IN THE SUPREME COURT OF MISSOURI

SC 90610

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

Relators,

vs.

HON. EDITH MESSINA,

Respondent.

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

BRIEF OF MISSOURI ORGANIZATION OF DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF AMICUS CURIAE

The Missouri Organization of Defense Lawyers ("MODL") is a professional organization of 1,155 lawyers in Missouri who represent defendants in litigation, including personal injury litigation, involving Missouri citizens. The issue of whether the Health Insurance Portability and Access Act ("HIPAA") prohibits defense counsel from engaging in *ex parte* communications with treating physicians and other health care providers and/or preempts Missouri state law permitting such communications is tremendously significant in many personal injury cases. As a result, this issue is of abundant interest to MODL and its members.

As discussed in this Brief, MODL supports the position of Respondent Hon. Edith Messina ("Respondent") that HIPAA does not preempt Missouri state law concerning *ex parte* communications with treating physicians and other health care providers nor preclude the HIPAA compliant protective order that Respondent entered in this case. MODL urges this Court to deny Relator's Petition for Writ of Prohibition.

CONSENT OF THE PARTIES

MODL has received consent to file this Brief from Respondent, counsel for Defendants and counsel for Relators.

JURISDICTIONAL STATEMENT

MODL hereby adopts the Jurisdictional Statement of Relators.

STATEMENT OF FACTS

MODL hereby adopts the Statement of Facts of Respondent.

POINTS RELIED ON

Point I

THE MISSOURI SUPREME COURT SHOULD DENY RELATOR'S PETITION FOR WRIT OF PROHIBITION, BECAUSE HIPAA DOES NOT PREEMPT MISSOURI LAW PERMITTING *EX PARTE* COMMUNICATIONS WITH A PLAINTIFF'S HEALTH CARE PROVIDER, IN THAT MISSOURI LAW IS NOT CONTRARY TO HIPAA.

45 C.F.R. § 160.202

45 C.F.R. § 160.203

45 C.F.R. § 164.508

45 C.F.R. § 164.512

42 U.S.C.A. § 1320d-7(a)(1)

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Point II

THE MISSOURI SUPREME COURT SHOULD DENY RELATOR'S PETITION FOR WRIT OF PROHIBITION BECAUSE HIPAA DOES NOT PRECLUDE THE PROTECTIVE ORDER ISSUED BY THE TRIAL COURT, IN THAT THE PROTECTIVE ORDER WAS ENTERED IN THE COURSE OF A JUDICIAL PROCEEDING.

45 C.F.R. § 164.512(e)(1)

RSMo. § 575.010(4)

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ARGUMENT

I. THE MISSOURI SUPREME COURT SHOULD DENY RELATOR'S PETITION FOR WRIT OF PROHIBITION, BECAUSE HIPAA DOES NOT PREEMPT MISSOURI LAW PERMITTING *EX PARTE* COMMUNICATIONS WITH A PLAINTIFF'S HEALTH CARE PROVIDER, IN THAT MISSOURI LAW IS NOT CONTRARY TO HIPAA.

A. HIPAA's Primary Purpose Was to Expand the Portability and Renewability of Health Insurance, and HIPAA Permits the Disclosure of Protected Health Information Pursuant to, *Inter Alia*, a Court Order.

Congress passed HIPAA in 1996 in order to further federal goals of improving "the efficiency and effectiveness of the health care system, by encouraging the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information," Pub. L. 104-191 § 261, 110 Stat. 1936 (1996), and increasing access to health care. *In re Diet Drug Litigation*, 895 A.2d 493, 497 (N.J. Super. Ct. Law Div. 2005) (holding that HIPAA did not preempt state law allowing *ex parte* interviews with treating physicians). Congress sought to increase such access by expanding the portability and renewability of insurance. *Id.* (citation omitted). As such, the "Act's first objective was not to protect privacy." *Id.* at 497 n.11 (citation omitted). Instead, during the legislative process, "concern was expressed that innovations in technology might endanger the ability to

protect health information; hence the adoption of privacy and security standards reflected in the HIPAA Privacy Rule" (45 C.F.R. Parts 160 and 164). *Id.* at 497 (citation omitted). Such adoption resulted from Congress delegating to the Secretary of the Department of Health and Human Services ("HHS") the task of promulgating regulations regarding the disclosure of "protected health information" ("PHI").[1] *See id.*; 45 C.F.R. § 164.502.

These regulations, including the Privacy Rule, took effect in April 2003 and provide that a covered entity, including most health care providers, may only disclose PHI as permitted by the regulations. *See* 45 C.F.R. § 164.534. HIPAA does not purport to eliminate the disclosure of PHI, but rather the Privacy Rule permits such disclosure during judicial proceedings in response to a court order or in response to a subpoena, discovery request or other lawful process if certain prerequisites are met. *See* 45 C.F.R. § 164.512(e). 45 C.F.R. § 164.512(e) provides that PHI may be disclosed in response to a subpoena, discovery request, or other lawful process, even if not accompanied by a court order, if the health care provider receives satisfactory assurance that reasonable efforts have been made by the defendant (1) to ensure that the plaintiff has been given notice of the request, or (2) to secure a "qualified protective order" meeting the requirements of 45 C.F.R. § 164.512(e)(1)(v).

[1] With certain exclusions, "[p]rotected health information means individually identifiable health information" that is transmitted by or maintained in electronic media or that is transmitted or maintained in any other form or medium. 45 C.F.R. § 160.103.

More specifically HIPAA permits disclosure of PHI "[i]n response to an order of a court." 45 C.F.R. § 164.512(e)(1)(i). A court order does not necessarily compel disclosure of PHI. *See e.g. Croskey v. BMW of North America*, No. 02CV73747, 2005 WL 4704767, at *4 (E.D.Mich. Nov. 10, 2005) (entering an order permitting *ex parte* communications with a plaintiff's treating physician but not compelling such communications). A covered entity may also disclose PHI pursuant to a HIPAA compliant authorization. *See* 45 C.F.R. § 164.508 (setting forth the requirements and components of a HIPAA complaint medical authorization). Similarly, a HIPAA compliant authorization, however, does not serve in any fashion to "compel" a plaintiff's health care providers to talk to defense counsel; rather, it simply demonstrates to the health care provider that HIPAA has been followed – a prerequisite to the disclosure of any PHI. *Arons v. Jutkowitz*, 880 N.E.2d 831, 842-43 (N.Y. 2007) ("HIPAA-complaint authorizations and HIPAA court orders cannot force a health care professional to communicate with anyone; they merely signal compliance with HIPAA and the Privacy Rule as is required before any use or disclosure of protected health information may take place.").

B. HIPAA Only Preempts "Contrary" State Law

HIPAA's Privacy Rule contains an express provision addressing preemption of state law. *See* 45 C.F.R. § 160.203. Both the preemption language and the surrounding statutory framework of the Privacy Rule reflect congressional intent, and both show that the Privacy Rule does not preempt state law with respect to *ex parte* contacts with a plaintiff's health care providers. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 116 S.Ct.

2240, 2250-51 (1996) ("[A]ny understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of congressional purpose' . . . Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it.") (citations omitted). Moreover, there is a strong presumption against preemption. *Id.* at 2250.

More specifically, the Privacy Rule contains the following provision regarding preemption of state law: "A standard, requirement, or implementation specification adopted under this subchapter that is *contrary* to a provision of State law preempts the provision of state law." 45 C.F.R. § 160.203 (emphasis added); *see also* 42 U.S.C.A. § 1320d-7(a)(1) ("[A] standard or implementation specification adopted or established under sections 1320d-1 through 1320d-3 of this title, shall supersede any *contrary* provision of State law . . . .") (emphasis added). The Privacy Rule then lists several exceptions to the general rule of preemption. *See* 45 C.F.R. § 160.203.

The Privacy Rule requires a *two-part* preemption analysis. First, a state law *must be contrary* to HIPAA in order to be preempted. If it is not contrary, then the state law is not preempted and the analysis ends there. *See* 45 C.F.R. § 160.203; *see also* B. 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, 1123 (Winter 2006) ("Without question, the single error courts make most frequently when they attempt to determine if a state law is preempted by HIPAA is their failure to make a threshold determination as to whether the two laws are contrary. This first step is critical because when the laws are not contrary, they generally

can be reconciled without one law preempting the other, so that the subsequent, more difficult stringency analysis can be avoided."). Second, *if* the state law *is contrary*, then and only then should one look to the "more stringent" exception to determine if the state law is preempted. In the context of a *contrary* state law, if the state law is more stringent than the Privacy Rule provisions, then it is not preempted. *See* 45 C.F.R. § 160.203.

In sum, HIPAA's Privacy Rule only preempts "contrary" provisions of state law, and absent the existence of a contrary state law as a threshold, HIPAA has no preemptive effect. *See* 45 C.F.R. § 160.203; 42 U.S.C.A. § 1320d-7(a)(1). It is within this framework that at least one commentator recognized that "the reality is that a state law will be preempted by HIPAA only very rarely." 43 Hous. L. Rev. at 1139.

C. Missouri Law Is Not "Contrary" to HIPAA

Missouri law is well-settled that defense counsel is entitled to engage in *ex parte* communications with a plaintiff's treating physician and other health care providers, assuming that the provider is indeed willing to participate in such communications. The *Brandt* cases specifically instruct that a plaintiff cannot prevent his/her health care providers from engaging in *ex parte* communications with opposing counsel where the plaintiff has put his or her physical condition at issue in the pleadings. *See Brandt v. Pelican*, 856 S.W.2d 658, 662-63 (Mo. banc 1993); *Brandt v. Med. Defense Assocs.*, 856 S.W.2d 667, 674 (Mo. banc 1993) (holding that "[o]nce the plaintiff makes a decision to enter into litigation, the 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," and "[t]he fiduciary duty that the physician owes the patient to

maintain in confidence medical information concerning the patient's mental or physical condition does not apply to an *ex parte* conference that is within the scope of the waivers"); *see also State ex rel. Norman v. Dalton*, 872 S.W.2d 888, 890 (Mo. App. E.D. 1994). The decision whether to engage in *ex parte* discussions belongs solely to the health care provider, not to the plaintiff or defendant. *See State ex rel. Jones v. Syler*, 936 S.W.2d 805, 809 (Mo. banc 1997).

These and other similar Missouri decisions are in no way "contrary" to HIPAA's provisions, nor do they purport in any way to contradict or abrogate HIPAA's requirements with respect to the authorization or court order necessary for the disclosure of PHI. Indeed, the HHS, in commenting on a provision of the Privacy Rule applicable to disclosure of PHI during judicial proceedings, has made clear that it was not the intent of HIPAA to disrupt the traditional practice of finding a full waiver of the physician-patient privilege when a litigant places his medical condition at issue in a lawsuit. *See* 65 Fed. Reg. 82462-01, 82530 ("The provisions of 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 protected health information.").

Further, under the Privacy Rule, a "contrary" state law is (1) one that makes it impossible to comply with both state and federal law or (2) one that stands as an obstacle to the accomplishment of the full purposes of the Privacy Rule. 45 C.F.R. § 160.202. This explanation is critical because Missouri law regarding communications with a plaintiff's health care providers is not "contrary" to the Privacy Rule. That is, and as

fully explained in the sections that follow, Missouri law regarding *ex parte* communications does not make it impossible to comply with the provisions of the Privacy Rule and does not stand as an obstacle to the accomplishment of the full purposes of the Privacy Rule. *See id.* As a result, the analysis of whether Missouri law is "more stringent" is never reached. *See id.*; 45 C.F.R. § 160.203.

Moreover, Relators agree with the position that Missouri law is not *contrary* to HIPAA. In their brief, Relators even argue that "[b]ecause HIPAA does not even purport to reach state-law litigation practices, especially with regard to informal discovery, there is no preemption analysis required, because preemption under HIPAA is expressly limited to 'contrary' state law." Relators' Brief p. 32.

1. Compliance with Both Missouri Law and HIPAA Is Possible Since HIPAA Does Not Prohibit *Ex Parte* Communications with Treating Physicians and Other Health Care Providers

Significantly, HIPAA and its Privacy Rule are *completely silent* about the issue of *ex parte* communications with treating physicians and other health care providers during litigation. *See Smith v. Am. Home Products Corp. Wyeth-Averst Pharm.*, 855 A.2d 608, 622 (N.J. Super. Ct. Law Div. 2003) ("Nowhere in HIPAA does the issue of *ex parte* interviews with treating physicians, as an informal discovery device, come into view. The court is aware of no intent of Congress to displace any specific state court rule, statute or case law . . . on ex parte interviews."). Missouri law cannot be contrary to a provision in the Privacy Rule that does not exist. It would be wholly illogical, and contrary to established principles of statutory construction, to equate HIPAA's silence on

the issue of *ex parte* communications with HIPAA placing some type of prohibition or restriction upon such communications.

The absence of any provisions in HIPAA concerning *ex parte* communications with treating physicians and other health care providers is not surprising since the purpose and objective of HIPAA was to improve portability of and access to health care coverage, and not to create some sort of federal privilege between physicians and patients. *See Diet Drug Litigation*, 895 A.2d at 497. Since there is no provision of HIPAA analogous to Missouri state law concerning physician-patient privilege, waiver thereof, or *ex parte* communications, there can be no finding that state law is somehow "contrary" to HIPAA. *See* 43 Hous. L. Rev. 1091, 1129-30 ("HHS has expressly stated that when there is no HIPAA provision that is analogous to state law, there can be no finding that the state law and HIPAA are contrary.") (citing 64 Fed. Reg. 59,918, 59,995 ("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.")).

Indeed, it is in no sense "impossible" for a party to comply fully with both Missouri state law and HIPAA. HIPAA allows the disclosure of PHI, whether it be through the physical transfer of medical records or through other communications from a plaintiff's health care providers, as long as the disclosure results from a HIPAA complaint authorization or a court order, subpoena or other lawful process consistent with HIPAA's provisions. *See* 45 C.F.R. § 164.508; 45 C.F.R. § 164.512(e). There is simply

nothing in Missouri state law that is "contrary" to or that purports to contradict or abrogate such HIPAA provisions.

2. Missouri Law Does Not Serve As Any Type of "Obstacle" to the Purposes and Objectives of HIPAA

Missouri law is likewise not "contrary" to any of the provisions of HIPAA since Missouri law poses no "obstacle" to the purposes and objectives of HIPAA. To the contrary, Missouri law *advances* the purposes and objectives of HIPAA by ensuring that confidential medical information is not disclosed unless it is properly authorized. *See Syler*, 936 S.W.2d at 806-07 (reciting prior precedent that medical authorizations must be tailored to the pleadings, limited in time, and addressed to specific health care providers). A medical authorization must be tailored to the pleadings and information relevant to the lawsuit, and any *ex parte* communications between defense counsel and a plaintiff's health care providers must also be so tailored and limited. *See id.* at 807; *Brandt v. Med. Def. Assocs.*, 856 S.W.2d at 674-75. Further, Missouri law purports to place no restrictions upon a party's ability to seek an authorization, court order (like the one entered by Respondent in this case) or employ other lawful process allowing disclosure of PHI consistent with HIPAA's Privacy Rule. *See* 45 C.F.R. § 164.508; 45 C.F.R. § 164.512(e); *see also Luna v. Kennett HMA, Inc.*, No. 1:07CV00043 RWS, 2007 WL 4468693, at * 2 (E.D.Mo. Dec. 17, 2007) ("Because [defendant] has complied with HIPAA, I need not determine at this time whether HIPAA Privacy Rules preempt and supersede Missouri law . . . .").

In summary, because Missouri law concerning *ex parte* communications with a plaintiff's health care providers does not make it "impossible" to comply with both Missouri law and HIPAA, and because Missouri law creates no type of "obstacle" to the purposes and objectives of HIPAA, there is nothing "contrary" to HIPAA in Missouri law, rendering any finding of HIPAA preemption of Missouri law on this issue improper.[2] *See* 45 C.F.R. § 160.203.

3. Case Law From Other Jurisdictions As Well As Other Authorities Have Similarly Concluded That State Law Permitting *Ex Parte* Communications with Treating Physicians and Other Health Care Providers Is Not Preempted by HIPAA

Case law from other jurisdictions as well as other authorities from Missouri and elsewhere have also concluded that HIPAA has no preemptive effect with respect to state

[2] Alternatively, even if Missouri law was somehow found to be "contrary" to HIPAA (which it is not, as explained above), the second step of HIPAA preemption analysis (*i.e.*, whether or not the "more stringent" exception applies) would fail since Missouri law in such instance could only properly be characterized as "more stringent" than HIPAA with respect to the privacy protection afforded patients. *See* T. Agniel, *et al.*, "Ex Parte Communications with Treating Health Care Providers: Does HIPAA Change Missouri Law?," 63 J. Mo. B. 296 (Nov.-Dec. 2007) (concluding that Missouri law is not "contrary" to HIPAA, and that even if it was so found, "Missouri law provides greater privacy protection for the individual than HIPAA and is, therefore, more stringent").

laws permitting *ex parte* communications with treating physicians and other health care providers where the requirements of HIPAA have been followed. For example, legal commentators in Missouri have recently addressed this very issue. *See* 63 J. Mo. B. 296 ("HIPAA does not create a federal physician-patient privilege, nor does it contain a provision addressing ex parte communications. Therefore, Missouri's physician-patient privilege and waiver thereof is not contrary to HIPAA and is not preempted by HIPAA. As a result, HIPAA should not be a factor in decisions regarding ex parte communications.");[3] *see also* 43 Hous. L. Rev. 1091, 1139-40 ("Although many courts have grappled with the issue of HIPAA preemption, the reality is that a state law will be preempted by HIPAA only very rarely. Under the HIPAA preemption rules, it is extremely unlikely that a state law will be both contrary to HIPAA and less stringent than HIPAA.").

Likewise, case law from other jurisdictions has reached the same conclusion or similar results. *See, e.g.*, *Holman v. Rasak*, 281 Mich. App. 507, 761 N.W.2d 391, 395 (Mich. App. 2008) ("defendants may conduct an ex parte oral interview with [plaintiff's] physician if a qualified protective order, consistent with 45 CFR 164.512(e)(1), is first put in place"); *Harris v. Whittington*, No. 06-1179-WEB, 2007 WL 164031, at * 3 (D.

[3] In its March-April 2009 issue, the Missouri Bar Journal published a responsive article, which attempts to rebut the Nov.-Dec. 2007 article cited herein. *See* Baird, A. *et al.*, "Ex Parte Communications with Physicians? Missouri's Old Rule v. HIPAA's New Rule," 65 J. Mo. B. 66 (March-Apr. 2009).

Kan. Jan. 19, 2007) ("Because defendant has satisfied the procedural requirements found in [HIPAA], the motion for an order concerning the disclosure of plaintiff's medical records and ex parte interviews with treating physicians shall be granted."); *Holmes v. Nightingale*, 158 P.3d 1039, 1041 (Ok. 2007) ("We hold that a court order permitting, rather than mandating, oral communications 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."); *Arons*, 880 N.E.2d at 842 (the New York Court of Appeals held it "entirely proper" to compel plaintiffs to execute HIPAA compliant authorizations that would have the effect of "permitting their treating physicians to discuss the medical condition at issue in the litigation with defense counsel . . . Plaintiffs waived the physician-patient privilege as to this information when they brought suit, so there was no basis for their refusal to furnish the requested HIPAA-compliant authorizations"); *Poser v. Varnovitsky*, 46 A.D.3d 1295, 1295-96 (N.Y. App. Div. 3d 2007) (affirming an order compelling the plaintiff to execute HIPAA complaint authorizations where defendant sought to conduct *ex parte* interviews with plaintiff's health care providers); *Weiss v. Astellas Pharma, US, Inc.*, No. 05-527-JMH, 2007 WL 2137782, at *1, *5-*6 (E.D. Ky. July 23, 2007) (same); *Harhara v. Norville*, No. 07-CV-12650, 2007 WL 2713847, at * 2 (E.D.Mich. Sept. 18, 2007) ("Where a plaintiff has placed his medical condition at issue, a defendant is entitled to review the plaintiff's medical records and conduct ex parte interviews with the plaintiff's treating physician . . . The court is persuaded that an order in compliance with HIPAA for the purpose of

exploring [plaintiff's] injuries that are relevant to this action is warranted.") (citation omitted).

The principal cases relied upon in the briefs of Relators and *Amicus Curiae* Brief of the Missouri Association of Trial Attorneys ("MATA") are distinguishable from the instant case. First, *Law v. Zuckerman*, 307 F.Supp.2d 705 (D. Md. 2004) – described in MATA's brief as "the seminal case on this issue" – involved a medical malpractice defendant whose counsel had *ex parte* communications with one of the plaintiff's treating physicians. *Id.* at 707. Significantly, and unlike the present case, defense counsel in the *Law* case made *no* apparent attempt to comply with HIPAA, engaging in such *ex parte* communications *without* obtaining a medical authorization from the plaintiff or any court order directing the disclosure of PHI. *See id.* In short, defense counsel and the treating physician seemed to have ignored HIPAA. Moreover, there was a specific Maryland statute involved that required health care providers in medical malpractice actions to disclose patient medical information *without* an authorization from the patient. *See id.* at 709. The court implicitly found that such statute was contrary to HIPAA's provisions concerning the disclosure of PHI and therefore conducted a "stringency" analysis under 45 C.F.R. § 160.203(b). *See id.* at 709-711. The court concluded that the Maryland statute was not "more stringent" than HIPAA, such that HIPAA preempted the less stringent and contrary Maryland statute. *Id.* at 711. There is no such contrary Missouri statute involved in the instant case, and defense counsel sought a HIPAA complaint court order. As such, the *Law* decision could not be more off-point or inapplicable here.

Second, Relators' and MATA's briefs also point to *Crenshaw v. Mony Life Ins. Co.*, 318 F. Supp.2d 1015 (S.D. Cal. 2004), where the court found that defense counsel violated HIPAA by conducting *ex parte* interviews with a physician without an authorization or court order. *Id.* at 1028. In *Crenshaw*, the court noted that although there was a protective order in place, it did not apply to plaintiff. As such, the court held that "the Protective Order does not satisfy the requirements of HIPAA." *Id.* As such, the *Crenshaw* case indicates that had defense counsel conducted the interview pursuant to a court order permitting such an interview no HIPAA violation would have occurred. *Id.* In the instant case, defense counsel obtained a court order before seeking to conduct *ex parte* interviews with plaintiff's treating physician. As such, the *Crenshaw* is also inapposite to the present case, and it provides no assistance to Relators.

In addition, Relators cite *Browne v. Horbar*, 6 Misc. 780, (N.Y. Sup. 2004), a New York trial court decision which prohibited defense counsel from interviewing plaintiff's decedent's treating physician on "the eve of trial" after the close of discovery. *Id.* This decision appears to be based as much on the timing of the request as it was the Privacy Rule in HIPAA. Furthermore, the judge in *Browne* acknowledged that at the time of the decision "[t]he Appellate Division has not yet addressed whether allowing treating physicians to speak with individuals against their patients' wishes is inconsistent with HIPAA." *Id.* at 786. Subsequently, the New York Appellate Division addressed the issue in *Arons* and determined that a plaintiff could be compelled to sign a HIPAA compliant authorization allowing defense counsel to conduct *ex parte* interviews with

plaintiff's treating physicians. Consequently, the *Browne* case is of no assistance to Relators.

Other decisions mentioned in passing in the briefs of Relators and MATA similarly involve the unique and different laws of particular states and are similarly distinguishable as a result. *See, e.g.*, *Moreland v. Austin*, No. S08G0498, 2008 WL 4762052, at *3 (Ga. Nov. 3, 2008) (involving Georgia law that allowed *ex parte* communications with a plaintiff's health care providers, irrespective of the procedural requirements of HIPAA, "once a patient files suit and puts his medical condition in issue"). Relators also cite *Moss v. Amira*, 826 N.E.2d 1001, 1006 (Ill. App. 2005), for the proposition that *ex parte* contacts between defense counsel and plaintiff's treating physicians violates public policy. However, the court in *Moss* was interpreting Illinois law and policy. HIPAA was not even mentioned in the *Moss* decision, except in a concurring opinion. *Id.*

In sum, Relators and MATA have failed to point to anything in Missouri law that is somehow "contrary" to HIPAA. As a result, HIPAA does not preempt Missouri law concerning *ex parte* communications with treating physicians. *See* 45 C.F.R. § 160.203.

D. The Attempt to Use HIPAA to Preempt and Preclude *Ex Parte* Communications Between Defense Counsel and a Plaintiff's Health Care Providers Is Contrary to Principles of Fundamental Fairness to All Parties

The attempt of Relators in this case to prevent defense counsel from *ex parte* communications with Relator's health care providers, and the resulting efforts by

Relators and MATA to use HIPAA to achieve that end, should be rejected as not only unjustifiable under HIPAA (as explained in the preceding sections), but also as contrary to principles of fundamental fairness to all parties. In short, these parties seek to use HIPAA as both a shield and a sword. They would have HIPAA construed to bar *ex parte* communications by defense counsel, "while allowing plaintiffs' attorneys to continue to use this method of informal discovery," in contravention of the fair and reasonable methods established by Missouri law for discovery of health care provider information through *ex parte* communications. *See* 63 J. Mo. B. 296, at Section V. As legal commentators in Missouri have already observed, "[t]his is fundamentally unfair and should be prohibited." *Id.*; *see also Croskey v. BMW of North Am.*, 2005 WL 4704767, at *3-*4 (E.D. Mich. 2005) (noting that defendant's objections to plaintiffs using the patient-physician privilege "as both a sword and shield . . . analogous to sending a boxer into the ring wearing a blindfold" were legitimate concerns, and holding that "[t]o allow Plaintiff to block the interview would be inconsistent with HIPAA's structure, and would impede Defendant's access to evidence").[4]

[4] The magistrate's decision in *Croskey* ruled that even after obtaining a HIPAA compliant authorization, HIPAA required notice to plaintiff's counsel before the interviews were conducted. *See Croskey v. BMW of North Am.*, 2005 WL 1959452 at *7 (E.D. Mich., Feb. 16, 2005). However, that finding was subsequently and specifically reversed by the United States District Judge in *Croskey*, 2005 WL 4704767, at *4, who held that defense

A plaintiff in litigation has ready access to any health care provider witness, and the plaintiff should not be permitted to cut off the same access to fact witnesses by those whom the plaintiff has chosen to sue. If this would be permitted, the plaintiff would handcuff the defendant and force his/her counsel to either discuss all or some aspects of their defense in front of the plaintiff's counsel or to forego talking to witnesses who may have critical information relevant to the defendant's defense or which may lead to relevant evidence. Or, the plaintiff would force the defendant's counsel to depose each and every one of the plaintiff's treating physicians and/or other health care providers.

It is indisputable that treating physicians and other health care providers of the plaintiff are fact witnesses who happen to have medical expertise. *See Brandt*, 856 S.W.2d at 673. A plaintiff's health care providers likely have significant evidence concerning the patient's medical conditions made relevant by the litigation. The information may or may not be beneficial to the defendant, but that is not known until the fact witness health care provider is asked. *See King v. Ahrens*, 798 F. Supp. 1371, 1380 (W.D.Ark. 1992) (describing *ex parte* communications between defense counsel and treating physicians as "a viable, efficient, cost effective method of ascertaining the truth"). *Ex parte* interviews provide an invaluable tool in determining whether deposing the plaintiff's treating physicians is actually necessary. *Carrie N. Lowe*, et al. "What Types of Ex Parte Communications are Permissible?", Med. Mal. L. & Strategy, 23 No. 9

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counsel was not required to provide notice to plaintiff's counsel before conducting *ex parte* interviews with plaintiff's treating physicians.

*1 (June 2006). "Forcing defense counsel to conduct depositions of all the plaintiff's treating physicians would be costly and time-consuming." *Id*. Moreover, at least one judge has recognized that formal discovery techniques "would have the effect of significantly interfering with the practice of medicine." *Kish v. Graham*, 833 N.Y.S.2d 313, 320 (N.Y. App. Div. 2007) (Pine, J. dissenting) *overruled by Arons v. Jutkowitz*, 880 N.E.2d 831 (N.Y. 2007).

Ex parte communications allow defense counsel the *same* access that the plaintiff's counsel possesses with respect to treating physicians and other health care providers of the plaintiff. Allowing *ex parte* communications simply places all parties on equal ground for discovery and prohibits plaintiffs from controlling or thwarting a defendant's fundamental right to discovery. As one court has stated, "[t]o shield [plaintiff's health care provider] 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 v. Provost*, 359 F.Supp.2d 234, 242 (N.D.N.Y. 2005) (citation omitted). The invitation of Relators and MATA that HIPAA be construed in just such a fashion here should likewise be squarely rejected.

II. THE MISSOURI SUPREME COURT SHOULD DENY RELATOR'S PETITION FOR WRIT OF PROHIBITION BECAUSE HIPAA DOES NOT PRECLUDE THE PROTECTIVE ORDER ISSUED BY THE TRIAL COURT, IN THAT THE PROTECTIVE

ORDER WAS ENTERED IN THE COURSE OF A JUDICIAL PROCEEDING.

HIPAA allows PHI to be disclosed "in the course of any judicial or administrative proceeding" pursuant to an order of the court. 45 C.F.R. § 164.512(e)(1). The Court of Appeals in this case held that the protective order allowing *ex parte* interviews with plaintiff's treating physicians did not occur "in the course of" a "judicial proceeding." *State ex rel. Proctor v. Messina*, No. WD 71326, 2009 WL 3735919 * 13 (Mo. App. November 10, 2009). The Court of Appeals reasoned that *ex parte* interviews with a plaintiff's treating physician do not occur "in the course of" a "judicial proceeding" because the "trial court has no general oversight of the meeting or any control over it." *Id.*

In reaching this conclusion, the Court of Appeals relied upon RSMo. § 575.010(4) which defines judicial proceeding, for purpose of the prosecution of crimes against the administration of justice not for HIPAA purposes, as "any official proceeding in court, or any proceeding authorized by or held under the supervision of a court." (emphasis added). Pursuant to this statute a judicial proceeding includes proceedings that are not necessarily supervised by the court if they are authorized by the court. The Court of Appeals, however, relied upon the supervision aspect of this statute and did not address the authorization aspect of the statute.

In the present case, the court authorized defense counsel to conduct *ex parte* interviews with plaintiff's treating physicians. The treating physicians had no obligation to engage in such discussions. The protective order merely permitted them to engage in

discussions, which the Privacy Rule would otherwise have prohibited. The Privacy Rule made it necessary for defense counsel to seek authorization from the court, because the Privacy Rule only allowed plaintiff's treating physicians to disclose PHI pursuant to an authorization, court order or other lawful process. Because plaintiff had not signed a HIPAA compliant authorization allowing *ex parte* communications with her treating physicians a court order was necessary. Thus, the trial court's protective order (i.e. authorization) to conduct *ex parte* interviews was not merely advisory. Consequently, the trial court's entry of a protective order was within a judicial proceeding as defined by RSMo. §575.010(4), and the trial court had control over the contents of the protective order.

Additionally, trial courts have control and oversight over litigants, attorneys and witnesses who appear before them. In this case, in entering the protective order the trial court was controlling and limiting the conduct of defense counsel in conducting *ex parte* interviews of plaintiff's treating physicians for the purpose of defending the lawsuit. Had counsel conducted *ex parte* interviews outside of the parameters of the trial court's protective order or otherwise disregarded the protective order, counsel may have been subject to sanction by the trial court for violation of a court order. Thus, although the trial court does not directly supervise the *ex parte* interview, in issuing a protective order, the trial court retains a certain amount of supervision and oversight over defense counsel's conduct in conducting the *ex parte* interview.

In reaching its decision, the Court of Appeals focused on the trial court's control over the treating physician and not the trial court's supervision of discovery and defense

counsel who are litigating before it. *See Proctor* at * 13. The Court of Appeals held that "a trial court has no authority to issue a purported HIPAA order advising the plaintiff's non-party treating physicians that they may or may not participate in informal discovery via *ex parte* communications." *Id.* This is contrary to HIPAA and decisions of other courts interpreting protective orders entered pursuant to HIPAA. *See supra* Part I.C.1&3.

A statement in a protective order informing a treating physician that he/she is not required to engage in *ex parte* communications with defense counsel, however, is merely a reiteration of long standing Missouri law that treating physicians are not required to engage in *ex parte* communications with defense counsel. *See Syler*, 936 S.W.2d at 809. Such a statement is a clarification to a treating physician (a non-attorney fact witness) that the protective order is entered pursuant to HIPAA to allow the disclosure of PHI, as opposed to a subpoena which may *require* the disclosure of PHI. The statement does nothing more than inform the treating physician that the protective order is not a subpoena, and it provides a treating physician with full knowledge of the circumstances of the requested *ex parte* interview. As one court reasoned in allowing defense counsel to conduct *ex parte* interviews with a plaintiff's treating physician pursuant to a court order containing a provision informing the treating physician that he/she was not required to engage in the discussions, "Plaintiff's treating physician may choose to speak with Defendant or may choose not to, but this decision should be made with full knowledge of the circumstances." *Croskey*, 2005 WL 4704767 at *4. As such, a protective order containing such a statement should not be invalidated merely because it provides a

treating physician with knowledge of the circumstances of the requested *ex parte* interview.

In addition, at least one court has squarely rejected the reasoning of the Court of Appeals opinion. In *Pratt v. Petelin*, No. 09-2252- CM-GLR, 2010 WL 446474 (D. Kan. February 4, 2010), a federal magistrate judge for the District of Kansas rejected the same kind of reasoning used by the Court of Appeals and held that it "declines to adopt the holding that *ex parte* interviews are not considered 'in the course of' a judicial proceeding." *Id.* at *8. The court reasoned that [a]lthough 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." *Id.* Furthermore, as indicated above other courts have permitted such protective orders. *See, e.g.*, *Holman* 761 N.W.2d 391; *Harris*, 2007 WL 164031; *Holmes*, 158 P.3d 1039; *Harhara*, 2007 WL 2713847.

Protective orders issued by trial courts authorizing defense counsel to conduct *ex parte* interviews are incidental to pending lawsuits and remain under the supervision of the trial court. Consequently, such protective orders are issued in the course of a judicial proceeding.

CONCLUSION

For the reasons stated above, the Court should deny Relators Petition for Writ of Prohibition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

Pursuant to Rule 84.06(c), the undersigned hereby certifies that: (1) this Brief includes the information required by Rule 55.03; (2) this Brief complies with the limitations contained in Rule 84.06(b); and (3) this Brief contains 7283 words, as calculated by the Microsoft Word software used to prepare this Brief.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served, via U.S. Mail, on this 30th day of April 2010, on:

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