to counsel of record for the opposing party, or the opposing party if there is no counsel of record, by no later than 24 hours before the interview;
> > >
> > > informs the treating physician of his or her right to consult with his or her own counsel in connection with the interview; and,
> > >
> > > memorializes what is discussed in the interview in written or recorded form, and provides it upon request to the physician.
>
> Notwithstanding section (1), a party may seek a protective order from the court which limits the subject matter of an opposing party

> interview with a treating physician, upon a showing that there is a significant likelihood that the patient's privileged information may be disclosed.
>
> Notwithstanding section (1) or section (2), a party may contact a treating physician for procedural matters, such as scheduling a deposition, requesting mailing information, or requesting information pertaining to the physician's status as a treating physician.
>
> Protection of treating physicians who participate in interviews with counsel for opposing parties.
>
> > No treating physician shall be liable for participating in interviews with counsel for opposing parties if the physician acted in good faith.

The above proposed statute attempts to reconcile concerns about granting unfettered access to plaintiffs' physicians with concerns that defense counsel will be unfairly prevented from using efficient, cost-effective means to gather relevant information from treating physicians. The statute further protects the physician from undue pressure by ensuring that he or she will give full, informed consent to any ex parte interviews with defense counsel. While this solution may not be perfect for every jurisdiction, it provides a starting point for legislatures, and judges, to begin considering mechanisms that balance the many legitimate policy interests raised by the ex parte treating physician issue.

CONCLUSION

While the proposed statute above may not ultimately prove to be the ex parte defense interview silver bullet, the point of this article is to highlight the significant policy issues raised by both sides of the bar, and the importance of crafting a solution that balances these interests, along with those of the physician witnesses at the center of the debate. The state of the law across the nation remains haphazard, and courts and legislatures regulate ex parte defense interviews in myriad ways.

Amidst the confusion, however, one truth that should be clear: that there are fair, measured approaches to permitting and regulating ex parte defense counsel interviews while promote the just and efficient administration of cases while adequately protecting plaintiffs' interests. Ex parte defense interviews are not prohibited by privilege or HIPAA, and, properly governed, they need not be adverse to plaintiffs' right and interests generally.

With that said, careful thought needs to be given when crafting any regulatory framework applicable to ex parte defense interviews. Adequate assurance should be given to ensure that the boundaries of plaintiffs' privileges are observed, that defense counsel do not take advantage of the

process to obtain information to which counsel is not entitled, and that treating physicians are able to fulfill their role in their patients' legal cases without fear of being sued or subjected to discipline from their own licensing boards.

Rising litigation costs, particularly in the medical malpractice context, should lead all concerned to embrace this opportunity to make the process more efficient and streamlined. Ex parte defense interviews clearly serve this policy, and plaintiffs' interests—while important—can be protected.