

IN THE SUPREME COURT OF MISSOURI

No. SC90610

STATE ex rel. BOBBIE JEAN PROCTOR AND VINCENT PROCTOR

Plaintiffs/Relators,

v.

HON. EDITH L. MESSINA

Respondent

**Appeal From The Circuit Court Of Jackson County, Missouri
16th Judicial Circuit
Hon. Edith L. Messina**

**Transfer from the Missouri Court of Appeals
Western District
Western District Case No. WD71326**

**SUBSTITUTE BRIEF OF
DEFENDANT ST. JOSEPH MEDICAL CENTER
FOR RESPONDENT**

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JURISDICTIONAL STATEMENT

Respondent is satisfied with Relators' Jurisdictional Statement.

STATEMENT OF FACTS

Plaintiff Bobbie Jean Proctor filed a medical malpractice action, clearly placing her physical condition at issue. *See* Exhibit A to Petition in Prohibition, pp. 1-11. Defendants, as part of their efforts to defend the litigation, moved the trial court to issue an order regarding the ability of their counsel to engage in informal and voluntary *ex parte* discussions with Plaintiff's treating health care providers (hereinafter referred to as "*ex parte* communication"), arguing that was permitted by Missouri common law and contemplated by Health Insurance Portability & Accountability Act of 1996 (hereinafter "HIPAA") at 45 CFR §164.512(e)(1). *See* Exhibits B & D to Petition in Prohibition, pp. 12-18, 23-24.

The Respondent, the Honorable Edith L. Messina, issued an Order (1) outlining the scope of the litigation waiver of Plaintiff's physician-patient privilege, and (2) advising Plaintiff's health care providers that they were authorized, but not required, to engage in informal *ex parte* communications with defense counsel under Missouri law and HIPAA, citing 45 C.F.R. §164.512(e)(1). *See* Exhibits H & I to Petition in Prohibition, pp. 94-99; Relator's Appendix A1-A6. (hereinafter sometimes referred to as "the Order").

Plaintiffs/Relators then sought a Writ of Prohibition from the Western District of the Missouri Court of Appeals, challenging the Order. State ex rel. Proctor v. Messina, ___ S.W.3d ___, 2009 WL 3735919, *1 (Mo.App. W.D. 2009). A panel of three judges (hereinafter the “Panel”) issued an opinion holding that Respondent, Judge Messina, lacked the authority to issue a formal order that detailed the scope of the Plaintiff’s litigation waiver of the physician-patient privilege and informed Plaintiff’s health care providers of their option to engage in *ex parte* discussions with defense counsel under Missouri law and in compliance with HIPAA. Id. at *14-16.

Two judges concluded that Section 164.512(e)(1) only allowed disclosure of PHI in “the course of a judicial proceeding,” which they restrictively defined to only those disclosures that occurred “*during* or *in* any official proceeding in court, or *during* or *in* any proceeding in which the trial court empowered the parties to act or in which the trial court acts in an oversight capacity.” Id. at *11-12. They then held Judge Messina lacked “authority and oversight” over *ex parte* communications with the treating physician, as “the trial court is limited by the enumerated discovery rules and the parameters of those rules.” Id. at *13-14.

The third judge issued a concurring opinion. Id. (Smart, concurring), at *16. He questioned whether the trial court was entirely without authority to issue an order facilitating *ex parte* communications with treating physicians in some contexts. Id. He further questioned the limited definition that had been ascribed to “in the course of any

judicial proceeding.” Id. Nevertheless, despite citing Missouri Supreme Court precedent “recogniz[ing] the value in allowing the defendant access to the treating physician,” he concurred because he believed that *ex parte* communication in medical malpractice “presents special inherent risks,” such as “the potential for impropriety,” so he concluded the Order exceeded the bounds of the trial court’s authority. Id. at *17-18.

This Court granted Defendants’/Respondents’ Applications for Transfer. Defendant St. Joseph Medical Center submits the following Substitute Brief on behalf of Respondent.

ARGUMENT IN RESPONSE TO POINT RELIED ON I

THE TRIAL COURT HAS EXPLICIT AUTHORITY FROM HIPAA AND INHERENT AUTHORITY UNDER MISSOURI COMMON LAW TO ISSUE AN ORDER DETAILING THE SCOPE OF THE PATIENT-LITIGANT WAIVER IN CIVIL LITIGATION, AND AUTHORIZING, THOUGH NOT COMPELLING, TREATING PHYSICIANS TO DISCLOSE SPECIFIED HEALTH INFORMATION TO DEFENSE COUNSEL THROUGH *EX PARTE* COMMUNICATIONS.

Standard Of Review

“The trial court is allowed broad discretion in the control and management of discovery.” State ex rel. Lichtor v. Clark, 845 S.W.2d 55, 59 (Mo.App. W.D. 1992).

“When reviewing the trial court’s decision concerning issues arising from pre-trial

discovery, this Court looks only for an abuse of the trial court's broad discretion." Crow v. Crawford & Co., 259 S.W.3d 104, 121 (Mo.App. E.D. 2008).

"A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." Lichtor, 845 S.W.2d at 59. "It is only for an abuse of discretion amounting to an injustice that the appellate courts will interfere." Id.

"A circuit court has broad discretion in controlling and managing discovery, and [the appellate court] should interfere with its exercise of discretion only when [the appellate court] deem[s] it to have abused its discretion to the point that a decision works an intolerable injustice." State ex rel. American Standard Ins. Co. of Wisc., v. Clark, 243 S.W.3d 526, 529 (Mo.App. W.D. 2008). "When reviewing the trial court's decision regarding issues arising from pre-trial discovery, [the appellate court will] look only for an abuse of this broad discretion which results in prejudice or unfair surprise." Day Advertising, Inc., v. DeVries and Assoc., 217 S.W.3d 362, 366 (Mo.App.W.D. 2007).

"A writ of prohibition is the proper remedy when the circuit court abuses its discretion" American Standard, 243 S.W.3d at 529. "[T]he party seeking the writ shoulders the burden of proving that the circuit court has abused its discretion" by showing the Respondent lacked jurisdiction or exceeded her jurisdiction. Id. at 529; State ex rel. Mitchell Humphrey & Co. v. Provaznik, 854 S.W.2d 810, 812 (Mo.App. E.D.

1993). The appellate court starts “with the presumption that the trial court acted appropriately.” Mitchell Humphrey, 854 S.W.2d at 812. “A writ of prohibition is a discretionary remedy,” and the appellate court may “examine new points not offered ab initio.” American Standard, 243 S.W.3d at 529.

Argument

The issue in this case is whether HIPAA’s Privacy Rule and Missouri law permit a health care provider to disclose PHI through *ex parte* communication when the subject of the PHI has put his or her medical condition at issue by filing a lawsuit, thereby waiving the patient-physician privilege (commonly known as the “patient-litigant waiver”). See Brandt v. Medical Def. Assoc. (“Brandt II”), 856 S.W.2d 667, 671 (Mo. banc 1993). The Panel’s opinion prohibiting *ex parte* communication is based entirely on the erroneous premise that HIPAA establishes a legal “prohibition” of “informal and voluntary *ex parte* communications with plaintiff’s physicians” that did not previously exist in Missouri law. Proctor, at *13. The Panel’s misinterpretation of HIPAA is the only basis for its departure from controlling Missouri Supreme Court law which allows *ex parte* communication.

Judge Messina’s Order met the letter and spirit of both HIPAA and Missouri common law in regard to *ex parte* communication after the patient-litigant waiver. HHS specifically acknowledged the need for the patient-litigant waiver when drafting HIPAA, and explicitly stated its intention to defer to state law regarding that waiver. See

Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82530 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160-64) (stating the Privacy Rule’s provisions are “not intended to disrupt current practice whereby an individual who is a party to a proceeding and has put his or her medical condition at issue will not prevail without consenting to the production of his or her protected information.”). The Missouri Supreme Court has consistently held that strong public policy reasons mandate the patient-litigant waiver, and that when there has been such a waiver, litigants have the right to engage in *ex parte* communication if the health care provider is willing. *See State ex rel. McNutt v. Keet*, 432 S.W.2d 597, 602 (Mo.banc. 1968); *Brandt II*, 856 S.W.2d at 673-74; *State ex rel. Jones v. Syler*, 936 S.W.2d 805, 809 (Mo.banc. 1997).

Thus, an Order which permits health care providers to participate in *ex parte* discussion with defense counsel at their option is in accord with federal and state law. Judge Messina did not abuse her discretion when issuing that order. This Court should therefore deny the Relators’ Petition for Writ. Judge Messina’s Order should stand as the appropriate procedure under Missouri law to effectuate *ex parte* communication following the patient-litigant waiver in civil litigation.

A. HIPAA Permits Ex Parte Communications in Missouri Legal Proceedings.

1. Historical Background of HIPAA and Its “Privacy Rule”

In 1996, Congress passed Health Insurance Portability & Accountability Act of 1996 (hereinafter “HIPAA”) to address a number of issues regarding the national health

care and health insurance system. Citizens for Health v. Leavitt, 428 F.3d 167, 171 (3d Cir. 2005).

Congress enacted HIPAA to increase the portability of health insurance and to reduce health care costs by simplifying administrative procedures. The development of national standards for electronic medical records management was central to the goal of simplification. Envisioning increasing privacy concerns associated with the move toward electronic record-keeping, Congress simultaneously authorized the secretary of the United States Department of Health and Human Services to promulgate rules governing the disclosure of confidential medical records.

In re Collins, 286 S.W.3d 911, 917 (Tx. 2009) (citations omitted).

“If Congress did not enact further legislation within three years of HIPAA’s enactment” to provide for the secure electronic exchange of health information, the Secretary of the Department of Health & Human Services (hereinafter “HHS”) was directed to “promulgate final regulations implementing the standards within 42 months of HIPAA’s enactment.” Citizens for Health, 428 F.3d at 172. When Congress did not enact additional legislation within that three year period, HHS implemented a rule through the administrative rule making process officially titled “Standards for Privacy of Individually Identifiable Health Information,” which has commonly become known as the “Privacy Rule.” Id. at 171, 173. “Generally, the Privacy Rule regulates the use and

disclosure by covered entities of health information that identifies the patients who are the subjects of the information.” 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 (Winter 2006) (*citing* 45 C.F.R. §164.534 (2005)).

When HHS went through the administrative process of regulation implementation, “the [Privacy] Rule went through four iterations: the Proposed Original Rule, the Original Rule, the Proposed Amended Rule, and the Amended Rule.” Citizens for Health, 428 F.3d at 172. “The final result was the Amended Rule” codified in 2003 at 45 C.F.R. pts. 160 & 164, which provided the effective version of the “Privacy Rule” (referred to hereinafter as “the Privacy Rule” or “HIPAA”). Id. at 173.

When promulgating the Amended Rule, HHS was required to and sought to “balance privacy protection and the efficiency of the health care system-not simply to enhance privacy.” Id. at 185. (“Citizens’ argument that the controlling policy underlying HIPAA is medical privacy and that the Amended Rule wholly sacrifices this interest to covered entities’ interests in efficiency and flexibility ignores the Act’s stated goals of ‘simplify[ing] the administration of health insurance,’ ... and ‘improv[ing] the efficiency and effectiveness of the health care system, ...”). “The privacy rules HHS enacted, 45 C.F.R. pts. 160 & 164 (2008), ‘strike [] a balance that permits important uses of information, while protecting the privacy of people who seek care and healing.’” In re

Collins, 286 S.W.3d at 917 (*citing* United States Department of Health and Human Services, Office for Civil Rights, Summary of the HIPAA Privacy Rule, at 1, *available at* <http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf> [last revised May 2003]”).

HIPAA’s Privacy Rule regulates the use and disclosure of PHI, be it oral or written. *See* 45 C.F.R. §160.103 (“*Health information* means any information, whether oral or recorded in any form or medium, that: (1) Is created or received by a health care provider ...; and (2) Relates to the past, present or future physical or mental health or condition of an individual; the provision of health care to an individual; ...”). However, HIPAA recognizes that an individual’s expectation of privacy in medical information is not absolute, and must be balanced against, and sometimes yield to, the goals and needs of other societal interests, as well as the rights of others. *See, e.g.*, 65 Fed. Reg. at 82464, 82468, & 82471.

“The Original Rule *required* covered entities to seek individual consent before using or disclosing protected health information for routine uses.” Citizens for Health, 428 F.3d at 173 (*citing* 65 Fed. Reg. 82810). The Privacy Rule was modified in several respects after receiving a great deal of public input, but the final “Amended Rule retains most of the Original Rule’s privacy protections,” setting forth a baseline for the use and disclosure of protected health information (hereinafter “PHI”) by “covered entities.” *Id.*

The Amended Rule depart[ed] from the Original Rule in one crucial respect. Where the Original Rule required covered entities to seek individual consent to use or disclose health information in all but the narrowest of circumstances, the Amended Rule allows such uses and disclosures without patient consent for “treatment, payment, and health care operations” – so-called “routine uses.”

Id. at 173-74 (*citing* 45 C.F.R. §164.506). The “Health Care Operations” exception is “the broadest category under the routine use exception” which allows for use and disclosure of PHI without the individual’s consent. Id. at 174. This exception covers a broad “range of management functions of covered entities” to allow health care providers to conduct routine business and administrative practices. Id. *See Section F, infra.*

In addition to “Health Care Operations” exception, the “Privacy Rule” also permitted the use and disclosure of PHI in a number of other circumstances without the individual’s consent. *See In re Collins*, 286 S.W.3d at 917. For example, judicial proceedings are another forum in which HHS determined that the Privacy Rule should permit disclosure of PHI. *See Cohen*, 43 Hous.L.Rev. at 1101 (*citing* 45 C.F.R. §164.512(e)(1)). HHS also permitted use and disclosure of PHI is when “required by law” pursuant to the regulation’s provisions. *See Cohen*, 43 Hous.L.Rev. at 1100 (*citing* 45 C.F.R. §164.512(a)). Both of these exceptions allow “covered entities to use or disclose protected health information without the individual’s consent, authorization or

agreement ... in compliance with requirements in §164.512.” See 65 Fed. Reg. at 82498-99. Examination of these two exceptions demonstrates that Judge Messina’s Order in this case was properly issued under HIPPA’s framework.

a. The “Litigation” Exception

45 C.F.R. §164.512(e)(1) allows the use and disclosure of PHI without an authorization or oral agreement from the patient “in the course of any judicial or administrative proceeding.” See Cohen, 43 Hous.L.Rev. at 1101 (*citing* 45 C.F.R. §164.512(e)(1)(i) (2005)). The regulation specifically provides:

§ 164.512 Uses and disclosures for which an authorization or opportunity to agree or object is not required.

A covered entity may use or disclose protected health information without the written authorization of the individual, as described in §164.508, or the opportunity for the individual to agree or object as described in §164.510, in the situations covered by this section, subject to the applicable requirements of this section. ...

* * *

(e) *Standard: Disclosures for judicial and administrative proceedings.*

(1) *Permitted disclosures.* A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

(i) In response to an order of a court or administrative tribunal; provided that the covered entity discloses only the protected health information expressly authorized by such order; ...

45 C.F.R. §164.512(e)(1)(i).

Pursuant to this exception, covered entities are permitted to disclose PHI “without the written authorization of the individual ... or the opportunity for the individual to agree or object” in four litigation settings. Cohen, 43 Hous.L.Rev. at 1101 (*citing* 45 C.F.R. §164.512(e)(1)(i) (2005)). One of these alternatives is “pursuant to a court order,” so long as the disclosure does not exceed what is authorized by the order. *Id.* Thus, as recognized by several courts, HIPAA expressly contemplates and provides for disclosure of PHI pursuant to an Order like that issued by Judge Messina in this case. *See, e.g., Pratt v. Petelin*, 2010 WL 446474 at *8 (D. Kan); *Bayne v. Provost*, 359 F.Supp.2d 234, 243 (N.D.N.Y. 2005); *In re Collins*, 286 S.W.3d at 917; *Arons v. Jutkowitz*, 880 N.E.2d 831, 842 (N.Y. 2007); *Holmes v. Nightingale*, 158 P.3d 1039, 1041 (Okla. 2007).

b. The “Required by Law” Exception

45 C.F.R. §164.512(a) provides an exception for use or disclosure “required by law,” a phrase defined to mean “a mandate contained in law that compels an entity to

make a use or disclosure of [PHI] that is enforceable in a court of law...” See Cohen, 43 Hous.L.Rev. at 1100, n. 55 (citing 45 C.F.R. §164.103 (2005)). The regulation specifically provides:

§ 164.512 Uses and disclosures for which an authorization or opportunity to agree or object is not required.

A covered entity may use or disclose protected health information without the written authorization of the individual, as described in §164.508, or the opportunity for the individual to agree or object as described in §164.510, in the situations covered by this section, subject to the applicable requirements of this section. ...

(a) *Standard: Uses and disclosures required by law.* (1) A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.

(2) A covered entity must meet the requirements described in paragraph (c), (e), or (f) of this section for uses or disclosures required by law. ...

45 C.F.R. §164.512(a). “HHS has indicated that it intends this exception to be ‘read broadly,’ stating that it applies to ‘the full array of binding legal authority, such as constitutions, statutes, rules, regulations, *common law*, or other governmental actions

having the effect of law.’” *See* Cohen, 43 Hous.L.Rev. at 1100 (*emphasis added*) (*quoting* 65 Fed. Reg. at 82668). This exception “was generally meant not to interfere with ... the requirements of ... other laws.” Ohio Legal Rights Serv. v. Buckeye Ranch, Inc., 365 F.Supp.2d 877, 890 (S.D. Ohio, 2005)).

Before implementing the Amended Rule providing HIPAA’s final Privacy Rule regulation, HHS rejected comments it had received criticizing the “Required by Law” exception. *See* Cohen, 43 Hous.L.Rev. at 1127, n. 201. HHS determined the exception was “necessary to harmonize the rule with existing state ... laws mandating uses and disclosures of” PHI, as HHS intended “to preserve access to information considered important enough by state ... authorities to require its disclosure by law.” *Id.* HHS further explained:

[W]e intend this provision to preserve access to information considered important enough by state or federal authorities to require its disclosure by law. ...

It is not possible, or appropriate, for HHS to reassess the legitimacy of or the need for each of these mandates in each of their specialized contexts. ...

[J]urisdictions have determined that public policy purposes cannot be achieved absent the use of certain protected health information, and we have chosen in general not to disturb their judgments.

See Id. (*citing* 65 Fed. Reg. at 82667).

2. Through HIPAA’s Exceptions, the Privacy Rule Defers to Missouri Substantive Law on *Ex Parte* Communication

HIPAA’s Privacy Rule specifically provides for the release of PHI in the setting of civil litigation through its exceptions. 45 C.F.R. §§164.512(a) & 164.512(e). HIPAA defers to state law as to when PHI should be disclosed by virtue of the patient-litigant waiver. *See* Cohen, 43 Hous.L.Rev. at 1127, n. 201 (*citing* 65 Fed. Reg. at 82667). HHS specifically stated the Privacy Rule’s provisions are “not intended to disrupt current practice whereby an individual who is a party to a proceeding and has put his or her medical condition at issue will not prevail without consenting to the production of his or her protected information.”). 65 Fed. Reg. at 82530.

Therefore, HIPAA does not provide a substantive legal prohibition of *ex parte* communication that did not previously exist under Missouri law. However, it does call for certain procedural protections, such as obtaining a court order pursuant to 45 C.F.R. §164.512(e)(1)(i). In this manner, HIPAA clearly contemplates the issuance of an Order like that issued by Judge Messina in this case.

3. HIPAA Works in Concert With Missouri Law While Deferring to State Substantive Law Regarding the Scope of the Patient-Litigant Waiver.

HIPAA contains an express preemption provision that provides the Privacy Rule regulations shall preempt any “contrary ... provision of State law.” 45 C.F.R. §160.203. Thus, the threshold requirement in a HIPAA preemption analysis is a determination as to

whether state law and HIPAA are “contrary”, meaning it is either (1) “impossible” to comply with both state and federal law, or (2) state law stands as an “obstacle” to the accomplishment of HIPAA’s purposes and objectives. *See* Cohen, 43 Hous.L.Rev. at 1105-06 (*citing* 45 C.F.R. §§ 160.203 (2005)). Finding that state law and HIPAA are contrary is “a precondition for any preemption analysis.” *Id.* at 1123 (*citing* Standards for Privacy of Individually Identifiable Health Information, 64 Fed. Reg. 59918, 59996 (proposed Nov. 3, 1999) (to be codified at 45 C.F.R. pts. 160-64)). Absent “conflict preemption,” the Privacy Rule “defers to state law mandates” and “is not intended to supplant nonconflicting state law.” *Id.* at 1106 n. 97 (*citing* 45 C.F.R. §160.203(a)(1)(iv) (2005) & 64 Fed. Reg. at 59994). If “state procedures and HIPAA procedures all can be performed simultaneously,” there is no conflict. *Id.* at 1130.

Applying HIPAA’s preemption analysis to the case at bar, it is evident that the federal regulations and Missouri common law can and should work in concert to satisfy both public policy concerns of (1) reasonably protecting the confidentiality of medical information and (2) affording fair and just resolution of disputes in a court of law. These goals are simultaneously accomplished by implementing HIPAA’s procedural safeguards and securing an Order like that issued by Judge Messina in this case.

HIPAA’s Privacy Rule is more stringent than Missouri common law regarding *ex parte* communication from a procedural standpoint, as HIPAA requires assurances (such as a court order) that a patient-litigant has been given notice and an opportunity to object

before the disclosure of PHI. 45 C.F.R. §164.512(e)(1). However, HIPAA's Required by Law exception provides that Missouri substantive law should govern the scope of the patient-litigant waiver which would encompass the issue of *ex parte* communications. 45 C.F.R. §164.512(a). As HHS explicitly stated that HIPAA's "Required by Law" exception should be read broadly to encompass state "common law," 65 Fed. Reg. at 82668, the conclusion that HIPAA defers to Missouri Supreme Court precedent regarding *ex parte* communication following the patient-litigant waiver is inescapable.

The HIPAA regulations are silent on the issue of *ex parte* communication.¹ See Bayne, 359 F.Supp.2d at 240 ("Absent within the four corners of the relevant rules and regulations and the enabling statute is any mention of an *ex parte* interview of a health provider, such as whether to prescribe or proscribe such actions ..."); Pratt, 2010 WL 446474 at *8 (D.Kan) ("Neither HIPAA nor any regulations implementing it, however, expressly authorize or prohibit *ex parte* communications with health care providers."); Smith v. Am. Home Prods. Corp. Wyeth-Ayerst Pharm., 855 A.2d 608, 622 (N.J. Super. Ct. Law Div., 2003) ("Nowhere in HIPAA does the issue of *ex parte* interviews with

¹Relators readily acknowledge HIPAA does not affect Missouri state law regarding the scope of the patient-litigant waiver: "HIPAA does not even purport to reach state-law litigation practices ..." Relators' Substitute Brief, p. 32. Since HIPAA defers to state law on this substantive issue, there is no call for HIPAA preemption as federal and state law do not conflict.

treating physicians, as an informal discovery device, come into view. The court is aware of no intent by Congress to displace any specific state court rule, statute or case law.”).

The reason HIPAA’s Privacy Rule does not expressly discuss or even mention the issue of *ex parte* communication is obvious. HHS recognized that it was not appropriate for it “to reassess the legitimacy of or the need for” state laws regarding the use and disclosure of PHI in “specialized contexts,” such as the patient-litigant waiver. *See* Cohen, 43 Hous.L.Rev at 1127, n. 201 (*citing* 65 Fed. Reg. at 82666-67). Rather, as HHS explicitly indicated it would defer and expressly does not preempt substantive state law, there is no reason for HIPAA to reference this “specialized context.”

Although the HIPAA regulations do not address the *ex parte* issue, HHS’ intent is nonetheless clear - it did not intend for HIPAA to in any way affect state law regarding the patient-litigant waiver. HHS explicitly stated that HIPAA was “not intended to disrupt current practice whereby an individual who is a party to a proceeding and has put his or her medical condition at issue will not prevail without consenting to the production of his or her protected information.” 65 Fed. Reg. at 82530 (*discussing* 45 C.F.R. §164.512).

As such, HIPAA does not affect long-standing Missouri Supreme Court common law which clearly permits *ex parte* communications after the patient-litigant waiver. *See* Section B, *infra*. *See* Cohen, 43 Hous.L.Rev. at 1130, n. 207 (“What does one do when there is a State provision and no comparable or analogous federal provision, or the

converse is the case? The short answer would seem to be that, since there is nothing to compare, there cannot be an issue of a ‘contrary’ requirement, and so the preemption issue is not presented.”) (*citing* 64 Fed. Reg. at 59995).

In her law review article, Ms. Cohen applied HIPAA’s preemption analysis to New York’s common law which authorized, but did not mandate, *ex parte* communications following the litigation waiver (the same rule Missouri has applied for 40 years). She concluded: “As the ... *ex parte* rule is permissive, allowing the meetings but not compelling them, there is no overt conflict between the state rule and HIPAA.” *See* Cohen, 43 Hous.L.Rev. at 1135.

When the highest appellate court in New York subsequently considered the *ex parte* rule in light of HIPAA, it concluded “there can be no conflict between New York law and HIPAA on the subject of *ex parte* interviews of treating physicians because HIPAA does not address this subject.” *See Arons*, 880 N.E.2d at 842.² That Court held that HIPAA merely imposed procedural prerequisites to informal discovery permitted under state law. *Id.*

Accordingly, the Privacy Rule does not prevent this informal discovery from going forward, it merely superimposes procedural prerequisites. As a

²*Browne v. Horbar*, 6 Misc.3d 780 (N.Y.Sup. 2004), the intermediate court opinion Relators cite in support of their arguments at pages 26-27 of their Substitute Brief, was abrogated by the *Arons* decision.

practical matter, this means that the attorney who wishes to contact an adverse party's treating physician must first obtain a valid HIPAA authorization or a court or administrative order; ...

In the appeals now before us, ... plaintiffs declined to sign these authorizations, defendants asked the trial courts for orders compelling them to do so, and the courts granted these requests. This was entirely proper. ... HIPAA court orders ... signal compliance with HIPAA and the Privacy Rule as is required before any use or disclosure of protected health information may take place.

Id. at 842-43.

Thus, there is no substantive preemption analysis, as the "Required by Law" exception (which the Panel did not address) and the "Litigation" exception (which the Panel incorrectly interpreted) remove any conflict between HIPAA and Missouri common law. Once HIPAA's procedural requirements are satisfied by obtaining a court order like that issued by Judge Messina, there is no conflict between state law and HIPAA. *See* Cohen, 43 Hous.L.Rev. at 1135-38. *See also* Holmes, 158 P.3d at 1041 ("[A] court order permitting, rather than mandating, oral communication with health care providers entered as a result of an individual clearly placing mental or physical conditions in issue by filing suit does not contravene HIPAA's confidentiality requirements").

In this fashion, HIPAA balances an individual's privacy interests against the need for the provision of PHI in litigation by allowing disclosure when covered entities, such as treating physicians, are provided assurance that the patient had notice and an opportunity to object to the disclosure of PHI. Orders like that issued by Judge Messina in this case satisfy that balance, as courts will not issue such orders without the knowledge of all parties to a case. As the Order provides built-in assurance that the patient had notice and an opportunity to object, it satisfies the purpose and procedural requirements of HIPAA.

The Panel correctly acknowledged that "examination of HIPAA's Privacy Rule must necessarily be guided by the intent of Congress in directing the Secretary to issue rules and regulations to implement the HIPAA Privacy Rule." Proctor, at *5. The United States Congress explicitly deferred to HHS on the issues in this case, by providing that a standard adopted pursuant to Sections 1330d-1 through 1320d-3 (which would include HIPAA's Section 164.512(e)), "shall not supersede a contrary provision of State law" if it is a provision that HHS determines is necessary for certain purposes. 42 U.S.C. § 1320d-7(a)(2)(A)(i)(IV). Therefore, satisfying Congressional intent compels a single conclusion - HIPAA expressly does not preempt Missouri's substantive common law permitting *ex parte* communications following the patient-litigant waiver, and HHS' stated intent to defer to state law on this should be given controlling significance.

The annotations to that federal code section include the following headnote from Bayne v. Provost, 359 F.Supp.2d 234 (N.D.N.Y. 2005):

Defendants in a civil rights suit ... were entitled to qualified protective order that was consistent with [HIPAA] ... which permitted them to conduct *ex parte* pretrial interview with home health care provider about a patient's medical history and condition ... for purpose of assisting in defense of lawsuit.

In Bayne, the issue before the Court was “whether the Defendants [would] be restricted from conducting an *ex parte* interview of the Plaintiff's health and medical providers by virtue of a limited or restricted HIPAA medical authorization.” 359 F.Supp.2d. at 235. After noting the HIPAA regulations did not mention *ex parte* interviews of health providers, the district court first observed that case law “would suggest that under the ‘proper procedures’ as established by HIPAA *ex parte* communications would be allowed.” 359 F.Supp.2d at 240 (*citing Law v. Zuckerman*, 307 F.Supp.2d 705, 707, 711 (D.Md. 2004)). The Bayne Court then reasoned that “to shield [a witness] from a proper *ex parte* interview by the Defendants, by virtue of standing on the strict interpretation of HIPAA as precluding such types of interviews, would be tantamount to denying the Defendants of their right to the effective assistance of counsel.” 359 F.Supp.2d at 242 (*citing IBM v. Edelstein*, 526 F.2d 37 (2nd Cir. 1975)).

HIPAA does create safety valves that would both permit the disclosure of such medical information and not abandon some control over this information. It would be fitting within the context of this case to have the Defendants secure a qualified protective order with specific requirements that may satisfy HIPAA and still give the Defendants an opportunity to conduct a one-on-one discussion with this critical witness. 45 C.F.R. §§ 164.512(e)(1)(ii)(B) & (v).

Id. The Bayne Court specifically recognized that a deposition of the witness could not and would not resolve the issue:

A deposition is not the same as an *ex parte* interview and this Court does not have the authority to limit, control, or nullify the benefits an interview may have over a deposition, and neither should the Plaintiff. ... If [the witness] refuses to be interviewed, a right which she has as a non-party to this action, then the Defendants can serve a subpoena upon her and conduct a deposition. ... Or, should events occur as Defendants contemplate, they should be able to avail themselves of both a deposition and an interview.

Id. at 242, n. 8. Therefore, the Court held:

In the interest of justice, and well within this Court's inherent authority to manage discovery, the Court will consider this entire discussion as a request to secure a qualified protective order in order for the Defendants to

exercise the ability to interview [the health care provider witness] on all of the relevant information she may have, including [the Plaintiff's] medical conditions, outside the presence of the Plaintiff.

Id. at 243.

Judge Messina's Order satisfies the procedural requirements of HIPAA as recognized by the federal district court in Bayne. Because her Order adheres to HIPAA's framework of providing procedural protections, no further preemption analysis is necessary. The Order is in complete accord with Missouri precedent holding the patient-litigant waiver authorizes *ex parte* communication as a matter of law, and HIPAA does not affect, alter or amend the sound reasons the Missouri Supreme Court had for holding that the patient-litigant waiver includes the right to engage in *ex parte* communication.

B. Missouri Allows *Ex Parte* Communication After the Patient-Litigant Waiver.

1. Missouri's Common Law on *Ex Parte* Communication

Since 1968, the law of Missouri has been that the patient-physician privilege is waived once the matter of plaintiff's physical condition is put at issue under the pleadings instituting litigation. *See McNutt*, 432 S.W.2d at 601 ("We therefore hold that once the matter of plaintiff's physical condition is in issue under the pleadings, plaintiff will be considered to have waived the privilege ... so far as information from doctors ... on the issue is concerned."). The Supreme Court of Missouri recognized the patient-litigant waiver was necessary to prevent plaintiffs from using the "privilege both as 'a shield and

a dagger at one and the same time’ ...” Id. The Court has stated the patient-physician privilege is not absolute and must give way to society’s interest in ascertaining the truth. State ex rel. Woytus v. Ryan, 776 S.W.2d 389, 393 (Mo.banc 1989).

In 1993, the Missouri Supreme Court once again considered the issue of “whether *ex parte* communications with the plaintiff’s treating physician are prohibited during the discovery period of litigation ...” Brandt v. Pelican, (Brandt I) 856 S.W.2d 658, 661 (Mo.banc 1993). In Brandt I, although reaffirming its holding in Woytus that it would not require a litigant-patient to execute a medical authorization specifically providing that a treating physician could engage in *ex parte* discussions with their adversary, and further noting that the physician could not be compelled to engage in informal *ex parte* discussions over the physician’s own objection, the Court reiterated its “basic holding [was] that *ex parte* communication with plaintiff’s treating physicians are not prohibited ...” Id. at 662-63.

In the companion case of Brandt II, while analyzing the *ex parte* issue more extensively, the Court stated:

Of course, the physician’s testimonial privilege and the fiduciary duty of confidentiality are not absolute; they must give way if there is a stronger countervailing societal interest. One such countervailing societal interest arises when a patient initiates litigation concerning the patient’s medical condition. Because the patient will of necessity be required to waive the

medical privilege in presenting evidence at trial, it is common for courts to find an implied waiver during the discovery stage of the litigation.

Brandt II, 856 S.W.2d at 671. The Court then reconsidered the scope of “the ‘patient-litigant’ waiver” that it had recognized in McNutt and “whether ex parte discussions with the plaintiff’s treating physicians are included within this implied waiver.” Id.

Missouri courts have been called upon on several occasions to determine whether a waiver will be limited or complete. When faced with this issue, we have, without exception, rejected the idea of a partial waiver and applied the principle that once there is a waiver, it is a full waiver.

Id. 672. The Court stated there are “at least two reasons for this guiding principle that a waiver is a full waiver.” Id. “First, the medical privilege only covers matters that are confidential. Once there is a disclosure of the information in any form, it is no longer confidential and therefore no longer privileged.” Id. “If a patient waives this privilege, it ceases to exist. It may not be waived in part and retained in part.” Id. (*quoting* Demonbrun v. McHaffie, 348 Mo. 1120, 156 S.W.2d 923, 924 (1941)).

Second, and even more important, the Missouri courts have made it abidingly clear that a patient should not be allowed to use the medical privilege strategically to exclude unfavorable evidence while at the same time admitting favorable evidence. We have referred to this prohibited practice as “permitting the plaintiff to use the privilege both as ‘a shield and

a dagger at one and the same time’ (which we do not believe the legislature intended), ...”

Brandt II, 856 S.W.2d at 671. “[T]he waiver of the privilege may not be strategically turned on and off by the party asserting it ...” Id. at 673.

Recognizing that the “treating physician is first and foremost a fact witness,” and “in a medical malpractice case, the treating physician will often also be an important fact witness on liability,” the Court held that a plaintiff should not be allowed to use the patient-physician privilege to preclude *ex parte* communication given the patient-litigant waiver. Id.

The physician should be free to receive input from all parties to the litigation as opposed to being sheltered from everyone except his patient. Once there is a waiver, then in preparing for and giving testimony neither the testimonial privilege nor the physician’s fiduciary duty of confidentiality should be used to manipulate or in any way influence the testimony of the physician. To allow any such use in this manner would be another form of the prohibited use of “a shield and a dagger at one and the same time.”

Id. The Court recognized other substantive reasons to allow *ex parte* communication. “[S]ince the physician’s testimony is usually technical and scientific in nature, it is particularly important that the attorney who expects to elicit testimony from a physician

have an opportunity to review with the witness the questions to be asked and the answers to be given.” Id. at 674.

In addition to the substantive reasons, the Court cited a few practical reasons to allow *ex parte* contacts. Medical witnesses are often very busy, their time is expensive, and at times they are, at best, difficult to deal with and unwilling to give testimony. Id. As such, the ability to talk informally can significantly contribute to judicial economy. Id.

Though the substantive reasons alone mandate allowing *ex parte* communication, the practical reasons are not insignificant. “Indeed, when the amount in controversy is relatively small, *ex parte* interviews may be the only realistic way of discovering the medical basis for a plaintiff’s underlying claim.” *See* Cohen, 43 Hous.L.Rev at 1113, n.136 (quoting 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, 475 (1994)). “Choking off informal contacts between attorneys and treating physicians invites the further unwelcome consequence of ‘significantly interfering with the practice of medicine’: ‘[i]nstead of communicating with an attorney during a 10-minute telephone call, a physician could be required to attend a four-hour deposition ...’ Arons, 880 N.E.2d at 838. *Ex parte* interviews also aid judicial economy in determining whether or not to use a physician as a witness at all. *See*

Cohen, 43 Hous.L.Rev at 1112, n. 136 (*citing* Rivera v. Glen Oaks Vill. Owners, Inc., No. 3289/2003, slip op. at 2 (N.Y. Sup. Ct. Jan 20, 2006)).

When asked to reconsider the issue once again in 1997, the Missouri Supreme Court reaffirmed the law allowing *ex parte* communications within the scope of the patient-litigant waiver, citing the “many reasons why *ex parte* communications are allowed in Missouri.” Jones, 936 S.W.2d at 809 (*citing* Brandt II, 856 S.W.2d at 673-74). “We will not interfere with the right of a health care provider to speak to whomever he or she chooses concerning information that is not subject to any privilege.” Id.

Thus, the right to engage in *ex parte* communication following the patient-litigant waiver is well entrenched in Missouri law. *See* State ex rel. Collins v. Roldan, 289 S.W.3d 780, 788 (Mo.App. W.D. 2009) (Welsh, concurring) (“In Brandt I and Brandt II the Missouri Supreme Court definitely recognized a defendant’s right to engage in *ex parte* communication with a plaintiff’s physician.”).

2. The Panel’s Analysis Violates Missouri Law Prohibiting Partial Waivers.

The Panel failed to appreciate HIPAA’s express disclaimer of any intent to affect State substantive law on the patient-litigant waiver in civil litigation. As a result of its failure to apply the Privacy Rule in the manner intended by Congress and HHS intended, the Panel issued an opinion which is in direct conflict with Missouri Supreme Court precedent. In effect, the Panel’s Opinion would have given the patient-litigant the right

to control the *manner* in which PHI is released in civil litigation proceedings, *i.e.*, a *partial waiver*, which has been consistently rejected by the Missouri Supreme Court.

“Missouri courts have been called upon on several occasions to determine whether a waiver will be limited or complete. When faced with this issue, we have, *without exception*, rejected the idea of a partial waiver and applied the principle that once there is a waiver, it is a full waiver.”

Brandt II, 856 S.W.2d at 672 (*emphasis added*). Creation of a partial waiver would provide the patient-litigant the ability to unfairly use the patient-physician privilege as “a shield and a dagger at one and the same time,” in further contravention of Missouri law. McNutt, 432 S.W.2d at 601.

HIPAA in no way supports the creation of a substantive privilege to a “partial waiver.” The Privacy Rule was in no way intended to create *any* privilege:

All that 45 C.F.R. §164.512(e) should be understood to do, therefore, is to create a procedure for obtaining authority ... We do not think HIPAA is rightly understood as an Act of Congress that creates a privilege.

The purely procedural character of the HIPAA standard for disclosure of medical information in judicial ... proceedings is indicated by the procedure for disclosure ...; the notice to the patient must contain “sufficient information about the litigation ... to permit the individual to

raise an objection to the court.” ... The objection in court would often be based on a privilege – the source of which would be found elsewhere than in the regulations themselves.

Northwestern Mem. Hosp. v. Ashcroft, 362 F.3d 923, 925-26 (7th Cir. 2004). To the contrary, as previously seen, HHS intended to defer to state substantive law on the scope of the patient-litigant waiver, while simultaneously protecting PHI by providing procedural safeguards to (1) ensure the patient had notice of a litigant’s intent to use and disclose PHI, and (2) give the patient an opportunity to object before the use and disclosure occurred.

3. Plaintiffs Cannot Prohibit The Right to *Ex Parte* Communication.

Relators argue that the defendants are attempting to circumvent prior holdings of the Missouri Supreme Court “which clearly stated a trial court could *not* compel plaintiffs to execute medical authorizations allowing for *ex parte* contact.” See Relators’ Substitute Brief, p. 22. This argument is disingenuous at best; the Woytus holding is unaffected by Judge Messina’s Order, since the Plaintiff was not compelled to do anything. See Section E.2, *infra*.

At the same time, the Relators are attempting not merely to circumvent prior holdings of the Missouri Supreme Court which clearly authorize *ex parte* communications following the patient-litigant waiver, but to render them meaningless. Accepting the Relators’ argument that *ex parte* discussions cannot occur unless

specifically authorized by litigant-patients would, in effect, abrogate the Missouri Supreme Court's holdings in McNutt, Brandt, and Jones, as it would give them the ability to preclude health care providers and other parties to legal proceeding from exercising their rights to engage in *ex parte* communication following the patient-litigant waiver.

Under Woytus, no plaintiff can be compelled to sign a medical authorization granting an adversary the ability to conduct *ex parte* discussions. 776 S.W.2d at 395. Since the Relator's argument and the Panel's Opinion would make such an authorization a prerequisite to any *ex parte* communications, the litigant-patient would *exclusively* have access to health care provider witnesses, contrary to Missouri law.

Missouri Courts have consistently held that parties should not be allowed to subvert the rights of other parties in litigation, including the right of access to witnesses. “[N]o 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...” State ex rel. Stufflebam v. Applequist, 694 S.W.2d 882, 888 (Mo.App.S.D. 1985) (*quoting Doe v. Eli Lilly & Co., Inc.*, 99 F.R.D. 126, 128 (D.D.C. 1983)). The decision of whether to engage in *ex parte* discussions belongs solely to the physician, not to plaintiff or defendant, and neither the plaintiff nor the defendant controls access to these witnesses. Jones, 936 S.W.2d at 809. As such, a “circuit court cannot preclude a defense attorney from *ex parte* discussions with a physician by granting the patient the power to prohibit those discussions.” Collins, 289 S.W.3d at 789 (Welsh, concurring).

[P]laintiff cannot claim that her interest in preserving the confidential information precludes [defendant] from attempting to hold *ex parte* discussions about non-confidential information with her physician. ... [W]hile plaintiff might prefer her doctor not to participate in *ex parte* discussions, our Supreme Court has held that she cannot preclude her physician from doing so in these circumstances.

State ex rel. Norman v. Dalton, 872 S.W.2d 888, 890-91 (1994).

In Norman, a trial court ruled the plaintiff had a right to prohibit *ex parte* communication with her physician, and the defendant moved for a writ of prohibition to preclude enforcement of that order. 872 S.W.2d at 889. Recognizing that “our Supreme Court has dispositively ruled on the substantive law at issue in relator’s petition for writ of prohibition,” the Norman Court held:

“[O]nce the matter of plaintiff’s physical condition is in issue under the pleadings, plaintiff will be considered to have waived the privilege ... so far as information from doctors ... bearing on that issue is concerned.” ... Therefore, plaintiff’s physician may discuss, *ex parte*, plaintiff’s relevant medical conditions because such information is subject to the waiver and is no longer confidential. ... “[O]nce the plaintiff makes a decision to enter into litigation, this decision carries with it the knowledge that any

information within the knowledge of the treating physician relevant to the litigated issues will no longer be confidential.”

* * *

By bringing her medical condition into issue, plaintiff waived the physician-patient privilege of confidentiality as to her medical information relevant to the underlying suit. ... Therefore, plaintiff cannot claim that her interest in preserving the confidential information precludes relator from attempting to hold *ex parte* discussions about non-confidential information with her physician.

* * *

[W]hile plaintiff might prefer her doctor not to participate in *ex parte* discussions, our Supreme Court has held that she cannot preclude her physician from doing so in these circumstances. The decision is the doctor’s. ... Here, when the trial court attempted to preclude relator from *ex parte* discussions by granting the plaintiff the power to prohibit those discussions, it erroneously decided an issue which our Supreme Court has explicitly determined to the contrary.

Id. at 890-91 (citations to Brandt I & Brandt II omitted). “Therefore, plaintiff’s physician may discuss, *ex parte*, plaintiff’s relevant medical conditions because such information is subject to the waiver and is no longer confidential.” Id. at 890.

Thus, although patient-litigants are not forced to sign a medical authorization that specifically sanctions *ex parte* communication between their treating health care providers and counsel for their adversary, Missouri law clearly will not allow patient-litigants to prohibit such meetings. As Relators' position would violate this aspect of Missouri law, it must be rejected. By denying their Petition for Writ and sanctioning the process through which Judge Messina issued the Order, this Court would remain consistent with Missouri law and public policy.

Missouri courts have explicitly recognized that *ex parte* communication "is a legitimate avenue for parties" that constitutes an integral and vital part of the litigation process. Norman, 872 S.W.2d at 891.

Informal discovery provides parties engaged in a lawsuit with another viable avenue during the pretrial discovery process. Informal discovery through *ex parte* discussions can serve as a valuable resource for parties to the suit. *Brandt II*, 856 S.W.2d at 674. Informal discovery can facilitate the discovery process and at points be helpful to both parties and to witnesses. *See Woytus*, 776 S.W.2d at 394.

Id.

Informal discovery has played a "venerable" role in litigation, and is as long-standing and valued as adversarial system itself. *See Doe*, 99 F.R.D. at 128 (*citing Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.E.d 451 (1947)). The "right to

interview an adverse party's witnesses (the witness willing) in private" is a "time-honored and decision-honored principle[]" in American jurisprudence. IBM, 526 F.2d at 42. The Missouri "Supreme Court has held the right in dispute here to be of substance and value which if denied may cause considerable hardship and expense to [defendants]." Norman, 872 S.W.2d. at 892.

In addition to being less costly and easier to schedule than a deposition, an interview of a witness "is conducive to spontaneity and candor in a way depositions can never be; and it is a cost-efficient means of eliminating non-essential witnesses from the list completely." Stufflebam, 694 S.W.2d at 888. Disallowing the private interview would "invade the work product doctrine ... and lay bare matters of trial strategy and mental impressions or legal theories" to opposing counsel. Id.

"The discovery process' purpose is to give parties access to relevant, non-privileged information while reducing expenses and burden as much as is feasible. The circuit court must ascertain that the process does not favor one party over another by giving it a tactical advantage..." American Standard, 243 S.W.3d at 529. "[Plaintiff's] attorneys have the right to seek a private interview with [treating health care providers] and no sound reason appears for denying the same right to defense counsel." Stufflebam, 694 S.W.2d at 888. These rights are fundamentally grounded in the Constitutional guarantees of due process and equal protection of the law provided by both the State of Missouri and federal law.

C. Precluding *Ex Parte* Communication Would Violate Constitutional Rights of Defendants in Civil Litigation.

The importance of *ex parte* discussions, especially medical malpractice cases, is obvious. The “treating physician is first and foremost a fact witness,” and may be the “principal fact witness on the issue of damages” and “will often also be an important fact witness on liability.” Brandt II, 856 S.W.2d at 673. Adoption of the Relators’ position would give plaintiffs in civil litigation exclusive meaningful access to these key witnesses, as they could merely refuse to provide a medical authorization to anyone other than their own attorney. In this fashion, patient-litigants would have the ability to talk privately with the principal fact witnesses when preparing their case under the protection of the work product doctrine, while depriving their adversary of a similar opportunity. Enabling a patient-litigant “so wielding the privilege to monitor his adversary’s progress in preparing his case by his presence on each occasion such information is revealed while his own preparation is under no such scrutiny” would be “an abuse of the [patient-physician] privilege.” *See* Cohen, 43 Hous.L.Rev at 1112, n. 132 (*quoting Doe*, 99 F.R.D. at 128-29).

The privilege was never intended ... to be used as a trial tactic by which a party entitled to invoke it may control to his advantage the timing and circumstances of the release of information he must invariably see revealed at some time.

The inchoate threat implicit in refusing or qualifying permission to speak to a witness in possession of privileged information operates to intimidate the witness ... and is itself a species of improper influence. It also enables the party so wielding the privilege to monitor his adversary's progress in preparing his case by his presence on each occasion such information is revealed while his own preparation is under no such scrutiny. The Court concludes that would be an abuse of the privilege to allow it to be used in such a manner which has no relation to the purposes for which it exists.

Doe, 99 F.R.D. at 128-29.

To provide a level playing field, defendants must be allowed the opportunity to pursue *ex parte* communications by obtaining an appropriate order from the trial court. Accepting Relators' argument would eviscerate the work product doctrine and result in fundamental unfairness in civil litigation proceedings. It would result in the denial of basic rights to which defendants are guaranteed by the Federal and State Constitutions, including the right to effective assistance of counsel, the right to due process, and the right to equal protection of the law. U.S. Const. amend. XIV §1; Mo. Const. Art. I, §10, Mo. Const. Art. I, §2.

“To shield [a witness] from a proper *ex parte* interview by the Defendants, by virtue of standing on the strict interpretation of HIPAA as precluding such types of interviews, would be tantamount to denying the Defendants of their right to the effective

assistance of counsel.” Bayne, 359 F.Supp.2d at 242. It would not only “impair the constitutional right to effective assistance of counsel but [is] contrary to time-honored and decision-honored principles, namely, that counsel for all parties have a right to interview an adverse party’s witnesses (the witness willing) in private, without the presence or consent of opposing counsel and without a transcript being made.” IBM, 526 F.2d at 42.

This is no less true in a criminal matter than in a civil matter. ... A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal case without the consent of opposing counsel. ... The right to effective counsel embraces more than just the right to retain counsel.

Id. at 44. (*quoting* Coppolino v. Helpern, 266 F.Supp 930, 935-36 (S.D.N.Y. 1967)).

The Panel’s Opinion, by precluding defendants from interviewing witnesses in preparation for trial, would force the defense to violate a cardinal rule of trial advocacy - never ask a question of a witness unless you know what the answer will be. “The exercise of the utmost skill at trial is not enough if counsel has neglected the necessary investigation and preparation of the case or failed to interview essential witnesses ...” McQueen v. State, 475 S.W.2d 111, 124 (Mo. 1971). Defendants would be forced to gamble as to what a key fact witness may say on the record, or alternatively ignore a potentially key fact witnesses altogether. Either way, the result is tantamount to refusing

defendants the effective assistance of counsel in violation of their Due Process rights. U.S. Const. amend. XIV §1; Mo. Const. Art. I, §10.

“The legitimate need for confidentiality in the conduct of attorneys’ interviews, with the goals of maximizing unhampered access to information and insuring the presentation of the best possible case at trial, was given definitive recognition by the [United States] Supreme Court in Hickman v. Taylor.” IBM, 526 F.2d at 42.

Proper preparation of a client’s case demands that [the lawyer] assemble information, sift what he [or she] considers to be the relevant from the irrelevant facts, prepare [] legal theories and plan [] strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients’ interests.

Id. at 42-43 (*quoting Hickman*, 329 U.S. at 511). “Building on the rationale of Hickman, courts have also specifically forbidden interference with the preparation of a client’s defense by restricting his counsel’s ability to freely interview witnesses willing to speak with him.” Id. at 43. A trial is a “quest for truth, ... [t]hat quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined.” Id.

Prohibiting *ex parte* communication would run afoul of Hickman, as defense counsel would not be able to conduct factual investigations or explore theories of the case

with key fact witnesses out of the sight and hearing of an adversary. Rather, defendants would either have to forego discovery or run the significant risk of helping their adversary make their case against them. See Brandt I, 856 S.W.2d at 666 (Covington, concurring in result) (“It is also clear that defense counsel would not normally risk placing a witness on the stand without having discussed the witness’s trial testimony beforehand, and it is not reasonable to expect a defense attorney to disclose his or her trial position by conducting such a discussion in the presence of the patient’s counsel.”). “[D]efense counsel must risk either deposing the physician and producing a record that is harmful to the defendant’s case and potentially available as proof for the plaintiff, or ‘not to depose the physician and risk having to cross-examine the physician without the benefit of a discovery deposition.’” Cohen, 43 Hous.L.Rev at 1113, n. 136 (*quoting* Kevin R. Gardner, Ex Parte Interviews of Treating Physicians After HIPAA, Metropolitan Corp. Couns., Mar. 2005, at 34).

It is naïve to suggest that depositions are a sufficient substitute to *ex parte* discussions, as they are clearly distinct in both function and purpose.

The trial judge apparently looked upon an interview as the taking of a deposition. In fact, there is little relation between them. A lawyer talks to a witness to ascertain what, if any, information the witness may have relevant to his theory of the case, and to explore the witness’ knowledge, memory

and opinion-frequently in light of information counsel may have developed from other sources. This is part of an attorney's so-called work product.

IBM, 526 F.2d at 41 (*citing* Hickman v. Taylor, 329 U.S. 495).

In contrast to the pre-trial interview with prospective witnesses, a deposition serves an entirely different purpose, which is to perpetuate testimony, to have it available for use or confrontation at the trial, or to have the witness committed to a specific representation of such facts as he [or she] might present. A desire to depose formally would arise normally after preliminary interviews might have caused counsel to decide to take a deposition.

Id. at 41, n.3. Similarly, counsel may have a strong desire not to perpetuate a witness' testimony upon learning what that witness has to say. To ask counsel to submit "initial probings, notwithstanding their lack of effectiveness in his client's behalf, is in effect to ask counsel to deny his client the effective representation to which he is entitled." Id. at 42 (*citing* Code of Professional Responsibility, Canon 7).

Relators are, in effect, asking the Court to force certain parties in civil litigation to reveal their "intangible work product, which is absolutely protected from discovery." State ex rel. Hackler v. Dierker, 987 S.W.2d 337, 338-39 (Mo.App. E.D. 1998). "Prohibition lies to prevent the forced disclosure of information during discovery,

particularly when the information is protected by a ... privilege.” State ex rel. White v. Gray, 141 S.W.3d 460, 463 (Mo.App. W.D. 2004).

Adopting Relators’ argument would violate the right of civil defendants to equal protection under the law by giving plaintiffs an unfair advantage in civil litigation. U.S. Const. amend. XIV §1; Mo. Const. Art. I, §2. “To prohibit *ex parte* communications would allow one party unrestricted access to fact witnesses, while requiring the other party to use formal discovery that could be expensive, timely, and unnecessary.” Pratt, at *7. “Allowing a plaintiff to have free access to potentially important facts and/or expert witnesses, while requiring defendant to use more expensive, inconvenient, and burdensome formal discovery methods tilts the litigation playing field in favor of the plaintiff.” *See* Cohen, 43 Hous.L.Rev at 1113, n. 136 (*quoting* Jennings, 59 Mo.L.Rev. at 475). Conversely, allowing *ex parte* communications “creates a just result by allowing both parties equal, unfettered access to fact witnesses.” Pratt, at *7. Therefore, allowing *ex parte* communication is “a matter of basic fairness: ‘[A] party should not be permitted to affirmatively assert a medical condition in seeking damages ... while simultaneously relying on the confidential physician-patient relationship as a sword to thwart the opposition in its efforts to uncover facts critical to disputing the party’s claim ...’” Arons, 880 N.E.2d at 837-38.

Relators’ are asking for a court-sanctioned advantage for one class of parties in litigation. As they would have it, patient-litigants in personal injury lawsuits would be

provided the “keys to the kingdom” and have the only opportunity for meaningful access to witnesses who happen to be treating health care providers. Depriving civil defendants of a similar opportunity would not only infringe on their right to equal protection, it would be tantamount to the courts violating their duty of impartiality. *See American Standard*, 243 S.W.3d at 529 (stating the purpose of the discovery process is to give parties access to relevant, non-privileged information while reducing expenses and burden and not favoring one party over another by providing a tactical advantage). For these reasons, the Relators’ Writ must be denied.³

D. The Panel Improperly Concluded that HIPAA Changed Missouri Law Allowing *Ex Parte* Communication.

Application of the “Required by Law” and “Litigation” exceptions nullify the premise on which the Panel based its deviation from Missouri Supreme Court precedent. The Panel essentially decided that only one of the procedural methods HIPAA provided to allow for use and disclosure of PHI, a specific authorization pursuant to 45 C.F.R. §164.508, can be utilized for *ex parte* discussions. *See Proctor*, at *15. This decision

³“A constitutional issue has been found to be preserved, even if not raised in the initial pleadings, if it was raised sufficiently early in the process to allow for the trial court to identify and rule on the issue and to give adequate notice to the opposing party.” *Care and Treatment of Schottel v. State*, 159 S.W.3d 836, 841 n.3 (Mo.banc. 2005).

was based on the faulty conclusion that the language of 45 C.F.R. §164.512(e) does not allow for *ex parte* discussions. *See Proctor*, at *12.

As previously demonstrated, HHS explicitly stated that HIPAA was “not intended to disrupt current practice whereby an individual who is a party to a proceeding and has put his or her medical condition at issue will not prevail without consenting to the production of his or her protected information.” 65 Fed. Reg. at 82530 (*discussing* 45 C.F.R. §164.512). The Panel overlooked HHS’ express intent to have HIPAA’s Privacy Rule defer to existing State common law regarding a litigant’s ability to obtain an adversary’s PHI when it was at issue in litigation, and HHS explicitly preserved state law practice through implementing this exception to HIPAA’s Privacy Rule. *See* 45 C.F.R. §164.512; 65 Fed. Reg. at 82498.

Although the Panel cited commentary from HHS in support its analysis, it failed to appreciate and effectuate not only the intent of HHS, but also the plain language of that HIPAA administrative regulation:

§ 164.512 Uses and disclosures for which an authorization or opportunity to agree or object is not required.

A covered entity may use or disclose protected health information **without the written authorization of the individual**, as described in §164.508, **or the opportunity for the individual to agree or object** as

described in §164.510, **in the situations covered by this section**, subject to the applicable requirements of this section. ...

(a) *Standard: Uses and disclosures required by law.* (1) A covered entity may use or disclose protected health information to the extent that **such use or disclosure is required by law** and the use or disclosure complies with and is limited to the relevant requirements of such law.

(2) A covered entity must meet the requirements described in paragraph (c), (e), or (f) of this section for uses or disclosures required by law.

* * *

(e) *Standard: Disclosures for judicial and administrative proceedings.*

(1) *Permitted disclosures.* A covered entity may disclose protected health information **in the course of any judicial or administrative proceeding:**

(i) In response to an **order of a court** or administrative tribunal; provided that the covered entity discloses only the protected health information expressly authorized by such order; ...

45 C.F.R. §164.512 (**emphasis added**). This language clearly allows *ex parte* communications without a patient's specific authorization pursuant to and in deference of

Missouri common law, a conclusion which becomes even clearer when considering HHS commentary.

Thus, the Panel's conclusion that HIPAA provided a prohibition of *ex parte* communications which did not previously exist under Missouri law, as Section 164.512(e)(1)(i) could not support an Order like that issued by Judge Messina, is not correct. The Panel defined "in the course of any judicial or administrative proceeding" far too narrowly, ignoring the manner in which the terms in that phrase were utilized by HHS when implementing the HIPAA regulations, as well as the plain and ordinary meaning of the language used in the regulation, as understood both in the dictionary and by Missouri law. See Proctor, at *11-12.

1. The Meaning of "In the Course of Any Judicial Proceeding."

The Panel observed that the HIPAA regulations did not specifically define "in the course of any judicial ... proceeding." Proctor, at *11. It therefore "looked to the dictionary for the plain and ordinary meaning" of "in the course of," and restrictively defined that to mean actions occurring "*during* or *in*" a judicial proceeding. Id. The Panel then used a statutory definition of "judicial proceeding" from the criminal code to narrowly define that phrase. Id. at *12. Using the constrictive definitions it had assigned to those phrases, the Panel then held that HIPAA prohibited *ex parte* communications.

The limited definitions ascribed by the Panel are flawed in three respects. First, and most importantly, the Panel ignored how HHS used the phrase "in the course of any

judicial proceeding” when drafting the HIPAA regulations, and how it intended the words in that phrase to be understood when implementing Section 164.512(e)(1). Second, the limited definitions are not supported by the plain and ordinary dictionary meanings of the words used in the phrase. Third, the Panel did not consider how that phrase has previously been interpreted by Missouri courts.

a. The HIPAA Regulations and Commentary. The most important consideration when determining how to define the phrase “in the course of any judicial proceeding” should be what HHS intended when authoring that regulation. “The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning.” Delta Air Lines, Inc. v. Director of Rev., 908 S.W.2d 353, 355 (Mo.banc. 1995).

HHS’ intent can be gleaned not only from the regulations as published in the Code of Federal Regulations, but also from its published commentary in the Federal Register. For example, the use of the term “proceeding” by HHS demonstrates that the Panel’s interpretation is far too narrow:

a. Importance of judicial and administrative process and the need for protected health information. Protected health information is often needed as part of an administrative or judicial proceeding. **Examples of such proceedings would include personal injury or medical malpractice**

cases or other lawsuits in which the medical condition of a person is at issue, ... The information may be sought well before a trial or hearing, to permit the party to discover the existence or nature of testimony or physical evidence, or in conjunction with the trial or hearing, in order to obtain the presentation of testimony or other evidence. These uses of health information are clearly necessary to allow the smooth functioning of the legal system. Requiring the authorization of the subject prior to disclosure could mean that crucial information would not be available, and could be unfair to persons who have been wronged.

64 Fed. Reg. at 59958-59 (*emphasis added*). Not only does the foregoing passage illustrate that HHS used the word “proceeding” synonymously with “litigation” or “lawsuit,” it also demonstrates that, when drafting the HIPAA regulations, HHS stressed the importance of providing defendants access to PHI in medical malpractice cases. HHS further recognized the inherent unfairness of requiring an authorization from the patient as a precondition to disclosure of PHI in this setting.

It is noteworthy that, in its initial proposal, HHS contemplated allowing production of PHI without a patient’s authorization in two circumstances: (1) in response to an order by the court, or (2) without a court order when the request involved “a party to the proceeding whose health condition is at issue.” 64 Fed. Reg. at 59958. In the latter circumstance, disclosure of PHI could occur, without an authorization or court order,

solely by virtue of the certification of “legal counsel representing a party to litigation”, through providing “a written statement certifying that the [PHI] requested concerned a litigant to the proceeding and that the health condition of the litigant was at issue at the proceeding.” 65 Fed. Reg. at 82529. This is a clear indication of HHS’ intent to remove use and disclosure of PHI following the patient-litigant waiver from the ambit of the Privacy Rule.

The modifications to the Privacy Rule in the final Amended Rule implemented by HHS, which removed the “certification” provision, did not alter its intent to have HIPAA defer to state common law regarding the disclosure of PHI following the patient-litigant waiver. When implementing the final rule, HHS stated:

The provisions in this paragraph are not intended to disrupt current practice whereby an individual who is a party to a proceeding and has put his or her medical condition at issue will not prevail without consenting to the production of his or her [PHI]. In such cases, we presume that parties will have ample notice and an opportunity to object in the context of the proceeding in which the individual is a party.

65 Fed. Reg. at 82530. In lieu of certification, HHS set up a procedural mechanism to provide for enhanced protection of PHI in the context of litigation while deferring to state substantive law regarding the patient-litigant waiver:

In § 164.512(e) of the final rule, we permit covered entities to disclose protected health information in a judicial ... proceeding if the request for such protected health information is made through or pursuant to an order from a court ... When a request is made pursuant to an order from a court ..., a covered entity may disclose the information requested without additional process. ... Under the rule, the individual exercises the right to object before the court ...”

Id. at 82529-30.

Thus, Judge Messina’s Order in this case clearly complies with both the letter and spirit of HIPAA. The regulations specifically contemplate such an Order being issued, as that process affords the patient-litigant an opportunity to object, while deferring to state substantive law regarding the scope of the patient-litigant waiver.

The Panel wrongly placed some significance on HHS’ consideration and ultimate rejection of permitting disclosure of PHI pursuant to any request made “in conjunction with” a judicial proceeding before it published the Proposed Original Rule. *See Proctor*, at *12 (*citing* 64 Fed. Reg. at 59959). When inviting comment on the initial proposal, HHS stated:

Under current practice, requests for documents are developed by the parties to a proceeding, with little review or oversight unless the request is challenged by the opposing party. In many instances, the parties make very

broad discovery requests that result in the production of large numbers of documents for review. Recipients of broad motions for document production often provide the requester with a substantial quantity of material, expecting the requester to page through the documents to identify the ones that are relevant to the proceeding. ... We are concerned that it could lead to substantial breaches of privacy where the material being requested is [PHI]. We are unsure if it is appropriate for private attorneys, government officials and others who develop such requests to be able to circumvent the protections provided by this rule with simple motions for document production that have not been subject to third-party review.

Under our proposal, therefore, a party to a proceeding that wishes production of information that includes [PHI] would generally need to seek judicial review of the request. If a court determines that a request for [PHI] is appropriate to the proceeding, a covered entity can produce the [PHI] pursuant to an otherwise lawful request.

We propose an exception to the general requirement for judicial review for [PHI] for instances in which the [PHI] of a party to the proceeding is relevant to the proceeding. ...

64 Fed. Reg. at 59959 (*emphasis added*). Obviously, as HHS' initial proposal would have permitted disclosure of PHI without an authorization or court order if a lawyer

merely certified the subject of the request had placed his or her physical condition at issue, HHS' rejection of the phrase "in conjunction with" in favor of "in the course of" does not support the Panel's holding.

Rather, when rejecting the "in conjunction with" language, HHS was not concerned about personal injury actions such as this case, where a patient's medical condition was squarely at issue, but rather with other types of cases where PHI could become ensnared in the discovery process for tangential reasons. For example, in a lawsuit to enforce a physician's non-compete clause with a former employer, medical records of non-parties to the action could have some relevancy, and as such may be sought by the litigants, despite the lack of a patient-litigant waiver.

b. The dictionary definitions. The dictionary definitions of the words used in the phrase "in the course of any judicial proceeding" do not justify the meaning the Panel ascribed to the phrase. The Panel used the following dictionary entry to define "in the course of": "(1) undergoing the specified process ... (2) during the specified period ... (3) during and as part of a specified activity." Proctor, at *11. Considering the intent of HHS when implementing HIPAA, the "specified process, period or activity" in this particular regulation is properly interpreted to mean the "litigation" or "lawsuit."

HHS clearly used the phrase "in the course of any judicial proceeding" to mean the entirety of a litigated dispute. *See* 64 Fed. Reg. at 59958-59 ("Examples of such proceedings would include ... medical malpractice cases."). As such, the broader

definition is more appropriate in this circumstance, as that is what was intended by HHS. *See* Delta Air Lines, 908 S.W.2d at 355 (stating the primary rule of statutory construction is to ascertain the intent of the legislature and to give effect to that intent).

The Panel did not look to the dictionary to define “judicial proceedings,” but rather relied solely on a statutory definition provided at RSMo. 575.010. Proctor, at *12. The statute provides that definition applies to Chapters 575 and 576. RSMo. 575.010. It is used to criminalize specific actions, like “Tampering with a Judicial Proceeding” by threatening to harm a juror during a trial. RSMo. 575.260. As the definition was drafted for those specific contexts, it was not intended for application to the issue in this case.

Consulting the dictionary to define “judicial proceedings” reveals that it should have a much broader meaning in the context of this case. In legal parlance, “proceeding” means “litigation.” Webster’s II New College Dictionary, 881 (Houghton 1995); The American Heritage Dictionary, 987 (2nd ed. 1982). “The word may be used synonymously with ‘action’ or ‘suit’ to describe the entire course of an action at law or suit in equity from the issuance of the writ or the filing of the complaint until the entry of a final judgment ...” Black’s Law Dictionary 1204 (6th ed. 1990). “‘Proceedings’ is defined to mean all the steps or measures adopted in the prosecution or defense of an action.” Statter v. U.S., 66 F.2d 819, 822 (9th Cir. 1933) (*citing* 6 Words and Phrases (Second Series), Vol. 3 at p. 1234). Clearly, Judge Messina’s Order met the dictionary definition of “in the course of any judicial proceedings,” as it was issued during

“litigation” and “in the course of an action at law” as one step in the defense of the action.

c. Missouri Precedent. Missouri Courts have previously construed the phrase “in the course of judicial proceedings” far more broadly than the Panel did in this case. In fact, conduct which did not occur “*in* or *during*” ‘an official proceeding in court or a proceeding in which the trial court empowers the parties to act or in which the trial court acts in an oversight capacity,’” (the language utilized by the Panel, Proctor at *12), was nonetheless held to have been performed “in the course of judicial proceedings” in Roberson v. Beeman, 790 S.W.2d 948, 950 (Mo.App.W.D. 1990).

In Roberson, the issue was whether “extrajudicial communications made by attorneys ... in the preparation or investigation of pending or anticipated civil judicial proceedings” were protected by the judicial privilege. 790 S.W.2d at 950. The judicial privilege precludes liability under the law of libel and slander for comments “published in the course of a judicial proceeding.” Id. The Roberson Court held that the privilege applied to statements made by an attorney in a demand letter, sent before any lawsuit was filed, even when the attorney never actually filed a lawsuit on behalf of the clients for whom the letter was sent. Id. at 949-50.

Thus, Missouri precedent does not support the Panel’s restricted view of what “in the course of any judicial proceeding” means. *See also* Pape v. Reither, 918 S.W.2d 376, 381 (Mo.App.E.D. 1996) (holding that a letter sent in furtherance of “settlement

negotiations qualif[ies] as judicial proceedings for purposes of the judicial privilege,” which precludes recovery for defamatory statements made “in the course of a judicial proceeding”).

d. Interpretation by Other Courts. Since the Panel’s opinion was issued, it has been cited by one other court. A federal district court rejected the limited definition utilized by the Panel and “decline[d] to adopt the holding that *ex parte* interviews are not considered ‘in the course of a judicial proceeding.’” Pratt, at *8.

Although not directly supervised by the Court, an *ex parte* interview of a plaintiff’s treating physician nevertheless proceeds as incidental to a pending law suit and to that extent may be regarded as “in the course of” a judicial proceeding. The HIPAA regulation for disclosure in the course of a judicial proceeding thus can apply to the disclosure of protected health information during an *ex parte* interview with a health care provider for plaintiff.

Id.

In addition, well before the Panel issued its Opinion, the Oklahoma Supreme Court also considered the meaning of “judicial proceeding” when it rejected the argument that HIPAA trumped Oklahoma common law (which permissively allowed *ex parte* communication following the patient-litigant waiver in the same fashion that Missouri law does). See Holmes, 158 P.3d at 1041. The Holmes Court noted that HIPAA’s

Section 164.512(e) allowed the disclosure of PHI pursuant to a court order, and “[s]ince the case below is a judicial proceeding, it appears that this subpart would apply here.” Id. at 1043 n. 10.

e. Conclusion. The definition the Panel utilized for “in the course of any judicial proceeding” when interpreting the Litigation exception provided by HIPAA’s Section 164.512(e)(1)(i) is not accurate and should be rejected. The Panel’s restrictive view of the phrase is inconsistent with Missouri precedent, takes an unduly narrow view of the plain and ordinary dictionary definitions of the terms utilized, and most importantly fails to appreciate the intended meaning of HHS in utilizing those terms.

Without the limited definition, the Panel’s justification for its conclusion that Section 164.512(e)(1)(i) does not apply to Judge Messina’s Order necessarily fails, and there is no basis to depart from Missouri Supreme Court precedent. The Relators’ Application for Writ should therefore be denied.

2. The Trial Court Has Authority to Issue the Order.

Another premise of the Panel’s Opinion was that a trial court is “limited by the enumerated discovery rules and the parameters of those rules.” Proctor, at *14. This proposition is also inaccurate, as the Panel overlooked well-established precedent regarding the inherent authority of a trial court to issue orders on matters of discovery and to administer justice in the cases before it. Moreover, the Panel failed to consider HIPAA’s explicit authorization for an Order just like that issued by Judge Messina.

The Western District of the Missouri Court of Appeals has specifically commented on the inherent authority of a trial court to issue orders to shape and control the course of discovery as a court of general jurisdiction:

[T]he trial court is not strictly limited in the exercise of its authority to that which is expressly provided by statute, rule or regulation. The court has “inherent authority” to make such reasonable orders as are necessary for the assistance of the finder of fact in its mission of truth-seeking. In determining whether the trial court has exceeded its jurisdiction, therefore, we look not merely to the rules of procedure and to legislative enactments, but also to whether the trial court's order is a reasonable exercise of its “inherent authority.”

Lichtor, 845 S.W.2d at 60. The Lichtor Court observed that “Missouri trial courts have long been authorized, *even prior to the adoption of rules of civil procedure*, to order the physical examination of a plaintiff ...” Id. at 59 (*emphasis added*). It noted the “inherent authority” of a trial court, being a court of original and general jurisdiction, to make and enforce orders as necessary to provide a full and fair adjudication of the dispute and the administration of justice. Id.

The trial court’s inherent authority to manage discovery in the administration of justice provides ample authority for issuing an order detailing the scope of the patient-litigant waiver of the patient-physician privilege. *See also* State ex rel. American Mfg.

Co. v. Anderson, 270 Mo. 533, 19 S.W. 268, 271 (Mo.banc 1917) (holding a trial court had inherent authority to order a party to allow its adversary to enter and inspect land, despite there being no such rule or statutory authority at the time). The Panel's argument that the trial court was limited to the enumerated rules of discovery in Missouri Rules of Civil Procedure 56 through 61, *see* Proctor, at *14, is not persuasive and is also somewhat self-contradictory.

The provision of formal discovery rules in no way prohibits counsel from engaging witnesses in informal interviews when formal discovery is ongoing in a litigated proceeding:

[W]hile the Federal Rules of Civil Procedure have provided certain specific formal methods of acquiring evidence from recalcitrant sources by compulsion, they have never been thought to preclude the use of such venerable, if informal, discovery techniques as the *ex parte* interview of a witness who is willing to speak.

See Doe, 99 F.R.D. at 128 (*citing* Hickman v. Taylor, 329 U.S. 495). In finding HIPAA did not alter state common law which permissively allowed *ex parte* communication following the patient-litigant waiver, New York's highest court said:

[T]here are no statutes and no rules expressly authorizing – or forbidding – *ex parte* discussions with *any* nonparty ... Attorneys have always sought to talk with nonparties who are potential witnesses as part of their trial

preparation. [The Rules of Civil Procedure do] not ‘close off’ these ‘avenues of informal discovery,’ and relegate litigants to the costlier and more cumbersome formal discovery devices.

Arons, 880 N.E.2d. at 838.

Finally, the Panel’s analysis seems to be inherently inconsistent in two respects. First, the Panel deviated from Missouri Supreme Court precedent on the basis of HIPAA, but at the same time failed to give effect to the very same regulation’s intent to allow for an Order just like that issued by Judge Messina in deference to state substantive law through the Required by Law and Litigation Exceptions. The resulting selective application of HIPAA’s provisions is inappropriate.

Second, the Panel concluded Judge Messina lacked authority to issue the Order as it was not authorized by the enumerated discovery rules. Proctor, at *14. However, the Panel also stated the trial court had inherent authority to “compel[] the plaintiff to sign a medical authorization that would authorize the disclosure of plaintiff’s reasonably related medical records.” Id. at n.6. These statements seem inconsistent as Rules 56 through 61 contain no provision for obtaining medical authorizations. *See* Collins, 289 S.W.3d at 786 (Welsh, concurring) (“I find nothing in the formal discovery rules regarding the use of medical authorizations.”).

The Relators echo the argument regarding the trial court’s authority to issue the Order. Aside from the Panel’s analysis, Relators provide no support for the proposition

that the trial court's inherent authority allows some actions that are not explicitly enumerated in the Rules, but not others. Given the several courts previously cited who have found the trial court has inherent authority to issue the specific type of Order issued by Respondent, as well as the HIPPA regulations themselves, this argument lacks merit.

E. The Remaining Arguments to Ban *Ex Parte* Communication Lack Merit.

1. Judge Messina's Order is Not an Impermissible "Advisory Opinion"

An advisory opinion is one "rendered by a court at the request of the government or an interested party indicating how the court would rule on a matter should adversary litigation develop." Black's Law Dictionary, 55 (6th Ed. 1990). "Advisory opinions have been described as those which are based on hypothetical situations and are not necessary for the resolution of the case before the court." State v. Burgin, 203 S.W.3d 713, 717 (Mo.App. E.D. 2006).

Judge Messina's Order is clearly not an advisory opinion, as it addresses an actual controversy, arising out of existing facts, the resolution of which is necessary in an ongoing adversarial proceeding. Plaintiff filed a lawsuit which squarely put her physical condition at issue, resulting in the patient-litigant waiver of the patient-physician privilege as a matter of law. Judge Messina's Order outlines the scope of the litigation waiver in this lawsuit, which has a clear effect on the ability of the defendants to defend their interests throughout this proceeding.

An “advisory opinion” deals with a hypothetical situation with no present legal controversy, which is obviously is not the case as between Ms. Proctor and St. Joseph Medical Center. They are adversarial parties with meaningful rights and liabilities at stake who are involved in an actual, justiciable legal controversy being actively litigating in front of Judge Messina. Thus, the Order is not a “non-binding statement by a court of its interpretation of the law on a matter submitted for that purpose.” Burgin, 203 S.W.3d at 717 (*citing* Black’s Law Dictionary, 1125 (8th Ed. 2004)). Rather, it defines the scope of PHI the defendants can obtain by operation of law due to the Plaintiff’s patient-litigant waiver of her patient-physician privilege.

Although the Order “advises” health care providers as to the scope of the waiver, that fact alone does not make it an “advisory opinion” in legal parlance. The mere similarity between the word “advise” and the legal term of art “advisory opinion” is of no consequence, and any argument to the contrary fails to appreciate the legal term of art.

2. Plaintiff Is Not Being Compelled to Sanction *Ex Parte* Communication.

Relators argue that Judge Messina’s Order violates Woytus & Collins as it “is the same as Respondent compelling Bobbie Jean Proctor to execute an authorization allowing defense counsel to meet privately with her treating physicians.” Relators’ Substitute Brief, p. 23-24. To the contrary, Plaintiff was not compelled to sign anything or take any affirmative act which could be construed as sanctioning *ex parte* communication. Judge Messina’s Order merely acknowledged the scope of the patient-

litigant waiver that occurred as a matter of law when she chose to put her medical condition at issue by filing a personal injury lawsuit in the State of Missouri.

The integrity of the Woytus holding is unaffected by her Order. This Court's holding in Woytus drew a logical line when it held a patient-litigant cannot be ordered to sign an authorization providing for *ex parte* communications. See Woytus, 776 S.W.2d at 395. While the Court may have felt it was inappropriate to require patient-litigants to sign authorizations that may appear to sanction meetings they would not occur, the Court has likewise held that they cannot prohibit such meetings. More importantly, the Court knew it was unnecessary. If patient-litigants prefer that such meetings do not occur, Woytus allowed them to express that desire by refusing to sign an authorization. At the same time, because no authorization was required as a prerequisite to *ex parte* communication, the patient-litigants could not foil the rights of others (the defendants and/or their health care providers) to pursue *ex parte* communication after the patient-litigant waiver.

When exercising her right to file this lawsuit, Plaintiff availed herself not only to the rights and benefits of Missouri's legal system, but also its obligations, responsibilities and requirements. By exercising her right to pursue a perceived grievance in a court of law, she has waived the patient-physician privilege as to those matters she put at issue under her pleadings:

Once the plaintiff makes a decision to enter into litigation, this decision carries with it the recognition that any information within the knowledge of the treating physician relevant to the litigated issues will no longer be confidential. On this point, *McCormick* states:

[I]t is not human, natural or understandable to claim protection from exposure by asserting a privilege for communications to doctors at the very same time when the patient is parading before the public the mental or physical condition as to which he consulted the doctor by bringing an action for damages arising from that same condition.

A trial under our system is a public event; it is not unreasonable to require a plaintiff who is asserting a claim against a defendant in which the plaintiff's physical condition is at issue to forego the confidentiality that would otherwise prevent the disclosure of information.

Brandt II, 856 S.W.2d at 674 (*quoting McCormick on Evidence*, §103). Patient-litigants still have the protection of the courts regarding the scope of the waiver, as evidenced in this case by the objections raised by Relators which have culminated in Point Relied On II. Thus, if there is a problem with the court's order, an avenue to relief still exists.

3. The Order Does Not Constitute a “New Discovery Method.”

Contrary to the suggestion of Relators and their amicus counsel, the defendants are in no way asking the court to create and adopt a “new discovery method.” (Relators’ Substitute Brief, p. 35; Brief of Missouri Association of Trial Attorneys as Amicus Curiae in Support of Relators, p. 10). Rather, defendants simply acted in accord with HIPAA before seeking to engage health care provider witnesses in *ex parte* discussions if they were so willing. Informally interviewing health care provider witnesses has been explicitly authorized by Missouri law for forty years, and the right to interview witnesses has always been at the very heart of trial advocacy in American jurisprudence; it is hardly new. *See Arons*, 880 N.E.2d. at 838 (“Attorneys have always sought to talk with nonparties who are potential witnesses as part of their trial preparation.”).

Obtaining a court order to comply with the procedural protections of HIPAA in no way changes Missouri law.⁴ Moreover, as previously shown, obtaining a court order

⁴However, obtaining such an order provides the further benefit of specifically defining the scope of the patient-litigant waiver for the treating health care provider. Relators complain that the Brandt decisions “placed the burden of identifying the legal boundaries of permitted disclosures squarely on the shoulders of the physicians ...” (Relators’ Substitute Brief, p. 20). Judge Messina’s Order alleviates that concern and burden by specifying the bounds of the waiver, and assuring the witnesses they can avoid potential liability under the HIPAA regulations by following the Order’s guidelines.

removes any tension between HIPAA and Missouri's *ex parte* common law, thereby quelling any concern that the Brandt holdings "may be anachronistic in a post-HIPAA world." See Collins, 289 S.W.3d at 784. Reconciling HIPAA with extant state law is easily accomplished through incorporating HIPAA's procedural safeguards so as to meet the Privacy Rule's goal of protecting medical privacy. See Cohen, 43 Hous. L. Rev. at 1127. Obtaining an order from the trial court clearly satisfies the intent of HIPAA, as it provides notice to the patient-litigant and an opportunity to object:

HIPAA does not expressly bar *ex parte* communications but does require certain procedures. One measure by which such information may be sought is pursuant to a court order specifying the substance of information to be released. We hold that an order, entered as a result of an individual placing mental or physical conditions in issue by filing suit ... does not contravene HIPAA's confidentiality requirements."

Holmes, 158 P.3d at 1047.

F. The Panel Failed to Consider the Other HIPAA Provisions When Issuing Its "Guidance".

The "guidance" issued at the end of the Panel's Opinion is far too broad and sweeping. See Proctor, at *15-16. Although the Panel cited several enumerated exceptions to the purported prohibition of *ex parte* communications in its Opinion, Id. at *9-10, it apparently failed to consider the merits of each exception when delivering its

“guidance to litigants, lawyers, trial courts, and physicians.” *Id.* at *15. Rather, the Panel summarily characterized them as a “narrow list of exceptions,” *Id.* at *5, and wrongfully concluded there were “none that apply to this factual setting.” *Id.* at *5, n. 2.

To the contrary, the Health Care Operations exception is absolutely applicable to St. Joseph Medical Center in this case, and permits the hospital’s business associates (such as defense counsel) to use and disclose Ms. Proctor’s PHI with certain of her treating health care providers. *See* 45 C.F.R. §164.502(a)(1)(ii). HHS specifically permitted such use and disclosure without the consent of the subject of the PHI, and without the need for an order pursuant to 45 C.F.R. §164.512(e). *See* 45 C.F.R. §164.506(c)(5).

When crafting the Privacy Rule, HHS recognized that it was vitally important to protect a hospital’s ability to conduct routine business operations, which would necessarily require use of PHI.

Health care providers ... must also use individually identifiable health information for certain health care operations, such as ... legal activities, to run their businesses ...[HHS’] goal is, and has always been, to permit these activities to occur with little or no restriction.

Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53,182, 53208-09 (August 14, 2002). “Health care operations” is specifically defined to include “conducting or arranging for ... legal services.” 45 C.F.R §164.501. HHS

intended for the “legal services” component of “health care operations” to be broadly construed. HHS was initially going to define “legal services” for purposes of HIPAA’s “health care operations” exception to mean “compiling and analyzing information in anticipation of or for use in a civil or criminal legal proceeding.” 65 Fed. Reg. at 82490. The initial definition provides a clear expression of intent to exempt all actions associated with defending a lawsuit from the auspices of the Privacy Rule,⁵ but the intended breadth of this exception becomes even more patent considering HHS provided “a broader reference to conducting or arranging for ‘legal services’” in the Amended Rule, with the specific intention of replacing the narrower phrasing of the Proposed Original Rule. 65 Fed. Reg. at 82490-91. Thus, there is no question that HIPAA excepted activities associated with a hospital defending itself in a medical malpractice lawsuit from the scope of the Privacy Rule.

There is likewise no question that HHS intended to allow the business associates of a hospital to be able to engage in *ex parte* communication by virtue of this exception. The regulations provide that “A covered entity that participates in an organized health care arrangement may disclose protected health information about an individual to another covered entity that participates in the organized health care arrangement for any health care operations activities of the organized health care arrangement.” 45 C.F.R.

⁵In addition, this provides yet another example of how HHS used the term “proceeding” synonymously with “lawsuit” or “litigation” and meant for it to have a broad context.

§164.506(c)(5). An “organized health care arrangement” is defined to mean a “clinically integrated care setting in which individuals typically receive health care from more than one health care provider.” 45 C.F.R §160.103.

Perhaps the most common example of this type of organized health care arrangement is the hospital setting, where a hospital and physician with staff privileges at the hospital together provide treatment to the individual. Participants in such clinically integrated settings need to be able to share health information freely not only for treatment purposes, but also to improve their joint operations.

65 Fed. Reg. at 82494.

Thus, because St. Joseph Medical Center has been named as a defendant in this legal proceeding, it is explicitly authorized by HIPAA, pursuant to 45 C.F.R. §164.502(a)(1)(ii) & §164.506(c)(5), to use and disclose PHI in conversations with affiliated health care providers, such as nurses or physicians on its medical staff. This exempts the hospital and its business associates, such as defense counsel, from the impact of the Privacy Rule as it relates to affiliated health care providers. In other words, HIPAA explicitly authorizes the hospital’s defense counsel to talk to Ms. Proctor’s health care providers if they fall within the hospital’s “organized health care arrangement,” and they can do so without the patient’s knowledge or consent.

A health care provider that has a direct treatment relationship with an individual is not required by the Privacy Rule to obtain an individual's consent prior to using and disclosing information about him or her for ... health care operations. They, like other covered entities, have regulatory permission for such uses and disclosures.

67 Fed. Reg. 53,211.

Failing to account for HIPAA's Health Care Operations exception would create not only patent and unconstitutional unfairness, but also absurd circumstances that could make it virtually impossible for a hospital to defend itself in litigation. For example, a defendant hospital alleged to be vicariously liable for the negligence of another health care provider could not talk to the individual whose actions it must defend outside the presence of the plaintiff's attorney, unless the plaintiff voluntarily gave up that tactical advantage. Thus, the Panel's "guidance" is misplaced.

Conclusion

HIPAA clearly contemplates the Respondent having authority to issue the Order under consideration. HIPAA does not purport to prohibit informal physician interviews or any other form of litigation-related information gathering permitted by state law. HIPAA cannot be construed to substantively prohibit *ex parte* communication with health care provider witnesses following the patient-litigant waiver when it is permitted by state

law. To the contrary, HHS specifically intended for the Privacy Rule to defer to state law practice regarding the scope of discovery in civil litigation.

The Relators' Petition Writ for Prohibition must be denied when considering the intended effect of the HIPAA regulations, failed long-standing Missouri Supreme Court precedent regarding the strong societal interests justifying the patient-litigant waiver, Missouri's complete rejection of the notion of partial waivers, and the impropriety of allowing a litigant-patient to use the patient-physician privilege as a "sword and a shield at one and the same time," which would give the patient-litigant an unfair advantage in civil proceedings and infringe upon the Constitutional rights of defendants in civil litigation. Judge Messina clearly had the authority to issue an Order detailing the scope of the patient-litigant waiver to effectuate the right to *ex parte* communication that Missouri law rightly provides. Finally, the procedure followed in this case should be affirmatively sanctioned as the proper procedure for upholding Missouri law in regard to *ex parte* communication while complying with HIPAA procedural requirements of HIPAA.

ARGUMENT IN RESPONSE TO POINT RELIED ON II

**THE TRIAL COURT'S ORDER WAS APPROPRIATELY
TAILORED TO THE BROAD ALLEGATIONS IN PLAINTIFFS'
PETITION.**

Defendant agrees that, under Missouri law, the Order should be confined to PHI which is within the scope the patient-litigant waiver, thereby allowing all appropriate discovery and investigation to occur as to the physical and mental conditions which were put at issue under the pleadings. “[T]he narrowness and breadth of the [waiver] is directly controlled by the narrowness and breadth of the allegations in plaintiff’s petition.” Jones, 936 S.W.2d at 807.

To effectuate this goal, litigant-patients who are putting their PHI at issue have an affirmative responsibility to appropriately plead their claimed injuries. In this case, Relator Bobbie Jean Proctor pled the following regarding her claimed physical injuries:

- a. She has suffered severe injury secondary to the unchecked bleeding and hemorrhaging including damage to her right leg resulting in a permanent loss of her ability to walk normally;
- b. She suffered profound hypoxia during the Code Blue resulting in her long term hospitalization secondary to her injuries secondary to the undiagnosed and untreated blood loss;
- c. She has received injuries secondary to the above trauma with consequences unknown to Plaintiff at present;
- d. She has been cause great physical and mental anguish;
- e. She has incurred reasonable and necessary medical expenses, including but not limited to, hospital bills, surgeon’s and doctor’s bills, and

other related bills for medical treatment, the exact amount of which is unknown at this time;

f. She has suffered a loss of her ability to lead a normal life;

g. She has suffered a loss of her enjoyment of life;

h. She has been put at risk for several other complications including by not limited to those secondary to the receipt of additional blood products, the code blue hypoxic event and other conditions presently unknown to Plaintiff Bobbie Jean Proctor; and,

i. She has suffered permanent injuries and disabilities.

See Exhibit A to Petition in Prohibition, pp. 9-10. As these allegations are somewhat broad and non-specific, they potentially put much of Ms. Proctor's physical being at issue. For example, she claimed "injuries with consequences unknown to Plaintiff at present" and "other conditions presently unknown to Plaintiff ..." including "those secondary to the receipt of additional blood products ..." *Ibid*. As such, the scope of her pleading was, at best, somewhat undefined, which called for a patient-litigant waiver which would be correspondingly broad.

Given these issues, before, during and after the hearing at which Judge Messina considered the proper scope of her Order, there were discussions among counsel regarding the breadth of Plaintiff's litigation waiver. Both the trial court and defense counsel offered to allow Plaintiffs to amend their pleadings to narrow and define the true

intended scope of that waiver. Counsel for this defendant has communicated that offer to plaintiffs' counsel once again while the Petition for Writ has been pending, but to no avail.

Defendant is also amenable to specific identification of covered entities given the previous holdings of the Missouri Supreme Court. However, Defendant respectfully suggests that is often not possible to identify all of the appropriate health care providers until discovery is well under way, as the trial court, the defendants and sometimes (despite the best of intentions) the plaintiffs themselves are unable to identify all of the health care providers who in fact witnessed particular relevant facts.

Therefore, for purposes of judicial economy, Defendant respectfully suggests that allowing a categorical identification of the appropriate recipients of the order, similar to that of the Order at issue in this case, would serve the interests of justice. It would promote judicial economy by preventing the potential need for requesting multiple authorizations or orders at various points in time. It would also allow for adversarial parties to investigate and confirm that particular health care providers are not, in fact, witnesses to certain events in the case, instead of having to rely solely on the records and memories of the patient and any witnesses she might be able to identify. For these reasons, reconsideration of previous law requiring that authorizations be addressed to specific health care providers is warranted.

In short, Defendant St. Joseph Medical Center remains amenable to narrowing and defining the true scope of the physical and mental conditions that Plaintiff truly wishes to put at issue, and request that the trial court issue a corresponding Order. Absent an amended pleading clarifying her claims, however, Plaintiff's perceived harm arising from the scope of the Order in this case is, at least to a significant degree, self-inflicted.

Therefore, Respondent respectfully requests that Relators' Petition for Writ of Prohibition be denied.

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CERTIFICATE OF COMPLIANCE

This brief complies with the provisions of Rule 55.03; that it contains 21,654 words (including Certificate of Service, Certificate of Compliance and cover page) complies with the word/line limitations contained in Rule 84.06(b); that a diskette of the Brief is included herewith in Word 13 format; that the diskette was scanned for virus using Trend Micro Antivirus software and found to be free of virus; and that one copy of the diskette and the original and nine (9) copies of the Respondant's Substitute Brief were delivered via courier, this 3rd day of May, 2010 to the Clerk of the Supreme Court of Missouri.

Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby further certify that a true and correct copy of the foregoing was deposited in the United States mail, first class postage prepaid, on the 3rd day of May, 2010 addressed to the following:

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