Ex Parte Communication in a Post-HIPAA World

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I. INTRODUCTION

In April 2003, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) went into effect.\(^1\) Generally, HIPAA regulates the use and disclosure of protected health information by covered entities.\(^2\) The implementation has wreaked havoc on medical malpractice and other personal injury litigation, and the obstacles it has created for defense counsel have been described as being “analogous to sending a boxer into the ring wearing a blindfold!”\(^3\) Specifically, HIPAA has impacted preexisting state rules governing informal discovery, and in many instances, has severely restricted defense counsel’s access to a plaintiff’s relevant health information.

What follows is a brief look into the history of HIPAA and its affect on discovery practices. While this paper will focus on Michigan, other jurisdictions will also be reviewed. The hope is that this paper will help provide insight to claim managers and defense counsel regarding the utilization of this effective discovery and litigation tool.

II. HIPAA PRIVACY RULE

As noted above, HIPAA regulates the use and disclosure of protected health information by covered entities.\(^4\) Protected Health Information (PHI) includes any information relating to healthcare treatment or payment, which contains any element of

\(^{1}\) See 45 CFR §164.534  
\(^{2}\) See 45 CFR §164.502(a)  
\(^{4}\) Id.
information that may have a potential to relate to an identifiable patient.\textsuperscript{5} Entities covered by HIPAA include healthcare providers, as well as healthcare plans and healthcare clearinghouses.\textsuperscript{6}

Under HIPAA, whenever a covered entity uses or discloses PHI, the use or disclosure must comply with the provisions of the Act. HIPAA mandates disclosure in only two instances - - when requested by either the patient or by the Secretary of Health and Human Services in order to enforce the Act.\textsuperscript{7} All other uses or disclosures are permissive in nature, including those made within the course of any judicial or administrative proceeding.\textsuperscript{8} These permissive disclosures fall under so-called public interest disclosures.\textsuperscript{9} This exception permits covered entities to use or disclose PHI in litigation circumstances without written authorization under the following circumstances:

1. the covered entity may disclose PHI pursuant to a court order or order from an administrative tribunal, but any such disclosure may not exceed what is directed by the order;\textsuperscript{10}

2. the covered entity may disclose PHI pursuant to an attorney’s subpoena or discovery request, if the covered entity obtains “satisfactory assurances” from the party seeking the disclosure that the requestor has made “reasonable efforts” to notify the individual of the request;\textsuperscript{11}

3. the covered entity may disclose PHI if it obtains “satisfactory assurances” from the party seeking the disclosure that the requestor has made “reasonable efforts” to obtain a qualified protective order, which prohibits the disclosure of the PHI for any reason other than the litigation and requires the return or destruction of the health information at the end of the litigation; or

\textsuperscript{5} See generally, 45 CFR. 164.500
\textsuperscript{6} See 42 USC §1320d(2), (3) and (5)
\textsuperscript{7} See 45 CFR §164.502(a)(2)(i) and (ii)
\textsuperscript{8} See 45 CFR §164.512(e)(1)
\textsuperscript{9} See 45 CFR §164.512
\textsuperscript{10} See 45 CFR §164.512(e)(1)(i)
\textsuperscript{11} See 45 CFR §164.512(e)(1)(ii)
\textsuperscript{12} See 45 CFR §164.512(e)(1)(iv)
4. if the covered entity does not receive either a court order directing the
disclosure or the above-described satisfactory assurances, then the
covered entity itself may make reasonable efforts to notify the
individual or to seek a qualified protective order.13

Despite the fact that HIPAA expressly permits disclosures under the above
circumstances, it became a weapon utilized by plaintiff lawyers to challenge the legality
of ex parte meetings with healthcare providers in states that once welcomed and
encouraged informal discovery. To do so, the plaintiff bar relied upon the Act's
preemption clause, which makes clear that HIPAA reigns supreme over any contrary
state laws.14 To determine whether a law is contrary, and thus, preempted by HIPAA,
one should look to whether it would be impossible for a covered entity to comply with
both HIPAA and the state requirements in disclosing or not disclosing PHI.15 Moreover,
if the state law stands as an obstacle to the purpose and objectives of HIPAA, then the
state law is preempted.16 The most relevant inquiry to determine whether HIPAA
preempts state law is whether the state rules are more stringent than HIPAA. If not,
HIPAA reigns supreme.

It is with this preemption clause, plaintiffs began to utilize HIPAA to challenge
defense counsel’s right to ex parte communication with healthcare providers in personal
injury and medical malpractice actions. Indeed, trial courts in states that historically
permitted such informal discovery became split on whether HIPAA, by way of its
preemption clause, ended counsel’s right to ex parte meetings under state court rules
and statute. In Michigan, HIPAA sparked a several year battle between plaintiffs,
defendants and the trial courts.

13 See 45 CFR §164.512(e)(1)(vi)
14 See 45 CFR §160.203
15 See 45 CFR §160.202
16 Id.
III. PRE-HIPAA MICHIGAN

Michigan courts have a long history of encouraging wide open discovery. In *Domako v Roe*\(^{17}\), the Michigan Supreme Court specifically held that defense counsel could properly and lawfully conduct ex parte interviews with a plaintiff’s treating physician once the physician/patient privilege is waived. In that case, the Court noted that discovery was governed by the Michigan Court Rules, which provide that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action...”\(^{18}\) Since the challenged ex parte communication was relevant to the issues in that case, the information could only be shielded from discovery by plaintiff through an assertion of privilege.

The physician/patient privilege in Michigan is statutorily granted.\(^{19}\) However, the statute also expressly provides for a waiver of that privilege if a patient brings an action for malpractice or personal injuries and produces any physician as a witness.\(^{20}\)

The Court noted that the purpose of providing for waiver when a patient’s physical or mental condition is in controversy is to prevent the suppression of evidence, and providing for equal access to relevant evidence.\(^{21}\)

In the *Domako* case, the Court held that the controlling law in Michigan is that ex parte meetings with medical providers are an acceptable and permissible form of discovery. The Court noted that restricting parties to so-called formal discovery would not “aid in the search for truth”, but would rather only “complicate trial preparation.”\(^{22}\)

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\(^{17}\) 438 Mich 347; 475 NW2d 30 (1991)

\(^{18}\) See MCR 2.302(B)(1)

\(^{19}\) See MCL 600.2957

\(^{20}\) Id.

\(^{21}\) *Domako*, supra at 355-356

\(^{22}\) Id. at 360
The Court concluded by finding that while ex parte and other means of informal discovery were not expressly provided for in the Michigan Court Rules, “prohibition of all ex parte interviews would be inconsistent with the purpose of providing equal access to relevant evidence and efficient, cost-effective litigation.”23

Similarly, courts have historically held that that a plaintiff does not have the right to control how a defendant conducts its investigation or how a defendant prepares his or her defense to an action. In *Davis v Dow Corning Corp.*24, the plaintiff's attorney attempted to convince a treating physician not to meet with the defense attorney without plaintiff's counsel being present. The Michigan Court of Appeals expressly rejected this tactic and noted that prohibition of ex parte interviews with treating physicians is inconsistent with the purpose of providing equal access to relevant evidence.

**IV. POST-HIPAA MICHIGAN**

This right to equal access to relevant medical information went unchallenged until HIPAA went into effect. At that time, the practice of unfettered access to a plaintiff’s treating physicians was halted. Medical providers began refusing to meet with counsel, absent an authorization specifically providing for ex parte oral communication. Plaintiffs refused to sign such authorizations, leading to motions being filed in almost every medical malpractice and personal injury case. Further, trial courts were inconsistent in their rulings on such motions, while some permitted ex parte communications; others flat out rejected any attempts by the defense to have access to treaters absent plaintiff counsel’s attendance.

23 *Id. at 361-362*
As more and more trial courts rejected defense counsels’ petitions to compel plaintiffs to execute authorizations permitting ex parte communication, the defense bar turned to seeking qualified protective orders, which would permit a healthcare provider to meet with counsel absent an authorization from the patient. Like the motions to compel authorizations, however, the trial courts were inconsistent and many were blanketly denying the requests under the guise of HIPAA’s preemption clause.

In 2005, the Michigan Court of Appeals in its unpublished opinion in Belote v Strange held that under the provisions of HIPAA, and unlike Michigan law, a plaintiff in a malpractice or personal injury action could not informally waive the physician/patient privilege. Accordingly, Michigan law was preempted by the federal statute. As such, the Court held that defendant’s failure to first obtain written authorization or to follow other discovery procedures as outlined in the Act prior to engaging in ex parte communications with plaintiff’s treating surgeon was, in and of itself, a violation of HIPAA.

Less than a month later, however, the Honorable Nancy G. Edmunds of the United States District Court for the Eastern District of Michigan clarified the process by which a defendant could seek an ex parte meeting absent a written authorization. Specifically, Judge Edmunds issued an Order in the matter of William Croskey v BMW of North America, et al, wherein she held that in order to conduct ex parte interviews with a treating physician under HIPAA, defense counsel must first obtain a waiver of the privilege by plaintiff or obtain a qualified protective order from the court. Judge

25 2005 WL 2758007 (October 25, 2005)
26 Supra.
Edmunds further held that HIPAA requires that any qualified protective order include the following bin order to be lawful under HIPAA:

- that defendants are prohibited from using or disclosing protective health information for any purpose other than in the litigation;
- that defendants are required to return or destroy the protected information at the end of the litigation;
- that the qualified protective order covers only the interview of plaintiff’s treating physicians;
- that the treating physicians shall be informed that the ex parte meeting is not being requested by the patient, but rather defense counsel and that the treating physician is not obligated to meet with and discuss plaintiff’s care and treatment with defense counsel;
- that the meeting is for the purpose of gaining information to assist in defense of a lawsuit brought by plaintiff; and
- that the treating physician may have their own attorney present during the meeting.

This ruling gave new life to the defense bar; however, State trial courts were still hesitant to grant qualified protective orders permitting ex parte communication. There were still great divides between how each individual trial judge ruled on requests for qualified protective orders, and the appellate courts gave little instruction. In 2006, the Michigan Court of Appeals in an unpublished decision in *Barnes v Beattie*[^27], for the first time explicitly acknowledged that even without the written consent or authorization permitting ex parte communications, HIPAA may permit ex parte communications under the permissive disclosure provisions of the act. This, however, did little to impact the trial courts.

Despite the *Croskey* decision setting forth the parameters for qualified protective orders, plaintiff attorneys continued to argue at the trial court level that ex parte meetings violated HIPAA and the preemption clause. In response, many judges simply

[^27]: 2006 WL 2089215 (July 27, 2006)
would not enter a qualified protective order or would do so only if the qualified protective order also permitted a plaintiff’s attorney to be present at any informal meeting. These orders were worthless as they negated the entire purpose behind a request for “ex parte” communication. Moreover, medical providers were hesitant to meet with counsel absent such order, even if “reasonable assurances” were provided that such qualified protective order was sought, as permitted under HIPAA.

Finally, in 2008 the Michigan Court of Appeals addressed these arguments, at least in part, in a published decision. In Holman v Rasak, plaintiff’s counsel argued to the trial court that ex parte communication violated HIPAA. The trial court agreed and ruled that HIPAA precluded ex parte meetings. The appellate court granted leave to appeal and found that defense counsel may conduct ex parte meetings with a plaintiff’s treating physician if a qualified protective order, consistent with HIPAA, is first sought. The Court’s opinion was affirmed by the Michigan Supreme Court, which concluded:

…informal interviews are routine practice and that there is no justification for requiring costly depositions…without knowing in advance that the testimony will be useful.

The Michigan Supreme Court confirmed that Michigan law permits ex parte interviews of treating physicians and that with the filing of a personal injury lawsuit, any privilege associated with the medical information is waived. Citing its own decision in Domako, the Supreme Court reiterated:

[p]rohibition of all ex parte interviews would be inconsistent with the purpose of providing equal access to relevant evidence and efficient, cost effective litigation.

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29 See Holman v Rasak, 486 Mich 429, 433; 785 NW2d 98 (2010)
30 Id. at 436-437
31 Id. at 435, citing Domako, supra. at 361-362
The Michigan Supreme Court then examined HIPPA and the various enumerated ways whereby medical information, including oral information, could be obtained. Specific to information obtained orally, such as during an ex parte meeting, the high court stated:

We see no logical reason that protected health information maintained in a physician’s records and conveyed verbally by a physician during an ex parte interview cannot be subject to a qualified protective order under 45 CFR 164.512(e)(1)(v).\(^\text{32}\)

Also instructive was the Court’s indication that:

While HIPAA is obviously concerned with protecting the privacy of individuals’ health information, it does not enforce that goal to the exclusion of all other interests. Rather, it balances the protection of individual privacy with the need for disclosure in some situations.\(^\text{33}\)

Ultimately the court held in relevant part:

Accordingly, we conclude that Michigan’s approach to informal discovery, which permits defense counsel to seek an ex parte interview with a plaintiff’s treating physician, is not “contrary” to HIPAA. An ex parte interview may be conducted and a covered entity may disclose protected health information during the interview in a manner that is consistent with HIPAA, as long as the covered entity received satisfactory assurance that reasonable efforts have been made to secure a qualified protective order that meets the requirements of 45 CFR 164.512(e)(1)(v).\(^\text{34}\)

Following the decision in Holman, there was little debate that qualified protective orders could be sought and that they should be granted. As such, plaintiffs began seeking restrictions on ex parte communications, to include that counsel be given advance notice of any meeting and be permitted to attend such meeting. The Court of

\(^{32}\) Id. at 444
\(^{33}\) Id. at 446
\(^{34}\) Id. at 446, citing 45 CFR 164.512(e)(1)(ii)(B)
Appeals, however, in *Szpak v Inyang, et al.*\(^{35}\), found that there was no good cause basis for the trial court to place added restrictions such as those outlined above. Further, the Court of Appeals found the inclusion of those restrictions, i.e. advance notice of time and place of meeting, and permitting plaintiff’s counsel to attend, constituted an abuse of discretion by the trial court.

In Michigan, it appears that the restrictions on informal discovery have come full circle with the recent decisions in *Holman* and *Szpak*. Since these opinions were released, plaintiffs are rarely challenging defense counsel’s right to ex parte meetings; however, the plaintiff bar has recently been taking a new tactic - - arguing that plaintiffs are entitled to know the identity of those treaters with whom defense counsel has met, as it is necessary so that the patient/plaintiff can monitor who has disclosed protected health information.

Further, there seems to be an increase, at least in Michigan, of suits against physicians for unauthorized disclosures of PHI. While HIPAA does not provide for a private civil action against a covered entity\(^ {36}\), Michigan does recognize a tort for unauthorized disclosure of privileged information.\(^ {37}\) These new strategies are just another attempt at blocking defendants’ access and intimidating physicians. Whether such attempts will be successful, remains to be seen.

V. **STATE SURVEY**

\(^{35}\) __Mich App __; __NW2d __; 2010 WL 4751765 (November 23, 2010)


\(^{37}\) See *Saur v Probes*, 190 Mich App 636; 476 NW2d 496 (1991)
Finally, as is probably clear by now, the state of the law as to whether ex parte communications are permissible is constantly changing. HIPAA has created numerous issues where none previously existed. This is true in Michigan as well as in other jurisdictions. Generally, states which have a history of permitting defense counsel to engage in ex parte communication, have continued to do so despite the restrictions placed by HIPAA. That being said, informal discovery is prohibited in a number of states, while the remaining jurisdictions have little by way of law.

It should be noted that the following survey is a rudimentary look at the status of law as to whether defense counsel may engage in ex parte communications with a plaintiff’s treating medical providers, absent authorization, in each of the fifty states and Washington D.C. This survey focuses on individual state law and how it has been applied by the state and federal courts. This survey is by no means an exhaustive review of the law and is being submitted for informational purposes only.

<table>
<thead>
<tr>
<th>STATE</th>
<th>WHETHER EX PARTE COMMUNICATIONS ARE ALLOWED UNDER STATE LAW</th>
</tr>
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<tbody>
<tr>
<td>Alabama</td>
<td>Yes, and if treating provider is willing, he or she may be hired as a defense expert.</td>
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<tr>
<td>Alaska</td>
<td>Yes, but only if treating provider consents to the meeting.</td>
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<tr>
<td>Arizona</td>
<td>No, even though the physician/patient privileged is waived, it is only waived as to formal means of discovery.</td>
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<tr>
<td>Arkansas</td>
<td>No, as the Arkansas Rules of Evidence preclude defense counsel from engaging in ex parte communications absent plaintiff’s consent.</td>
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<tr>
<td>California</td>
<td>Yes; however, at least one federal court held that ex parte communications violated HIPAA.</td>
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<tr>
<td>State</td>
<td>Ex Parte Allowance</td>
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<tr>
<td>Colorado</td>
<td>Yes, to the extent that ex parte interviews are limited to medical matters relevant to the litigation.</td>
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<tr>
<td>Connecticut</td>
<td>Yes, as at least one federal court held that ex parte communications are allowable under HIPAA; however, note that at least one case denied defendant’s request to compel plaintiff to authorize ex parte communications.</td>
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<tr>
<td>Delaware</td>
<td>Yes, but only with prior consent or by court order.</td>
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<tr>
<td>District of Columbia</td>
<td>Yes, with a 1992 case holding that ex parte meetings are appropriate means of informal discovery.</td>
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<tr>
<td>Florida</td>
<td>No, ex parte meetings are barred by Florida statute.</td>
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<tr>
<td>Georgia</td>
<td>Yes, but finding that HIPAA preempts state law, thus mandating defendants to petition for a qualified protective order when plaintiff withholding consent.</td>
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<tr>
<td>Hawaii</td>
<td>Maybe, as there does not appear to be any law regarding ex parte communications in Hawaii.</td>
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<tr>
<td>Idaho</td>
<td>Yes, as a 1997 case held that the discovery rules in Idaho do not restrict defense counsel’s access to a treating physician.</td>
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<tr>
<td>Illinois</td>
<td>No, Illinois has long precluded ex parte interviews with treating physicians, and an attempt by the legislature to permit such informal discovery was declared unconstitutional.</td>
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<tr>
<td>Indiana</td>
<td>No, a 1993 decision barred defense attorneys from conducting ex parte meetings with treating physicians.</td>
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<tr>
<td>Iowa</td>
<td>No, as it appears that the physician/patient privilege may only be waived in a testimonial setting; however, at least one case permitted workers compensation defendants to engage in ex parte communications.</td>
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<tr>
<td>Kansas</td>
<td>Yes, although it does not appear that the state courts have addressed the issue, but it has been raised via amicus briefs in a case currently pending in the Kansas high court.</td>
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<td>Kentucky</td>
<td>Yes, Kentucky continues to permit ex parte meetings and treats</td>
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plaintiff’s treating physicians as nothing more than fact witnesses.

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<tr>
<th>State</th>
<th>Information</th>
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<tr>
<td>Louisiana</td>
<td>No, as Louisiana has a statute which limits a waiver of the physician/patient privilege to formal methods of discovery.</td>
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<tr>
<td>Maine</td>
<td>No, however, there are no state court decisions addressing ex parte meetings; however, a federal district court found that a waiver of the privilege only applies to formal methods of discovery.</td>
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<tr>
<td>Maryland</td>
<td>Yes, while a federal district court found HIPAA to be supreme, under state law, ex parte meetings are permitted.</td>
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<tr>
<td>Massachusetts</td>
<td>No, the state and federal courts in Massachusetts frown upon ex parte communications by defense counsel.</td>
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<tr>
<td>Michigan</td>
<td>Yes, with the recent Holman and Szpak decisions, defense counsel may engage in ex parte communications with authorization or upon motion for qualified protective order.</td>
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<tr>
<td>Minnesota</td>
<td>No, a 2003 federal district court case against a drug manufacturer held that Minnesota law does not permit defense counsel to engage in informal interviews of a plaintiff’s treating physician, absent the plaintiff’s consent.</td>
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<tr>
<td>Mississippi</td>
<td>No, the Mississippi Rules of Evidence provides that the litigation waiver of the physician/patient relationship does not authorize ex parte communications by defense counsel.</td>
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<tr>
<td>Missouri</td>
<td>Yes, Missouri law does not prohibit ex parte communications, but note that a recent decision by the Missouri Supreme Court held that while HIPAA does not preempt Missouri law regarding ex parte communications, a trial court has no authority to issue an order informing a treating physician that he or she may meet with counsel pursuant to state and federal law.</td>
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<tr>
<td>Montana</td>
<td>Maybe, there is conflicting case law, whereas a 1986 Montana Supreme Court found informal interviews were permissible; however, a 1999 federal district court held that ex parte communications were barred by Montana statute.</td>
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<tr>
<td>Nebraska</td>
<td>Maybe, a recent (June 2011) federal district court noted that there was no state law on point, and after a review of other jurisdictions, permitted defense counsel to engage in ex parte communications with treating physicians with entry of a protective order and</td>
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<tr>
<td>State</td>
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<tr>
<td>Nevada</td>
<td>Yes, a recent order of the Nevada Supreme Court (May 2011), upheld defense counsel’s ex parte communications with plaintiff’s treaters to discover information regarding his medical condition.</td>
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<tr>
<td>New Hampshire</td>
<td>No, a 1987 case held that a waiver of the physician/patient privilege did not permit defense counsel to engage in informal interviews absent patient’s consent.</td>
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<tr>
<td>New Jersey</td>
<td>Yes, as HIPAA does not preempt state law regarding ex parte communication, but note, that defense counsel must move to compel plaintiff to sign an authorization and provide plaintiff with notice and description of scope of the interview.</td>
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<tr>
<td>New Mexico</td>
<td>No, New Mexico disfavors ex parte communication based upon public policy considerations involving physician/patient privilege.</td>
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<tr>
<td>New York</td>
<td>Yes, with recent case law determining that HIPAA did not preclude informal interviews and that plaintiffs could be compelled to authorize ex parte meetings.</td>
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<td>North Carolina</td>
<td>No, the courts in North Carolina have continued to hold that ex parte communications are improper.</td>
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<tr>
<td>North Dakota</td>
<td>Maybe, but it appears that the only relevant law is from the federal district court, disfavoring informal interviews of plaintiff’s treating physicians.</td>
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<tr>
<td>Ohio</td>
<td>Maybe, as it does not seem that there is an outright prohibition against ex parte meetings; however, at least one 2002 federal district court does indicate that such disclosure in violation of state privilege statute could subject physician to a subsequent lawsuit. Ohio courts have already ruled that HIPAA does not preempt state statutes.</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Yes, HIPAA does not preempt state statutes, and defense counsel can engage in ex parte communications with plaintiff’s treaters.</td>
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<tr>
<td>Oregon</td>
<td>No, as Oregon’s physician/patient privilege statute a patient has the right to prevent others from disclosing protected information in</td>
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<tr>
<td>State</td>
<td>Response</td>
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<tr>
<td>Rhode Island</td>
<td>No, Rhode Island statute only permits disclosures of protected information via formal methods of discovery.</td>
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<tr>
<td>South Carolina</td>
<td>Yes, with a federal court finding that there is no physician/patient privilege under South Carolina law, and as such, plaintiff has no right to control defense counsel's access to witnesses.</td>
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<tr>
<td>South Dakota</td>
<td>No, as even with waiver of a privilege upon filing suit, does not authorize defense counsel to engage in ex parte communications with plaintiff’s medical providers.</td>
</tr>
<tr>
<td>Tennessee</td>
<td>No, with the high court of Tennessee finding that ex parte communications violated the implied covenant of privacy between a patient and his or her physician.</td>
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<tr>
<td>Texas</td>
<td>Yes, Texas has found that HIPAA does not preempt its Rules of Civil Practice which permit informal interviews between defense counsel and plaintiff’s treating physicians.</td>
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<tr>
<td>Utah</td>
<td>No, a 2008 case found that treating physicians cannot engage in ex parte communications with defense counsel.</td>
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<tr>
<td>Vermont</td>
<td>Maybe, state law seems to be silent on this issue.</td>
</tr>
<tr>
<td>Virginia</td>
<td>No, a 2002 product liability federal case denied defendant drug manufacturer’s request to engage in ex parte contact, finding that it was contrary to Virginia’s physician/patient privilege statute.</td>
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<tr>
<td>Washington</td>
<td>No, a 2010 case upheld the prohibition on informal, ex parte interviews with a plaintiff’s treating physician.</td>
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<tr>
<td>West Virginia</td>
<td>No, a patient does not authorize ex parte communications simply because he or she files suit and places his medical condition in controversy.</td>
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<tr>
<td>Wisconsin</td>
<td>No, defense counsel may not seek “discovery” of confidential and protected information through ex parte or informal communication with a treating physician.</td>
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</table>
Wyoming  Maybe, as Wyoming does not have any law directly on point; however, case law does suggest that physicians are not compelled to meet with defense counsel informally.

VI. SPECIAL CONSIDERATIONS IN NORTH CAROLINA PRACTICE

As indicated in the chart above, the courts in North Carolina have continued to hold that ex parte communications are improper. The seminal case regarding ex parte communications with treating physicians under North Carolina law is Crist v. Moffatt, 326 N.C. 326, 336, 389 S.E.2d 41, 47 (1990), establishing that defense counsel in a medical malpractice action may not interview plaintiff’s nonparty treating physicians privately without plaintiff’s express consent and instead must utilize statutorily recognized methods of discovery.

To date, the North Carolina State Bar has issued four formal ethics opinions relating to this issue:

- RPC\textsuperscript{38} 162: A lawyer may not communicate with the opposing party’s nonparty treating physician about the physician’s treatment of the opposing party unless the opposing party consents.
- RPC 180: A lawyer may not passively listen while the opposing party’s nonparty treating physician comments on his or her treatment of the opposing party unless the opposing party consents.
- RPC 184: The lawyer for opposing party may communicate directly with

the pathologist who performed an autopsy on plaintiff’s decedent without the consent of the personal representative of the decedent’s estate.

- RPC 224: Employer’s lawyer may not engage in direct communications with the treating physician for an employee with a workers’ compensation claim.

Applying these ethics opinions, a defense attorney may only contact a nonparty treating physician privately in the following limited ways without the plaintiff’s prior express consent:

- to arrange the physician’s appearance at the trial as a witness (RPC 162);
- to transmit in writing the questions the attorney expects to pose to the physician at trial, so long as neither privileged information or responses to those inquiries are sought (RPC 162); and
- to accept by mail medical records directly from the physician after the case has been called for trial and the physician has been subpoenaed as a witness for the defense (RPC 180).

Meanwhile, in North Carolina, plaintiff’s bar often has been able to convince nonparty treating physicians that they must speak with plaintiff’s counsel by citing two medical professional guidelines: Guideline IV B. 1 regarding Consultation and

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39 Please note that while these four ethics opinions do not in and of themselves have the force of law, they are regarded as definitive interpretations of the Revised Rules of Professional Conduct by the North Carolina State Bar Council, and the State Bar on its website advises North Carolina lawyers to treat its ethics opinions as binding as a matter of professionalism. See http://www.ncbar.gov/faq/f_faq.asp.

40 Nothing in the Crist v. Moffatt decision itself, see 326 N.C. at 336, 389 S.E.2d at 47, or in the RPCs, discourages consensual informal discovery. The opposing party remains free to consent to defense counsel having direct communications with the nonparty treating physician. Whether the physician will directly communicate with defense counsel even with the patient’s consent is another story.
Testimony from the Medico-Legal Guidelines of North Carolina\textsuperscript{41} as well as the American Medical Association (AMA) Code of Medical Ethics, Opinion 9.07 “Medical Testimony” (which has been endorsed and adopted by the North Carolina Medical Board\textsuperscript{42}).

However, the current version of Opinion 9.07\textsuperscript{43} does not appear to contain any obligation for treaters to speak with plaintiff’s counsel beyond the general phrase “physicians have an obligation to assist in the administration of justice.” After all, a physician must hold the “patient’s medical interests paramount” not their legal interests. Id. (emphasis added). Guideline IV B. 1 of Medico-Legal Guidelines of North Carolina\textsuperscript{44} acknowledges explicitly that the obligation to consult with a patient’s attorney “may be limited if the patient has, or may have, a potential malpractice claim against the physician. If a physician is unclear whether the obligation to consult with a patient’s attorney may be limited, the physician is encouraged to consult with legal counsel for the North Carolina Medical Society, their own attorney, or ask the advice of their professional liability insurer.” See Guideline IV B. 1. Even to the extent these guidelines purport to impose obligations to confer with plaintiff’s counsel, none carry the force of law.

In a climate where physicians are understandably concerned with their own potential liability for malpractice and/or disclosure of confidential information under professional rules, state laws, and HIPAA, the trend is now for nonparty treating

\textsuperscript{41} These guidelines were collaborated on and adopted by the North Carolina Medical Society and the North Carolina Bar Association.
\textsuperscript{42} See http://www.ncmedboard.org/position_statements/detail/medical_testimony/.
\textsuperscript{43} This is available at http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion907.page?.
\textsuperscript{44} This is available at http://www.ncmedsoc.org/non_members/public_resources/2008%20Final%20M-L%20Guidelines.pdf.
physicians to be represented by their own counsel. Physicians in North Carolina are beginning to discover that they can seek the assistance of their malpractice insurance carriers and obtain counsel for cases even where they are nonparties.

These represented physicians are not only aware and informed that defense counsel may only contact them under very narrow parameters, but they may also refuse to have ex parte communications with plaintiff’s counsel, directing such counsel to speak with their lawyer. Rule 4.2 of the North Carolina Rules of Professional Conduct makes clear, “During the representation of a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”

Frustrating to plaintiff’s counsel, the physician’s attorney may very well decide that it is in the best interests of his or her doctor client that medical information only be conveyed to either party via deposition or other statutorily recognized methods of formal discovery.

There are other rules that may keep plaintiff’s counsel from direct contact with a nonparty treating physician. In the case of a represented organization, for example, a party hospital with defense counsel, Comment 9 to Rule 4.2 also prohibits communications by other lawyers with employee physicians who double as:

- a constituent of the organization who supervises, directs or consults with the organization’s lawyer concerning the matter;

45 This is available at http://www.ncbar.gov/rules/rules.asp.
46 Meanwhile, of course, the patient himself or herself remains free to have direct contact with his or her treating physician, and so the physician-patient relationship is not disturbed.
47 Note that although defense counsel is of course permitted access to its client’s employees, often in these cases the nonparty treating physicians are merely on staff at the hospital, and thus the Crist v. Moffatt restrictions apply.
• a constituent of the organization who has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability; and/or

• any constituent of the organization, regardless of position or level of authority, who is participating or participated substantially in the legal representation of the organization in a particular matter.

There is no exception carved out of Rule 4.2 or Comment 9 for plaintiff’s counsel who wish to have direct communications with nonparty treating physicians who are represented by counsel or who qualify as one of the enumerated constituencies of a represented organization.

Indeed, the intention of Crist v. Moffatt was not to provide plaintiff’s counsel with a sword, but to provide patients with a shield as to their confidential medical information, and to protect physicians from, in their efforts to be honest and forthcoming, but perhaps lacking guidance as to their legal obligations, revealing private information without a patient’s consent. See 326 N.C. at 333-36, 389 S.E.2d at 46-7. A nonparty treating physician presumably did nothing to place himself or herself in the midst of adversarial litigation, and yet he or she must navigate a minefield of potential missteps. Buffering physicians from both the plaintiff and the defense, if they choose to be represented by counsel, serves the aims of safeguarding physicians, obtaining their truthful and necessary testimony, and protecting a patient’s confidential information.

After all, the thrust of Crist v. Moffatt was not to prevent the exchange of information about the patient’s medical condition, but simply to insulate physicians and
patients from harm by restricting the methods by which such information could be conveyed. See 326 N.C. at 336, 389 S.E.2d at 47. The best way to accomplish this goal may be for all nonparty treating physicians to be represented by counsel, who can act as additional gatekeepers and stewards of confidential health information. In the end, this may mean that the only substantive communications with nonparty treating physicians by either side’s counsel in North Carolina will be by deposition, a method which affords nonparty treating physicians the greatest structure and least risk.