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An Important Consequence of HIPAA: No More *Ex Parte* Communications Between Defense Attorneys and Plaintiffs' Treating Physicians

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Abstract

The authors discuss the importance of HIPAA as it relates to the harm that ex parte *communications between defense attorneys and plaintiffs' treating physicians can cause.*

Introduction

Alabama courts have not yet put an end to the practice of *ex parte*[1] communications between defense attorneys and plaintiff's treating physicians.[2] Of the state courts that have addressed the propriety of such *ex*

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[1]*Ex parte* is defined as "on one side only; by or for one party; done for, on behalf of, or on the application of, one party only, . . . for the benefit of [that] one party only, and without notice to, or contestation by, any person adversely affected." BLACK'S LAW DICTIONARY 576 (6th ed. 1990).

[2]*See* Romine v. Medicenters of Am., Inc., 476 So. 2d 51, 55 n.2 (Ala. 1985); Mull v. String, 448 So. 2d 952, 954 (Ala. 1984).

parte communications, twenty-four absolutely prohibit them.[3] 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.[4] Three states have banned *ex parte* communications either by court rule or statute.[5] In another three states where state courts have not decided the issue, federal district courts have held that defendants cannot engage in *ex parte* communications.[6] Nationally, the a clear majority view is that such *ex parte* communications are disfavored in the law.[7]

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[3]*See* Duquette v. Superior Court, 778 P.2d 634, 642, 161 Ariz. 269 (Ct. App. 1989); Valentino v. Gaylord Hosp., 1992 WL 43134, *2, 6 Conn. L. Rtpr. 87 (Super. Ct. Feb. 19, 1992); Acosta v. Richter, 671 So. 2d 149, 156, 21 Fla. L. Weekly S29 (1996); State v. Moses, 58 P.3d 72, 100 Haw. 14 (2002); Best v. Taylor Machine Works, 689 N.E.2d 1057, 1100, 179 Ill. 2d 367, 458, 228 Ill. Dec. 636, 679 (1997); Cua v. Morrison, 626 N.E.2d 581, 586 (Ind. App. 1993), *aff'd & opinion adopted in* 636 N.E.2d 1248 (Ind. 1994); Roosevelt Hotel Ltd. Partnership v. Sweeney, 394 N.W.2d 353, 357 (Iowa 1986); Wesley Med. Ctr. v. Clark, 669 P.2d 209, 215, 234 Kan. 13, 20 (1983); Sanders v. Spector, 673 So. 2d 1176 (La. App. 1996); Schwartz v. Goldstein, 508 N.E.2d 97, 99, 400 Mass. 152, 154 (1987); Wenninger v. Muesing, 240 N.W.2d 333, 337, 307 Minn. 405, 411 (1976); Scott v. Flynt, 704 So. 2d 998, 1007 (Miss. 1996); Jaap v. District Ct., 623 P.2d 1389, 1392, 191 Mont. 319, 323 (1981); Nelson v. Lewis, 534 A.2d 720, 723, 130 N.H. 106, 111 (1987); Church's Fried Chicken v. Hanson, 845 P.2d 824, 829, 114 N.M. 730, 735 (App. 1992); Anker v. Bordnitz, 413 N.Y.S.2d 582, 586 (App. Div. 1979); Crist v. Moffatt, 389 S.E.2d 41, 47, 326 N.C. 326, 335 (1990); Alexander v. Knight, 25 Pa. D. & C.2d 649, 655 (C.P. Phil. Cty. 1961), *aff'd*, 177 A.2d 142 (Pa. Super. Ct. 1962) (*ex parte* contacts now also prohibited by PA. R. CIV. P. 4003.6); S.C. St. Board of Med. Exam'rs v. Hedgepath, 480 S.E.2d 724, 726, 325 S.C. 166, 169 (1997); Schaffer v. Spicer, 215 N.W.2d 134, 137, 88 S.D. 36, 39-40 (1974); Givens v. Mullekin, 75 S.W.3d 383, 409 (Tenn. 2002); Loudon v. Mhyre, 756 P.2d 138, 142, 110 Wash. 2d 675, 681 (1988); State *ex rel.* Kitzmiller v. Henning, 437 S.E.2d 452, 456, 190 W. Va. 142, 146 (1993); Wardell v. McMillan, 844 P.2d 1052, 1067 (Wyo. 1992).

[4]*See* Green v. Bloodsworth, 501 A.2d 1257, 1259 (Del. Super. Ct. 1985); Morris v. Thompson, 937 P.2d 1212, 1217, 130 Idaho 138, 143 (1997); Brandt v. Pelican, 856 S.W.2d 658, 661 (Mo. 1993); Stempler v. Speidell, 495 A.2d 857, 861-62, 100 N.J. 368, 377 (1985); Domako v. Rowe, 475 N.W.2d 30, 33, 438 Mich. 347, 354 (1991); Steinberg v. Jensen, 534 N.W.2d 361, 370-73, 194 Wis. 2d 439, 463-69 (1995).

[5]*See* ARK. R. EVID. 503; *In re* Miller, 585 N.E.2d 396, 403, 63 Ohio St. 3d 99, 107 (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 (2003).

[6]*See* Neubeck v. Lundquist, 186 F.R.D. 249, 251 (D. Me. 1999); Weaver v. Mann, 90 F.R.D. 443, 445 (N.D. 1981); Horner v. Rowan Cos., 153 F.R.D. 597, 601-02 (S.D. Tex. 1994).

[7]*See* Crist v. Moffatt, 389 S.E.2d 41, 45, 326 N.C. 326, 332 (1990) ("The emerging consensus adheres to the position that defense counsel is limited to the formal methods

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 the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[8] Initiated during the Clinton presidency,[9] Congress imposed upon the Secretary of the Department of Health and Human Services (HHS) the obligation to establish "Standards for Privacy of Individually Identifiable Health Information."[10] As finally promulgated, HIPAA's "Privacy Rule establishes, for the first time, a foundation of federal protections for the privacy of protected health information."[11] This new *federal* patient privacy protection means that secret, *ex parte* communications are no longer to be tolerated in Alabama or elsewhere.

I. What Is HIPAA?

Public Law 104-191 was signed into law by President Clinton on August 21, 1996. When Congress did not meet the Act's original August 21, 1999 deadline for enacting comprehensive privacy legislation, the

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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 generally, 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 (1989-99); John Kassel, *Ex Parte Conferences With Treating Physicians COUNTERPOINT . . . Defense Counsel's Ex Parte Communication With Plaintiff's Doctors: A Bad One-Sided Deal*, S.C. LAW. Sept.-Oct. 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).

[8]Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191 (1996).

[9]*See id.*; Statement by President William J. Clinton Upon Signing H.R. 3103, 32 WEEKLY COMP. PRES. DOC. 1480, (Aug. 21, 1996).

[10]Privacy Rule, 65 Fed. Reg. 82,463 (Dec. 30, 2000) (codified at 45 C.F.R. §§ 160, 164 (2002)).

[11]U.S. Dep't of Health & Human Servs., *Office for Civil Rights Summary of the HIPAA Privacy Rule* (Apr. 11, 2003), *available at* http://www.hhs.gov/ocr/hipaa/privacy.html [hereinafter *Summary of the HIPAA Privacy Rule*].

Secretary of HHS was directed to develop privacy regulations.[12] In response to this mandate, HHS published a final regulation in the form of the Privacy Rule in December 2000, which was scheduled to become effective April 14, 2001.[13] Subsequently, President Bush appointee, HHS Secretary Tommy Thompson, suspended the effective date of the regulations and called for an additional opportunity for public comment. After modifications ostensibly intended to "ensure that the Privacy Rule worked as intended," HHS adopted a final Privacy Rule now codified as 45 C.F.R. §§ 160, 164, which became effective April 14, 2003.[14]

HIPAA is intended to provide a baseline of health information privacy protections, which states are free to rise above in order to best protect their citizens.

> HIPAA and the Standards promulgated by the Secretary expressly "supercede [sic] any contrary provision of State law," *except* as provided in 42 U.S.C. § 1320d-7(a)(2). Under that exception, HIPAA and its standards expressly do *not* preempt contrary state law, *if* the state law "relates to the privacy of individually identifiable health information," and is "more stringent" than HIPAA's requirements.[15]

HIPAA does not preempt "more stringent" state laws,[16] and specifically defers to state law on issues concerning parental access to the health information of minor children.[17]

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[12]Standards for Privacy of Individually Identifiable Health Information, 68 Fed. Reg. 82,462-01, 82,469 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160 & 164); 42 U.S.C. §§ 1320d-1(d), 1320d-3(a)(b), 1320d-4(b) (1996).

[13]*Summary of the HIPAA Privacy Rule*, *supra* note 11.

[14]*Id.*

[15]U.S. *ex rel.* Stewart v. Louisiana Clinic, 2002 WL 31819130, at *3 (E.D. La. 2002) (quoting 42 U.S.C. § 1320d-7(a)(1) (1996)) (citing 42 U.S.C. § 1320d-7(a)(2) (1996)); *see also In re* PPA Litig., 2003 WL 2203734 (N.J. Super. Ct. Law Div. Sept. 23, 2003) (holding that certain provisions of New Jersey's procedures governing *ex parte* contacts are less stringent than HIPAA and are therefore preempted by HIPAA).

[16]"More stringent" is defined in 45 C.F.R. § 160.202 (as amended in 2002). According to the district court in *Stewart*, to avoid preemption, "[state] law must (1) be 'contrary' to HIPAA or its Standards, (2) relate to the privacy of individually identifiable health information *and* (3) be 'more stringent' than federal law." *Stewart*, 2002 WL 31819130, at *4.

[17]*See* 45 C.F.R. § 164.502(g)(3) (2002).

Except as otherwise permitted or required, Protected Health Information (PHI)[18] may not be disclosed without a valid authorization, and any use or disclosure must be consistent with the authorization granted.[19] The Privacy Rule applies to both written and oral communications.[20] The HIPAA regulation applicable to judicial proceedings is 45 C.F.R. § 164.512(e)(1). 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 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.

HIPAA's regulations for judicial proceedings permit disclosure of PHI only under the following conditions:

> (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
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> (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:

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[18]PHI is defined as:

> individually identifiable health information:
>
> (1) Except as provided in paragraph (2) of this definition, that is:
>
> (i) Transmitted by electronic media;
>
> (ii) Maintained in electronic media; or
>
> (iii) Transmitted or maintained in any other form or medium.
>
> (2) Protected health information excludes individually identifiable health information in:
>
> (i) Education records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. § 1232g;
>
> (ii) Records described at 20 U.S.C. § 1232g(a)(4)(B)(iv); and
>
> (iii) Employment records held by a covered entity in its role as employer.

45 C.F.R. § 160.103 (2002).

[19]45 C.F.R. § 164.508 (2002) ("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) (2002).

[20]45 C.F.R. § 160.103 (2002).

> (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.[21]

These sections may be summarized as allowing disclosure only in response to: (1) a court order expressly authorizing the disclosure of the requested PHI, or (2) a subpoena or discovery request issued pursuant to the Rules of Civil Procedure, 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.

Subsection (ii) does not require the entry of a protective order; it requires only that a defendant seeking PHI demonstrate to the healthcare provider that it has requested one, or that the defendant has made a good-faith effort to give notice to the individual. Some attorneys may contend that making such a demonstration in each discovery request is overly burdensome. Of course, one of the ways to avoid that burden is to have the court enter a protective order in each case under subsection (v), which would then be provided with each subpoena or discovery request under subsection (ii). However, 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).[22]

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[21] 45 C.F.R. § 164.512(e)(1)(II) (2002).

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

Other aspects of HIPAA include the patient's right to an accounting. Individuals may request and have "a right to receive an accounting of disclosures of protected health information [that occurred during] the six years prior to the date [of the request]."[23] This accounting is required to include the date of the disclosure, who received the information, and a brief description of the information disclosed and the purpose or basis for the disclosure. An accounting is not required where the individual has provided an authorization under section 164.508.[24] The accounting requirement was intended

> as a means for the individual to find out the non-routine purposes for which his or her protected health information was disclosed by the covered entity, so as to increase the individual's awareness of persons or entities other than the individual's health care provider or health plan in possession of this information. To eliminate some or all of these public purposes [from compliance] would defeat the core purpose of the accounting requirement.[25]

Obviously, then a patient has the right to know whether his doctor has engaged in *ex parte communications*.

In addition, HIPAA provides civil or criminal penalties for covered entities who misuse personal health information.[26] HHS's Office for Civil Rights (OCR) has been charged with investigating complaints and enforcing the privacy regulation. "When appropriate, OCR can impose civil monetary penalties for violations of the privacy rule provisions. Potential

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[23]45 C.F.R. § 164.528 (2002) ("Accounting of disclosures of protected health information").

[24]"Elimination of an accounting requirement for authorized disclosures is justified in large part by the individual's knowledge of and voluntary agreement to such disclosures." Standards for Privacy of Individually Identifiable Health Information, 68 Fed. Reg. 82,462-01, 82,469 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160 & 164).

[25]*Id.* at 53,245.

[26]U.S. Dep't of Health & Human Servs., Press Release, *Fact Sheet: Protecting the Privacy of Patients' Health Information*, Apr. 14, 2003, ¶ 21, *available at* http://www.hhs.gov/news/facts/privacy.html. OCR may impose fines of up to $100 per violation, up to $25,000 per year; "criminal penalties . . . for certain actions such as knowingly obtaining protected health information in violation of the law," can range up to $50,000 and one year in prison, or up to $100,000 and five years in prison if committed under "false pretenses," or up to $250,000 and ten years in prison if "committed with the intent to *sell, transfer, or use protected health information* for commercial advantage, *personal gain* or malicious harm." *Id.* (emphasis added).

criminal violations of the law would be referred to the U.S. Department of Justice for further investigation and appropriate action."[27] Though HIPAA does not expressly provide for civil lawsuits in response to violations of confidentiality, it does not conflict with enforcement of any "more stringent" state laws that allow an individual to bring a breach of fiduciary duty, breach of confidentiality or privilege, or similar state-recognized cause of action.[28]

The new privacy protections afforded by HIPAA have survived two recent court challenges.[29] HHS Secretary Thompson recently lauded one such judicial endorsement with a clear statement about the importance of ensuring patient privacy that clearly undercuts any defense suggestion that the new Privacy Rule may sometimes be ignored:

> Today's [Fourth] Circuit ruling upholding the constitutionality of the HIPAA Privacy Rule is a victory for America's patients and the principle that the federal government can provide protections to insure the enhanced confidentiality of their medical records.
>
> This administration strongly supports a policy of providing a first-time-ever federal level of protection for the medical records of all Americans. . . . Consumers will benefit from these new limits on the way their personal medical records may be used or disclosed by those entrusted with this sensitive information.
>
> The new rules reflect a common-sense balance between protecting patients' privacy and ensuring the best quality care for patients. They do not interfere with the ability of doctors to treat their patients, and they allow the

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[27] *Id.* ¶ 20.

[28] *See, e.g.*, Horne v. Patton, 291 Ala. 701, 709, 287 So. 2d 824, 829-30 (1973) ("[I]t must be concluded that a medical doctor is under a general duty not to make extra-judicial disclosures of information acquired in the course of the doctor-patient relationship and that a breach of that duty will give rise to a cause of action."); *see also* Lonette E. Lamb, *To Tell or Not to Tell: Physician's Liability for Disclosure of Confidential Information About a Patient*, 13 CUMB. L. REV. 617 (1983); Judy E. Zelin, Annotation, *Tort Liability for Unauthorized Disclosure of Confidential Information About Patient*, 48 A.L.R.4th 668 (1986 & Supp. 2003) (collecting state and federal cases in which courts have considered whether tort liability exists when a physician or other medical practitioner makes an unauthorized disclosure of confidential information about his patient).

[29] *See* S.C. Med. Ass'n v. Thompson, 327 F.3d 346 (4th Cir. 2003); Ass'n of Am. Physicians & Surgeons, Inc. v. United States Dep't of HHS, 224 F. Supp. 2d 1115 (S.D. Tex. 2002), *aff'd by* 67 Fed. Appx. 253, 2003 WL 21196194 (5th Cir. 2003).

> continuing public health activities, such as tracking infectious disease outbreaks and reporting adverse drug events, to continue.[30]

In sum, with HIPAA, Congress sought to balance individuals' privacy rights against practical and functional concerns. Allowances are made for waiver of confidentiality in certain circumstances, such as when conflicts arise with public health concerns or criminal law investigation and enforcement. 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.[31] *Ex parte* communications between defense counsel 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.

II. *Ex Parte* Contacts Are Harmful

A. Harm to Patients-Plaintiffs

Patients are quite 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.

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."[32] The Supreme Court of West Virginia stated that "[p]rivate nonadversary interviews of a doctor by adverse counsel threaten to undermine the confidential nature of the physician-patient relationship."[33]

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[30]U.S. Dep't of Health & Human Servs., News Release, *Statement by Tommy G. Thompson*, Apr. 28, 2003, *available at* http://www.hhs.gov/news/press/2003pres/20030429a.html.

[31]45 C.F.R. § 164.512(e)(1)(v)(A) (2002).

[32]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).

[33]State *ex rel.* Kitzmiller v. Henning, 437 S.E.2d 452, 454, 190 W. Va. 142, 144 (1993).

That court further noted that "[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 a context other than the lawsuit at hand."[34] The Supreme Court of Iowa was particularly concerned about physicians revealing confidential information unrelated to the lawsuit. That court wrote:

> We are concerned . . . 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.[35]

"Secret meetings between defense lawyers and treating physicians are an affront to both the rights of 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."[36]

B. Harm to Physicians

Physicians are placed in unenviable positions when defense attorneys engage them in *ex parte* communications, because they 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: . . .

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[34]*Kitzmiller*, 437 S.E.2d at 455.

[35]Roosevelt Hotel Ltd. Partnership v. Sweeney, 394 N.W.2d 353, 357 (Iowa 1986).

[36]Corboy, *supra* note 32, at 1038.

> Whatever I see or hear, professionally or privately, which ought not to be divulged, I will keep secret and tell no one.[37]

The American Medical Association's *Principles of Medical Ethics* require the following:

> 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 privacy within the constraints of the law.
>
> . . . .
>
> VIII. A physician shall, while caring for a patient, regard responsibility to the patient as paramount.[38]

According to the American Medical Association (AMA), "[a] breach of confidentiality is 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."[39] Although the AMA's ethical guidelines may not be legally binding, maintaining patient confidentiality is a legal as well as an 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.[40]

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[37]Hippocrates, *Oath of Hippocrates*, in HIPPOCRATIC WRITINGS (J. Chadwick & W. N. Mann trans., Penguin Books 1950).

[38]American Medical Ass'n, *Principles of Medical Ethics*, ¶¶ 1-8 *available at* http://www.ama-assn.org/ama/pub/category/2512.html (last updated Apr. 2, 2002).

[39]American Medical Ass'n, *Patient Confidentiality*, ¶ 4 *available at* http://www.ama-assn.org/ama/pub/category/4610.html (last updated Dec. 30, 2003).

[40]*Id.* ¶ 2; *see also* Zelin *supra* note 28, at 668.

Physicians are also confronted with feelings of professional loyalty and empathy. In many states, Alabama included, there may be a coercive influence exerted by a shared malpractice insurer. Medical Assurance, Inc. (now a subsidiary of ProAssurance, Corp.) asserts on its website that it provides malpractice insurance for ninety percent of Alabama's physicians.[41] As the Arizona Court of Appeals recognized, 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.[42]

> 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 to reject the request for an *ex parte* interview]. In other words, the physician witness might feel compelled to participate in the *ex parte* interview because the insurer defending the medical malpractice defendant may also insure the physician witness.[43]

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

> [T]he 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

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[41]*See Insurer Profile* (Nov. 30, 2000), *available at* http://www.medicalassurance.com\s_and_p_mai_profile.pdf. Website printouts on file with authors.

[42]Duquette v. Superior Court, 778 P.2d 634, 641, 161 Ariz. App. 269, 276 (Ct. App. 1989).

[43]*Duquette*, 778 P.2d at 641.

> to suit by revealing the plaintiff/patient's confidences which are not pertinent to the pending litigation.[44]

The Alabama Board of Medical Examiners (ABME) 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."[45] The ABME further declares

> 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 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.
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> . . . .
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> 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; . . .
>
> . . . 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, selflessness and appropriate care–are foremost in the hearts, minds, and actions of the physician licensed by the Board.[46]

HIPAA requires a physician to provide only the minimum necessary information in response to a lawful request for protected health care information.[47] A physician, in an individual's absence, must utilize his

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[44]Manion v. N.P.W. Med. Ctr., 676 F. Supp. 585, 594-95 (M.D. Penn. 1987).

[45]ALA. ADMIN. CODE r. 540-X-9-.07 ("Position Statement of the Alabama Board of Medical Examiners Concerning the Physician-Patient Relationship").

[46]*Id.*

[47]45 C.F.R. § 164.512(e) (2002).

professional judgment to determine what information meets this standard.[48] This is a difficult task with regards to legal issues about which the physician is likely to be poorly informed. He risks civil or criminal liability–or both–for HIPAA violations if he provides unnecessary protected information.[49] It is grossly unfair for the physician to be put to such risks without input from his patient's 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). If the issue were properly understood, physicians might object just as loudly as their patients to any attempts to engage them in *ex parte* communications.

C. 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."[50] In the absence of evidence that *ex parte* interviews afford any

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[48]45 C.F.R. § 164.510(b)(3) (2002).

[49]42 U.S.C. § 1320d5-1320d6 (2003).

[50]Petrillo v. Syntex Labs, Inc., 499 N.E.2d 952, 956, 148 Ill. App. 3d 581, 587, 102 Ill. Dec. 172, 176 (Ct. App. 1986).

greater 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."[51] 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.*[52]

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 eight-to-zero.[53]

D. Potential Harm to Defense Attorneys

Additionally, allowing unfettered *ex parte* communications with plaintiff's treating physicians raises significant ethical problems for defense attorneys, especially when the physician may be characterized as an expert witness. The American Bar Association has commented:

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

[52]*Id.* at 6.

[53]*Ex parte* John Eagan, M.D., Ala. S. Ct. Case No. 1001142, 852 So. 2d 204 (Ala. 2002) (writ denied, no opinion). An Alabama case without a published opinion is assigned no precedential weight under Rule 9 of the Alabama Appellate Rules.

> Although the Model Rules do not explicitly prohibit ex parte contacts with an opposing party's expert witness, a lawyer who engages in such contacts may violate Model Rule 3.4(c) if the matter is pending in federal court or in a jurisdiction that has adopted an expert-discovery rule patterned after Federal Rule of Civil Procedure 26(b)(4)(a).[54]

Alabama Rule of Professional Conduct 3.4(c) is exactly the same as Model Rule 3.4(c).[55] Alabama Rule of Civil Procedure 26(b)(4)(A) is almost exactly the same as Rule 26(b)(4)(A) of the Federal Rules of Civil Procedure. Thus, when a plaintiff lists his treating physicians as expert witnesses, a defendant's attorney may be deemed to violate Rule 3.4(c) by engaging in *ex parte* contacts with them.[56]

Defense counsel often claim that *ex parte* interviews are necessary in order to develop attorney work product without the supervision or oversight of the plaintiff's counsel. This argument belies the law and common sense. The Supreme Court of Iowa stated: "Arguments based on invasion of attorney work product and trial strategy are unpersuasive and somewhat out of tune with our modern discovery process."[57] Work product by its very nature involves forming strategy, developing legal theories, and developing defenses. Even those states that have allowed *ex parte* contacts do not allow defendants to discuss their opinions, theories, or strategy regarding the patient or case without consent of both the plaintiff and the physician.[58]

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[54]ABA Ethics Opinion, Formal Opinion 93-378 (Nov. 8, 1993).

[55]MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(c) (1990).

[56]One treatise notes: "Since existing rules of civil procedure carefully provide for limited and controlled discovery of an opposing party's expert witnesses, all other forms of contact are impliedly prohibited." 2 GEOFFREY HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING § 3.4:402 (2d ed. Supp. 1994). Therefore, an attorney who engages in prohibited communications may run afoul of Rule 3.4(c) by "[k]nowingly disobey[ing] an obligation under the rules of a tribunal." *Id.*

[57]Roosevelt Hotel Ltd. Partnership v. Sweeney, 394 N.W.2d 353, 358 (Iowa 1986).

[58]*See, e.g.*, Steinberg v. Jensen, 534 N.W.2d 361, 371-72 (Wis. 1995) (holding that *ex parte* contacts are permissible but holding that defendant must tell the physician that he can decline the interview and that any information regarding opinions may not be discussed without the presence of opposing counsel or "through a writing, an exact duplicate of which must be sent concurrently to opposing counsel"); Stempler v. Speidler, 495 A.2d 857, 865 (N.J. 1985) (holding that *ex parte* contacts are allowed, but that the defendants must provide to the plaintiff the scope of the interview and inform the physician that the interview is totally voluntary).

The defense's "work product" argument is also contrary to existing Alabama law. A witness's statement is not considered "work product" in Alabama.[59] Moreover, "work product" does not include opinions of an expert witness; nor does it include questions to a third-party witness, such as a treating physician, because the treating physician is free to tell a plaintiff's lawyer what the defense lawyer asked him.[60]

III. Alabama Law

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.[61] The court also has explained that one reason it has refused to exclude the testimony of physicians who engage in *ex parte* communications is because of an "absence of a statutory physician-patient testimonial privilege."[62] Another reason for the decision is that the information sought would otherwise "be legally discoverable by the defendant in that litigation."[63] The court held

> 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

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[59] *See* Assured Investors Life Ins. Co. v. Nat'l Union Assocs., 362 So. 2d 228, 232 (Ala. 1978).

[60] *See* ALA. R. CIV. P. 26(b).

[61] *See* Romine v. Medicenters of Am., Inc., 476 So. 2d 51, 55 n.3 (Ala. 1985); Mull v. String, 448 So. 2d 952, 954 n.2 (Ala. 1984); *see also* Zaden v. Elkus, 2003 WL 22113880, at *14 (Ala. Sept. 12, 2003) ("'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.'" (quoting Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128 (D.D.C. 1983))).

[62] *Mull*, 448 So. 2d at 954.

[63] *Id.*

> disclosures to unrelated third parties would not only contravene our recognition of the physician's primary duty of non-disclosure in *Horne* [*v. Patton*], 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.[64]

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).[65] The fact that this protection comes from Congress rather than the Alabama legislature is immaterial because of the preemptive force of the *federal* regulations.[66]

As stated above, the federal regulations preempt any less stringent state law. It is clear that the practice of engaging in *ex parte* contacts, and any Alabama court's tolerance of that practice, is less stringent than the requirements of HIPAA's federal regulations. *Ex parte* contacts provide defendants with unfettered access to a plaintiff's treating physician. Such contacts are made without notice to the plaintiff and without any restrictions on the substance of the physician's conversation with the defendant's counsel. On the contrary, the federal regulations now prohibit the disclosure of PHI without compliance with the regulations. These regulations require compliance with 45 C.F.R. § 164.512(e)(1), discussed above, and that any disclosure of PHI be limited to the absolute minimum information necessary. 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. Therefore *ex parte* communications are inconsistent with and less stringent than the federal regulations, and they are no longer to be tolerated in Alabama or elsewhere.

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[64] *Id.* at 954-55 (citing Horne v. Patton, 291 Ala. 701, 287 So. 2d 824 (1973)) (citations & footnotes omitted). *Cf. Zaden*, 2003 WL 22113880, at *14 (quoting *Doe*, 99 F.R.D. at 128 ("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 are satisfied . . . .")).

[65] 45 C.F.R. § 164.512(e)(1) (2002).

[66] 45 C.F.R. § 160.202 (2002).

Alabama's Rules of Civil Procedure, on the other hand, seem to be as stringent as the federal regulations. They also afford defendants ready access to a plaintiff's treating physicians. For example, the Alabama Rules of Civil Procedure, patterned after the Federal Rules of Civil Procedure, have twelve rules governing the methods and forms of discovery, including interrogatories, requests or production of documents, and depositions upon written questions. None of Alabama's rules restrict a defense attorney's efforts to discover facts and opinions from treating physicians, so long as plaintiff's attorney is given notice and an opportunity to participate (as with depositions[67] or depositions upon written questions[68]), or notice and an opportunity to object (as with non-party subpoenas[69]). Moreover, defense counsel can easily obtain medical records by requesting them from plaintiff's counsel. These procedures comply with and seem to be as stringent as the HIPAA regulations because they provide the plaintiff notice and an opportunity to object, as required by 45 C.F.R. § 164.512(e)(1). Accordingly, a simple requirement that a defendant comply with the Alabama Rules of Civil Procedure may avoid the preemptive effect of the federal regulations.

Another reason that Alabama courts must follow the provisions of HIPAA and prohibit *ex parte* communications can be found in the Alabama Supreme Court's recent decisions regarding a trial court's discretionary authority to impose restrictions on a party's access to witnesses.[70] The court formerly looked upon any such restrictions unfavorably.[71] In *Ex parte Stephens*, the court went so far as to vacate a trial court's protective order that restricted the plaintiff's access to the defendant's policyholders to interviews at which the defense's counsel was present.[72] Justice Houston issued a sharp dissent, however, stating that, "[i]n this case, the plaintiffs do not show a clear abuse of discretion.

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[67]ALA. R. CIV. P. 32.

[68]ALA. R. CIV. P. 31. It is well recognized that Rule 31 "sets forth an inexpensive alternative to the deposition on oral examination." 1 CHAMP LYONS, JR., ALABAMA PRACTICE: RULES OF CIVIL PROCEDURE § 31.1, at 603 (3d ed. 1996).

[69]ALA. R. CIV. P. 34(b)(2).

[70]*See Ex parte* Henry, 770 So. 2d 76, 80 (Ala. 2000).

[71]*See, e.g.*, *Ex parte* Stephens, 676 So. 2d 1307 (Ala. 1996), *overruled by Ex parte* Henry, 770 So. 2d 26 (Ala. 2000); *Ex parte* Clark, 582 So. 2d 1064 (Ala. 1991) (a case upon which the court relied heavily in *Stephens*).

[72]676 So. 2d 1307, 1307 (Ala. 1996).

... [I]t was within the trial court's discretion to issue the protective order so as to allow defense counsel to be present during the interviews of former policyholders."[73] Interestingly, Justice Houston based his decision on the fact that the "[i]nsurers' policyholder lists are confidential, proprietary information."[74]

Justice Houston's dissent in *Stephens* was adopted by the court in *Ex parte Henry*, the case that overruled *Stephens*.[75] In *Henry*, the court affirmed a trial court's protective order that prevented the plaintiff's attorney from contacting any of the defendant's policyholders except by a trial court-approved-letter that required the recipient to take the "affirmative step of contacting the plaintiff's attorney if they so wish."[76] "We recognize that this holding conflicts with prior cases involving the question whether a trial judge clearly abused his discretion by placing limitations on the method by which the plaintiff's attorneys could contact other policyholders. To the extent those cases conflict with today's holding, they are overruled."[77]

Henry accurately reflects the current state of the law in Alabama on a trial court's restrictions on witness access. *Trial courts have broad control over a party's method of contacting a witness.* Part of the rationale for the restriction on the plaintiffs in *Henry* was the confidentiality of the defendant's policyholder lists.[78] Similarly, in *Horne v. Patton*, the Alabama Supreme Court recognized the confidential nature of information obtained in the doctor-patient relationship.[79] Alabama's legislature has provided legal protection of a patient's mental health records by enacting a psychotherapist-patient privilege.[80] Obviously, psychotherapist-patient and physician-patient communications are much more sensitive than confidential policyholder lists. This correlates well with the congressional emphasis on the need to protect an individual's

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[73]*Stephens*, 676 So. 2d at 1316-17 (Houston, J., dissenting), *overruled by Ex parte* Henry, 770 So. 2d 76 (Ala. 2000).

[74]*Id.* at 1316.

[75]*Henry*, 770 So. 2d at 80.

[76]*Id.* at 81.

[77]*Id.* (citing *Ex parte* Hicks, 727 So. 2d 23 (Ala. 1988); *Stephens*, 676 So. 2d at 1316-17).

[78]*Id.* at 80.

[79]291 Ala. 701, 706, 287 So. 2d 824, 827 (1973).

[80]*See* ALA. R. EVID. 503; ALA. CODE § 34-26-2 (1975).

personal health information, as evidenced by the passage of HIPAA and most particularly the *Privacy Rule*. Thus, it is clear that, because a trial court cannot provide protections less stringent than those required by the HIPAA, they can and must use their inherent authority to control a defendant's access to a plaintiff's treating physicians by prohibiting *ex parte* communications.

Some Alabama laws are already more stringent than HIPAA, and are not preempted. Alabama's recognition of a psychotherapist-patient privilege is an example of a state law that provides greater protections. In Alabama, patients and their personal representatives have a privilege to prevent the disclosure of "confidential communications, made for the purposes of diagnosis or treatment of the patient's mental or emotional condition, including alcohol or drug addiction, among the patient, the patient's psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family."[81] The Alabama Supreme Court has consistently held that a plaintiff does not waive this privilege by filing a civil lawsuit and placing his mental condition at issue.[82] Despite the fact that a patient files a lawsuit which puts the plaintiff's mental condition at issue, the privilege still "provides the patient the right to refuse to disclose, *and to prevent others from disclosing*, confidential communications between the patient and psychotherapist . . . and it encompasses notes or records made by the psychotherapist."[83] This privilege is waived only when the holder of the privilege "objectively manifest[s] a clear intent not to rely upon the privilege."[84]

The plaintiff has no way of knowing whether the privilege can or should be waived when *ex parte* interviews allow defendants to gather information in secret. Only the formal discovery process or some other system in which the plaintiff is granted the opportunity to determine whether the defendants seek privileged information gives the plaintiff the protections afforded by Alabama's psychotherapist-patient privilege. The Alabama Supreme Court has held that a motion for protective order governing the informal discovery process is the proper method of con-

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[81] ALA. R. EVID. 503; *see also* ALA. CODE § 34-26-2 (1975).

[82] *See Ex parte* Pepper, 794 So. 2d 340, 343 (Ala. 2001); *Ex parte* United Serv. Stations, Inc., 628 So. 2d 501, 504 (Ala. 1993).

[83] *United Serv. Stations*, 628 So. 2d at 504 (emphasis added).

[84] *Id.* at 505.

trolling access to privileged or confidential information.[85] It has also held that a trial court has broad powers to control the methods of discovery and "to prevent its abuse by any party."[86] Thus, Alabama courts must use these powers to enforce its laws which are more stringent than HIPAA and prohibit *ex parte* communications.

Finally, as discussed above, the Alabama Supreme Court declined in *Romine v. Medicenters of America, Inc.* to exclude testimony from a treating physician who had engaged in *ex parte* communications with the defendant physician's attorney.[87] The testimony allowed was directly relevant to the issues presented in the lawsuit. The court again relied on the absence of a statutory recognition of a physician-patient privilege, and the absence of evidence that the defense attorneys had sought *through coercive or improper conduct* "disclosure of confidential information . . . via private interviews outside conventional discovery procedures."[88] However, HIPAA does not require a showing of coercive or improper conduct for a court to provide protections for a plaintiff's medical information. HIPAA renders the plaintiff's medical information confidential and requires notice and authorization as set forth in 45 C.F.R. § 164. Thus, HIPAA, by its very nature and unambiguous language, provides protections for a plaintiff's medical information. Because HIPAA preempts less stringent state law and provides the baseline for acceptable means by which necessary relevant information may be obtained, *ex parte* interviews of a treating physician to gain protected health information are now, by their very nature, improper.

Conclusion

Alabama courts recognize the confidentiality of medical records and a statutory privilege for the privacy of psychotherapy records. HIPAA provides a *federal* regulatory answer to the Alabama Supreme Court's concern that the absence of a state privacy statute places societal concerns

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[85] *See* Marsh v. Wenzel, 732 So. 2d 985, 990 (Ala. 1998).

[86] Assured Investors Life Ins. Co. v. Nat'l Union Assocs., Inc., 362 So. 2d 228, 231 (Ala. 1978).

[87] 476 So. 2d 51 (Ala. 1985).

[88] *Romine*, 476 So. 2d at 60.

above the need to protect the individual's privacy. HIPAA now provides a baseline of minimal privacy protections, which leaves in place the more stringent aspects of Alabama law but requires Alabama's courts–all courts–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.