

IN THE SUPREME COURT OF MISSOURI

SC 90610

STATE OF MISSOURI, ex rel. BOBBIE JEAN PROCTOR
and VINCENT PROCTOR,

Relators,

vs.

HON. EDITH MESSINA,

Respondent.

Original Proceeding

Bobbi Jean Proctor and Vincent Proctor vs. Timothy Blackburn, M.D., et al.
Case No. 0816-CV24576

BRIEF OF MISSOURI ASSOCIATION OF TRIAL ATTORNEYS AS *AMICUS*
CURIAE IN SUPPORT OF RELATORS

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INTERESTS OF AMICUS CURIAE

The Missouri Association of Trial Attorneys (MATA) is a professional organization of approximately 1,400 trial lawyers in Missouri, most of whom are engaged in personal injury litigation involving Missouri citizens.

Whether a trial court has authority to issue a qualified protective order permitting boundless *ex parte* interviews between defense counsel and a plaintiff's treating physicians is an important question in many personal injury cases. Injured plaintiffs should be afforded the protections of the Health Insurance Portability and Access Act (hereinafter referred to as "HIPAA"). Accordingly, this issue is of considerable interest to MATA and its members.

As discussed herein, MATA supports Relators Bobbie Jean and Vincent Proctor's position that Missouri law and HIPAA preclude the Court from entering an order concerning *ex parte* physician interviews between defense counsel and a plaintiff's treating physicians. Injured plaintiffs in Missouri are protected by both Missouri law and the HIPAA privacy protections when the release of protected healthcare information is at issue. MATA urges this Court to make Relators' writ of prohibition or mandamus absolute.

CONSENT OF THE PARTIES

MATA has received consent from counsel for Plaintiffs, Bobbi Jean and Vincent Proctor, to file this brief. MATA sent a request for consent for the filing of this brief to Defendants on March 17, 2010. Respondent, Honorable Edith Messina, has consented to the filing of any *amicus curiae* briefs in support of either party. Counselor for Defendants Timothy L. Blackburn, M.D. and Kansas City Heart Group, P.C., Maureen M. Brady, consented orally to the filing of this brief on March 17, 2010. Counselor for Defendant St. Joseph Hospital, Sean T. McGrevey, reported on March 18, 2010 that the Relator will consent to the filing of this brief. Therefore, MATA files its brief *Amicus Curiae* in support of the Relators pursuant to Rule 84.05(f)(2).

JURISDICTIONAL STATEMENT

MATA hereby adopts the Jurisdictional Statement of Relators.

STATEMENT OF FACTS

MATA hereby adopts the Statement of Facts of Relators.

POINTS RELIED ON

- I. ***EX PARTE* COMMUNICATIONS ARE A MEANS OF INFORMAL DISCOVERY, AND THE TRIAL COURT DOES NOT HAVE AUTHORITY TO ISSUE AN ORDER CONCERNING INFORMAL DISCOVERY OUTSIDE THE CONFINES OF RULE 56.01.**
- II. **ANY INFORMATION THAT CAN BE OBTAINED LEGITIMATELY THROUGH *EX PARTE* DISCUSSION WITH TREATING PHYSICIANS CAN ALSO BE OBTAINED THROUGH THE METHODS OF DISCOVERY LISTED IN THE MISSOURI RULES OF CIVIL PROCEDURE.**
- III. **MISSOURI DECISIONS CONCERNING *EX PARTE* CONVERSATIONS WITH TREATING PHYSICIANS.**
- IV. **HIPAA'S PURPOSE IS TO PROTECT INDIVIDUAL HEALTH INFORMATION**
- V. **HIPAA PREEMPTS STATE LAWS THAT ALLOW UNRESTRICTED *EX PARTE* CONTACTS**

ARGUMENT

I. EX PARTE COMMUNICATIONS ARE A MEANS OF INFORMAL DISCOVERY, AND THE TRIAL COURT DOES NOT HAVE AUTHORITY TO ISSUE AN ORDER CONCERNING INFORMAL DISCOVERY OUTSIDE THE CONFINES OF RULE 56.01.

Ex parte communications are a matter of informal discovery pursuant to Missouri law. “Informal discovery” would pertain to methods of obtaining information that are not specifically mentioned by statute or rules. The Missouri Supreme Court has previously included ex parte communications in the category of informal discovery tools. In *Brown v. Hamid*, a case pre-dating HIPAA by a decade, the Court stated, “The question thus becomes whether, as a means of **informal discovery**, opposing counsel may contact *ex parte* an expert retained by the other side” 856 S.W.2d 51, 54 (Mo. 1993) (emphasis added). Several other Missouri cases also refer to *ex parte* communications as means of “informal discovery.” See *State ex. rel Normal v. Dalton*, 872 S.W.2d 888 (Mo. App. 1994); *State ex rel. Woytus v. Ryan*, 776 S.W.2d 389 (Mo. banc 1989); *Brandt v. Pelican*, 856 S.W.2d 658 (Mo. 1993). “The meeting at which ex parte communications occur is not a judicial proceeding because the trial court has no general oversight of the meeting or any control over it.” See *State ex rel. Proctor v. Messina*, 2009 WL 3735919 at *13 (Mo. App. November 10, 2009) (citing *State ex. rel Norman v. Dalton*, 872 S.W.2d 888, 891 (Mo. App. 1994)). The Minnesota Supreme Court has also held that ex parte interviews are tools of **informal discovery**. *Filz v. Mayo Foundation*, 136 F.R.D. 165, 172 (D. Minn. 1991) (emphasis added) (explaining that the "informal discussion"

procedure outlined in Minn. Stat. § 595.02, subd. 5, “does not rise to the level of formal discovery procedure”) *Id.* 449 N.W.2d at 170.

“Parties may freely conduct their discovery, as long as both parties follow the rules of discovery, as explicitly enacted by the Missouri Supreme Court.” *State ex rel. Collins v. Roldan*, 289 S.W.2d 780 (Mo. App. 2009) (J. Welsh concurring)(citations omitted). “**When the parties dispute the legal parameters of the discovery rules, it is within the circuit court’s discretion to rule on such a dispute...however, [the circuit court’s discretion] is limited to the parameters of the rules.**” *State ex rel. Collins v. Roldan*, 289 S.W.2d at 788 (citing *State ex. rel Normal v. Dalton*, 872 S.W.2d 888 (Mo. App. 1994)). Rule 56.01 identifies the types of authorized discovery in civil cases:

Parties may obtain discovery by one or more of the following methods:
depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes, physical and mental examinations; and requests for admission.

Rule 56.01 does not mention “formal” discovery to include *ex parte* communications. “[I]n Missouri, the trial court has the authority and oversight over formal discovery proceedings authorized or held under the supervision of a court. See *State ex rel. Proctor v. Messina*, 2009 WL 3735919 at *13 (Mo. App. November 10, 2009) (citing *State ex. rel Norman v. Dalton*, 872 S.W.2d 888, 891 (Mo. App. 1994)). “No witness is forced to participate in discovery except through the formal discovery procedures. If a witness refuses to be interviewed ... [*ex parte*,] the attorney's only

practical recourse is to take the witness' deposition.” *State ex. rel Norman v. Dalton*, 872 S.W.2d 888 (citing *Brandt I* at 663, *Brandt II*, 856 S.W.2d at 674).” The right to engage in *ex parte* discussions with plaintiff’s physician is subject to consent of the physician.” *Id.* (citing *Brandt I*, 856 S.W.2d at 662). “Moreover ... **witnesses will only be required to participate in the formal discovery procedures as outlined in the Rules of Court.**” *Id.* (citing *Brandt I*, 856 S.W.2d at 663).

The Respondent in this case has essentially asked the court to create and adopt a new discovery method; the court enforced waiver of privilege allowing *ex parte* informal interviews with physicians. The July 2, 2009 Order goes beyond formal discovery stating: “counsel for the defendants are hereby authorized to talk with Bobbie Jean Proctor’s treating physicians or other health care providers, without counsel or the parties, including the plaintiff, being present or participating . . .” The trial court does not have authority to issue an order that authorizes counsel for the defendants to conduct informal discovery through *ex parte* interviews or conversations with Mr. Proctor’s treating physicians.

II. ANY INFORMATION THAT CAN BE OBTAINED LEGITIMATELY THROUGH *EX PARTE* DISCUSSION WITH TREATING PHYSICIANS CAN ALSO BE OBTAINED THROUGH THE METHODS OF DISCOVERY LISTED IN THE MISSOURI RULES OF CIVIL PROCEDURE.

“Information or evidence that can be obtained legitimately through *ex parte* discussion can also be obtained through the methods of discovery listed in the *Rules*. Any burdens caused defendants by being restricted to the specially enumerated discovery procedures are outweighed by the potential risks to the physician-patient relationship in

deviating from those procedures.” *State ex rel. Woytus* 776 S.W.2d 389, 395. What is possible in an “unauthorized” *ex parte* interview would also be possible in one “authorized” by a court.

Saving money and convenience are not enough to justify *ex parte* contacts with plaintiff’s treating physicians by defense counsel; if that were the primary concern, defendants would not object to the presence of plaintiff’s counsel at such meetings. Additionally, physicians routinely charge for any meeting, as well as deposition. Denying defendants *ex parte* access to a plaintiff’s treating physicians, absent express authorization, does not deprive defendants the opportunity to obtain the same information while, at the same time, protecting all parties involved. As stated by the Court in *Alsip v. Johnson City Medical Center*, 197 S.W.3d 722, 727 (Tenn. 2006):

We simply are not persuaded that the defendants here would be impeded from learning all the decedent’s relevant medical information by being prohibited from communicating *ex parte* with non-party physicians. “ ‘[A] prohibition against ... *ex parte* contacts regulates only how defense counsel may obtain information from a plaintiff’s treating physician, i.e., it affects defense counsel’s methods, not the substance of what is discoverable.’ ” *Crist v. Moffatt*, 326 N.C. 326, 389 S.E.2d 41, 45 (1990) (quoting *Manion v. N.P.W. Med. Ctr.*, 676 F.Supp. 585, 593 (M.D.Penn.1987)). On this point, all the parties to this case, and their amici, agree: not only did the defendant here have access to “any and all” of the decedent’s medical records pursuant to an agreed order, the defendant also may obtain discovery of all relevant medical information via any of the formal procedures prescribed in

Tennessee Rule of Civil Procedure 26.01, including deposition upon oral examination or written questions, written interrogatories, and requests for admissions. The plaintiff here fully concedes that the decedent's relevant medical information is discoverable-the question is simply *how* the defendant may discover it. “[I]t 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.” *Petrillo v. Syntex Lab., Inc.*, 148 Ill.App.3d 581, 102 Ill.Dec. 172, 499 N.E.2d 952, 956 (1986). We agree with numerous “[o]ther courts [that have] concluded that formal discovery procedures enable defendants to reach all relevant information while simultaneously protecting the patient's privacy by ensuring supervision over the discovery process....” *Crist*, 389 S.E.2d at 46 (citing *Petrillo v. Syntex Lab., Inc.*, 102 Ill.Dec. 172, 499 N.E.2d at 963; *Roosevelt Hotel Ltd. P'ship v. Sweeney*, 394 N.W.2d 353, 356 (Iowa 1986); *Anker v. Brodnitz*, 98 Misc.2d 148, 413 N.Y.S.2d 582, 585-86 (N.Y.Sup.Ct.1979)).

Similarly, in Missouri, the limits of authorized discovery commence with Rule 56. *See Woytus* at 391; Missouri Supreme Court Rule 56.01. Following formal discovery channels also affords Court oversight. While it may be deemed that the plaintiff has waived the statutory privilege with regard to certain information, the filing of a lawsuit does not constitute a waiver of the plaintiff's right to the protections afforded by Missouri's Rules of Civil Procedure.

Issuing a purported formal order concerning non-party medical providers supplies an advisory opinion to said non-party. “The *Rules* do not prohibit a party from trying to

convince an expert that an opinion is erroneous, and should be reconsidered in light of particular facts or in light of the opinions of other experts. However, when a party or an attorney emphasizes his or her connections with an expert's colleagues or superiors -- especially when unrelated to the case -- it may constitute a form of pressure on an expert's decision to testify, and implies the possibility of indirect benefits or punishments from that decision.” *Brown*, 856 S.W.2d at 54.

Broad *ex parte* discussions undermine the objectivity of the treating physician who is primarily a fact witness. An unauthorized *ex parte* interview with the non-party treating physician could disintegrate or provide the opportunity for a discussion of the impact of a jury’s award upon a physician’s professional reputation, the rising cost of malpractice insurance premiums, the notion that the treating physician might be the next person to be sued, and other topics which might influence the treating physician’s views.

III. MISSOURI DECISIONS CONCERNING *EX PARTE* CONVERSATIONS WITH TREATING PHYSICIANS.

Other than the present case, the only relevant post-HIPAA Missouri opinion addressing *ex parte* contacts is *State ex rel. Collins v. Roldan*, 289 S.W.3d 780 (Mo.App. W.D. 2009) (transfer denied September 1, 2009). While *Collins* involved the denial of a request to compel a plaintiff to execute a medical authorization which authorized *ex parte* contacts, the analysis in this case is the same. The *Collins* court recognized that **defense counsel, was “in essence, seeking a court order compelling Smith to execute a medical authorization authorizing *ex parte* interviews with her treating physicians.” The Collins court held “a third party seeking such *ex parte* contacts may not ask the court**

to compel the patient to consent to, or to compel *the physician* to actually participate in such discussions.’ Id. at 784-785 (emphasis added).

In 1993 (ten years prior to the enactment of HIPAA) the Supreme Court of Missouri decided *Brandt v. Pelican*, 856 S.W.2d 658 (Mo. 1993) (“*Brandt I*”) and *Brandt v. Medical Defense Associates*, 856 S.W.2d 667 (Mo. 1993) (“*Brandt II*”). Until the *Collins* decision in 2009, *Brandt I* and *Brandt II* were the premier Missouri cases discussing the issue of *ex parte* communications between a patient’s treating physicians and a defendant’s attorneys.

In the *Brandt* cases, the plaintiff filed a medical malpractice cause of action against a doctor for his failure to monitor and warn the plaintiff of the potential side effects of a drug he prescribed. Subsequent to the plaintiff’s treatment by the defendant doctor, she was treated by two other doctors. Plaintiff’s counsel took the depositions of the two subsequent treating doctors. After these depositions took place of the two subsequent treating doctors, the defendant’s attorneys initiated *ex parte* communications with the doctors regarding the plaintiff’s physical condition (PHI pursuant to HIPAA).

After their *ex parte* communications with defense counsel, the two subsequent treating doctors both doctors testified at trial and provided expert opinions on behalf of the defendant. One doctor was a paid expert witness for the defendant. On appeal, the plaintiff argued that the two doctors changed their previous testimony after the *ex parte* communications with defense counsel.

Brandt I held that neither Missouri common law nor the incompetent witness statute prohibits a patient’s treating physician from having *ex parte* communications with

the defendant's attorneys during the discovery period of litigation. 856 S.W.2d 658, 662. *Brandt II* held that once an issue concerning a patient's medical condition is instigated in litigation, this serves as a waiver of a physician's testimonial privilege under Section 491.060(5), RSMo, as well as a waiver of a physician's fiduciary duty of confidentiality. 856 S.W.2d 667, 674. According to the *Brandt* decisions, the only bar on a physician's *ex parte* communication is that he or she cannot go outside the scope of this waiver.

The *Brandt* decisions indicate the only bar on a physician's *ex parte* communication is that he or she cannot go outside the scope of this waiver. *Id.* Thus, the Supreme Court placed the burden of identifying the legal boundaries of permitted disclosures squarely on the shoulders of the physician who is participating in these discussions without the benefit of counsel. *See Brandt II*, 856 S.W.2d 667, 674 (“If a physician engages in an *ex parte* conference absent such a waiver or discloses any information beyond the scope of such a waiver, then the patient may maintain an action for damages in tort against the physician.”) (emphasis added). While the Missouri Courts have determined in *Brandt I*, *Brandt II*, and *Collins*, that *ex parte* contacts are not prohibited to the extent they fall within the privilege waiver triggered by the parties' pleadings to the extent a physician may choose to engage in such contacts, the filing of a personal injury suit does not waive the protections afforded by HIPAA. And to the extent Missouri law is less stringent than HIPAA's privacy protections, HIPAA controls. 42 U.S.C.A. § 1320d-7(a)(2).

IV. HIPAA'S PURPOSE IS TO PROTECT INDIVIDUAL HEALTH INFORMATION

One of the primary purposes of HIPAA is to protect the security and privacy of individually identifiable health information. *Smith v. American Home Products Corp. Wyeth-Ayerst Pharmaceutical, et al.*, 855 A.2d 608, 611 (N.J. 2003). HIPAA and the related provisions established in the Code of Federal Regulations supersede and preempt any contrary provisions of state law, unless the state law provides privacy protection that is “more stringent” than HIPAA’s requirements. *Id.*; 42 U.S.C.A. § 1320d-7(a)(2). HIPAA’s stated purpose of “protecting a patient’s right to confidentiality of his or her individual medical information” is a “compelling federal interest,” as opposed to a state’s “less compelling” interest in “permitting access to medical information where confidentiality has been waived.” *Id.* Thus, to the extent a state’s law is less stringent than the privacy protections provided by HIPAA, HIPAA controls. 42 U.S.C.A. § 1320d-7(a)(2).

Congress delegated the task of creating national standards to the Department of Health and Human Services to “ensure the integrity and confidentiality of the information.” The regulations promulgating these standards became effective on April 14, 2003, and are collectively known as “the Privacy Rule.” *Smith v. American Home Products Corp. Wyeth-Ayerst Pharmaceutical, et al.*, 855 A.2d 608, 611 (N.J. 2003) (citing 42 U.S.C.A. § 1320d-2(d)(2)(A); 45 C.F.R. §§ 160 et seq., 164 et seq; 65 Fed. Reg. 82462 (Dec. 28, 2000)). The Privacy Rule sets forth standards and procedures for the collection and disclosure of protected health information (“PHI”). *Id.* (citing 45 C.F.R. § 160.103)).

PHI includes **any information, whether oral or recorded in any form or medium**, that (a) is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse and (b) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual. *Id.* at 612 (citing 45 C.F.R. § 160.103).

Under the HIPAA Privacy Rule, an entity must make reasonable efforts to limit PHI to the “minimum necessary” to accomplish the intended purpose of the use, disclosure or request.¹ **Pursuant to 45 C.F.R. § 164.512(e), a health care provider may disclose protected health information in the course of a judicial proceeding under either of two circumstances: (1) if the provider is ordered to do so by a court, or (2) if the provider discloses in response to traditional methods of formal discovery, i.e. “subpoena, discovery request or other legal process,”** as long as certain conditions are met. 45 C.F.R. § 164.512(e)(1)(i)-(ii). Under this Section of the Code, the conditions are that (a) the health care provider must be assured that the requesting entity or its representative has provided the patient with written notice and opportunity to object, or (b) that in relation to the information contemplated by the discovery request or subpoena, the requesting entity has moved the court for a “qualified protective order.” 45 C.F.R. § 164.512(e)(1)(ii)(A)-(B).

¹ *Id.* (citing 45 C.F.R. § 164.508).

Thus, the Order here allowing *ex parte* discussions provides no oversight capacity for the Court as it would have in the formal discovery process pursuant to the Missouri Supreme Court Rules. As stated within the *Proctor* Court of Appeals decision, "... we conclude that 45 C.F.R. 164.512(e) permits a covered entity, pursuant to a court order or subpoena, discovery request, or other lawful process, to disclose information *during* or *in* any official proceeding in court, or *during* or *in* any proceeding in which the trial court empowers the parties to act or in which the trial court acts in an oversight capacity." *Proctor* Court of Appeals Opinion, p. 21 (emphasis in original).

Moreover, an *ex parte* interview cannot be reconciled with the protections provided by HIPAA because the disclosure occurs without affording Plaintiff an opportunity to object. Unless defense counsel provides exclusive written questions to be asked of a treating physician, Plaintiff will not have notice or an opportunity to object to the questions asked by defense counsel.

V. HIPAA PREEMPTS STATE LAWS THAT ALLOW UNRESTRICTED *EX PARTE* CONTACTS

The courts of other jurisdictions have dealt specifically with the issue of whether the HIPAA Privacy Rule preempts a state's law that allows unrestricted *ex parte* contacts with a patient's treating physician.

The seminal case on this issue is *Law v. Zuckerman*. 307 F.Supp.2d 705 (S.D.Md. 2004). *Law* is a case interpreting Maryland law, and like Missouri, Maryland allows *ex parte* contacts between defendant's counsel and a treating physician when a patient places his or her medical condition at issue in a lawsuit. *Id.* at 708 (citing *Butler-Tulio v.*

Scroggins, 774 A.2d 1209 (Md. Ct. App. 2001). In *Law*, the plaintiff brought a medical malpractice case against the defendant for rendering her cervix incompetent during laser surgery. *Id.* at 707. After the plaintiff produced her medical records to the defendant's counsel, defendant's counsel met *ex parte* with the plaintiff's treating physician, without notifying the plaintiff or giving her an opportunity to object. *Id.* at 707. The plaintiff argued that the contact violated the HIPAA Privacy Rule. *Id.* at 707.

The court recognized that HIPAA, while not barring all contact between counsel and a health care provider, "clearly regulates the methods by which a physician may release a patient's health information, including 'oral' medical records." *Id.* at 708. The *Law* court held that Maryland law was less stringent than the HIPAA requirements, and therefore HIPAA preempted Maryland's law. "[I]n the absence of strict compliance with HIPAA" *ex parte* contacts with treating physicians "are prohibited." *Id.* at 708. The mechanisms set forth in the Privacy Rule are meant to ensure that protected health information is not disclosed without first providing notice to the patient and an opportunity to object to the disclosure. *See* 65 Fed. Reg. 82462, 82463 (Dec. 28, 2000).

The *Law* court pointed out that the "HIPAA statute has radically changed the landscape of how litigators can conduct informal discovery in cases involving medical treatment." *Law*, 307 F.Supp. at 711. It noted that before HIPAA, "*ex parte* contacts with an adversary's treating physician may have been a valuable tool in the arsenal of savvy counsel...The element of surprise could lead to case altering, if not case dispositive results." *Id.* After the enactment of HIPAA, "[c]ounsel should now be far more cautious

in their contacts with medical fact witnesses when compared to other fact witnesses to ensure that they do not run afoul of HIPAA's regulatory scheme." *Id.*

Before adversarial counsel may participate in *ex parte* communications with a treating health care provider, the minimum protections afforded to patients under HIPAA. HIPAA requires the adversarial counsel to first obtain a court order or the patient's express consent. In short, HIPAA protects a patient's healthcare information "unless the patient is given a reasonable notice and opportunity to object." 45 C.F.R. § 164.512(e)(1)(ii)(A)-(B). If a state law provides less stringent privacy protections than HIPAA, then HIPAA preempts the state law and the patient will be provided with the HIPAA privacy protections as well as any state law protections.

CONCLUSION

For the reasons stated above, MATA urges this Court to make Relators' writ of prohibition or mandamus absolute.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that a copy of the computer diskette containing the full text of Brief of *Amicus Curiae* Missouri Association of Trial Attorneys In Support of Respondent is attached to the Brief and has been scanned for viruses and is virus-free.

Pursuant to Rule 84.06(c), the undersigned hereby certifies that: (1) this Brief includes the information required by Rule 55.03; (2) this Brief complies with the limitations contained in Rule 84.06(b); and (3) this Brief contains 4,086 words, as calculated by the Microsoft Word software used to prepare this brief.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served, via U.S. Mail, on this 1st day of April, 2010, to:

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