HIPAA SPELLS THE END TO SECRET *EX PARTE* COMMUNICATIONS BETWEEN DEFENSE ATTORNEYS AND PLAINTIFFS TREATING PHYSICIAN

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Chris D. Glover
Beasley, Allen, Crow, Methvin, Portis & Miles
Montgomery, Alabama

Defense attorneys often utilize the long established practice of *ex parte* communications with plaintiff's treating physicians. They have done so because those communications are an effective tool in their preparation of the defense case. Well …it was until HIPAA. Of the thirty-eight state courts that have addressed the propriety of such *ex parte* communications, twenty-four absolutely prohibit them.[1] Another six states permit informal interviews outside the Rules of Civil Procedure, but place such significant restrictions on them that they cannot truly be called *ex parte* communications.[2]

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[1]See *Duquette v Superior Court*, 778 P.2d 634 (Ariz. App. 1989); *Valentino v. Gaylord Hosp.*, 1992 conn. Super. LEXIS 456 (Conn. Sup. Ct. 1992); *Acosta v. Richter*, 671 So. 2d 149 (Fla. 1996); *State v. Moses*, 100 Hawaii 14, 58 P.3d 72 (2002) (cert. granted 2002); *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (Ill. 1997; *Cua v. Morrison*, 626 N.E.2d 581 (Ind. App. 1993), aff'd and opinion adopted in, 636 N.E.2d 1248 (Ind. 1994); *Roosevelt Hotel Ltd. Partnership v. Sweeney*, 394 N.W. 2d 353 (Iowa 1986); *Wesley Med. Ctr. V. Clark*, 669 P.2d 209 (Kan. 1983); *Sanders v. Spector*, 673 So. 2d 1176 (La. App. 1996); *Schwartz v. Goldstein*, 508 N.E.2d 97 (Mass. 1987); *Wenninger v. Muesing*, 240 N.W.2d 333 (Minn. 1976); *Scott v. Flynt*, 704 So. 2d 998 (Miss. 1996); *Jaap v. District Ct.*, 623 P.2d 1389 (Mont. 1981); *Nelson v. Lewis*, 534 A.2d 720 (N.H. 1987); *Church's Fried Chicken v. Hanson*, 845 P.2d 824 (N.M. App. 1992); *Anker v. Bordnitz*, 413 N.Y.S.2d 582 (App. Div. 1979); *Crist v. Moffatt*, 389 S.E.2d 41 (N.C. 1990); *Alexander v. Knight*, 25 Pa. D. & C. 2d 649 (C.P. Phil. Cty. 1961), aff'd, 177 A.2d 142 (Pa. Super. Ct. 1962) (*ex parte* contacts now also prohibited by Rule 4003.6, Pa.R.C.P.); *South Carolina St. Board of Med. Exam. V. Hedgepath*, 480 S.E.2d 724 (S.C. 1997); *Schaffer v. Spicer*, 215 N.W.2d 134 (S. Dak. 1974); *Givens v. Mullekin*, 75 S.W.3d 383 (Tenn. 2002); *Loudon v. Mhyre*, 756 P.2d 138 (Wash. 1988); *Kitzmiller v. Henning*, 437 S.E.2d 452 (W. Va. 1993); *Wardell v. McMillan*, 844 P.2d 1052 (Wyo. 1992).

[2]See *Green v. Bloodsworth*, 501 A.2d 1257 (Del. Sup. Ct. 1985); *Morris v. Thompson*, 937 P.2d 1212 (Idaho 1997); *Brandt v. Pelican*, 856 S.W.2d 658 (Mo. 1993);

Three states have banned *ex parte* communications either by court rule or statute.[3] In another three states whose state courts have not decided the issue, federal district courts have held that defendants cannot engage in *ex parte* communications.[4] Nationally, there is a clear majority view that such *ex parte* communications are disfavored in the law.[5]

HIPAA

The Health Insurance Portability and Accountability Act ("HIPAA") became law on August 21, 1996. HIPAA, initiated during the Clinton administration, authorized the first comprehensive federal standards for protecting the privacy of personal health information ("Privacy Rules"). The Privacy Rules, contained at 45 C.F.R. §§ 160 and 164, regulate the use and disclosure of protected health information ("PHI"). PHI is

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Stempler v. Speidell, 495 A.2d 857 (N.J. 1985); *Damako v. Rowe*, 475 N.W.2d 30 (Mich. 1991); *Steinberg v. Jensen*, 534 N.W.2d 361 (Wis. 1995).

[3]See Rule 503, Ark. R. Evid.; *In re Miller*, 585 N.E.2d 369 (Ohio 1992) (holding that "physician-patient privilege is statutory in nature and is codified at R.C. 2317.02(b)"); Va. Stat. Ann. § 8.01-399.

[4]See *Neubeck v. Lundquist*, 186 F.R.D. 248 (D. Me. 1999); *Weaver v. Mann*, 90 F.R.D. 443 (D.N.Dak. 1981); *Horner v. Rowan Cos., Inc.*, 153 F.R.D. 597 (S.D. Tex. 1994).

[5]*Crist v. Moffatt*, 389 S.E.2d 41, 45 (N.C. 1990) ("The emerging consensus adheres to the position that defense counsel is limited to the formal methods of discovery enumerated by the jurisdiction's rules of civil procedure, absent the patient's express consent to counsel's *ex parte* contact with her treating physician.").

For other discussions of this issue, see, e.g., Bobby Russ, *Can We Talk? The Rest of the Story or Why Defense Attorneys Should Not Talk to the Plaintiff's Doctors*, 39-FEB Tenn. B.J. 29 (2003); *Commentary, Recognizing the Split: The Jurisdictional Treatment of Defense Counsel's Ex Parte Contact With Plaintiff's Treating Physician*, 23 J. Legal Prof. 247 (1989-1999); John Kassel, *Ex Parte Conferences With Treating Physicians COUNTERPOINT ... Defense Counsel's Ex Parte Communication With Plaintiff's Doctors: A Bad One-Sided Deal*, South Carolina Lawyer September-October 1997; John Jennings, note, *The Physician-Patient Relationship: Admissibility of Ex Parte Communication Between Plaintiff's Treating Physician and Defense Counsel*, 59 Mo. L. Rev. 441 (1994).

broadly defined as any individually identifiable health information. This includes information regarding a person's past, present or future physical or mental health; the provision of health care; or the past, present or future payment of health care. This new federal patient privacy protection means that secret, *ex parte* communications are no longer to be tolerated.

Except as otherwise permitted or required, PHI may not be disclosed without a valid authorization, and any use or disclosure must be consistent with the authorization granted.[6] Plaintiff's attorneys should specifically exclude *ex parte* communications when HIPAA authorizations are provided as a courtesy to defense counsel. Likewise, the plaintiff attorney's authorization should allow them.

The Privacy Rule applies to both written and oral communications.[7] The HIPAA regulation applicable to judicial proceedings is 45 C.F.R. § 164.512(e)(1).[8] Subsections 164.512(e)(1)(i) and (e)(1)(ii) define the circumstances in which a healthcare provider may reveal PHI in the course of a judicial proceeding. Nowhere do the regulations permit healthcare providers to discuss PHI with defense attorneys just because a lawsuit is pending. Nowhere do any of the HIPAA regulations permit or purport to permit *ex parte* communications. The regulations are simply silent about the issue.

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[6]45 C.F.R. § 164.508 Uses and disclosures for which an authorization is required. Furthermore, when producing PHI, health care providers must produce only the minimum information necessary: "When using or disclosing protected health information ... a covered entity must make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure or request." 45 C.F.R. § 164.502(b)(1).

[7]45 C.F.R. § 160.103.

[8]This regulation (current as of October 11, 2003) is reproduced in its entirety as Appendix A.

HIPAA's judicial proceedings may be summarized as allowing disclosure "only in response to:

> "(A) a Court Order that expressly authorizes the disclosure of the information; or
>
> "(B) a subpoena or discovery request, if a qualified protective order has been requested or a good-faith effort has been made to give notice to the individual and any objections have been resolved."

The subpoena provision does not require the entry of a protective order; it requires only that a defendant seeking PHI demonstrate to the doctor that it has requested one. However, this demonstration can be burdensome. Most courts have handled the situation with a blanket protective order. HIPAA subsection (v) only requires two things in a protective order: (1) a mandate that the protected health information will be used only for the litigation and (2) a requirement that all information be returned at the end of the litigation. Furthermore, subsection (ii) only applies to subpoenas and discovery requests. Thus, any protective order entered for HIPAA purposes should state only that the Court authorizes, in response to any subpoena or other discovery request, a doctor or other healthcare provider to produce protected health information, subject to the conditions in subsection (v).[9]

In sum, with HIPAA, Congress sought to balance individuals' privacy rights against practical and functional concerns. Although 45 C.F.R. § 164.512(e)(1) provides for the limited release of information relevant to a lawsuit in response to a court order, subpoena, or other proper discovery request, the Privacy Rule does not affect any waiver of a patient's right of confidentiality. *Ex parte* communications between defense counsel

[9]There obviously is no requirement in HIPAA that court-ordered protective orders permit *ex parte* contacts between defense attorneys and plaintiff's treating physicians.

and a plaintiff's treating physician for the purpose of gaining a strategic advantage in the defense of a civil lawsuit therefore violate both the letter and the spirit of the Act.

A LOOK AT ALABAMA LAW

Alabama is one of many states that specifically allowed *ex parte* communications prior to HIPAA. Incidentally, Alabama courts have not yet put an end to the practice of *ex parte* communications between defense attorneys and plaintiff's treating physicians. However, Alabama's past reasoning for tolerating the *ex parte* communications is no longer valid in light of Congress's recognition of the importance of privacy of personal medical information through its promulgation of HIPAA.

The Alabama Supreme Court has made it clear that it does not condone *ex parte* interviews with plaintiff's treating physicians when the defendants engage in improper conduct.[10] The Court also has explained that the reason it tolerated any *ex parte* communications at all was because of an "absence of a statutory physician-patient testimonial privilege. ..."[11] The Court recognized a narrow right to engage in *ex parte* communications with a plaintiff's treating physician when the information sought would otherwise "be legally discoverable by the defendant in that litigation."[12] The Court wrote:

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[10]See *Romine, supra*, 476 So.2d 55 n. 3; *Mull v. String, supra*, 448 So.2d 952, 954 n. 2; see, also, *Zaden v. Elkus* [Ms. 1012149, Sept. 12, 2003], __ So.2d __ , 2003 WL 22113880 (Ala. 2003) at * 14 quoting *Doe v. Eli Lilly & Co.*, 99 F.R.D. 126, 128 (D.D.C. 1983) ("'The potential for influencing trial testimony is inherent in every contact between a prospective witness and an interlocutor, formal or informal, and what a litigant may justifiably fear is an attempt by an adversary at *improper* influence for which there are sanctions enough if it occurs.").

[11]*Mull v. String*, 448 So.2d at 954.

[12]*Id.*

> We therefore hold that when a patient sues a defendant other than his or her physician, and the information acquired by the physician as a result of the physician-patient relationship would be legally discoverable by the defendant in that litigation, then the patient will be deemed to have waived any right to proceed against the physician for the physician's disclosure of this information to that defendant or that defendant's attorney. Our recognition of this narrow exception does not, however, encompass a physician's disclosure of information acquired during the physician-patient relationship to persons other than such a defendant or that defendant's attorney. To hold otherwise and allow public disclosures to unrelated third parties would not only contravene recognition of the physician's primary duty of non-disclosure in *Horn* [*v. Patton*, 291 Ala. 701, 287 So.2d 824 (1973)], but also flout the policy considerations protecting the patient's privacy interest in full, *confidential* disclosure to his or her physician to obtain an accurate diagnosis and treatment.[13]

HIPAA now provides the missing statutory privilege that undercuts any claim by defense attorneys that they are free to speak with a plaintiff's treating physician about protected health information. Because of the Privacy Rule, PHI is not "legally discoverable" unless and until the defense attorney first complies with 45 C.F.R. § 164.512(e)(1).

EX PARTE **CONTACTS ARE HARMFUL**

Harm to Patients/Plaintiffs

Patients are reasonably entitled to expect that their physicians will keep private health information confidential. Unfortunately, that expectation of privacy is trampled when defense attorneys communicate in secret with a plaintiff's physicians about the defense of a lawsuit.

[13]*Id*. 448 So.2d at 954-955 (emphasis in original). Cf., *Zaden v. Elkus, supra*, at * 14, quoting *Doe v. Eli Lilly & Co.*, 99 F.R.D. 126, 128 (D.D.C. 1983) (" ... Unless impeded by privilege an adversary may inquire, in advance of trial, by any lawful manner to learn what any witness knows if other appropriate conditions the witness alone may impose or satisfy, ...").

It was recognized years ago that "[e]x parte contacts are a 'hardball' tactic long favored by the defense bar, particularly in medical malpractice suits."[14] The Supreme Court of West Virginia noted that "[P]rivate nonadversary interviews of a doctor by adverse counsel threaten to undermine the confidential nature of the physician-patient relationship" and "[t]he danger of *ex parte* interviews of a doctor by adverse counsel is that the patient's lawyer is afforded no opportunity to object to the disclosure of medical information that is remote, irrelevant, or compromising in the context other than the lawsuit at hand."[15] The Supreme Court of Iowa was particularly concerned about physicians revealing confidential information unrelated to the lawsuit. That court wrote:

> The possibility of inadvertent wrongful disclosure of confidential matters troubles us. We do not mean to question the integrity of doctors and lawyers or to suggest that we must control discovery in order to assure their ethical conduct. We are concerned, however, with the difficulty of determining whether a particular piece of information is relevant to the claim being litigated. Placing the burden of determining relevancy on an attorney, who does not know the nature of the confidential disclosure about to be elicited, is risky. Asking the physician, untrained in the law, to assume this burden is a greater gamble and is unfair to the physician. We believe this determination is better made in a setting in which counsel for each party is present and the court is available to settle disputes.[16]

"Secret meetings between defense lawyers and treating physicians are an affront to both the rights of the patients, who are entitled to place their trust in their doctors, and the rights of plaintiffs to a fair trial of their claims against alleged wrongdoers."[17]

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[14]Phillip H. Corboy, *Ex Parte Contacts Between Plaintiff's Physician and Defense Attorneys: Protecting the Patient-Litigant's Right to a Fair Trial*, 21 Loy. U. Chi. L.J. 1001, 1001-02 (1990).

[15]*West Virginia ex rel Kitzmiller v. Henning*, 437 S.E.2d 452 (W. Va. 1993).

[16]*Roosevelt Hotel Ltd. Partnership v. Sweeney*, 395 N.W.2d 353, 357 (Iowa 1986).

[17]Corboy, *Right to Fair Trial*, *supra*, 21 Loy. U. Chi. L.J. at 1038.

Harm to Physicians

Physicians are placed in unenviable positions when defense attorneys engage them in *ex parte* communications, as physicians are confronted with numerous competing ethical, legal and professional pressures in deciding whether and how to respond to such requests. For example, the familiar Hippocratic Oath impresses upon physicians a great moral obligation to advocate for, and safeguard the confidences of, the patients they treat:

> "I swear by Apollo the healer, by Aesculapius, by Hygeia (Health) and all the powers of healing, and call to witness all the gods and goddesses that I may keep this Oath, and promise to the best of my ability and judgment: . . . Whatever I see or hear, professionally or privately, which ought not to be divulged, I will keep secret and tell no one."[18]

The American Medical Association's *Principles of Medical Ethics* requires as follows:

> "The medical profession has long subscribed to a body of ethical statements developed primarily for the benefit of the patient. As a member of this profession, a physician must recognize responsibility to patients first and foremost, as well as to society, to other health professionals, and to self. The following Principles adopted by the American Medical Association are not laws, but standards of conduct which define the essentials of honorable behavior for the physician.
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> "IV. A physician shall respect the rights of patients, colleagues, and other health professionals, and shall safeguard patient confidences and provacy within the constraints of the law.
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> "VIII. A physician shall, while caring for a patient, regard responsibility to the patient as paramount."[19]

[18]Hippocrates, *Oath of Hippocrates*, in *Hippocratic Writings* (J. Chadwick and W. N. Mann trans., Penguin Books 1950).

[19]*Principles of Medical Ethics*, AMA http://www.ama-assn.org/ama/pub/category/2512html adopted June 17, 2001, (cite (last updated May 08, 2002).

The AMA defines a breach of confidentiality as "a disclosure to a third party, without patient consent or court order, of private information that the physician has learned within the patient-physician relationship."[20] While the AMA's ethical guidelines may not be legally binding, maintaining patient confidentiality is a legal as well as ethical duty: "A physician's legal obligations are defined by the *U.S. Constitution*, by federal and state laws and regulations, and by the courts. Even without applying ethical standards, courts generally allow a cause of action for a breach of confidentiality against a treating physician who divulges confidential medical information without proper authorization from the patient."[21] Physicians are also confronted with feelings of professional loyalty and empathy. In many states, Alabama included, there may be coercive influence exerted by a shared malpractice insurer. ProAssurance, Inc. (formerly known as Medical Assurance and Mutual Assurance) asserts on its website[22] that it provides malpractice insurance for ninety percent of Alabama's physicians. As the Arizona Court of Appeals recognized,[23] the fact that a treating physician shares the same insurance carrier as the defendant is highly relevant to the pressure a physician faces when a defense attorney requests an *ex parte* interview. The court stated:

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[20]*Patient confidentiality*, AMA, Office of Gen. Counsel, Div. Of Health Law http://www.ama-assn.org/ama/pub/printcat/461html (last updated April 17, 2003).

[21]*Id.*; see, also, Zelin annotation.

[22]See http://www.medicalassurance.com and the report on that website giving Medical Assurance's market share. Website printouts on file with authors.

[23]*Duquette v. Superior Court*, 778 P. 2d 634, 641 (Ariz. App. 1989).

> "We also note that in Arizona, a substantial number of physicians are insured by a single 'doctor owned' insurer. Realistically, this factor could have an impact on the physician's decision [whether or not to reject the request for an *ex parte* interview]. In other words, the physician might feel compelled to participate in the *ex parte* interview because the insurer defending a medical malpractice defendant may also insure the physician witness."

The District Court for the Middle District of Pennsylvania is also particularly sensitive to the risk of untoward influences from medical liability insurers:

> Furthermore, the unauthorized ex parte interview of a plaintiff's treating physician by defense counsel creates a situation which may invite questionable conduct. 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 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.[24]

The Alabama Board of Medical Examiners holds the position that "it is unethical and unprofessional for a physician to allow financial incentives or contractual ties of any kind to adversely affect his or her medical judgment of practice care."[25] The ABME further declares that:

> "(2) Therefore, it is the position of the Alabama Board of Medical Examiners that any act by a physician that violates or may violate the trust a patient places in the physician places the relationship between physician and patient at risk. This is true whether such an act is self-determined or

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[24] *Manion v. N.P.W. Med. Ctr.*, 676 F.Supp. 585, 594-595 (M.D. Penn. 1987).

[25] 540-X--9-.07 *Position Statement of the Alabama Board of Medical Examiners concerning the Physician-Patient Relationship,* Patricia E. Schaner, Atty. for the ABME; stat. auth. Code of Ala. 1975, § 10-12-45, 34-24-53.

the result of the physician's contractual association with a health care entity. The Board believes the interest and health of the people of Alabama are best served when the physician-patient relationship remains inviolate. The physician who puts the physician-patient relationship at risk also puts his or her relationship with the Board in jeopardy.

"(4) Patient trust is fundamental to the relationship thus established. It requires the following:

(a) that there be adequate communication between the physician and the patient;
(b) that there be no conflict of interest between the patient and the physician or third parties;
(c) that intimate details of the patient's life shared with the physician be held in confidence; . . .(5) The Board believes the interests and health of the people of Alabama are best served when the physician-patient relationship, founded on patient trust, is considered sacred, and when the elements crucial to that trust-- communication, patient privacy, confidentiality, competence, patient autonomy, compassion, and appropriate care-- are foremost in the hearts, minds, and actions of the physician licensed by the Board."[26]

HIPAA requires a physician to provide only the minimum necessary information in response to a lawful request for protected health care information.[27] A physician, in an individual's absence, must utilize his professional judgment to determine what information meets this standard.[28] This is a difficult task with regards to legal issues about which the physician is likely to be poorly informed. He risks civil and/or criminal liability for HIPAA violations if he provides unnecessary protected information.[29] It is grossly unfair for the physician to be put to such risks without input from his patient's

[26]*Id.* (emphasis added).

[27]45 CFR § 164.512(e).

[28]45 C.F.R. § 164.510(b)(3).

[29]42 U.S.C. § 1320d5-1320d6.

counsel or guidance from a court. At minimum, fairness requires that physicians receive balanced input from each side in a lawsuit as they fulfill their Congressionally mandated role of determining what information must be divulged or held in confidence.

The implications of improper physician disclosures are clear: administrative sanctions (e.g., loss of medical license); criminal sanctions (e.g., HIPAA penalties); and civil sanctions (e.g., civil tort liability for invasion of privacy, etc.). Properly understood, physicians should object just as loudly as their patients to any attempts to engage them in *ex parte* communications.

Harm to the Civil Justice System

The civil justice system also suffers from the practice of *ex parte* contacts between defense and plaintiff's treating physicians. The Rules of Civil Procedure and Discovery were designed to afford all parties equal access to justice. The Rules are intended to eliminate "trial by ambush" and other odious practices like these. Use of discovery methods such as interrogatories, depositions, or even informal interviews following notice to the plaintiff and the opportunity for the plaintiff or a representative to be present, allow counsel for both parties to inform the physician which issues are relevant to the subject matter of the suit, and what portions of the patient's medical records are considered confidential. Conformance with these traditional practices does not hamper the attorney's preparation of a lawful defense. In fact, "it is undisputed that *ex parte* conferences yield no greater evidence, nor do they provide any additional information, than that which is already obtainable through regular methods of discovery."[30] In the absence of any evidence that *ex parte* interviews afford any greater

[30] *Petrillo v. Syntex Labs, Inc.*, 499 N.E.2d 952, 956 (Ill. App. 1986).

access to discoverable information, or any reduction in cost than that available in following the methods set forth in the Rules of Civil Procedure, no legitimate justification for this practice exists.

Following formal discovery channels also affords court oversight. In *Ex parte Eagan*, the trial court issued a protective order prohibiting *ex parte* contacts by the defendants' attorneys with the plaintiff's treating physicians in a malpractice case in order to "protect the patient from wrongful disclosure of [her] privileged information; the third party health care provider, from liability for breach of that privilege; and the defendant's representatives from charges of wrongdoing."[31] Rejecting a defense contention that the mere filing of the lawsuit constituted a waiver of any claim of privilege, the trial court wrote: "The filing of an action under the Alabama Medical Liability Act releases other physicians who have treated the plaintiff from their fiduciary duty not to disclose legally discoverable information in the malpractice action. The physician providing such information has no legal liability to the patient for providing such information. [However], that [does] not mean that the filing of malpractice action constitutes a waiver of the plaintiff's right to the protections afforded by Rule 26, et. seq., of the Alabama Rules of Civil Procedure."[32]

[31]*Ballew v. Eagan*, Jefferson County, Alabama, Circuit Court Case No. CV-00-6528-JSV, February 23, 2001 Protective Order, at p. 4.

[32]*Id.* at p. 6.

The malpractice defendants' subsequent petition for a writ of mandamus filed with the Alabama Supreme Court in an effort to overturn the trial court's protective order was denied by a vote of 8-0.[33]

CONCLUSION

HIPAA renders the plaintiff's medical information confidential and requires notice and authorization as set forth in 45 CFR 164. As such, it preempts less stringent state law and provides the baseline for acceptable means by which necessary relevant information may be obtained. Under HIPAA, *ex parte* interviews of a treating physician to gain protected health information are now by their very nature improper.

HIPAA provides a legislative response to many state's concerns, including Alabama, that the absence of a privacy statute places societal concerns above the need to protect the individual's privacy. HIPAA also provides a baseline of minimal privacy protections to safeguard the confidentiality of personal health information as set forth in the HIPAA regulations. When measured against this framework, improper *ex parte* interviews between defense attorneys and plaintiff's treating physicians may no longer be tolerated.

[33]*Ex parte John Eagan, M.D.*, Ala. S. Ct. Case No. 1001142, __ So.2d __ (Ala. 2002) (writ denied, no opinion). An Alabama case without a published opinion is assigned no precedential weight under Rule 9, Ala.App.R.