

IN THE SUPREME COURT OF MISSOURI

STATE ex rel. BOBBIE JEAN PROCTOR
and VINCENT PROCTOR,
Relators

vs.

Appeal No. SC90610

THE HONORABLE EDITH L. MESSINA,
Respondent

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
AT KANSAS CITY
16th JUDICIAL CIRCUIT
THE HONORABLE EDITH L. MESSINA, JUDGE
On Transfer from the Western District Missouri Court of Appeals,
Case No. WD71326

SUBSTITUTE REPLY BRIEF OF RELATORS

Michael T. Yonke, No. 42821
myonke@yplawfirm.com
Hans H. van Zanten, No. 52045
hvanzanten@yplawfirm.com
YONKE & POTTENGER, L.L.C.
1100 Main Street, Suite 2450
Kansas City, Missouri 64105
(816) 221-6000
FAX (816) 221-6400
Attorneys for Relators

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ARGUMENT

The “Litigation Exception”:

HIPAA was enacted to, among other things, “ensure the integrity and confidentiality of [patient] information.” 42 U.S.C. § 1320d-2(d)(2)(A); *see also State ex rel. Proctor v. Messina*, 2009 WL 3735919 (Mo.App.W.D.,2009)(“In HIPAA, Congress directed the Secretary to issue rules and regulations designed to *ensure the privacy of patients’ medical information.*” *Id.* at 5 (emphasis in original)). In 2003, the privacy rules became effective, including the “litigation exception” found at 45 C.F.R. § 164.512(e). Respondent argues that HIPAA “expressly contemplates and provides for disclosure of PHI pursuant to an Order like that issued by Judge Messina in this case.” (St. Joseph Brief at p.22). However, a secret, oral *ex parte* interview, without the presence of the patient or her counsel, violates HIPAA because adequate safeguards cannot be devised due to the very nature of a secret, *ex parte* interview. By virtue of being “*ex parte*”, there will always be a risk of inadvertent violation of the confidential relationship between patient and physician that HIPAA seeks to protect. An *ex parte* interview does not fit into any of the rules or exceptions within HIPAA. Within the context of an *ex parte* interview, no particular PHI is requested until after the entry of an Order, such as the one entered by Respondent.

Respondent maintains the Order is compliant and consistent with HIPAA because there was a hearing prior to the entry of the Order and the Plaintiffs had notice and an opportunity to object. However, there has been no meaningful notice or opportunity to object to the requested PHI because the patient is not made aware of what information is actually going to be requested. The hearing regarding the Defendants' motion for an Order authorizing *ex parte* interviews was essentially notice and opportunity to object to the request to make an *ex parte* request for PHI, not to the actual disclosure of PHI.

The purpose of these secret *ex parte* interviews is for the Defendants to gather PHI that is not disclosed to the patient or her counsel. Neither the trial court, nor the Plaintiffs, will ever know the information requested by the Defendants in the context of an *ex parte* interview. There can be no assurance of compliance with the protections of HIPAA within an *ex parte* interview, even with a Court Order outlining the scope of permitted disclosure. This is precisely why *ex parte* contacts are not in the "letter and spirit" of HIPAA because the protections provided by HIPAA cannot be achieved within the informal context of a secret *ex parte* interview. The patient has no notice or opportunity to object to statements and questions actually discussed. The patient cannot object because she does not know the questions that are going to be asked or what is going to be said. Just because all of the parties have knowledge an *ex parte* interview is going to take place does not

place any protections or safeguards as to what is actually discussed, including the mental impressions and opinions of treating physicians.

Contrary to Respondent's assertion, Relators are not using the patient physician privilege as a sword and shield. Respondent incorrectly frames the issue as being a waiver issue. The issue is not the waiver of the privilege or the discoverability of PHI, but the method and manner in obtaining PHI under the purview of HIPAA protections. HIPAA protections simply cannot be effectuated within the context of an *ex parte* interview. HIPAA neither endorses nor prohibits informal discovery of PHI. Since formal discovery methods contemplated by HIPAA require notice and an opportunity to object, informal discovery would require, at a minimum, the same safeguards. In other words, safeguards for informal discovery should be greater than for formal discovery since there is no notice to the actual request for PHI or an opportunity to object.

Even if the Order executed in this case is deemed compliant with HIPAA, which it is not, there is nothing in the Missouri rules that allows for this type of formal order for informal discovery. Respondent argues the Order is proper in this case and protects the health care provider because it provides clear notice of the permitted disclosure. Prior to the enactment of HIPAA, Missouri did not prohibit *ex parte* interviews. See, *Brandt v. Medical Defense Associates*, 856 S.W.2d 667 (Mo. banc 1993). The risk was essentially on the physician or health care provider to

determine the proper scope of disclosure. Now, Respondent argues, HIPAA provides a procedural device that allows Respondent to issue an Order, thus protecting the physician (or other covered entities). However, the Order is misleading because it is labeled as such. If there is an inadvertent wrongful disclosure by the health care provider, there is nothing the Court could do to remedy the disclosure (except possibly to sanction counsel or the party who sought the disclosure). The disclosure cannot be undone. The Utah Supreme Court has voiced similar concerns with regard to *ex parte* interviews:

We agree with the courts that have prohibited *ex parte* communications between a plaintiff's treating physician and defense counsel for two primary reasons. First, not doing so undermines patient expectations of physician-patient confidentiality. Second, appropriately limiting the scope of a treating physician's disclosure requires judicial monitoring that cannot occur in the context of *ex parte* communications.

Sorensen v. Barbuto, 177 P.3d 614, 619 (Utah 2008).

Since the protections contemplated by HIPAA (e.g. notice and opportunity to object) are impossible to impose within the context of a secret, *ex parte* interview, HIPAA does not allow *ex parte* interviews. Given the foregoing, HIPAA is contrary to Missouri law that permits *ex parte* interviews. If HIPAA is considered more stringent in this context, in order for HIPAA to preempt Missouri law on the subject,

it has to be impossible to comply with both. *See Beverly Cohen, Reconciling the HIPAA Privacy Rules with State Laws Regulating Ex Parte Interviews of Plaintiffs' Treating Physicians: A Guide to Performing HIPAA Preemption Analysis*, 43 Hous. L.Rev. 1091 (Winter 2006). Even though HIPAA and Missouri law seem to be in conflict, compliance can be achieved with both HIPAA and Missouri law by express authorization of the Patient. Thus, there is no preemption in this context. However, just because HIPAA does not preempt Missouri law on the subject does not mean HIPAA should be ignored and not complied with. HIPAA is not silent on oral disclosure of PHI applicable to *ex parte* interviews. Absent an express authorization, the protections afforded within the litigation exception cannot be adequately satisfied.

Respondent relies heavily upon *Arons v. Jutkowski*, 9 N.Y.3d 393, 880 N.E.2d 831(2007)¹. First, the Court in *Arons* decided, contrary to Missouri law, that the Plaintiff could be compelled to sign an authorization which authorized defense counsel to meet with the Plaintiff's treating physicians *ex parte*. *See Id.* Second, the

¹ Respondent declares *Browne v. Horbar*, 6 Misc. 3d 780 (N.Y. Sup. 2004) cited by Relators has been "abrogated" by the *Arons* case. St. Joseph Brief at p. 29, fn.2. However, the *Browne* case has not been abrogated, overruled or mentioned by *Arons*. *Browne* did not consider or decide whether allowing treating physicians to speak with individuals against their patients' wishes is inconsistent with HIPAA. *See Id.* at 786-8.

reasoning of the New York Court of Appeals is flawed when it concluded there is “no conflict between New York law and HIPAA on the subject of *ex parte* interviews because HIPAA does not address the subject.” *Id.* at 415. Protected “health information” as defined by the Secretary includes orally disseminated health information. 45 C.F.R. § 160.103. This would necessarily include *ex parte* “oral” communications with a physician. Respondent, in relying on *Arons*, argues “that Court held that HIPPA (sic) merely imposed procedural prerequisites to informal discovery permitted under state law.” (St. Joseph Brief at p. 29). At some point, the imposition of procedural requirements transforms informal discovery to formal discovery. As stated previously, this method of discovery is not enumerated within the Missouri Supreme Court Rules, and any information that can be legitimately obtained within an *ex parte* interview can be obtained within formal discovery methods where all parties are protected.

Constitutional Issue:

Respondent argues that the inability to perform *ex parte* interviews is a constitutional violation. As stated in *Century 21-Mabel O. Pettus, Inc. v. City of Jennings*, 700 S.W.2d 809, 810 (Mo. 1985): “[i]t is firmly established that a constitutional question must be presented at the earliest possible moment ‘that good pleading and orderly procedure will admit under the circumstances of the given case, otherwise it will be waived.’ ” *Meadowbrook Country Club v. Davis*, 384 S.W.2d

611, 612 (Mo.1964); *Securities Acceptance Corp. v. Hill*, 326 S.W.2d 65, 66 (Mo.1959). Respondent has failed to raise the constitutional issue in any of the prior pleadings before the trial court. The constitutional violation was raised for the first time in Respondent's Application for Transfer and is not properly preserved. Thus, Respondent has waived any constitutional issues by failing to raise it at the earliest opportunity. Respondent argues that Defendants would be unable "to conduct factual investigations or explore theories of the case with key fact witnesses...." (St. Joseph brief at p. 50). However, these fact witnesses create records which are available to Defendants. Further, any opinions held by these fact witnesses are discoverable through formal discovery methods.

HIPAA not intended to disrupt current litigation practices:

By precluding *ex parte* interviews by defense counsel, a Plaintiff still has to consent to production of PHI, which can still be obtained through formal discovery methods where everyone is protected. Again, Respondent misses the mark. The focus here is not the discoverability of the Plaintiff's medical condition because of a state-made waiver rule. The focus is on the method of obtaining the information in light of HIPAA's privacy concerns. As stated above, HIPAA's protections cannot be achieved within the context of an informal *ex parte* interview.

Respondent’s Order is not compelling Plaintiff to sign authorization:

Respondent argues the Order here is not compelling Plaintiff to do anything. Thus it is distinguishable from Missouri cases that prohibit compelling Plaintiff to execute a medical authorization authorizing *ex parte* interviews. This is a distinction without a difference. The Order authorizes treating physicians to meet privately with defense counsel over Plaintiff’s objection. The effect of the Order is in direct conflict with *State ex rel. Woytus v. Ryan*, 776 S.W.2d 389, 395 (Mo. banc 1989), *Brandt v. Medical Defense Associates*, 856 S.W.2d 667 (Mo. banc 1993), and *Brandt v. Pelican*, 856 S.W.2d 658 (Mo. banc 1993). The Plaintiff is indirectly being compelled to consent to defense counsel meeting *ex parte* with Plaintiff’s treating physicians. The Order here is the same result as if the trial Court had compelled Plaintiff to execute an authorization which authorized defense counsel to secretly meet with Plaintiff’s treating physicians outside the presence of Plaintiff or her counsel.

“Required by Law” Exception:

Respondent argues, in conjunction with the “litigation exception” (45 C.F.R. § 164.512(e)), that the “Required by Law” exception applies within the context of an *ex parte* interview. However, Respondent’s reliance is misguided and misplaced. The “required by law” exception was clearly intended to be a catch-all for those state laws or mandates that require disclosure based upon its own policy reasons. There is

nothing in Missouri law which mandates or requires disclosure within the context of an *ex parte* interview with covered health care providers by defense counsel. While the waiver of privilege may require the disclosure of relevant PHI by the Plaintiff in a personal injury action pursuant to Missouri law, the method of disclosure pursuant to Missouri law is within the confines of formal discovery. Pursuant to Missouri law, there is no informal discovery method which compels disclosure.

Further, the “required by law” provision must meet the requirements of subsections (c), (e) or (f). *See* 45 C.F.R. § 164.512(a)(2). Subsection (e) is the “litigation exception” previously discussed. Subsection (c) deals with victims of abuse, neglect or domestic violence; and subsection (f) deals with law enforcement purposes. Thus, the only applicable subsection within the context of this case is the litigation exception contained within subsection (e). It makes sense, by the plain language contained within 45 C.F.R. §164.512(e), that it be read in conjunction with the “required by law” exception contained in 45 C.F.R. § 164.512(a). The litigation exception is essentially part of the “required by law” exception. For example, 45 C.F.R. § 164.512(e)(1)(i), states in pertinent part:

(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; or
- (Emphasis added).*

“In response to an order” suggests the disclosure is required because an order compels disclosure. The Order here does not order the disclosure of PHI within an *ex parte* interview. Therefore, the health care provider is not responding to an Order, but would be responding to a request by defense counsel for an *ex parte* interview. Responding to an Order is in line with the “required by law” exception. A situation could arise where a health care provider fails to respond to a subpoena. Thereafter, the party seeking disclosure could move the Court for an order compelling disclosure as commanded by the subpoena. However, the Order executed by Respondent in this case was not compelling disclosure of anything. It essentially provided the health care provider an authorization to disclose PHI. Another example of the “required by law” exception is subsection (c) which deals with victims of abuse, neglect or domestic violence. Missouri has a mandatory reporting statute for suspected abuse. R.S.Mo. § 210.115. When a health care provider encounters suspected abuse, disclosure is required pursuant to Missouri law. *Id.* Within the context of *ex parte*

interviews, the broad “required by law” exception discussed by Respondent simply does not add anything to the litigation exception previously discussed.

Health Care Operations – Legal Services:

Respondent and Amici cite to the “Health Care Operations” exception to obtaining an express authorization. The Privacy Rule permits a defendant physician to use or disclose patient information to defend him or herself without obtaining the prior written authorization of the patient who is the subject of the information. *See* 45 C.F.R. § 164.506(c)(1) (permitting a covered entity to use or disclose protected health information for its own treatment, payment, or health care operations without the prior written authorization of the patient); *Id.* § 164.501 (defining health care operations to include legal services). However, to construe these provisions as allowing *ex parte* interviews within the litigation context is a stretch. HIPAA specifically addresses permitted disclosures within the context of litigation in 45 C.F.R. 164.512(e). To interpret the Health Care Operations provision in the manner Respondent does renders the litigation exception meaningless. It also heightens the likelihood of inadvertent disclosure of embarrassing or unrelated protected health information because there would be no oversight or protection with regard to the scope of any disclosures.

Briefs filed by Amicus Curiae in Support of Respondent:

Two (2) amicus briefs filed in support of Respondent cite to *Holman v. Rasak*, 761 N.W.2d 391 (Mich. Ct. App. 2008). As correctly pointed out by one, an appeal has been granted to the Michigan Supreme Court and is currently pending. Thus, reliance on Michigan case law is inappropriate. Interestingly, one of the amicus briefs does not contain a single case citation.

It is somewhat surprising the amicus briefs filed by the various medical associations advocate for the allowance of *ex parte* interviews. Even if the Order signed by Judge Messina is deemed appropriate by this Court, there is no Court oversight or supervision with regard to this informal discovery method. In fact, Respondent maintains “there is no need for court oversight of this order because it is not part of formal discovery.” (Blackburn Brief at p. 25). Thus, the risk of inadvertent disclosure penalties falls squarely on the health care provider, who has knowledge of the PHI, and has to make a determination as to what is appropriate for disclosure. It is unfair to place the health care provider in this position. The Supreme Court of Iowa voiced similar concerns in *Roosevelt Hotel Ltd. Partnership v. Sweeney*, 394 N.W.2d 353, 357 -358 (Iowa 1986):

The possibility of inadvertent wrongful disclosure of confidential matters troubles us. We do not mean to question the integrity of doctors and lawyers or to suggest that we must control discovery in order to assure their ethical

conduct. We are concerned, however, with the difficulty of determining whether a particular piece of information is relevant to the claim being litigated. Placing the burden of determining relevancy on an attorney, who does not know the nature of the confidential disclosure about to be elicited, is risky. Asking the physician, untrained in the law, to assume this burden is a greater gamble and is unfair to the physician. We believe this determination is better made in a setting in which counsel for each party is present and the court is available to settle disputes. Furthermore, we see the forced consent to private interviews with plaintiffs' health care providers as inconsistent with our discovery rules generally. Deposition testimony is obtained when opposing counsel are present and participate, and the testimony is recorded and preserved. *See Iowa R. Civ. P. 140.* Arguments based on invasion of attorney work product and trial strategy are unpersuasive and somewhat out of tune with our modern discovery process.

The formal discovery methods enumerated within the Missouri Supreme Court Rules provides defense counsel the method to obtain the same information sought after in an *ex parte* interview, while at the same time protecting all parties and non-parties. Any potential benefits the defense counsel may have by conducting *ex parte* interviews is easily outweighed by the patient's privacy interests and the societal interest in maintaining the sanctity of the physician patient relationship.

CONCLUSION

Relators pray that this Court, upon hearing of all matters at issue herein, will make Relators' writ of prohibition or mandamus absolute, and will grant Relators such other processes, orders and remedies as may to the Court appear fair, just and appropriate under the circumstances.

YONKE & POTTENGER, L.L.C.

Michael T. Yonke, No. 42821
myonke@yplawfirm.com
Hans H. van Zanten, No. 52045
hvanzanten@yplawfirm.com
1100 Main Street, Suite 2450
Kansas City, Missouri 64105
(816) 221-6000
FAX (816) 221-6400
Attorneys for Relators

CERTIFICATION OF SERVICE AND COMPLIANCE

WITH RULE 84.06(b) and (c)

The undersigned hereby certified that on this 13th day of May, 2010, one true and correct copy of the foregoing Reply Brief, and one CD-ROM disk containing the foregoing Reply Brief, in Microsoft Word (2007) format, were mailed, postage prepaid, to:

Honorable Edith L. Messina
Circuit Court of Jackson County, Division 12
415 East 12th Street
Kansas City, Missouri 64106
RESPONDENT

Jana V. Richards
Maureen M. Brady
SANDERS CONKRIGHT & WARREN, LLP
9401 Indian Creek Parkway, Suite 1250
Overland Park, Kansas 66210
**ATTORNEYS FOR TIMOTHY L. BLACKBURN, M.D.
AND KANSAS CITY HEART GROUP, P.C.**

Sean T. McGrevey
Scott M. Adam
ADAM & McDONALD, PA
9300 West 110th Street, Suite 470
Overland Park, Kansas 66210
ATTORNEYS FOR ST. JOSEPH MEDICAL CENTER

Leland Dempsey
Ashley L. Baird
DEMPSEY & KINGSLAND, PC
1100 Main Street, Suite 1860
Kansas City, MO 64105
**ATTORNEYS FOR AMICUS CURIAE MISSOURI
ASSOCIATION OF TRIAL ATTORNEYS**

Robert W. Cotter
Matthew M. Geary
DYSART TAYLOR LAY COTTER & MCMONIGLE, PC
4420 Madison Avenue
Kansas City, Missouri 64111
**ATTORNEYS FOR AMICUS CURIAE MISSOURI ORGANIZATION
OF DEFENSE LAWYERS**

Harvey M. Tettlebaum
Robert L. Hess, II
HUSCH BLACKWELL SANDERS, LLP
235 East High Street, Suite 200
Jefferson City, MO 65101
**ATTORNEYS FOR AMICUS CURIAE AMERICAN COLLEGE OF
RADIOLOGY, MISSOURI RADIOLOGICAL SOCIETY, MISSOURI
DENTAL ASSOCIATION, MISSOURI HEALTH CARE ASSOCIATION,
AND DELMAR GARDENS NORTH OPERATING, LLC**

R. Kent Sellers
LATHROP & GAGE, LLP
2345 Grand Blvd., Suite 2200
Kansas City, MO 64108
**ATTORNEY FOR AMICUS CURIAE MISSOURI HOSPITAL
ASSOCIATION**

The undersigned further certifies that the foregoing Reply Brief complies with the limitations contained in Rule No. 84.06(b), and that the Brief contained 3,732 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the Brief, has been scanned for viruses and is virus free.

Respectfully submitted,

YONKE & POTTENGER, L.L.C.

Michael T. Yonke, No. 42821
myonke@yplawfirm.com
Hans H. van Zanten, No. 52045
hvanzanten@yplawfirm.com
1100 Main Street, Suite 2450
Kansas City, Missouri 64105
(816) 221-6000
FAX (816) 221-6400
Attorneys for Relators