



## IN THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

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

Relators, )

v. )

THE HONORABLE EDITH L. )  
MESSINA, CIRCUIT JUDGE, )  
SIXTEENTH JUDICIAL CIRCUIT, IN )  
JACKSON COUNTY, MISSOURI, )

Respondent. )

WD71326

OPINION FILED:  
November 10, 2009

### ORIGINAL PROCEEDING IN PROHIBITION

**Before:** James M. Smart, Jr., Presiding Judge, and James E. Welsh and Mark D. Pfeiffer, Judges

Bobbie Jean and Vincent Proctor have sought a writ from this court seeking to prohibit the Circuit Court of Jackson County (trial court) from enforcing its purported discovery order in the pending civil case of *Bobbie Jean Proctor & Vincent Proctor vs. Kansas City Heart Group, P.C., Timothy L. Blackburn, M.D., & St. Joseph Medical Center*, Case No. 0816-CV24576. In the case below, the trial court issued a purported *formal* discovery order advising non-parties that the trial court believed it was permissible for these non-party medical providers to engage in *informal ex parte* communications with attorneys for the defendant medical providers. We

issued a preliminary writ on August 25, 2009, to determine the extent to which the federal Health Insurance Portability and Accountability Act of 1996, Pub.L. No. 104-191, 110 Stat.1936 (HIPAA), pre-empted Missouri law on the issue of *ex parte* communications in informal discovery and also to re-examine the State of Missouri's law on this topic. We now make our preliminary writ absolute.

Bobbie Jean and Vincent Proctor filed a petition for damages for personal injuries against Kansas City Heart Group, P.C., Timothy L. Blackburn, M.D., and St. Joseph Medical Center. In their petition, the plaintiffs alleged that Bobbie Jean suffered damages arising out of the defendants' medical negligence during her surgery in March 2004.

On January 28, 2009, Blackburn and Kansas City Heart Group, P.C., filed a motion in which they sought a *formal* order from the court specifically authorizing *informal ex parte* communications with Bobbie Jean's treating physicians and other health care providers. On February 24, 2009, St. Joseph Medical Center filed a similar motion. The trial court heard oral arguments on June 11, 2009. On July 17, 2009, the trial court issued its purported *formal* order sustaining the motions and "authorized" non-party medical providers of Bobbie Jean Proctor to engage in *informal ex parte* communications with attorneys representing defendant medical providers, although the purported "order" specifically advises any of plaintiffs' medical providers presented with the purported "order" that they are free to ignore the purported "order" as it relates to *ex parte* communications with parties and their attorneys if they have not received authorization from their patient to engage in such *ex parte* communications.<sup>1</sup> The plaintiffs filed

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<sup>1</sup> Our emphasis on the formality of the trial court's order expressly authorizing informal, *ex parte* communications with a litigant patient's non-party physician absent express authorization from the patient relates to our discussion, *infra*, that trial courts in the State of Missouri have no oversight authority to supervise such informal discovery.

a motion seeking a writ of prohibition. On August 25, 2009, we issued a preliminary writ.

“Prohibition is a discretionary writ that only issues to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power.” *State ex rel. Marianist Province of the U.S. v. Ross*, 258 S.W.3d 809, 810 (Mo. banc 2008).

In *State ex. rel Collins v. Roldan*, 289 S.W.3d 780, 783 (Mo. App. W.D. 2009), this court noted that pursuant to the Supremacy Clause of the United States Constitution, HIPAA may pre-empt Missouri law on the issue of *ex parte* communications between an attorney and a treating physician. We did not examine or decide this issue because we decided the case on other grounds. *Id.* at 784 n.6. This application for writ of prohibition, however, puts the issue of whether or not HIPAA pre-empts Missouri law squarely before us. This is an issue of first impression in Missouri courts.

The Supremacy Clause of the United States Constitution states that federal law “shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2. Under this clause, state laws that conflict with federal laws are pre-empted and have no effect. *Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748, 798 (Mo. App. W.D. 2008). The United States Supreme Court has cautioned that in the interest of preventing federal encroachment on the state’s authority, a court interpreting a federal statute pertaining to areas traditionally controlled by state law should be reluctant to find pre-emption. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Thus, the United States Supreme Court has held that a federal law will pre-empt state law only when it is the clear and manifest purpose of Congress to

do so. *Id.* To determine if Congress intended to pre-empt state law, the court must examine the text and structure of the federal law. *Id.*

There are three types of pre-emption: (1) express pre-emption, when a federal law expressly declares that it pre-empts state law, (2) implied field pre-emption, when “the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” and (3) conflict pre-emption, when “compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *In re Estate of Bruce*, 260 S.W.3d 398, 400 (Mo. App. W.D. 2008) (quoting *Jensen v. Mo. Dep’t of Health & Senior Servs.*, 186 S.W.3d 857, 860 (Mo. App. W.D. 2006)).

Congress included an express pre-emption clause in HIPAA. *See* 42 U.S.C.A. § 1320d-7(a). Because HIPAA contains an express pre-emption clause, our task is to construe the plain language of the statute to determine the extent to which Congress intended for HIPAA to pre-empt state law. *CSX Transp.*, 507 U.S. at 664.

HIPAA’s pre-emption clause is contained in 42 U.S.C.A. § 1320d-7, which states that:

(1) General rule

Except as provided in paragraph (2), *a provision or requirement under this part, or 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*, including a provision of State law that requires medical or health plan records (including billing information) to be maintained or transmitted in written rather than electronic form.

(2) Exceptions

A provision or requirement under this part, or a standard or implementation specification adopted or established under sections 1320d-1

through 1320d-3 of this title, shall not supersede a contrary provision of State law, if the provision of State law—

(A) is a provision the Secretary determines—

(i) is necessary—

(I) to prevent fraud and abuse;

(II) to ensure appropriate State regulation of insurance and health plans;

(III) for State reporting on health care delivery or costs; or

(IV) for other purposes; or

(ii) addresses controlled substances[.]

Pursuant to the authority granted to it under HIPAA, 42 U.S.C.A. § 1320d-2(d)(2)(A), the Secretary of the Department of Health and Human Services (the Secretary) promulgated a federal regulation on HIPAA’s pre-emptive effect. This regulation is similar to HIPAA’s statutory language and states that “[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). The regulations define “State law” as “a constitution, statute, regulation, rule, common law, or other State action having the force and effect of law.” 45 C.F.R. § 160.202. 45 C.F.R. § 160.203 also provides exceptions to this general rule and states that HIPAA will not pre-empt state law when, among other things, the state law is more stringent:

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. This general rule applies, except if one or more of the following conditions is met:

.....

(b) The provision of State law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter.

HIPAA's language states that "**a** provision or requirement under this part, or 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[.]" 42 U.S.C.A. § 1320d-7(a)(1). Congress used the indefinite article "a" to modify the term "provision." Because Congress did not identify which provision of HIPAA would pre-empt state law, it is apparent that Congress is using the term "a" to mean that **any** provision of HIPAA could supersede **any** provision of state law. See BLACK'S LAW DICTIONARY 1 (5<sup>th</sup> ed. 1979) (mentioning that the indefinite article "a" "is not necessarily a singular term" and "is often used in the sense of 'any'"); *Lewis v. Spies*, 350 N.Y.S.2d 14, 17 (N.Y. App. Div. 1973). Congress, however, used the singular noun "provision." By using the singular noun "provision," it is clear that Congress envisioned a scenario where a single provision of HIPAA could replace a single provision of state law but the rest of the state's law would still be enforceable.

Our interpretation is consistent with the Secretary's interpretation of the rules and regulations. The Secretary has stated that, to engage in a pre-emption analysis, the court must first isolate a specific provision of HIPAA and compare that provision with its analogous state provision:

The initial question that arises in the preemption analysis is, what does one compare? The statute directs this analysis by requiring the comparison of a "provision of State law [that] imposes requirements, standards, or implementation[] specifications" with "the requirements, standards, or implementation specifications imposed under" the federal regulation. The statute thus appears to contemplate that what will be compared are the State and federal requirements that are analogous, i.e., that address the same subject matter.

Department of Human Health and Services, Standards for Privacy of Individually Identifiable Health Information, 64 Fed. Reg. 59918, 59995 (Nov. 3, 1999). The Secretary also recognizes that, even if HIPAA pre-empts one provision of state law, the rest of the state's laws relating to the privacy of an individual's health information would remain enforceable:

It is recognized that States generally have laws that relate to the privacy of individually identifiable health information. These laws continue to be enforceable, unless they are contrary to part C of title XI or the standards, requirements, or implementation specifications adopted or established pursuant to the proposed subpart x.

*Id.*

The issue for a court engaging in a HIPAA pre-emption analysis, therefore, is not whether or not HIPAA, as a general matter, is contrary to and more stringent than the entirety of a state's laws on the privacy of a patient's medical information. Rather, the issue is whether or not a specific provision of HIPAA is contrary to and more stringent than a specific provision of state law. *See also* 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, 1133 (Winter 2006) (stating that most courts err in performing HIPAA pre-emption analysis because they fail to isolate specific provisions and instead attempt to determine whether or not the entire state statutory scheme is contrary to the entirety of HIPAA).

Thus, under the plain and ordinary language of HIPAA's pre-emption clause, to engage in a pre-emption analysis, we must first identify a specific provision of HIPAA that conflicts with any provision of Missouri's law on *ex parte* communications between attorneys and physicians to determine whether or not any provision of Missouri's law on such *ex parte*

communications is contrary to any provision of HIPAA's and, if so, whether or not it is more or less stringent than HIPAA's provision. If and when we conclude that a specific provision of HIPAA pre-empts Missouri law in any fashion, our discussion is not complete until we harmonize any other specific provisions of Missouri law that are not pre-empted by HIPAA. So, our discussion on this topic is twofold: to identify both (1) conflicting provisions of HIPAA and Missouri law and (2) those provisions of Missouri law that do not conflict with HIPAA. In doing so, our goal is to provide guidance to Missouri's trial courts, litigants, and their attorneys as to what is and is not permissible in the area of *ex parte* oral communications between defendants or their attorneys or representatives, and plaintiff's treating physicians.

**HIPAA and Missouri Law on the Issue of Ex Parte Communications**

Our 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. In HIPAA, Congress directed the Secretary to promulgate rules and regulations designed to *ensure the privacy of patients' medical information*. 42 U.S.C.A. § 1320d-2(d)(2)(A); *see also Crenshaw v. Mony Life Ins. Co.*, 318 F. Supp.2d 1015, 1028 (S.D. Cal. 2004); *Moreland v. Austin*, 670 S.E.2d 68, 70 (Ga. 2008) (HIPAA's goal is to protect a patient's health information). It comes as no surprise then, that with the governing principle of patient privacy, the Secretary did, in fact, create regulations prohibiting health care providers from disclosing "protected health information," whether "oral or recorded in any form or medium," unless medical providers comply with a narrow list of exceptions separately itemized by the Secretary elsewhere in the Secretary's regulatory scheme. The HIPAA regulations draw no distinction between formal versus informal disclosures and, instead, broadly prohibit all

disclosures in the absence of a specifically enumerated exception to this general rule of prohibition.

Specifically, the Secretary defined protected “health information” as:

*[A]ny* information, whether *oral* or recorded in any form or medium, that:

(1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and

(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; or the past, present, or future payment for the provision of health care to an individual.

45 C.F.R. § 160.103 (emphasis added). This federal regulation’s use of the term *oral* communication is clearly broad enough to include *ex parte* “oral” communications with a physician and it is, likewise, broad enough to encompass health information that is part of a written medical record or the physician’s memory of his treatment of the patient. Generally speaking, then, HIPAA promotes a renewed awareness of, or emphasis upon, the principle of patient privacy. For these reasons, we conclude that HIPAA generally prohibits physicians from engaging in an *ex parte* oral disclosure of a patient’s protected health information.<sup>2</sup>

In most, if not all, respects, Missouri law on *ex parte* communications is consistent with the scope, purpose, and specific regulatory premise of HIPAA. In other respects, a person could argue that Missouri law is contrary to HIPAA on this topic. To understand the dividing lines, we must review the history of Missouri’s case precedent that has led to its current state of the law on this topic.

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<sup>2</sup> As discussed later herein, HIPAA itemizes exceptions to the general prohibition of the disclosure of protected health information, but none that apply to this factual setting.

We begin the odyssey in 1968 with our Missouri Supreme Court's first commentary on the relationship between a plaintiff's right of patient confidentiality in the doctor-patient privilege context and the defendant's right to conduct discovery when the plaintiff places his physical condition in issue in the filing of a personal injury lawsuit. In *State ex rel. McNutt v. Keet*, 432 S.W.2d 597 (Mo. banc 1968), the Missouri Supreme Court, while not addressing the issue of *ex parte* contacts with treating physicians, concluded that when a plaintiff placed his physical condition in issue by filing a personal injury lawsuit, he waived the privileged status of medical information contained within the plaintiff's medical records. *Id.* at 601.

The issue of *ex parte* conversations with treating physicians was first addressed by a Missouri court in *State ex rel. Stufflebam v. Appelquist*, 694 S.W.2d 882 (Mo. App. S.D. 1985). In *Stufflebam*, the court concluded that a litigant patient who had placed his physical condition at issue in a personal injury lawsuit could be ordered by the trial court to execute an authorization consenting to *ex parte* communications between his treating physicians and the opposing litigant's counsel. *Id.* at 888.

Four years later, however, the Missouri Supreme Court abrogated the holding in *Stufflebam* in *State ex rel. Woytus v. Ryan*, 776 S.W.2d 389 (Mo. banc 1989), and expressly held that a litigant patient in a personal injury lawsuit could not be compelled by court order to sign medical authorizations consenting to *ex parte* communications with treating physicians. *Id.* at 395. In *Woytus*, our Missouri Supreme Court expressed numerous policy statements that mirror the privacy policies of HIPAA, and it is worth noting a number of these statements in analyzing the relationship of HIPAA, Missouri law, and the case presently before us. For illustrative purposes:

Although the patient is deemed to have waived the statutory privilege with regard to certain information, the ongoing confidential and fiduciary relationship between physician and patient continues to require protection from conduct that might jeopardize the sanctity of that relationship.... “A physician occupies a position of trust and confidence as regards his patient – a fiduciary position. It is his duty to act with the utmost good faith. This duty of the physician flows from the relationship with his patient and is fixed by law...”

*Id.* at 393 (citation omitted). The court refused to compel a patient to sign a medical authorization order consenting to *ex parte* communications because “the [Missouri Rules of Civil Procedure] do not expressly forbid *ex parte* discussion, [or] expressly authorize such discussion as a method of discovery.” *Id.* at 392. The Supreme Court refused to add a non-enumerated discovery method to the Rules because of the potential risks to the physician-patient privilege:

[T]his Court will not require that a non-enumerated discovery method be added to those already available under the [Missouri Rules of Civil Procedure]. Information or evidence that can be obtained legitimately through *ex parte* discussion [with treating physicians] can also be obtained through the methods of discovery listed in the [Missouri Rules of Civil Procedure]. Any burdens caused defendants by being restricted to the specially enumerated discovery procedures are outweighed by the potential risks to the physician-patient relationship in deviating from those procedures.

*Id.* at 395. These risks include the possibility (or, some would argue, probability) that:

An unauthorized *ex parte* interview could disintegrate into a discussion of the impact of a jury’s award upon a physician’s professional reputation, the rising cost of malpractice insurance premiums, the notion that the treating physician might be the next person to be sued, and other topics which might influence the treating physician’s views.

*Id.* (quoting *Manion v. N.P.W. Med. Ctr. of N.E. Pa., Inc.*, 676 F. Supp. 585, 594-95 (M.D. Pa. 1987)).

Finally, in 1993, our Missouri Supreme Court issued a pair of companion opinions addressing voluntary and informal *ex parte* communications between plaintiff’s treating physician and defendant or defendant’s representatives. *Brandt v. Pelican*, 856 S.W.2d 658 (Mo.

banc 1993) (*Brandt I*); *Brandt v. Med. Def. Assocs.*, 856 S.W.2d 667 (Mo. banc 1993) (*Brandt II*).

In *Brandt I*, the issue presented was whether voluntary and informal *ex parte* communications between defense counsel and plaintiff's treating physician (without plaintiff's consent) were prohibited during the discovery period of litigation. 856 S.W.2d at 661. The court focused on Missouri's physician-patient testimonial privilege statute, § 491.060(5), RSMo Supp. 1992, and answered the question by concluding that there was nothing in this statute that expressly prohibited<sup>3</sup> informal and voluntary *ex parte* communications with plaintiff's physician. *Id.* Lacking a statutory or common law testimonial preclusion for this informal discovery measure, the court refused to sanction the defendant for the voluntary and informal *ex parte* communication with the plaintiff's treating physician. *Id.* at 662. Notably, though, the court reaffirmed its previous holding in *Woytus* that a plaintiff cannot be compelled to execute a medical authorization authorizing his treating physicians to engage in *ex parte* communications with the defendant nor could plaintiff's treating physician be compelled to engage in informal *ex parte* discussions with the defense. *Id.* Likewise, our Missouri Supreme Court commented that it was correct to observe that "our opinion in *Woytus* 'shows a judicial philosophy that discourages *ex parte* conversations with plaintiff's doctor.'" *Id.* at 661 (citation omitted).

In *Brandt II*, the court's starting point of discussion was a reminder that, in *Brandt I*, the court had concluded that there was no statutory basis in Missouri for concluding that voluntary *ex parte* communications between defense counsel and plaintiff's treating physician were **prohibited**. 856 S.W.2d at 669. With no statutory basis to **prohibit** Missouri personal injury

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<sup>3</sup> There is also nothing in the statute that affirmatively authorizes informal and involuntary *ex parte* communications with a litigant patient's treating physicians.

litigants from engaging in informal discovery via *ex parte* voluntary discussion with plaintiff's treating physicians, the court in *Brandt II* shifted its analysis to whether such voluntary *ex parte* communications by the plaintiff's treating physician violated the physician's common law fiduciary duty of confidentiality. *Id.* The court decided the case based upon the doctrine of waiver, concluding that once a *McNutt* medical privilege waiver occurs in the filing of a personal injury lawsuit in which the plaintiff's medical condition is placed at issue, the plaintiff has waived both the physician's testimonial privilege and the physician's fiduciary duty of confidentiality, including voluntary *ex parte* conferences with the plaintiff's treating physician within the limited scope of the waiver. *Id.* at 674. Notably, though, the Missouri Supreme Court in *Brandt II* reiterates its warning in *Brandt I* that nothing in either of these opinions is designed to create any right to compel the plaintiff or his treating physicians to authorize, or participate in, such *ex parte* communications. *Id.* at 674-75.

Subsequent to *Brandt I* and *Brandt II*, Congress passed HIPAA. Although Missouri's statutory law on the topic of the physician testimonial privilege may be silent on the issue of voluntary *ex parte* communications with a defendant or his representatives, HIPAA is not silent. HIPAA's general rule is that *ex parte* communications with a litigant patient's physician are prohibited. Absent an exception to this general rule in the enumerated exceptions outlined in HIPAA (none of which apply to the underlying facts), HIPAA plainly prohibits such communications. Missouri courts are bound to follow HIPAA's statutory and regulatory mandate. In doing so, we do not believe that we are required to pre-empt Missouri law. However, we conclude that the practical ramification of harmonizing Missouri law with HIPAA versus pre-emption of Missouri law both lead to the same result.

First, based upon the Missouri Supreme Court's holding in *Brandt I*, we believe that our Supreme Court requires enforcement of HIPAA's prohibition of *ex parte* communications with plaintiff's non-party treating physicians. As we noted above, in *Brandt I*, the Supreme Court did not affirmatively *create* a right for attorneys to engage in voluntary and informal *ex parte* communication with plaintiff's physician. Instead, the Supreme Court merely confirmed that, at that time, there was no state or federal law that *prohibited* such informal communications with plaintiff's physicians. *Brandt I*, 856 S.W.2d at 663. In other words, the Missouri Supreme Court held that in the absence of a statutory prohibition—either state or federal—it would not prohibit *ex parte* communications between an attorney and a physician. Conversely, it follows then, had a statutory prohibition—state or federal—existed in 1993, our Missouri Supreme Court would have enforced it. This is especially true given the Supreme Court's dictum in *Brandt I* discouraging attorneys from engaging in *ex parte* communications with physicians. *Id.* at 661. Because of the Supreme Court's language in *Brandt I*, we believe that the Supreme Court was instructing Missouri courts that if the state legislature or Congress enacted a statutory prohibition against *ex parte* communications, then Missouri courts must enforce that statutory prohibition. Hence, since Congress has now enacted HIPAA, which contains a prohibition against *ex parte* communications, we must enforce it. Because compliance with both federal and state law is possible, our interpretation harmonizes Missouri and federal law on this topic and pre-emption of Missouri law is not necessary.

Second, even assuming that the Missouri Supreme Court, in either of the *Brandt* opinions, was not implicitly directing us to enforce a future statutory prohibition of *ex parte* communications, such as HIPAA, we have no choice but to yield to the dictate of HIPAA

because of the pre-emption doctrine. As we noted above, to determine if HIPAA pre-empts state law, we must determine whether or not HIPAA's prohibition of the oral disclosure of plaintiff's protected health information by one or more of plaintiff's treating physicians, absent authorization by plaintiff, pre-empts Missouri law that fails to prohibit such *ex parte* disclosures.

Pursuant to HIPAA's regulations:

Contrary, when used to compare a provision of State law to a standard, requirement, or implementation specification adopted under this subchapter, means:

(1) A covered entity would find it impossible to comply with both the State and federal requirements; or

(2) The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of part C of title XI of the Act or section 264 of Pub.L. 104-191, as applicable.

45 C.F.R. § 160.202.

Here, at the very least, if we were to interpret either of the *Brandt* opinions to stand for the proposition that our Missouri Supreme Court would not apply HIPAA's prohibition of unauthorized, informal *ex parte* communications with a plaintiff's physician, Missouri law would stand as an obstacle to the accomplishment and execution of HIPAA's full purpose, which as we noted above, is to protect a patient's right to the confidentiality of his or her individual medical information. *Crenshaw*, 318 F. Supp.2d at 1028; *see also Moreland*, 670 S.E.2d at 70 (HIPAA's goal is to protect a patient's health information). Missouri law that would refuse to recognize the prohibition of HIPAA and fail to prohibit informal *ex parte* communication would stand in sharp contrast because it would not be designed to protect a patient's private health information. If this were our interpretation of Missouri law, we would have no choice but to conclude that Missouri's law that fails to prohibit health care providers from engaging in

*ex parte* oral communications with an attorney, absent the presence of one of HIPAA's enumerated exceptions (none of which apply to the underlying facts), would be pre-empted by HIPAA.<sup>4</sup>

To the contrary, however, we conclude that Missouri law recognizes that a federal statutory prohibition of such *ex parte* communications is controlling and, as such, we believe that Missouri law dictates to us that we must enforce HIPAA's regulatory scheme prohibiting these *ex parte* communications and that it is, therefore, not necessary for us to conclude that Missouri law is pre-empted. As stated previously, we have illustrated both possible scenarios for the purpose of demonstrating that the result is the same, with or without the application of the pre-emption doctrine.

**HIPAA's Enumerated Exceptions to the Prohibition of *ex parte* Communications**

HIPAA's regulation that prohibits the unauthorized disclosure of a patient's protected health information, however, does include enumerated exceptions to the ban:

(1) Permitted uses and disclosures. A covered entity is *permitted* to use or disclose protected health information as follows:

(i) To the individual;

(ii) For treatment, payment, or health care operations, as permitted by and in compliance with § 164.506;

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<sup>4</sup> Although not raised by the parties, we would note that we have a duty *sua sponte* to address issues of our jurisdiction. *In re Estate of Bruce*, 260 S.W.3d 398, 400 n.1 (Mo. App. W.D. 2008). As we noted in *State ex. rel Collins v. Roldan*, 289 S.W.3d 780, 783 (Mo. App. W.D. 2009), the Missouri Supreme Court has crafted Missouri's law on *ex parte* communications between an attorney and treating physicians. Of course, an appellate court is bound by Missouri Supreme Court precedent and cannot overrule such precedent. *Custer v. Hartford Ins. Co.*, 174 S.W.3d 602, 609 (Mo. App. W.D. 2005). Thus, if the issue of pre-emption created a question concerning the validity of the Supreme Court's precedent, we would not have jurisdiction to address the issue. As we noted in *Bruce*, however, pre-emption does not concern the law's validity. 260 S.W.3d at 400 n.1. Rather, it merely presents an issue of whether or not Missouri's law must yield to the dictates of a federal directive because of the Supremacy Clause. *Id.* Thus, because pre-emption is not a question of the law's validity, we have the jurisdiction to hold that Missouri's law is pre-empted. *Id.* As we noted in *Bruce*, this is consistent with the numerous appellate court decisions that have decided pre-emption cases. *Id.* As we discuss, *infra*, it is not necessary for us to apply the pre-emption doctrine in this case because we believe that Missouri law and HIPAA are consistent with each other.

(iii) Incident to a use or disclosure otherwise permitted or required by this subpart, provided that the covered entity has complied with the applicable requirements of § 164.502(b), § 164.514(d), and § 164.530(c) with respect to such otherwise permitted or required use or disclosure;

(iv) Pursuant to and in compliance with a valid authorization under § 164.508;

(v) Pursuant to an agreement under, or as otherwise permitted by, § 164.510; and

(vi) As permitted by and in compliance with this section, § 164.512, or § 164.514(e), (f), or (g).

45 C.F.R. § 164.502(a) (emphasis added). For example, under 45 C.F.R. § 164.502(a), HIPAA permits *ex parte* communications between a physician and a third party when the patient expressly authorizes the *ex parte* communications by issuing a valid authorization pursuant to 45 C.F.R. § 164.508(a)(1), which says:

Except as otherwise permitted or required by this subchapter, a covered entity may not use or disclose protected health information without an authorization that is valid under this section. When a covered entity obtains or receives a valid authorization for its use or disclosure of protected health information, such use or disclosure must be consistent with such authorization.

In this case, however, the plaintiff did not issue an authorization under 45 C.F.R. § 164.508(a)(1). Instead, the trial court issued a purported order directed to non-party medical providers who had provided treatment to the plaintiff authorizing such medical providers to engage in *ex parte* communications with the defendant's attorneys<sup>5</sup> because it believed that its purported order fell under 45 C.F.R. § 164.502(a)'s exceptions for disclosures that are permitted under 45 C.F.R. § 164.512(e). The trial court's purported order states, in pertinent part:

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<sup>5</sup> Thus, the effect of the trial court's purported order is to provide an advisory opinion to persons and entities not parties to the underlying litigation. Aside from Missouri's case law which disfavors advisory opinions, *see e.g. State v. Burgin*, 203 S.W.3d 713, 717 (Mo. App. E.D. 2006), it is that much more perplexing that the trial court is communicating an advisory opinion to those not even a party to the underlying litigation.

TO: All Hospitals, Clinics, Pharmacies, Physicians, Social Workers, Educators, Psychiatrists, Psychologists, Therapists, Governmental Agencies, (State and Federal); All Other Medical Institutions, Practitioners, Health Care Providers, Past and Present.

....

You are further notified that, pursuant to federal and state law, counsel for the defendants are hereby authorized to talk with Bobbie Jean Proctor's treating physicians or other health care providers, without counsel or the parties, including the plaintiff, being present or participating, provided the health care provider consents to the interview. This is based on the Court's finding that the plaintiff has made a claim for personal injuries, and in filing this lawsuit has waived any privilege existing between the patient and health care provider. This Order does not require you to meet or speak with any attorney in this proceeding. You have the right to decline an attorney's request to speak or meet with you informally.

....

This Order complies with HIPAA federal standards for privacy of individual health information, 45 C.F.R. Parts 160 and 164. . . .

This Court further enters a qualified protective order consistent with 45 C.F.R. 164.512(e)(1). Specifically, the parties are prohibited from using or disclosing the protected health information of Bobbie Jean Proctor for any purpose other than this litigation. Further, the parties agree to return to the covered entity or destroy the protected health information (including all copies made) at the end of this litigation.

(Emphasis removed.)

Under 45 C.F.R. § 164.512(e)(1), HIPAA authorizes disclosure in the course of any judicial or administrative proceeding:

(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

(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

(A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or

(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

(Emphasis added.) Thus, the trial court is correct that the Secretary created exceptions to HIPAA's general prohibition on the disclosure of plaintiff's protected health information and that some of those exceptions are listed in 45 C.F.R. § 164.512(e). The trial court, however, erred in its application of 45 C.F.R. § 164.512(e)(1) to this case because the plain and ordinary language of 45 C.F.R. § 164.512(e)(1) does not authorize the disclosure of protected health information during a meeting in which an attorney, without express authorization of the patient, has *ex parte* communications with a physician.

Stated another way, 45 C.F.R. § 164.512(e)(1) permits a health care provider to disclose otherwise protected health information “*in the course of any judicial or administrative proceeding*” if that disclosure is in response to (i) an order of a court, or (ii) in response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court. (Emphasis added.) Thus, by the express language of 45 C.F.R. § 164.512(e)(1), regardless of what prompts the disclosure (court order, subpoena, discovery request, or other lawful process), the covered entity's disclosure must occur “in the course of” a “judicial proceeding.”

Neither HIPAA nor its regulations define “in the course of” or “judicial proceeding.” Missouri also has not defined these terms in its common law for the purposes of HIPAA or, more

importantly, the context of this provision of HIPAA. As we have said before, when the statute in question fails to provide a statutory definition, and there is no case law interpreting the term in the context of the statute, then the dictionary may be used to derive the plain and ordinary meaning of a term. *State v. Harris*, 156 S.W.3d 817, 823 (Mo. App. W.D. 2005). Likewise, our Missouri Supreme Court has concluded that when a term contained within a statute is undefined, the legislative enacting body is presumed to intend that the term be used in its plain and ordinary meaning according to the dictionary. *Tendai v. Mo. Bd. of Registration for the Healing Arts*, 161 S.W.3d 358, 366 (Mo. banc 2005) (*overruled on other grounds*). THE NEW OXFORD AMERICAN DICTIONARY 389 (2<sup>nd</sup> ed. 2005) defines “in the course of” as (1) “undergoing the specified process...(2) during the specified period...(3) during and as part of the specified activity.” This definition of “in the course of” is consistent with the Secretary’s interpretation of 45 C.F.R. § 164.512(e)(1). The Secretary has stated that:

In § 164.512(e) of the final rule, we permit covered entities to disclose protected health information *in a* judicial or administrative proceeding if the request for such protected health information is made through or pursuant to an order from a court or administrative tribunal or in response to a subpoena or discovery request from, or other lawful process by a party to the proceeding.

Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82529 (Dec. 28, 2000) (emphasis added). Given the definition of “in the course of,” the exception in 45 C.F.R. § 164.512(e)(1) is valid only if the disclosure is to occur *during* or *in* a judicial or administrative proceeding.

While Missouri has not defined “judicial proceeding” for the purposes of HIPAA and HIPAA’s express language is silent on this topic, in another context, Missouri defines “judicial proceeding” as “any official proceeding in court, or any proceeding authorized by or held under the supervision of a court[.]” § 575.010 RSMo 2002.

BLACK'S LAW DICTIONARY 122 (5<sup>th</sup> ed. 1979) (citation omitted) defines "authorize" as:

[t]o empower, to give a right or authority to act. To endow with authority or effective legal power, warrant, or right. To permit a thing to be done in the future. It has mandatory effect or meaning, implying a direction to act.

"Authorized" is sometimes construed as equivalent to "permitted"; or "directed," or to similar mandatory language. Possessed of authority; that is, possessed of legal or rightful power, the synonym of which is "competency."

BLACK'S LAW DICTIONARY defines "supervision" as "[a]n act of occupation of supervising; inspection." *Id.* at 1290. It also defines "supervise" as "[t]o have general oversight over, to superintend or to inspect." *Id.* Using these definitions, we conclude that 45 C.F.R. § 164.512(e) permits a covered entity, pursuant to a court order or subpoena, discovery request, or other lawful process, to disclose information *during* or *in* any official proceeding in court, or *during* or *in* any proceeding in which the trial court empowers the parties to act or in which the trial court acts in an oversight capacity.

This interpretation is consistent with the Secretary's interpretation of the regulation. The Secretary has stated that the Department of Human Health and Services considered using the phrase "in conjunction with" any judicial or administrative proceeding but decided to use the phrase "in the course of" any judicial or administrative proceeding because "in conjunction with" would allow disclosures in situations where the trial court had no oversight capacity:

*In developing our proposal, we considered permitting covered entities to disclose protected health information pursuant to any request made **in conjunction with a judicial or administrative proceeding**. We rejected this option because we believe that current procedures for document production could result in unwarranted disclosure of protected health information. **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. While such a process may be appropriate for many types of records, we are concerned that it could lead to substantial breaches of privacy where the material being requested is protected health information. 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.*

Department of Human Health and Services, Standards for Privacy of Individually Identifiable Health Information, 64 Fed. Reg. at 59959 (emphasis added).

In Missouri, the trial court has the authority and oversight over, among other things: (1) pretrial motion proceedings and trial (i.e. official proceedings in court), and (2) formal discovery (i.e. proceedings authorized by or held under the supervision of a court). *State ex rel. Dalton v. Norman*, 872 S.W.2d 888, 891 (Mo. App. E.D. 1994). The case law is clear, however, that while Missouri law has not, until today, prohibited a party from engaging in voluntary *ex parte* communications with a treating physician, *Brandt I*, 856 S.W.2d at 661, the trial court has never supervised these communications nor exercised authority over them. The trial court cannot compel a plaintiff to expressly authorize *ex parte* discussions with her physician. *Woytus*, 776 S.W.2d at 392. The trial court cannot force a physician, over his own objection, to engage in informal *ex parte* discussions with an attorney during discovery. *Brandt I*, 856 S.W.2d at 662. Given Missouri's law on the subject of *ex parte* physician communications, the meeting at which *ex parte* communications occur is not a judicial proceeding because the trial court has no general oversight of the meeting or any control over it. Thus, 45 C.F.R. § 164.512(e), which permits disclosures in the course of judicial proceedings, does not apply to a meeting for *ex parte* communications, and consequently, 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.

Our conclusion is not only consistent with our interpretation of the HIPAA regulations but is also consistent with traditional principles of Missouri law. As we noted above, in *Brandt I*, our Missouri Supreme Court relied upon the fact that there was no legal "prohibition" of informal and voluntary *ex parte* communications with plaintiff's physicians at the time *Brandt I* was authored. In *Brandt II*, our Missouri Supreme Court next addressed the waiver of both the testimonial privilege and the physician's fiduciary duty of confidentiality in the context of a *McNutt* based waiver after the plaintiff places his or her physical condition at issue in a personal injury lawsuit.<sup>6</sup> *Brandt II* begins its discussion by first reiterating its conclusion from *Brandt I* that there was, at that time, no legal prohibition of informal and voluntary *ex parte* conversations with plaintiff's treating physicians. The enactment of HIPAA now presents a statutory framework that does, in fact, encompass a "prohibition" of physician disclosure of a patient's protected health information in formal **and** informal settings. Had the *Brandt* opinions been decided post-HIPAA, we believe that the Missouri Supreme Court would have enforced HIPAA in the same fashion that we do now and would have reached the same result that we do today.

Lest anyone attempt to suggest that our Missouri Supreme Court ever enthusiastically endorsed the slippery slope that presents itself when one of plaintiff's treating physicians is called upon to engage in *ex parte* communications with a defendant or defendant's representatives in which the interests of the physician's patient are often pitted against the

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<sup>6</sup> In *McNutt*, it should be noted that our Missouri Supreme Court discussed the inherent authority of trial courts to issue formal orders to compel formal discovery of the production of medical records (i.e. trial courts have authority over the enumerated rules of formal discovery), in that instance, compelling the plaintiff to sign a medical authorization that would authorize the disclosure of plaintiff's reasonably related medical records in the course of formal discovery. 432 S.W.2d at 601.

interest of a member of the physician's profession, we remind lawyers and litigants alike of the following statement from our Missouri Supreme Court in *Brandt II*:

In reaching our conclusion, we stop short of enthusiastically endorsing the idea that a physician should freely engage in *ex parte* discussions regarding a patient's condition. When a doctor engages in *ex parte* communications with a patient's adversaries, there is a risk that the disclosure will exceed the bounds of the waiver of the privilege.

856 S.W.2d at 674-75.

In both of the *Brandt* opinions, our Missouri Supreme Court reiterated its conclusion from *Woytus* that a plaintiff cannot be compelled by a trial court to sign an authorization consenting to *ex parte* communications with his treating physicians in favor of defendants or their attorneys. It is our Supreme Court's rationale for this conclusion that is particularly relevant to our discussion today:

[T]his court will not require that a non-enumerated discovery method be added to those already available under the [Missouri Rules of Civil Procedure]. Information or evidence that can be obtained legitimately through *ex parte* discussion [with treating physicians] can also be obtained through the methods of discovery listed in the [Missouri Rules of Civil Procedure]. Any burdens caused defendants by being restricted to the specially enumerated discovery procedures are outweighed by the potential risks to the physician-patient relationship in deviating from those procedures.

*Woytus*, 776 S.W.2d at 395.

Litigants and lawyers involved in lawsuits have a right to perform discovery, and they are entitled to do so within the parameters of rules of discovery enacted by our Missouri Supreme Court. *Id.* at 392. When the parties dispute the legal parameters of the rules of discovery, the trial court has discretion to rule on the dispute, ***but the trial court is limited by the enumerated discovery rules and the parameters of those rules.*** *Norman*, 872 S.W.2d at 890.

The rules of discovery enumerated by our Missouri Supreme Court are found at Rule 56

through Rule 61 of the Missouri Rules of Civil Procedure (the Discovery Rules). The formal nature of the substance of the Discovery Rules gives the trial court discretion to issue orders relating to the parameters of formal interrogatories, depositions, production of documents, requests for admission, physical and mental examinations, and discovery sanctions. However, there is nothing in the *formal* nature of the Discovery Rules that authorizes the trial court to issue orders governing methods of *informal ex parte* communications with plaintiff's non-party treating physicians.

Likewise, for the reasons stated previously, there is no regulation in the HIPAA framework that authorizes a trial court in Missouri to issue an order permitting a physician to divulge a patient's protected health information outside the confines of a judicial proceeding over which the trial court has direct supervision thereof.

### **Conclusion**

In the instant case, by issuing a purported *formal* order that is directed to non-party medical providers and, essentially, provides an advisory opinion to said non-party medical providers about the trial court's understanding of the law on *informal ex parte* communications, the trial court exceeded its authority and that "order" is prohibited.

In summary, we offer the following guidance to litigants, lawyers, trial courts, and physicians in this setting:

- Trial courts – A trial court cannot authorize a physician to violate his or her duty under HIPAA. To permit a trial court to do so only creates confusion for physicians, lawyers, and litigants. Thus, trial courts are not authorized to issue discovery orders compelling a litigant patient to sign an authorization consenting to any person's *ex parte*

communications with his or her treating physicians and cannot issue discovery orders directing a non-party treating physician that the non-party physician may participate in informal *ex parte* communications about the physician's patient to persons that have not received express authorization to do so from the physician's patient.

- Litigant patients – Litigant patients are free to execute authorizations authorizing *ex parte* communications between the patient's treating physician(s) and any person to whom the litigant patient authorizes such *ex parte* communications about the litigant patient's mental and/or physical condition, but a litigant patient in a personal injury lawsuit is not obligated to sign any such authorization.<sup>7</sup>
- Physicians – Absent express authorization from your patient, a physician is not permitted to engage in *ex parte* communications with other persons or otherwise divulge the patient's protected health information unless the physician complies with all relevant HIPAA regulations including, but not limited to, 45 C.F.R. § 164.512(e)(1). While not an exhaustive list, a physician is certainly permitted to disclose, orally or otherwise, a patient's protected health information in the following settings: (1) express authorization from the physician's patient; (2) a formal discovery deposition, whether by written interrogatory or live testimony taken under oath, in which the patient's attorney is present or otherwise has notice thereof; (3) testimony at a trial or other judicial or administrative proceeding in which the patient is a plaintiff in the proceeding and has placed plaintiff's physical or mental condition or both at issue in the litigation and in which a trial judge is

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<sup>7</sup> Again, our opinion today is addressing this topic in the context of personal injury litigation and not in the context of separate issues that relate to, for example, permitted disclosures to health insurance companies providing payment for a patient's medical treatment.

presiding over the proceedings, so that the physician is subject to further direction from the trial judge during such testimony by the physician.<sup>8</sup>

- Lawyers – Lawyers are not permitted to attempt to convince a physician to violate his or her duty under HIPAA and engage in informal *ex parte* communications with a litigant patient’s physician absent express authorization from the litigant patient. There is no HIPAA authorized exception to the general prohibition of such communications, in Missouri, that authorizes a trial court to issue an order granting lawyers the authority to conduct such communications. Any attempt by a lawyer to convince a physician to voluntarily, and perhaps unwittingly, violate HIPAA may carry with it a host of other legal ramifications.

Based upon the foregoing, the preliminary writ of prohibition is made absolute.

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Mark D. Pfeiffer, Judge

James E. Welsh, Judge, concurs.

James M. Smart, Jr., Presiding Judge, concurs in separate concurring opinion.

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<sup>8</sup> Of note, a person who, in violation of the HIPAA Privacy Rule, unlawfully obtains or discloses individually identifiable protected health information can be fined up to \$50,000 or imprisoned for up to one year, or both. *See* 42 U.S.C.A. § 1320d-6.



***In the Missouri Court of Appeals***  
**WESTERN DISTRICT**

**STATE OF MISSOURI EX REL. BOBBIE )**  
**JEAN PROCTOR AND VINCENT )**  
**PROCTOR, )**  
**RELATORS, )**  
**v. )** **WD71326**  
**)** **OPINION FILED:**  
**)** **November 10, 2009**  
**THE HONORABLE EDITH L. MESSINA, )**  
**CIRCUIT JUDGE, 16TH JUDICIAL )**  
**CIRCUIT, IN JACKSON COUNTY, )**  
**MISSOURI, )**  
**RESPONDENT. )**

**Concurring Opinion**

I concur in making absolute the Writ of Prohibition. I write separately simply to say that while I believe the court lacked authority for its “order” in this case, and while I believe *ex parte* interviews with treating physicians present certain inherent risks, I am not convinced that a trial court is entirely without authority to facilitate *ex parte* communications with treating physicians in other contexts.

Plaintiffs Bobbie Jean Proctor and Vincent Proctor have alleged that negligence on the part of the medical providers caused physical injuries to Mrs. Proctor. The defendants want to engage in informal discovery with Mrs. Proctor’s treating physicians. Mrs. Proctor refuses to sign a form authorizing her physicians to engage in *ex parte* discussions with the defendants’

attorneys. She cannot be compelled to do so because the court is not permitted under Missouri law to compel Mrs. Proctor to sign such an authorization. *State ex rel. Woytus v. Ryan*, 776 S.W.2d 389 (Mo. banc 1989); *Brandt v. Pelican*, 856 S.W.2d 658 (Mo. banc 1993) (*Brandt I*) and *Brandt v. Med. Def. Assocs.*, 856 S.W.2d 667 (Mo. banc 1993) (*Brandt II*); *State ex rel. Collins v. Roldan*, 289 S.W.3d 780 (Mo. App. 2009). This court’s “order” here did not compel the execution of an authorization. Rather, the court’s “order” simply purports to advise physicians that the court views the defendant’s attorneys as “authorized to talk” with Mrs. Proctor’s treating physicians under HIPAA’s standards related to protected health information.<sup>1</sup>

The HIPAA regulations authorize discovery “in the course of any judicial or administrative proceeding” in response to an “order of a court . . . provided that the health care provider discloses only the protected health information expressly authorized by such order.” 45 C.F.R. § 164.512(e). Alternatively, HIPAA regulations authorize such discovery in response to a subpoena or “discovery request” if the physician receives “assurance” that the patient has been given notice of the request. 45 C.F.R. § 164.512(e)(ii)(A). Thus, I would assume that an ordinary request for documents or a deposition *subpoena duces tecum* showing that copies thereof were furnished to the opposing party and to opposing counsel (so as to allow an opportunity to object, or seek a protective order) is sufficient to satisfy HIPAA as long as it specifies the particular protected health information to be disclosed. If all that is required is a routine “discovery request” manifesting notice to the plaintiff–patient and creating the opportunity to object, then I would suppose that the phrase “in the course of any judicial . . .

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<sup>1</sup> The majority correctly raises the question of whether the communication issued by the court is an “order” within the meaning of the HIPAA regulations. The trial court’s communication is more like a letter of advice than it is a ruling directing the course of the litigation and binding on the parties and counsel. But even if we assume that, within the HIPAA regulations, this communication qualifies as an “order,” the trial court’s communication still, in my view, exceeds its authority as stated herein.

proceeding” should not be viewed as being limited to a proceeding in the courtroom over which the judge is presiding at that moment.<sup>2</sup> Accordingly, it is at least arguable that “in the course of” such a lawsuit a communication from a court (designated an “order”) that purports to specify protected health information that is at issue in the lawsuit and therefore discoverable would exempt the treating physician from the restrictions of HIPAA and the physician–patient privilege to that extent.

However, that does not mean that I believe that the court’s communication in this case should be sustained as authorized in law. The authority that the court may have under Missouri law to facilitate (without compelling) informal discovery<sup>3</sup> is necessarily limited to actions that would reasonably tend to further the resolution of the litigation according to its true merits so as to promote a just result. *See State ex rel. Lichtor v. Clark*, 845 S.W.2d 55, 60 (Mo. App. 1992).

This is a medical malpractice case. Informal *ex parte* discovery in such a case presents special inherent risks that are not generally present in other types of personal injury litigation. In *Woytus*, which did not involve a medical malpractice claim, the court nevertheless felt compelled to mention the risks of *ex parte* interviews in *medical malpractice* cases:

This court will not overlook the current concerns in the medical malpractice insurance industry and the attitudes of physicians and carriers alike. An unauthorized *ex parte* interview could disintegrate into a discussion of the impact of a jury’s award upon a physician’s professional reputation, the rising cost of malpractice insurance premiums, the notion that the treating physician

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<sup>2</sup> The language of the Secretary of Health and Human Services (from the Preamble to the *Proposed Privacy Rule*) quoted in the majority opinion confuses me in its reference to “simple motions for document production that have not been subject to third party review.” Was the Secretary then suggesting that the contemplated “third party review” is different from the trial court action in ruling on objections and protective orders? It seems very unlikely that the Secretary contemplates a HIPAA-focused special master ruling *sua sponte* on all discovery requests as to health information.

<sup>3</sup> *See, e.g., State ex rel. Atchison, Topeka & Santa Fe R.R. v. O’Malley*, 888 S.W.2d 760, 762 (Mo. App. 1994); *State ex rel. Pitt v. Roberts*, 857 S.W.2d 200, 202 (Mo. banc 1993).

might be the next person to be sued, and other topics which might influence the treating physician's views. The potential for impropriety grows even larger when defense counsel represents the treating physician's own insurance carrier and when the doctor, who typically is not represented by his personal counsel at the meeting, is unaware that he may become subject to suit by revealing the plaintiff/patient's confidences which are not pertinent to the pending litigation.

776 S.W.2d at 395 (quoting *Manion v. N.P.W. Med. Ctr. of N.E. Pa., Inc.*, 676 F.Supp. 585, 594-95 (M.D. Pa. 1987)). What is possible in an "unauthorized" *ex parte* interview would also be possible in one "authorized" by a court. There surely is a reason that, excepting *Woytus*, the reported cases involving attempts by defendants to engage in *ex parte* interviews with treating physicians are *all* medical malpractice cases.

I recognize that in the *Brandt* cases, which were malpractice cases, the Court had a chance to entirely disapprove voluntary *ex parte* communications with treating physicians, and yet it did not do so. *Brandt II*, 856 S.W.2d at 672-74. The Court said it recognized value in allowing the defendant access to the treating physician to "have an opportunity to review with the witness the questions to be asked [at trial or deposition] and the answers to be given." *Id.* at 674. The Court also wished to allow the defendant an opportunity "to be able to pick up the telephone and talk informally with the doctor about the arrangements to testify." *Id.* In spite of such statements by the Court, however, I cannot conclude that the Court would today (post-HIPAA) support the issuance, over the objection of the plaintiff, of an "order" of broad authorization like the one in this case. I agree that HIPAA has pre-empted common law standards on the divulgence of protected health information (to the extent that such common law standards are more relaxed). And, clearly, *ex parte* interviews with treating physicians, regardless of context, but particularly in medical malpractice litigation, will always (by virtue of being *ex parte*) present the risk of inadvertent violation of the confidential relationship between

patient and physician that HIPAA seeks to protect. *See Woytus*, 776 S.W.2d at 395. Thus, I do not see, despite the sentiment for informality expressed in *Brandt II*, that counsel for the defendant in a medical malpractice case (or other case involving similar considerations as to objectivity) should be allowed an opportunity, *ex parte*, to confer with the treating physician about “the questions to be asked and the answers to be given.”<sup>4</sup>

I also believe that, even apart from the effect of HIPAA, our Supreme Court would not approve the broad authorization issued by the circuit court in this case because the Court would recognize that broad *ex parte* discussions would risk undermining the objectivity of the treating physician. In a case in which expert testimony is likely to play a major if not dominant role, the cause of justice will be affected by purportedly neutral expert testimony that lacks objectivity. If a treating physician who is primarily a fact witness (in the inception) ends up becoming a non-retained expert for the defense as a result of *ex parte* discussions, with testimony or demeanor that is influenced by factors irrelevant to the merits, the pursuit of justice will not be aided.

For the foregoing reasons, I agree that the circuit court’s “order” exceeds the bounds of its authority in this case. I concur in making the Writ of Prohibition absolute.

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James M. Smart, Jr., Judge

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<sup>4</sup> In any event, though, I think one item mentioned in *Brandt II* has not been affected by HIPAA. I am not currently aware of anything that would prohibit counsel for the defendant from “picking up the telephone” and talking *ex parte* with the doctor’s staff or the doctor “about arrangements” for a deposition or a court appearance, as long as such logistical discussions do not involve the plaintiff’s protected health information. I do not see that defense counsel are or have been precluded from such ability; and in the event of any practical difficulty, an “order” from a court facilitating such a logistical discussion would seem fully permissible.