

Revisiting “An Important Consequence of HIPAA: No More Ex parte Communications Between Defense Attorneys and Plaintiffs’ Treating Physicians”—An Examination of Alabama’s Experience with HIPAA’s Privacy Regulations

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Introduction

Our argument in an article written fourteen years ago,¹ as now, is simple and straightforward: To the extent Alabama’s pre-HIPAA² common law decisions³ may be understood to permit unfettered ex parte communications between defense attorneys and plaintiffs’ treating physicians concerning individually identifiable⁴ protected health infor-

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¹ David G. Wirtes, Jr., R. Edwin Lamberth & Joanna Gomez, *An Important Consequence of HIPAA: No More Ex parte Communications Between Defense Attorneys and Plaintiffs’ Treating Physicians*, 27 AM. J. TRIAL ADVOC. 1 (2003).

² Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996). HIPAA was signed into law by President Clinton on August 21, 1996. See 42 U.S.C. § 300gg-91 (2016); 42 U.S.C. § 1320d-9 (2009). HIPAA’s current Privacy Rule became effective on June 27, 2014. 45 C.F.R. § 160 (2014).

³ See *Zaden v. Elkus*, 881 So. 2d 993, 1013 (Ala. 2003); *Romine v. Medicenters of Am., Inc.*, 476 So. 2d 51, 54-56 (Ala. 1985); *Mull v. String*, 448 So. 2d 952, 954 (Ala. 1984).

⁴ See 42 U.S.C. § 1320d(6)(B) (2010) (defining “Individually identifiable health information”); see also 45 C.F.R. § 160.103 (2014) (defining “Individually identifiable health information” and “Protected health information”).

mation,⁵ those decisions are contrary to,⁶ and afford protections less stringent⁷ to, individually identifiable protected health information than HIPAA's Privacy Rule, as they are now preempted.⁸ Whether the *ex parte* communications are written or oral,⁹ in Alabama they are now prohibited.¹⁰ "HIPAA's 'Privacy Rule establishes, for the first time, a foundation of federal protections for the privacy of protected health information.' This new *federal* patient privacy protection means that secret *ex parte* communications are no longer to be tolerated in Alabama or elsewhere."¹¹

Prior to HIPAA's enactment, scholars debated the propriety of such *ex parte* communications generally.¹² Since HIPAA's enactment, the

⁵ See 45 C.F.R. § 160.103 (2014) (defining "protected health information").

⁶ The Privacy Rule defines "contrary" to mean

(1) [a] covered entity would find it impossible to comply with both the State and Federal requirements; or (2) [t]he provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of part C of title XI of the Act, section 264 of Public Law 104-191 . . . as applicable.

45 C.F.R. § 160.202 (2013).

⁷ *Contra* 45 C.F.R. § 160.202 (2013) (defining and providing criteria for the term "more stringent").

⁸ See 42 U.S.C. § 1320d-7(a)(1) (1996) (establishing a general rule that federal law in the area supersedes contrary state law); 45 C.F.R. § 160.203 (2002) (giving general HIPAA preemption guidelines); see also 45 C.F.R. § 160.202 (2013) (defining "State law" as "a constitution, statute, regulation, rule, *common law*, or other State action having the force and effect of law" (emphasis added)); U.S. Dep't of Health & Human Serv., *Does the HIPAA Privacy Rule Preempt State Laws?*, HHS.GOV (Mar. 12, 2003), <https://www.hhs.gov/hipaa/for-professionals/faq/399/does-hipaa-preempt-state-laws/index.html> ("[S]tate laws that are contrary to the Privacy Rule are preempted by the Federal requirements, unless a specific exception applies.").

⁹ The Privacy Rule applies to both written and oral disclosures of protected health information. See 42 U.S.C. § 1320d(4) (2010) (defining "health information").

¹⁰ Treating physicians fall within the list of covered entities regulated by the Privacy Rule. See 42 U.S.C. § 1320d(2)-(5) (2010) (defining "health care clearinghouse," "health care provider," "health information," and "health plan"); 42 U.S.C. § 1320d-1(a)(3) (1996) (applying to any health care provider transmitting health information); 45 C.F.R. § 160.103 (2017) (defining "health care provider" as "a provider of medical or health services . . . and any other person or organization who furnishes, bills, or is paid for health care").

¹¹ Wirtes et al., *supra* note 1, at 3.

¹² See, e.g., Jacqueline M. Asher, *Ex parte Interviews with Plaintiff's Treating Physicians—The Offensive Use of the Physician-Patient Privilege*, 67 U. DET. L. REV.

debate continues, but now in the context of the newly enhanced federal health information privacy protections.¹³

501, n. 45 (1990) (citing *Alston v. Greater S.E. Community Hosp.*, 107 F.R.D. 35, 37 (D.D.C. 1985) (noting the split among district courts for the District of Columbia regarding the propriety of contact)); Philip 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, 1014-15 (1990) (stating that because the rules of civil procedure are silent, most courts address the issue of ex parte communications on public policy grounds); John Jennings, Note, *The Physician-Patient Relationship: The Permissibility of Ex parte Communications Between Plaintiff's Treating Physicians and Defense Counsel*, 59 MO. L. REV. 441 (1994) ("The distinction . . . is not whether a confidential relationship exists, but the breadth of the confidential relationship and the scope of the waiver of that relationship implied by the patient filing a lawsuit in which the plaintiff's medical condition is an issue."); J. Christopher Smith, *Recognizing the Split: The Jurisdictional Treatment of Defense Counsel's Ex parte Contact with Plaintiff's Treating Physician*, 23 J. LEG. PROF. 247, 253-55 (1999) (listing nineteen jurisdictions that prohibit ex parte communications, seven jurisdictions that cite discovery justifications for prohibiting ex parte communications, and twenty jurisdictions that allow ex parte communications); David L. Woodard, *Shielding the Plaintiff and Physician: The Prohibition of Ex parte Contacts with a Plaintiff's Treating Physician*, 13 CAMPBELL L. REV. 233, 240-46 (1991) (outlining the arguments for and against ex parte interviews).

¹³ Scott Aripoli, *Hungry Hungry HIPAA: Has the Regulation Bitten Off More Than It Can Chew by Prohibiting Ex parte Communication with Treating Physicians?*, 75 UMKC L. REV. 499, 500 (2006) ("Whether HIPAA truly does preclude defense attorneys from conducting ex parte interviews with treating physicians has yet to be concretely settled in jurisdictions that have traditionally allowed ex parte communications," and that "[d]efense attorneys are worried—so worried [about HIPAA's application to ex parte communications] that HIPAA has become a hot topic at CLE conferences nationwide."); Lynee Bernabei & Andrew Schroeder, *Protect Clients' Private Health Records*, 40 TRIAL 32, 35 (2004) ("[I]t is likely that HIPAA has ended the practice of ex parte interviews of treating physicians without the plaintiff's formal authorization."); Angela T. Burnette & D'Andrea J. Morning, *HIPAA and Ex parte Interviews—The Beginning of the End?*, 1 J. HEALTH & LIFE SCI. L. 73, 81-83 (2008) (addressing the various questions counsel should consider when dealing with the newly enhanced federal health information privacy protections and the continued debate); Beverly Cohen, *Reconciling the HIPAA Privacy Rule with State Laws Regulating Ex parte Interviews of Plaintiffs' Treating Physicians: A Guide to Performing HIPAA Preemption Analysis*, 43 HOUS. L. REV. 1091, 1116-19 (2006) (While the debate continues, New York has implemented a "HIPAA-compliant authorization[] permitting plaintiffs' treating physicians to speak with defense counsel."); Melissa A. Couch, *Litigating Medical Malpractice Cases in Oklahoma: The Aftermath of HIPAA*, 57 OKLA. L. REV. 827, 835 (2004) (addressing the challenges HIPAA places on "state statutes allowing attorneys to use informal discovery methods to obtain medical information"); Nancy Erfle & Anne Talcott, *Procedural Hurdles: HIPAA and Ex parte Contact With the Treating Physician*, 48 No. 5 DRI FOR DEF. 60 (May 2006) ("With the maintenance of privacy as a primary goal, HIPAA arguably precludes ex parte contact with treating physicians. Although most courts have examined the issue have

Given the recent promulgation of HITECH,¹⁴ where Congress again embraced HIPAA's protective reach and preemptive effect,¹⁵ examination

quite reasonably concluded that HIPAA merely adds procedural hurdles, the cautious practitioner must be familiar with those hurdles or risk losing this time-honored litigation tool.”); Whitney B. Hayes, *Physician-Patient Confidentiality in Health Care Liability Actions: HIPAA's Preemption of Ex parte Interviews with Treating Physicians Through the Obstacle Test*, 44 U. MEM. L. REV. 97, 114 (2013) (discussing the various conclusions of courts in determining the effects of HIPAA's *ex parte* communication limitations); Andrew King, *HIPAA: Its Impact on Ex parte Disclosures With an Adverse Party's Treating Physician*, 34 CAP. U. L. REV. 775, 777-80 (2006) (discussing the impact of HIPAA on “the ‘procedural’ aspects of disclosure.”); Robert B. Miller & Tegan Schlatter, *Can This Health Information Be Disclosed?: Navigating the Intricacies of HIPAA in Claims Litigation*, 40 SPG BRIEF 32, 36 (2011) (noting issues courts are facing in determining whether to allow *ex parte* communications with physicians); Thomas A. Moore & Matthew Gaier, *Recent Cases on Ex parte Interviews With Treating Physicians*, N.Y. L. J., Oct. 4, 2005 (discussing new approaches courts have taken to address the dispute between plaintiffs and defendants over *ex parte* communications); Thomas A. Moore & Matthew Gaier, *Ex parte Interviews With Treating Physicians*, N.Y. L. J., July 6, 2004 (“[B]ased upon the requirements of HIPAA and the rule of *Anker*, defendants will no longer be able to have *ex parte* communications with a plaintiff's treating doctors prior to trial.”); John F. Olinde & Hal McCard, *Understanding the Boundaries of the HIPAA Preemption Analysis: Who is Regulated by the Privacy Rule and What Information Does HIPAA Protect?*, 72 DEF. COUNSEL J. 158, 168 (2005) (“Courts have only recently begun to examine the issue of the impact of HIPAA on *ex parte* interviews with plaintiffs' treating physicians.”); Melissa Phillips Reading & Laura Marshall Strong, *Ex parte Communications Between Defense Counsel and Treating Physicians*, 53 FOR THE DEF. 30, at *2 (Oct. 2011) (identifying “a Michigan Supreme Court case authorizing *ex parte* communications under a qualified protective order” that may be reviewed by the United States Supreme Court); Joseph Regalia & V. Andrew Cass, *Navigating the Law of Defense Counsel Ex parte Interviews of Treating Physicians*, 31 J. CONTEMP. HEALTH L. & POL'Y 35, 68-69 (2015) (suggesting possible remedies for new *ex parte* interview standards); Grace Ko, Note, *Partial Preemption Under the Health Insurance Portability and Accountability Act*, 79 S. CAL. L. REV. 497, 498 (2006) (discussing the increasing access to medical records caused in part by HIPAA and in part by the “shift to electronic data management”); Myles J. Poster, Comment *HIPAA Confusion: How the Privacy Rule Authorizes “Informal” Discovery*, 44 U. BALT. L. REV. 491, 498 (2015) (analyzing the difficulties courts are facing in determining the threshold at which state and federal law contradict each other).

¹⁴ HITECH is an acronym for the Health Information Technology for Economic and Clinical Health Act, which was enacted as part of the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5. See 42 U.S.C. § 300jj-14 (2016) (explaining the “[p]rocess for adoption of endorsed recommendations”); 42 U.S.C. §§ 17901 (2009) (explaining the “[c]oordination of Federal activities with adopted standards and implementation specifications”).

¹⁵ Modifications to the HIPAA Privacy, Security, Enforcement, and Breach Notification Rules under the Health Information Technology for Economic and Clinical

of Alabama's experiences in its trial and appellate courts relative to adhering to the federal mandates concerning ensuring protection of confidential health information seems timely and warranted.

I. HIPAA's Mandates

The privacy rules mandate that a health care provider “may not use or disclose protected health information” except as allowed by other provisions, such as disclosing the information to the individual patient or for further treatment of the individual or for payment for the health care provider's services.¹⁶ The regulations allow a health care provider to “obtain consent of the individual to use or disclose protected health information to carry out treatment, payment, or health care operations.”¹⁷

The regulations “shall supersede any contrary provision of State law.”¹⁸ The privacy regulations preempt “contrary” state law unless “[t]he provision of State law relates to the privacy of individually identifiable health information and is *more stringent* than a standard, requirement, or implementation specification adopted” in the relevant parts of the regulations adopted by the Secretary.¹⁹ HIPAA also provides that a state regulation *more stringent* than the HIPAA privacy regulations is *not* preempted.²⁰

Health Act and the Genetic Information Nondiscrimination Act; Other Modifications to the HIPAA Rules, 78 Fed. Reg. 17, 5556, 5577 (Jan. 25, 2013) (codified at 45 C.F.R. § 160 and 164) (implementing statutory amendments under the HITECH Act “to strengthen the privacy and security protection for individuals’ health information,” and stating that “the HIPAA privacy rule provides a Federal floor of privacy protections, with States free to impose more stringent privacy protections should they deem appropriate”); *see also* 42 U.S.C. § 17951 (2009) (describing HITECH’s relationship with state and other federal laws).

¹⁶ 45 C.F.R. § 164.502 (2013).

¹⁷ 45 C.F.R. § 153.506(b)(1) (2013); *see also* 42 C.F.R. § 164.501 (2013) (“Health care operations” is defined to include matters such as “[c]onducting quality assessment and improvement activities,” “[r]eviewing the competence or qualifications of health care professionals,” and other similar activities.).

¹⁸ 42 U.S.C. § 1320d-7(a)(1) (1996).

¹⁹ 45 C.F.R. § 160.203(b) (2002) (emphasis added).

²⁰ *See* P.L. 104-191, § 264(c)(2) (1996) (“A regulation promulgated under paragraph (a) shall not supersede [sic] a contrary provision of State law, if the provision of State law imposes requirements, standards, or implementation specifications

The regulation governing disclosure in legal proceedings specifies that a covered entity can disclose protected information if ordered to do so by a court, subpoena, discovery request, or other legal process.²¹ When producing such information, covered entities must produce only the minimum information necessary.²²

II. Alabama's General Discovery Rules Regarding Privacy

It is the trial court's role "to exercise its broad discretion in a manner that will implement the philosophy of full disclosure of relevant information, and at the same time afford a party, or others, maximum protection against harmful side effects which would result from unnecessary disclosure."²³ The Alabama Supreme Court delineates that individuals have a right to privacy, which includes the right to avoid unwanted publicity that may damage or humiliate a reasonable person.²⁴ Determinations are case specific, but are guided by sound precedential authority.²⁵ For example, in *Ex parte Crawford Broadcasting Co.*,²⁶ the Alabama Supreme Court concluded that discovery seeking private salary information when not a matter of public record was deemed "a highly sensitive

that are more stringent than the requirements, standards, or implementation specifications imposed under the regulation.").

²¹ 45 C.F.R. § 164.512(e)(i)-(ii) (2016).

²² *Id.* § 164.512(b)(1).

²³ *Ex parte Dorsey Trailers, Inc.*, 397 So. 2d 98, 103 (Ala. 1981) (quoting *Ex parte Guerdon Indus. Inc.*, 373 So. 2d 322, 324 (Ala. 1979)).

²⁴ *Horne v. Patton*, 287 So. 2d 824, 830 (Ala. 1974) (citing *Norris v. Moskin Stores, Inc.*, 132 So. 2d 321, 323 (Ala. 1961); *Abernathy v. Thornton*, 83 So. 2d 235, 236 (Ala. 1955); *Smith v. Doss*, 37 So. 2d 118, 120 (Ala. 1947)); *see also Ex parte Mack*, 461 So. 2d 799, 801 (Ala. 1984) (discussing the denial of a discovery request because of possible unwanted publicity).

²⁵ The United States Supreme Court has long recognized that the right to privacy under the Fourteenth Amendment protects an individual's right to control the nature and extent of any release of private information. *See, e.g., Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 457 (1977) (discussing the privacy expected by the President of the United States); *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977) (discussing the release of medical records to the state of New York without the patients' permission).

²⁶ 904 So. 2d 221 (Ala. 2004).

subject for most people” and “such a personal and private matter that compelling it to production would clearly constitute harassment.”²⁷ Similarly, in *Ex parte Henry*,²⁸ the same court determined that “[a]n insurance company’s policyholder lists are confidential proprietary information to which a litigant has no right except through court-ordered discovery.”²⁹

III. Alabama’s Specific Rules Regarding Privacy of Medical Information

Alabama common law before HIPAA also generally protected the confidentiality of disclosures made in the course of a physician-patient relationship. In *Horne v. Patton*,³⁰ the Alabama Supreme Court wrote, “it 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.”³¹ The court held that a complaint alleging that a doctor improperly disclosed the patient’s medical information to the plaintiff’s employer, resulting in him being fired, stated causes of action for breach of fiduciary duty, invasion of privacy, and breach of implied contract.³² *Horne* was followed in *Taylor v. Baptist Medical Center*,

²⁷ *Ex parte Crawford Broadcasting*, 904 So. 2d at 226.

²⁸ 770 So. 2d 76 (Ala. 2000).

²⁹ *Ex parte Henry*, 770 So. 2d at 80; accord *Ex parte John Alden Life Ins. Co.*, 999 So. 2d 476, 487 (Ala. 2008).

³⁰ 287 So. 2d 824 (Ala. 1974).

³¹ *Horne*, 287 So. 2d at 829-30.

³² *Id.* An action for invasion of privacy relative to medical care is of ancient origin. See, e.g., Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890) (citing *Prince Albert v. Strange*, 1 McN. & G. 25 (1849)) (“Lord Cottenham stated that a man ‘is entitled to be protected in the exclusive use and enjoyment of that which is exclusively his,’ and cited with approval the opinion of Lord Eldon, as reported in a manuscript note of the case of *Wyatt v. Wilson*, in 1820, respecting an engraving of George the Third during his illness, to the effect that ‘if one of the late king’s physicians had kept a diary of what he heard and saw, the court would not, in the king’s lifetime, have permitted him to print and publish it;’ and Lord Cottenham declared, in respect to the acts of the defendants in the case before him, that ‘privacy is the right invaded.’”).

Inc.,³³ *Mull v. String*,³⁴ *Crippen v. Charter Southland Hospital, Inc.*,³⁵ and *Ex parte Mack*.³⁶

United States District Judge Inge Prytz Johnson, of the Northern District of Alabama, held that regardless of whether an actual statutory physician-patient privilege exists, patients have an inherent privacy right with regard to medical information disclosed within the scope of a doctor-patient relationship.³⁷

IV. Jefferson County, Alabama's Experience With HIPAA and No Ex parte Communications Discovery Orders

Two years before HIPAA's Privacy Rules were implemented, presiding Jefferson County Circuit Judge J. Scott Vowell issued a discovery order in *Ballew v. Eagan*,³⁸ a medical negligence case, prohibiting the defendants from engaging in any ex parte conferences or informal interviews with the plaintiffs' treating doctors.³⁹ Eagan filed a petition for a writ of mandamus seeking an order directing Judge Vowell to vacate his no-ex parte-communications order but the Alabama Supreme Court denied the petition on March 8, 2002, without an opinion.

Following the mandamus denial in *Ballew*, Judge Vowell convened an *ad hoc* committee of the Birmingham Bar Association to address the ex parte communications issue relative to compliance with HIPAA's new Privacy Rules in civil litigation, where individually identifiable protected

³³ 400 So. 2d 369, 373 (Ala. 1981).

³⁴ 448 So. 2d 952, 955 (Ala. 1984) (reversing dismissal of a similar complaint).

³⁵ 534 So. 2d 286, 289 (Ala. 1988) (reversing summary judgment for a defendant).

³⁶ 461 So. 2d 799, 801 (Ala. 1984) (denying petition for writ of mandamus which sought order compelling discovery of identities of others receiving abortions on particular day cited).

³⁷ *In re Chantix (Varenicline) Prods. Liab. Litig.*, No. 2:09-CV-2039-IPJ, 2011 WL 9995561 at *3 (N.D. Ala. June 30, 2011) (citing *Ex parte St. Vincent's Hosp.*, 991 So. 2d 200, 208 (Ala. 2008)).

³⁸ Protective Order, *Ballew v. Eagan*, No. CV-2000-6528 (Jefferson Cty. Ala. Cir. Ct. filed Feb. 23, 2001) (J. Scott Vowell, Circuit Judge).

³⁹ *Id.* at *6.

health information would be the subject of discovery. The work of that committee and its creation of a standard HIPAA-compliant discovery order for Jefferson County civil cases was reported in *The Alabama Lawyer* in September 2004.⁴⁰ According to that committee, its “standard” order for Jefferson County “did not intend to broaden or restrict any party’s ability to conduct discovery pursuant to Alabama law, as the proposed order expressly states.”⁴¹ The committee further explained that they did not intend to change Alabama law on ex parte interviews with doctors.⁴² The intended law was in effect prior to HIPAA’s enactment, and the *Zaden v. Elkus*⁴³ rule only promotes HIPAA compliance.⁴⁴ “[A] covered entity may disclose protected health information in response to a discovery request or other lawful process giving much needed comfort to the covered entity that the court authorizes the disclosure.”⁴⁵

Zaden, referenced by the *ad hoc* committee, was construed to mean that a plaintiff does not waive the right to object to ex parte conferences between defense attorneys and plaintiffs’ treating physicians by entry of a standard HIPAA order. Furthermore, such an order did *not* give defense counsel carte blanche to engage in such ex parte interviews.⁴⁶ Similarly,

⁴⁰ *Standard HIPAA Order in Civil Actions*, 65 ALA. LAW. 332, 337 (2004).

⁴¹ *Id.* at 337 (citing *Zaden v. Elkus*, 881 So. 2d 993 (Ala. 2003)).

⁴² *Id.*

⁴³ 881 So. 2d 993 (Ala. 2003).

⁴⁴ *Standard HIPAA Order in Civil Actions*, *supra* note 40.

⁴⁵ *Id.*

⁴⁶ *See e.g.*, Order at 11, *Vincent v. Summers*, No. CV-12-902000 (Jefferson Cty. Ala. Cir. Ct. Sept. 4, 2012) (Joseph Boohaker, Circuit Judge) (This order prohibited ex parte communications in a medical negligence case in part because of the holding in *Elkus*, which Judge Boohaker interpreted to mean “the clear import of *Elkus* is that plaintiff does not waive the right to object to *ex parte* conferences between plaintiff’s treating physicians and opposing counsel by entry of the ‘standard [Jefferson County] HIPAA Order. It is also clear that the entry of such an order does not give Defense counsel carte blanche to engage in such *ex parte* interviews with Plaintiff’s subsequently treating physicians. Rather, upon timely objection made, a Plaintiff reserves the right to object to such *ex parte* meetings, and to a ruling, such as was issued by Judge Vowell in *Ballew v. Eagan*, wherein such *ex parte* meetings were completely disallowed as not being a recognized means of conducting discovery under the provisions of the Alabama Rules of Civil Procedure. In *Elkus*, counsel for plaintiff failed to timely object to the *ex parte* meetings before they took place.”) (emphasis omitted).

in *Albright v. Merck & Co.*,⁴⁷ discussing *ex parte* interviews with plaintiff's prescribing and treating physician, Judge Vowell entered orders *prohibiting* any *ex parte* communications pursuant to the new HIPAA privacy rules.⁴⁸ Judge Vowell's reasoning is instructive:

Upon consideration, this court will not allow counsel for defendants in medical malpractice cases or in cases such as this one, to conduct *ex parte* interviews with plaintiffs' treating physicians. In order to protect the patient's expected right of privacy to his medical information, such interviews should only be conducted after reasonable notice to plaintiff's counsel. Plaintiff's counsel should have the opportunity to be present for such interviews. There are many reasons for this court's conclusion, but this procedure provides the opportunity for defendant's counsel to gain the information they need to fully examine or cross-examine the medical witness while protecting the patient's right to have his medical information protected from disclosure. In enacting HIPAA, the Congress of the United States has clearly expressed the public policy of this country is to protect such private health information from public disclosure. That privacy cannot be guaranteed if *ex parte* conferences are allowed. In addition, if such conferences were allowed, both counsel and physician are putting themselves in a position to be accused with violating the patient's right. Under this order, all legal rights are protected.⁴⁹

In keeping with the broad discretion afforded by Alabama law in shaping discovery orders,⁵⁰ other judges in Jefferson County and throughout the State of Alabama have entered similar discovery orders prohibiting *ex parte* communications in deference to HIPAA's Privacy Rules.⁵¹

⁴⁷ Discovery Order, *Albright v. Merck & Co., Inc.*, No. CV-05-2316, 2006 WL 4681958 (Jefferson Cty. Ala. Cir. Ct. Nov. 1, 2006).

⁴⁸ *Albright*, 2006 WL 4681958.

⁴⁹ *Id.*

⁵⁰ See *Wirtes et al.*, *supra* note 1, at 20-22 (discussing how the supreme court's ruling in *Ex parte Henry*, 770 So. 2d 76 (Ala. 2000), affords trial judges discretion to impose restrictions upon parties' access to witnesses); see also *Zaden v. Elkus*, 881 So. 2d 993, 1004 (Ala. 2003) ("Discovery matters are within the trial court's sound discretion, and this Court will not reverse a trial court's ruling on a discovery issue unless the trial court has clearly exceeded its discretion." (citing *Home Ins. Co. v. Rice*, 585 So. 2d 859, 862 (Ala. 1991)); accord *Ex parte John Alden Life Ins. Co.*, 999 So.2d 476, 481 (Ala. 2008) ("[T]his Court is bound to '[l]et the trial court be the trial court, without microscopic manipulation of its discretion by this Court.'").

⁵¹ See Appendix *infra*.

V. The No Ex parte Communications Issue Has Been Presented to the Alabama Supreme Court at Least Four Times

The impact of the new HIPAA Privacy Rules upon ex parte communications has been presented to the Alabama Supreme Court at least four times by way of petitions for writs of mandamus seeking review of circuit courts' discovery orders. In many instances, non-parties filed briefs as amici curiae addressing the ex parte communications issue.⁵² In each instance, the supreme court denied the petition without an opinion.⁵³ The supreme court's decade-long silence seems consistent with its holding in *Ex parte John Alden Life Insurance Co.*⁵⁴ that, with respect to discovery issues, it will "[l]et the trial court be the trial court without microscopic manipulation of its discretion by this Court."⁵⁵

VI. Physician Confidentiality Should Be Mandatory and Non-Negotiable

Physicians have been taught for centuries that maintaining confidentiality of patients' information is of paramount importance. United States

⁵² See e.g., Brief of Amicus Curiae Alabama Ass'n for Justice in Support of Plaintiff/Respondent, *Hollins v. Mobile Infirmiry Ass'n*, Nos. 1130677, 1130678, 2014 WL 3953676 (Ala. Jul. 8, 2014); Brief of Amicus Curiae Medical Ass'n of the State of Alabama, *Hollins v. Mobile Infirmiry Ass'n*, Nos. 1130677 and 1130678, 2014 WL 4232534 (Ala. Jul. 23, 2014); Brief of Amicus Curiae Alabama Defense Lawyers Ass'n, *Hollins v. Mobile Infirmiry Ass'n*, Nos. 1130677 and 1130678, 2014 WL 4232535 (Ala. Jul. 23, 2014).

⁵³ See *Ex parte Eagan*, Docket No. 1001142 (mandamus denied Sept. 7, 2001); *Ex parte Farley*, Docket No. 1100570 (mandamus denied June 10, 2011); *Ex parte Mobile Infirmiry Association d/b/a Mobile Infirmiry Medical Center*, Docket Nos. 1130677, 1130678 (mandamus denied Dec. 5, 2014); *Ex parte CVS Caremark Corp.*, Docket No. 1150073 (mandamus denied Jan. 27, 2016).

⁵⁴ 999 So. 2d 476, 481 (Ala. 2008).

⁵⁵ *Ex parte Henry*, 770 So. 2d 76, 81 (Ala. 2000) (quoting *Ex parte Howell*, 704 So. 2d 479, 483 (Ala. 1997) (Houston, J., dissenting)); see ALA. R. APP. P. 53(d) (providing that "no-opinion" affirmances are not precedent, but "[they] shall have no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state, except for the purpose of establishing the application of the doctrine of law of the case, *res judicata*, *collateral estoppel*, double jeopardy, or procedural bar") (emphasis added).

District Judge Eldon Fallon for the Eastern District of Louisiana cogently summarized the ancient bases of physicians' duties concerning confidentiality in an order prohibiting *ex parte* communications in the *Vioxx MDL* litigation:

The special relationship which exists—and some would insist, must exist between a patient and his or her doctor was first recognized by Hippocrates of Cos in the fifth century B.C. and is codified in the Hippocratic oath. The classical version of the Hippocratic Oath reads in pertinent part: “What I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself, holding such things shameful to be spoken about.” The principles set forth in the ancient Hippocratic Oath were formally introduced to modern Western society in 1803 with Thomas Percival’s publication of *Medical Ethics*. The American Medical Association (“AMA”) adopted Percival’s precepts in 1847 in its first Code of Ethics. The modern AMA rule, promulgated by the AMA’s Council on Ethical and Judicial Affairs in 1998, states that “information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree.” Today, most graduates of medical schools in this country recite a modern version of the Hippocratic Oath upon matriculation.

The importance of the physician-patient relationship is not limited to Western medicine. An Oath of Initiation, required of practitioners of Ayurvedic medicine in India since the fifth century B.C., stresses confidentiality of the physician-patient relationship as well. In China, Sun Ssu-Miao, a pioneer of Chinese medicine, authored the “Thousand Golden Remedies” in the seventh century A.D. The text outlines the decorum and discretion required of physicians, especially with regard to their dealings with patients. The physician-patient relationship is also described in the Oath of Asaph, required of practitioners of Hebrew medicine since approximately the sixth century A.D. In particular, the Oath of Asaph requires physicians to “not divulge the secret of a man who has trusted you.”

The physician-patient privilege has transfigured from a code of ethics into a matter of law in most states in this Union. In 1776, the English case of Elizabeth, Duchess of Kingston, established that the physician-patient privilege did not exist as a matter of English common law. However, in 1828, New York passed a statute codifying the physician-patient privilege. Forty states and the District of Columbia have since similarly codified the physician-patient privilege.

The ethical rules and attendant laws regarding the relationship between a physician and a patient serve both utilitarian and fairness purposes. Confidentiality reduces the stigma attached to seeking treatment for some infectious diseases and invites patients to provide information about previous ailments with greater candor. This effect allows physicians to provide more thorough preventative care. Moreover, because “[a]lmost every member

of the public is aware of the promise of discretion contained in the Hippocratic Oath, [] every patient has a right to rely upon this warranty of silence.” Impairing the relationship between a physician and a patient would therefore not only be unfair to patients that have provided information to their physicians in confidence, but could reduce the quality of medical care provided.

In this litigation, the information imparted to the physicians by the Plaintiffs was given to the doctors while they were in the course of their well-established confidential relationship with the Plaintiffs. Therefore, this confidential relationship and the effect that counsels’ communications would have on that relationship are very relevant concerns for the Court in fashioning appropriate guidelines for communications with the Plaintiffs’ prescribing physicians. The Court also has to consider the Health Insurance Portability and Accessibility Act of 1996, 42 U.S.C. § 1320d, et seq. (“HIPAA”), which is intended to “ensure the integrity and confidentiality of [patients’] information” and to protect against “unauthorized uses or disclosures of the information.” Further, this MDL case involves the separate laws of fifty states, some of which provide for a broader physician-patient privilege than others. The Court realizes that the physicians in this litigation are in a different position than in the typical personal injury case. This peculiarity, however, does not justify destroying the physician-patient relationship and all of the concerns that arise because of that relationship.⁵⁶

Judge Fallon’s observations are often quoted and embraced by other esteemed federal jurists.⁵⁷ Many other courts have likewise prohibited such *ex parte* communications in light of HIPAA’s new Privacy Rules.⁵⁸

⁵⁶ *In re Vioxx Prods. Liab. Litig.*, 230 F.R.D. 473, 475-76 (E.D. La. 2005) (footnotes omitted).

⁵⁷ *See, e.g., In re Benicar (Olmesartan) Prods. Liab. Litig.*, MDL No. 2026, 2016 WL 1370998, at *4 (D.N.J. Apr. 6, 2016) (“There is nothing uneven or unfair about the Court’s ruling.”); *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, 167 F. Supp. 3d 936, 939 (N.D. Ill. 2016) (“[A]s Judge Fallon aptly noted in the *Vioxx* case, this ‘does not leave the Defendants without any access to information. . . .’”); *ex parte In re Nuvaring Prods. Liab. Litig.*, MDL No. 1964, 2009 WL 775442, at *1 (E.D. Mo. Mar. 20, 2009) (“I find that I am in complete agreement with United States District Judge Eldon Fallon’s ultimate decision on facing a similar motion in the *In re Vioxx Products Liability Litigation*.”); *In re Kugel Mesh Hernia Repair Patch Litig.*, MDL No. 1842, 2008 WL 2420997, at *1 (D.R.I. Jan. 22, 2008) (“I am particularly guided by Judge Fallon’s treatment of this issue in the *Vioxx MDL* . . . [where] Judge Fallon ultimately concluded that ‘the just option . . . is to protect the relationship between a doctor and patient by restricting defendants from conducting *ex parte* communications with plaintiffs’ treating physicians but allowing plaintiffs’ counsel to engage in *ex parte* interviews with those doctors who have not been named as defendants.’”).

⁵⁸ *See, e.g., Strayhorne v. Caruso*, No. 11-15216, 2014 WL 916814, at *1 (E.D. Mich. Mar. 10, 2014) (“Congress promulgated rules governing the doctor-patient

The American Medical Association is unequivocal that “[r]especting patients’ privacy and confidentiality is a *core ethical obligation in*

privilege in that it ‘ushered in a strong federal policy in favor of protecting the privacy of patient medical records.’”); *Piehl v. Saheta*, No. CCB-13-254, 2013 WL 2470128, at *3 (D. Md. June 5, 2013) (“HIPAA’s strong language suggests that exceptions allowing *ex parte* communications for ‘expressly authorized’ information were not intended to give one party an unlimited and uncontrolled opportunity to engage with health care providers, regardless of the relevance of the information found.”); *In re Chantix (Varenicline) Prod. Liab. Litig.*, No. 2:09-CV-2039-IPJ, 2011 WL 9995561, at *3, *4 (N.D. Ala. June 30, 2011) (“Regardless of whether an actual privilege exists, ‘patients enjoy a right to privacy and confidentiality with regard to disclosures made within the doctor-patient relationship’ . . . [d]efendant and defense counsel shall not meet *ex parte* with plaintiffs’ treating physicians regarding any matters, generalized or specific to the plaintiffs’ individual claims.”); *In re Seroquel Prod. Liab. Litig.*, No. 6:06-md-1769-Orl-22DAB, 2008 WL 821889, at *5 (M.D. Fla. 2008) (forbidding *ex parte* communications without authorization or court order); *In re Vioxx Prods. Liab. Litig.*, 230 F.R.D. 473, 477 (E.D. La. 2005); *EEOC v. Boston Market Corp.*, No. CV 03-4227 LDW WDW, 2004 WL 3327264, at *5 (E.D. N.Y. Dec. 16, 2004) (“[E]x *parte* communications regarding the disclosure of health information, while not expressly prohibited by HIPAA, create . . . too great a risk of running afoul of that statute’s strong federal policy in favor of protecting the privacy of patient medical records.”); *Law v. Zuckerman*, 307 F. Supp. 2d 705, 711 (D. Md. 2004) (“HIPAA . . . has radically changed the landscape of how litigators can conduct informal discovery in cases involving medical treatment.”); *Crenshaw v. MONY Life Ins. Co.*, 318 F. Supp. 2d 1015, 1029 (S.D. Cal. 2004) (“HIPAA does not authorize *ex parte* contacts with health care providers.”); *In re Baycol Prods. Litig.*, 219 F.R.D. 468, 471 (D. Minn. 2003) (“Minnesota privilege law does not require that Defendants be allowed to conduct *ex parte* physician interviews.”); *Benally v. United States*, 216 F.R.D. 478, 480 (D. Ariz. 2003) (“[T]he state of Arizona recognizes the physician-patient privilege, and interprets the privilege to prohibit *ex parte* interviews by defendant’s counsel of plaintiff’s treating physicians, as a matter of public policy and as means to preserve the integrity of the privilege.”); *Moreland v. Austin*, 670 S.E.2d 68, 73 (Ga. 2008) (“[D]efense counsel cannot contact a plaintiff’s prior treating physicians to discuss his or her medical history without complying with HIPAA regulations.”); *State ex rel. Proctor v. Messina*, 320 S.W.3d 145, 155-57 (Mo. 2010) (en banc) (holding the plain reading of the HIPAA section authorizing exceptions to the disclosure of protected health information, “does not authorize the disclosure of protected health information during a meeting in which an attorney, without express authorization of the patient, has *ex parte* communications with a physician”); *Leavitt v. Siems*, 330 P.3d 1, 7-8 (Nev. 2014) (explaining that *ex parte* conferences with physicians are not more beneficial than traditional discovery); *Alsip v. Johnson City Med. Ctr.*, 197 S.W.3d 722, 729 (Tenn. 2006) (refusing to allow and highlighting the negative aspects of physician *ex parte* communications); *Smith v. Orthopedics Int’l Ltd.*, 244 P.3d 939, 942-43 (Wash. 2010) (stating “defense counsel may not engage in *ex parte* contacts with a plaintiff’s physician” (citing *Loudon v. Mhyre*, 756 P.2d 138, 138 (1988))); *Moss v. Amira*, 826 N.E.2d 1001, 1006 (Ill. App. 2005) (“*Ex parte* communications and conferences between defense counsel and a plaintiff’s treating physician are prohibited as violative of public policy because they jeopardize the sanctity of the confidential and fiduciary relationship between a physician and his patient.”).

medicine."⁵⁹ Its principles of medical ethics, § 3.2.1 on confidentiality states that "[p]hysicians . . . have an ethical obligation to preserve the confidentiality of information gathered in association with the care of the patient," and "patients are entitled to decide whether and to whom their personal health information is disclosed."⁶⁰ However, when physicians are permitted to disclose information, either by law or with consent, they are required to disclose as little information as possible, and inform the patient of disclosure. However, specific consent is not required in all situations.⁶¹

VII. HIPAA's New Privacy Rules—and the Rulings Prohibiting Ex parte Communications—Are Consistent With Alabama Law Governing Health Care Providers' Confidentiality Obligations

A. Patient Medical Records

We continue to advocate for rulings prohibiting such ex parte communications. We believe such rulings are consistent with HIPAA's (and HITECH's) letter and intent, as well as Alabama's common law, statutory, and regulatory rules governing confidentiality of patient medical information. For example, Alabama Code section 34-24-504 expresses Alabama's public policy requiring *all* licensed healthcare providers to protect patient medical records as confidential:

⁵⁹ AMA Code of Medical Ethics, Chapter 3: Opinions on Privacy, Confidentiality & Medical Records 1, <https://www.ama-assn.org/sites/default/files/media-browser/code-of-medical-ethics-chapter-3.pdf> (last visited Mar. 3, 2017); *see also* Angela T. Burnette & D'Andrea J. Morning, *HIPAA and Ex parte Interview—The Beginning of the End?*, 1 J. HEALTH & LIFE SCI. L. 73, 101 (2008) ("The physician should not reveal confidential information *without express consent of the patient*, subject to certain exceptions which are *ethically justified* because of *overriding* considerations.' . . . When the disclosure of confidential information is *required by law or court order*, physicians generally should notify the patient. Physicians should disclose the minimal information required by law, advocate for protection of confidential information, and if appropriate, seek a change in the law.").

⁶⁰ AMA Code of Medical Ethics, *supra* note 59, at 5.

⁶¹ *Id.*

Any licensee licensed under the provision of this article shall comply with all laws, rules, and regulations governing the maintenance of patient medical records, including patient confidentiality requirements, regardless of the state where the medical records of any patient within this state are maintained.⁶²

B. Physicians, Psychotherapists, and Nurses

Alabama's physicians, in particular, are required to protect the confidentiality of their patients' medical information. Pursuant to the regulatory authority granted in section 34-24-311,⁶³ the Alabama Medical Licensure Commission, together with the Alabama Board of Medical Examiners, jointly promulgate regulations concerning physicians' duties to create, maintain, and provide access to medical records. The duties are mandatory, as shown by section 34-24-360(22),⁶⁴ which gives the Alabama Medical Licensure Commission "the power and duty to suspend, revoke, or restrict" a physician's license to practice for failing to maintain a patient's medical record to the minimum standards set by the Commission.⁶⁵ Specifically relying upon the "minimum standards" provision of section 34-24-360(22), the Medical Licensure Commission promulgated minimum standards concerning creation, maintenance, and accessibility of medical records that every physician licensed to practice medicine in Alabama shall maintain for each of his or her patients.⁶⁶ Among other requirements, the Alabama Administrative Code requires physicians (and physician assistants) to protect confidentiality:

(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 relationship and 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.

⁶² ALA. CODE § 34-24-504 (1975).

⁶³ § 34-24-311.

⁶⁴ § 34-24-360(22).

⁶⁵ *Id.*

⁶⁶ *Id.*

(6) This same fundamental physician-patient relationship also applies to physician assistants.⁶⁷

Confidential information developed in the course of psychotherapist-patient relationships are expressly protected by statute and Alabama Rule of Evidence 503.⁶⁸

Standards adopted by the Alabama Board of Nursing require nurses to “[r]espect the dignity and rights of patients . . . including, but not limited to: (a) Privacy[,] (b) Safety[,] and (c) Protection of confidential information, unless disclosure is required by law.”⁶⁹

C. Hospitals and Nursing Homes

Alabama’s hospitals, nursing homes, assisted living facilities, and the like must also maintain their patients’ medical records in confidence. The Alabama Code governs “Licensing of hospitals, nursing homes, and other health care institutions.”⁷⁰ The purpose of the article is

to promote the public health, safety, and welfare by providing for the development, establishment, and enforcement of standards for the treatment and care of individuals in institutions within the purview of this article and the establishment, construction, maintenance, and operation of such institutions which will promote safe and adequate treatment and care of individuals in such institutions.⁷¹

A licensee is required to “establish, conduct or maintain any hospital as

⁶⁷ ALA. ADMIN. CODE r. 540-X-9-.07(5)-(6); *see, e.g.*, ALA. CODE § 34-24-360(2) (1975) (“The Medical Licensure Commission [has] the power and duty to suspend, revoke, or restrict . . . [a physician’s license for] [u]nprofessional conduct as defined herein or in the rules and regulations promulgated by the commission.”).

⁶⁸ ALA. R. EVID. 503; ALA. CODE § 34-26-2 (1975); *Ex parte Pepper*, 794 So. 2d 340, 343 (Ala. 2001) (“The strength of the public policy on which the statutory psychotherapist-patient privilege is based has been well recognized by this Court.”); *Ex parte United Serv. Stations, Inc.*, 628 So. 2d 501, 504 (Ala. 1993) (finding the psychotherapist-patient privilege is not waived by the mere filing of a lawsuit).

⁶⁹ ALA. ADMIN. CODE r. 610-X-6-.03(11).

⁷⁰ ALA. CODE § 22-21-21 (1975).

⁷¹ *Id.*

defined in Section 22-21-20.”⁷² A person applies to the State Board of Health for such a license.⁷³ Furthermore, “[t]he State Board of Health may grant licenses for the operation of hospitals which are found to comply with the provisions of this article and any regulations lawfully promulgated by the State Board of Health.”⁷⁴ The Board may suspend or revoke a license on grounds including “[v]iolation of any of the provisions of this article or the rules and regulations issued pursuant thereto.”⁷⁵ Section 22-21-28 gives the Board “the power to make and enforce . . . modify, amend, and rescind, reasonable rules and regulations governing the operation and conduct of hospitals as defined in Section 22-21-20. All such regulations shall set uniform minimum standards applicable alike to all hospitals of like kind and purpose”⁷⁶

The pertinent Alabama State Board of Health regulation concerning hospitals’ duties to maintain the confidentiality of medical records states:

[A] hospital shall have a procedure for ensuring the confidentiality of patient records. Information from or copies of records may be released only to authorized individuals, and the hospital shall ensure that unauthorized individuals cannot gain access to or alter patient records. Original medical records shall be released by the hospital only in accordance with federal or state laws, court orders, or subpoenas.⁷⁷

The definition of “hospitals” in section 22-21-20 includes “skilled nursing facilities, intermediate care facilities, assisted living facilities, and specialty care assisted living facilities rising to the level of intermediate care.”⁷⁸ The Alabama Supreme Court has also held that a nursing home is a hospital for purposes of the Alabama Medical Liability Act.⁷⁹ Thus,

⁷² § 22-21-22.

⁷³ § 22-21-23.

⁷⁴ § 22-21-25(a).

⁷⁵ § 22-21-25(b)(1).

⁷⁶ § 22-21-28(a).

⁷⁷ ALA. ADMIN. CODE r. 420-5-7-.13(3)(c).

⁷⁸ ALA. CODE § 22-21-20(1) (1975).

⁷⁹ *Husby v. S. Ala. Nursing Home, Inc.*, 712 So. 2d 750, 753 (Ala. 1998); *Ex parte Northport Health Serv., Inc.*, 682 So. 2d 52, 55 (Ala. 1996).

the statutes and regulations concerning confidentiality apply to all these Alabama health care institutions.⁸⁰

Conclusion

The only just and proper ruling that can be faithful to the federal mandates of HIPAA and HITECH, as well as to Alabama's common law, statutory and regulatory mandates concerning confidentiality of patients' medical information is to prohibit *ex parte* communications between defense attorneys and their surrogates with plaintiffs' health care providers.

⁸⁰ See ALA. ADMIN. CODE r. 420-5-10-.03(35)(b) ("The [nursing] facility must keep confidential all information contained in the resident's records, regardless of the form or storage method of the records, except when release is required by . . . [l]aw.").

Appendix

The No Ex parte Communications Issue in Alabama

The authors have argued the no ex parte communications issue dozens of times across the state. We here catalogue *only* representative orders. We do not, for example, list the innumerable repeat orders by the same judges, nor do we purport to suggest that this list is exhaustive. Judges sometimes change their minds. Rather, we simply here list cases with Alabama's circuit court judges issuing orders ruling that HIPAA's new federal privacy protections bar ex parte communications about individually identifiable protected health information.

Judge Jack B. Weaver: HIPAA Order, Thomas v. Ala. River Cellulose LLC, No. CV-15-900035 (Monroe Cty. Ala. Cir. Ct. Jan. 6, 2017). This order restricts ex parte interaction with health care providers, who prescribe or treat a plaintiff, to the plaintiff or their representative unless the defendants' counsel provides "notice of the date, time, and place of any ex parte interview or communication," and allow the plaintiff, or his representative to be present. However, this does not limit the party's right to contact the health care provider for scheduling or subpoena compliance.

Judge Michael A. Youngpeter: HIPAA Order, Godwin v. Mobile Infirmary Ass'n, No. CV-16-902066 (Mobile Cty. Ala. Cir. Ct. Nov. 10, 2016). The judge allowed defense counsel to communicate with the plaintiff's decedent's health care providers so long as "reasonable notice of the time and place of the communication and opportunity to be present and to participate," and providing an exception to the prohibition of ex parte interaction if the plaintiff alleged an agency relationship with Defendant which forms the basis for "vicarious liability against" the provider.

Judge John R. Lockett: HIPAA Order in Civil Action, Terry v. The River Shack, LLC, No. CV-15-902712 (Mobile Cty. Ala. Cir. Ct. Feb. 4, 2016). This order allows informal interaction between agents of the defendant and the plaintiff's medical providers *if* plaintiff's counsel receives "reasonable advance notice of the time and place" of the interaction and afforded the opportunity to be present; however, ex parte interaction with providers is prohibited.

- Judge Roderick P. Stout:* Order, *Eaton v. Nationwide Mut. Fire Ins. Co.*, No. CV-15-902526 (Mobile Cty. Ala. Cir. Ct. Dec. 23, 2015). “Court will not approve HIPAA Orders expressly providing for *ex parte* communications with health care providers.” (emphasis omitted).
- Judge Scott P. Taylor:* HIPAA Order in Civil Action, *Gabb v. Sweatman*, No. CV-15-901376 (Baldwin Cty. Ala. Cir. Ct. Dec. 4, 2015) (ordering the defendant’s counsel may communicate with the plaintiff’s health care providers only after providing notice and opportunity to be present to plaintiff’s counsel).
- Judge Bert W. Rice:* HIPAA Order in Civil Action, *Barnhill v. Infirmiry Health Sys., Inc.*, No. CV-15-900125 (Escambia Cty. Ala. Cir. Ct. Sept. 29, 2015) (determining the defendant’s counsel may communicate with the plaintiff’s health care providers only after providing notice and opportunity to be present to the plaintiff’s counsel).
- Judge Ben H. Brooks:* HIPAA Order, *Smith v. Mobile Infirmiry Med. Ctr.*, No. CV-15-901184 (Mobile Cty. Ala. Cir. Ct. May 4, 2015) (stating the defendant’s counsel may communicate with the plaintiff’s healthcare providers only with individual consent or court order but only after notice and an opportunity to object has been provided to the individual).
- Judge James C. Wood:* HIPAA Order, *Hughes v. Bay Area Physicians*, No. CV-15-900766 (Mobile Cty. Ala. Cir. Ct. Mar. 25, 2015) (allowing the defendant’s counsel to communicate with the plaintiff’s healthcare providers only with individual consent or court order but only after notice and an opportunity to object has been provided to the individual).
- Judge Sarah H. Stewart:* Order, *Battle v. Mobile Infirmiry Ass’n*, No. CV-15-900351 (Mobile Cty. Ala. Cir. Ct. Mar. 18, 2015) (allowing the defendant’s counsel to communicate with the plaintiff’s health care providers only after providing notice and opportunity to be present to the plaintiff’s counsel).
- Judge James H. Anderson:* HIPAA Order in Civil Action, *Hill v. Jackson Hosp. & Clinic, Inc.*, No. CV-14-901546 (Montgomery Cty. Ala. Cir. Ct. Oct. 30, 2014) (allowing the defendant’s counsel to communicate with the plaintiff’s health care providers only after providing notice and opportunity to be present to the plaintiff’s counsel).
- Judge Robert Wilters:* HIPAA Order in Civil Action, *Carrington v. Caribe Resort Condominium Ass’n, Inc.*, No. CV-12-900071 (Baldwin Cty. Ala. Cir. Ct. July 18, 2012) (determining that the defendant’s counsel may communicate with the plaintiff’s health care providers as long as notice and an opportunity to be present and participate is provided to plaintiff’s counsel).
- Judge Robert H. Smith:* HIPAA Order in Civil Action, *Davis v. Mobile Infirmiry Med. Ctr.*, No. CV-11-902191 (Mobile Cty. Ala. Cir. Ct. Nov. 9, 2011) (holding the defense must provide reasonable notice and opportunity

to participate when seeking to interview the plaintiff's prescribing and treating physicians).

Judge Brian P. Howell: Order, *Tidwell v. N.E. Ala. Reg'l Med. Ctr.*, No. CV-09-900230 (Calhoun Cty. Ala. Cir. Ct. Dec. 22, 2009) (holding the defense must provide reasonable notice and opportunity to participate when seeking to interview the plaintiff's healthcare providers).

Judge Karen K. Hall: HIPAA Order in Civil Action, *Hice v. McCallie*, No. CV-09-900420 (Madison Cty. Ala. Cir. Ct. May 7, 2009) (holding the defense must provide reasonable notice and opportunity to participate when seeking to interview the plaintiff's prescribing and treating physicians).

Judge Bruce E. Williams: HIPAA Order in Civil Action, *Cooke v. Mayhall Wrecker Serv., Inc.*, No. CV-09-900043 (Madison Cty. Ala. Cir. Ct. Apr. 22, 2009) (holding the defense must provide reasonable notice and opportunity to participate when seeking to interview the plaintiff's prescribing and treating physicians).

Judge Charles A. Graddick: HIPAA Order, *Dean v. Laboratory Corp. of Am.*, No. CV-08-901386 (Mobile Cty. Ala. Cir. Ct. Apr. 9, 2009) (denying a request for ex parte interviews).

Judge James W. Woodroof: HIPAA Order in Civil Action, *Hodges v. Housing Investors, Inc.*, No. CV-08-900192 (Limestone Cty. Ala. Cir. Ct. Dec. 16, 2008) (holding the defense must provide reasonable notice and opportunity to participate when seeking to interview the plaintiff's prescribing and treating physicians).

Judge Joseph S. Johnston: Order, *Estes v. Providence Hosp.* No. CV-08-90174 (Mobile Cty. Ala. Cir. Ct. Nov. 25, 2008) (holding the defense counsel must provide reasonable notice and opportunity to participate when seeking to interview the plaintiff's prescribing and treating physicians).

Judge Loyd H. Little, Jr.: HIPAA Order in Civil Action, *Mardis v. Howie*, No. CV-08-900621 (Madison Cty. Ala. Cir. Ct. Nov. 25, 2008) (holding the defense must provide reasonable notice and opportunity to participate when seeking to interview the plaintiff's prescribing and treating physicians).

Judge Robert M. Baker: HIPAA Order in Civil Action, *Powers v. Robinson Scrap Haulers, LLC*, No. CV-08-900082 (Limestone Cty. Ala. Cir. Ct. Oct. 21, 2008) (holding the defendants were not allowed to hold ex parte interviews with the treating physicians of the plaintiff).

Judge Jack M. Meigs: HIPAA Order in Civil Action, *Williams v. Dixie Midwest Express, Inc.*, No. CV-08-900005 (Hale Cty. Ala. Cir. Ct. July 11, 2008). This order stated, in personal injury cases, ex parte communication between the defendant's representatives and the plaintiff's treating health care providers is not allowed. Additionally, the defense must provide reasonable notice and opportunity to participate when seeking to interview the plaintiff's prescribing and treating physicians.

- Judge Laura W. Hamilton:* HIPAA Order in Civil Action, Johnson v. Weldon, No. CV-08-900381 (Madison Cty. Ala. Cir. Ct. June 24, 2008) (stating ex parte communications are barred and the defense must provide reasonable notice and opportunity to participate when seeking to interview the plaintiff's prescribing and treating physicians).
- Judge J. Scott Vowell:* HIPAA Order in Civil Action, Wayne v. Pharmacia Corp., No. CV-05-1590 (Jefferson Cty. Ala. Cir. Ct. May 5, 2008) (holding ex parte communications are barred and the defense must provide reasonable notice and opportunity to participate when seeking to interview the plaintiff's prescribing and treating physicians ex parte).
- Judge Thomas S. Wilson:* Qualified HIPAA Protective Order, Stoneburner v. All Pro, Inc., No. CV-06-1127 (Tuscaloosa Cty. Ala. Cir. Ct. Feb. 5, 2007) (stating the defendant must give ten days notice and give plaintiff's counsel the opportunity to be present for any communication's with the plaintiff's physician).
- Judge Inge Prytz Johnson:* Order, Moore v. Eagle Mfg. Co., No. CV-04-J-2399-S (N.D. Ala. Sept. 26, 2005). The defendant's motion for entry of a HIPAA Order allowing ex parte communication was denied, and noted that communication with the plaintiff's health care provider requires ten days notice to plaintiff's counsel and the opportunity for plaintiff's counsel to be present during the communications.
- Judge Ferrill D. McRae:* Order, Brown v. Zalepuga, No. CV-03-0867 (Mobile Cty. Ala. Cir. Ct. May 19, 2004). "[T]he Defendants cannot conduct *ex parte* interviews of [Plaintiff's] health care providers. Should they wish to meet or speak with any of those health care providers, the Defendants' attorneys must first notify Plaintiffs' counsel and afford them the opportunity to be present during any such interview or conversation."