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Physician-Patient Relationship: The Permissibility of Ex Parte Communications between Plaintiff's Treating Physicians and Defense Counsel, The

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Notes

The Physician-Patient Relationship: The Permissibility of Ex Parte Communications Between Plaintiff's Treating Physicians and Defense Counsel

Brandt v. Pelican[1] and *Brandt v. Medical Defense Associates*[2]

I. INTRODUCTION

Ex parte interviews of nonparty witnesses are commonly used by attorneys in determining whether witnesses have sufficiently valuable information to warrant taking their deposition or using their testimony at trial as well as in actually preparing witnesses to testify.[3] Although ex parte interviews are accepted for most witnesses, ex parte contact between a plaintiff's treating physician and a defendant's attorney raises the question of whether such communications are inconsistent with the physician-patient privilege and the physician's duty of confidentiality. Because of these considerations, many states disallow such ex parte interviews.[4]

In the *Brandt* cases, the Missouri Supreme Court permitted ex parte communications between a plaintiff's physicians and defense counsel. This Note will examine the reasoning behind the court's decision and compare the *Brandt* decision to various approaches taken by other jurisdictions to resolve the apparent conflict between the physician-patient relationship and informal discovery methods such as ex parte communications.

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1. 856 S.W.2d 658 (Mo. 1993).

2. 856 S.W.2d 667 (Mo. 1993).

3. Stempler v. Speidell, 495 A.2d 857, 864 (N.J. 1985) ("Personal interviews . . . are an accepted, informal method of assembling facts and documents in preparation for trial."); Lewis v. Roderick, 617 A.2d 119, 122 (R.I. 1992). *See also* Barbara Podlucky Berens, Note, *Defendants' Right to Conduct Ex Parte Interviews with Treating Physicians In Drug or Medical Device Cases*, 73 MINN. L. REV. 1451, 1451 (1989).

4. *See infra* note 77.

II. FACTS AND HOLDING

A. *Brandt v. Pelican* [Brandt I]

Brandt I was a medical malpractice action brought by William Brandt against Dr. George Pelican, a physician who treated him for Crohn's disease.[5] In March of 1986, Mr. Brandt was referred to Dr. Pelican, a gastroenterologist, by his family physician, for treatment of a painful abscess near his anal canal that occurred as a result of Crohn's disease.[6] Dr. Pelican prescribed the drug Flagyl on a long-term basis to treat the anal abscess.[7] A side effect of Flagyl is peripheral neuropathy, which is an "extremely painful condition caused by damage to the nerves in the extremities."[8] Dr. Pelican did not warn Mr. Brandt of the side effects of Flagyl or advise him of the symptoms of peripheral neuropathy so that he could stop taking Flagyl if any of the symptoms appeared.[9]

In September of 1986, Brandt returned to his family physician, complaining of numbness in his hands and feet.[10] Brandt was advised to discontinue the use of Flagyl and was referred to Dr. Gary Myers, a neurologist, for treatment.[11] Dr. Myers diagnosed Brandt's condition to be persistent peripheral neuropathy.[12]

Mr. Brandt began seeing Dr. Ira Kodner in September of 1986 for surgical treatment of the abscess.[13] Through the use of surgical techniques, the abscess finally healed by July of 1989.[14]

Mr. Brandt brought a medical malpractice action against Dr. Pelican alleging three counts of negligence: (1) Failing to inform him of the risk of peripheral neuropathy; (2) failing to warn him to "be on the lookout for symptoms of peripheral neuropathy"; and (3) failing to properly monitor him while he was taking Flagyl.[15]

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5. Crohn's disease is "an inflammation of the bowel or digestive system, which can occur periodically and then go into remission." *Brandt I*, 856 S.W.2d at 659.

6. *Id.* at 660.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* Peripheral neuropathy usually ceases once the patient stops taking Flagyl. Occasionally, however, the peripheral neuropathy does not end with the discontinuation of the medication. Such a condition is termed "persistent peripheral neuropathy." *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

During discovery, the plaintiff deposed both Dr. Myers and Dr. Kodner.[16] Following these depositions, Dr. Myers and Dr. Kodner engaged in ex parte interviews with Dr. Pelican and his attorney.[17] Neither Dr. Myers nor Dr. Kodner were called by the plaintiff to testify.[18] Both doctors, however, were called by the defense to testify as to their treatment of Mr. Brandt and to give expert opinions.[19] The jury returned a verdict in favor of Dr. Pelican.[20] The plaintiff moved for a new trial, claiming that "both Dr. Kodner and Dr. Myers changed their testimony from that given in their respective depositions as a result of the ex parte contacts" thus entitling plaintiff "to a new trial at which the changed testimony of Dr. Kodner and Dr. Myers will not be admitted."[21] The trial court held a post-trial evidentiary hearing and ruled that the ex parte communications were not improper.[22] Upon transfer,[23] the Missouri Supreme Court affirmed the lower court's ruling, distinguishing a physician's duty of confidentiality from the physician-patient privilege.[24] The court held that when there is disclosure of confidential information by a physician outside of testimony or formal discovery, the physician-patient privilege cannot be asserted.[25] This holding was grounded in the fact that the sole source of the physician-patient privilege in Missouri is a statute,[26] which applies only to "disclosure of confidential medical information by testimony in court or by formal discovery."[27] Therefore, in *Brandt I*, there was no basis "for granting plaintiff a new trial because of his physicians' out-of-court disclosures of medical information."[28] The Court deferred discussion of the physicians' duty of confidentiality and liability for extra-judicial disclosure of medical information to its related opinion, *Brandt v. Medical Defense Associates*.[29]

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16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 659.
21. *Id.* at 661.
22. *Id.* The trial court noted that even if the ex parte communications were improper, "there was no prejudice to the plaintiff created by the ex parte contacts." *Id.*
23. There was no intermediate court decision. *Id.*
24. *Id.* at 661.
25. *Id.*
26. MO. REV. STAT. § 491.060 (Supp. 1993).
27. *Brandt I*, 856 S.W.2d at 662. The court said that "there was no physician-patient privilege under the common law in Missouri or elsewhere." *Id.*
28. *Id.*
29. 856 S.W.2d 667 (Mo. 1993) [*Brandt II*]. *Brandt I* and *Brandt II* were both

B. *Brandt v. Medical Defense Associates* [Brandt II]

Brandt II arose out of *Brandt I*. Following a jury verdict for the defendant in *Brandt I*, the plaintiff filed *Brandt II* "seeking actual and punitive damages based on civil conspiracy to breach a fiduciary duty (Count I) and civil conspiracy based on invasion of privacy (Count II) against Dr. Kodner, Dr. Myers, Dr. Pelican, and Medical Defense Associates, the medical malpractice liability insurer for Dr. Pelican in [*Brandt I*]."[30] The defendants filed motions to dismiss, which alleged that the plaintiff failed to state a cause of action.[31] The trial court granted the defendants' motions.[32] The Missouri Court of Appeals for the Eastern District reversed, finding that plaintiff had stated a cause of action against Dr. Kodner and Dr. Myers for breach of fiduciary duty, and against Dr. Pelican and Medical Defense Associates for aiding and abetting Dr. Kodner and Dr. Myers in committing the tort of breach of fiduciary duty.[33]

The Missouri Supreme Court, upon transfer of the case from the court of appeals, again asserted, as it did in *Brandt I*, that the physician-patient privilege applies only to testimony in court or testimony during formal discovery.[34] The court held that a physician does have a "fiduciary duty of confidentiality" that generally prohibits extra-judicial disclosures of confidential information, but it is separate and distinct from the "testimonial privilege" that is found in Missouri Revised Statutes section 491.060(5).[35] Additionally, the Court held that when there is an issue joined to the litigation that concerns the plaintiff's medical condition, the plaintiff will be considered to have waived both the "testimonial privilege" and the "fiduciary duty of confidentiality,"[36] thus allowing ex parte contacts between plaintiff's treating physicians and defense counsel.

III. LEGAL BACKGROUND

A. *The Physician-Patient Privilege*

"Although the general policy of the law is to obtain as many facts as possible about a controversy on trial, rules of evidence often exclude reliable

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decided on the same day.

30. *Brandt II*, 856 S.W.2d at 669.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* See *infra* text accompanying note 117 for the text of this statute.

36. *Brandt II*, 856 S.W.2d at 674.

testimony if it was acquired by the witness through some confidential relation."[37] One such privileged relationship is that of doctor and patient.[38] This privilege did not exist at common law,[39] and it was not until 1828 that New York enacted the first physician-patient privilege statute in any common law jurisdiction.[40] The notes to New York's 1828 legislative session reveal two main policy justifications for establishing a physician-patient privilege. First, the privilege was to promote public health by encouraging patients to make full disclosure of medical information to their doctors.[41] Second, the legislators analogized communications between a doctor and patient to privileged conversations between attorneys and clients and reasoned that the

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37. Zechariah Chafee Jr., *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand*, 52 YALE L.J. 607, 608 (1943).

38. Others include husband and wife, attorney and client, and priest and confessor. *Id.* at 608.

39. Quarles v. Sutherland, 389 S.W.2d 249, 251 (Tenn. 1965); Daniel W. Shuman, *The Origins of the Physician-Patient Privilege and Professional Secret*, 39 SW. L.J. 661, 674-76 (1985).

40. Shuman, *supra* note 39, at 676 n.75. The statute read, "No person duly authorized to practice physic or surgery, shall be compelled to disclose any information which he may have acquired in attending any patient, in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him, as a surgeon." N.Y. REV. STAT. 1829 II, 406, part III, tit. 3, ch. VII, art. VIII, § 7. Missouri was the second state to enact such a privilege statute. Robert A. Wade, Note, *The Ohio Physician-Patient Privilege: Modified, Revised, and Defined*, 49 OHIO ST. L.J. 1147, 1148 (1989).

41. Original Reports of the Revisers, vol. 5, p. 34 (1828) (cited in EDWARD W. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 105, at 224 n.86 (2d ed. 1972) [hereinafter MCCORMICK]) ("[U]nless such [physician-patient] consultations are privileged, men will be incidentally punished by being obliged to suffer the consequences of injuries without relief from the medical art, and without conviction of offense.").

This rationale is also prominent in modern jurisdictions. *See, e.g.*, *id.* § 98, at 213 ("[T]he only purpose that could possibly justify the suppression in a law suit of material facts learned by the physician is the encouragement of freedom of disclosure by the patient so as to aid in the effective treatment of disease and injury."); Domako v. Rowe, 475 N.W.2d 30, 33 (Mich. 1991); Crist v. Moffat, 389 S.E.2d 41, 45 (N.C. 1990); Nelson v. Lewis, 534 A.2d 720, 722 (N.H. 1987). *See also* Rowland H. Long, *The Physician-Patient Privilege Statutes Obstruct Justice*, 25 INS. COUNS. J. 224, 224-25 (1958); Edmund M. Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence*, 10 U. CHI. L. REV. 285, 290 (1942-43); Shuman, *supra* note 39, at 664.

private communications between a doctor and a patient are at least as important as the information exchanged between an attorney and a client.[42]

One prominent scholar has stated that a privilege is only justified when the harm of the secrecy allowed in the courtroom because of the privilege is outweighed by the benefit of the free communications fostered by the privilege.[43] However, "[t]he validity of the [physician-patient] privilege has been questioned by most of the leading evidence authorities in this country"[44] because the justifications for the privilege do not outweigh the harm caused by the privilege.[45] Moreover, many commentators call for the abolition of

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42. Original Reports of Revisers, vol. 5, p. 34 (1828) (cited in MCCORMICK, *supra* note 41, § 105, at 224 n.86) ("The ground on which communications to counsel are privileged, is the supposed necessity of a full knowledge of the facts, to advise correctly, and to prepare for the proper defence or prosecution of a suit. But surely the necessity of consulting a medical adviser, when life itself may be in jeopardy, is still stronger.").

43. Chafee, *supra* note 37, at 608.

44. State *ex rel.* Grimm v. Ashmanskas, 690 P.2d 1063, 1065 (Or. 1984).

45. In response to the justification that the privilege is necessary to ensure proper medical treatment, see Chafee, *supra* note 37, at 609 (stating that except for a few highly disgraceful or very private conditions, "medical treatment is so valuable that few would lose it to prevent facts from coming to light in court"); Long, *supra* note 41, at 224 ("There is no evidence that a patient will censor facts at the expense of recovery, merely because he *may* know, if he lives in New England, that his physician can be ordered to disclose his findings in court. There is no evidence that case histories obtained by New England hospitals and clinics are not as full and complete as those obtained by medical institutions in New York or Minnesota, where privileged communication statutes exist."); Morgan, *supra* note 41, at 290 (noting that to assume that the patient will be deterred from disclosing medical information to his or her physician in absence of a privilige also supposes that the patient is anticipating a lawsuit and is considering what he or she will want to say on the witness stand); Shuman, *supra* note 39, at 664 ("Few seriously contend that these assumptions accurately reflect patient decision-making behavior in the case of physical problems.").

In response to the justification that the physician-patient relationship is at least as important as the attorney-client relationship, see MCCORMICK, *supra* note 41, § 105, at 224-25 ("As the client considers what he shall reveal to his lawyer he will often have in mind the possibility of the exposure of his statements in court, for the lawyer's office is the very anteroom of the courthouse. The patient, on the other hand, in most instances, in consulting his doctor will have his thoughts centered on his illness or injury and his hopes for betterment or cure, and the thought of some later disclosure of his confidences in the courtroom would not usually be a substantial factor in curbing his freedom of communication with his doctor."); W.A. Purrington, *An Abused Privilege*, 6 COLUM. L. REV. 388, 393-94 (1906) ("They were . . . misled by a false analogy between the patient consulting a medical man with no thought and with little probability of litigation, and, in most cases, with no aversion to publicity, and the

the privilege.[46] In spite of criticism, a majority of jurisdictions have a physician-patient privilege statute.[47]

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client consulting an attorney upon matters of law with a strong likelihood of being involved in litigation."). *See also* Chafee, *supra* note 37, at 609; Morgan, *supra* note 41, at 290.

46. *See, e.g.*, MCCORMICK, *supra* note 41, § 105, at 228 ("More than a century of experience with the statutes has demonstrated that the [physician-patient] privilege in the main operates not as the shield of privacy but as the protector of fraud. Consequently the abandonment of the privilege seems the best solution."); *id.* (stating that the "evil results of the privilege [are] . . . suppression of what is ordinarily the best source of proof . . . [a] one-sided view of the facts upon which the court must act . . . [and] [t]he complexities and perplexities which result from a statute which runs against the grain of justice, truth and fair dealing"); 8 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2380(a), at 831 (McNaughton rev. 1961) ("Ninety-nine per cent of the litigation in which the privilege is invoked consists of three classes of cases—actions on policies of life insurance where the deceased's misrepresentations of his health are involved, actions for corporal injuries where the extent of the plaintiff's injury is at issue, and testamentary actions where the testator's mental capacity is disputed. In all of these the medical testimony is absolutely needed for the purpose of learning the truth.")

47. ALASKA R. EVID. 504; ARIZ. REV. STAT. ANN. § 12-2235 (1982); ARK. R. EVID. 503; CAL. EVID. CODE § 994 (West 1966 & Supp. 1994); COLO. REV. STAT. § 13-90-107 (1987 & Supp. 1993); CONN. GEN. STAT. ANN. § 52-146 (West 1991 & Supp. 1994); DEL. R. EVID. 503; D.C. CODE ANN. § 14-307 (1989); FLA. STAT. ANN. § 90.503 (West 1979 & Supp. 1994) and FLA. STAT. ANN. § 455.241 (West 1979 & Supp. 1994); HAW. R. EVID. 504; IDAHO CODE § 9-203 (1979); 735 ILL. COMP. STAT. ANN. 5/8-802 (Smith-Hurd 1993); IND. CODE ANN. § 34-1-14-5 (Burns Supp. 1993); IOWA CODE § 622.10 (1993); KAN STAT. ANN. § 60-427 (1983); LA. CODE EVID. ANN. art. 510 (West Supp. 1993); ME. R. EVID. 503; MD. CTS. & JUD. PROC. CODE ANN. § 9-109 (1989); MASS. GEN. LAWS ANN. ch. 233, § 20 (West 1986 & Supp. 1993); MICH. COMP. LAWS ANN. § 600.2157 (West 1986 & Supp. 1993); MINN. STAT. ANN. § 595.02 (West 1988 & Supp. 1994); MISS. CODE ANN. § 13-1-21 (1972 & Supp. 1993); MO. REV. STAT. § 491.060 (Supp. 1993); MONT. R. CIV. P. 35(b)(2), MONT. CODE ANN. § 26-1-805 (1993); NEB. REV. STAT. § 27-504 (Supp. 1993); NEV. REV. STAT. § 49.225 (1991); N.H. REV. STAT. ANN. § 329:26 (Supp. 1993); N.J. STAT. ANN. § 2A:84A-22.2 (West 1976); N.M. R. EVID. 4-504; N.Y. CIV. PRAC. L. & R. 4504 (McKinney 1978 & Supp. 1994); N.C. GEN. STAT. § 8-53 (1986); N.D. R. EVID. 503; OHIO REV. CODE ANN. § 2317.02 (Anderson Supp. 1993); OKLA. STAT. ANN. tit. 12, § 2503 (West 1993); OR. REV. STAT. § 40.235 (1993); 42 PA. CONS. STAT. ANN. § 5929 (1982); R.I. GEN. LAWS § 5-37.3-4 (Supp. 1993); S.D. CODIFIED LAWS ANN. §§ 19-13-6 to -11 (1987); TENN. CODE ANN. § 24-1-207 (Supp. 1993); TEX. R. CIV. EVID. 509, TEX. REV. CIV. STAT. ANN. art. 4495b, § 5.08 (West Supp. 1994); UTAH R. EVID. 506, UTAH CODE ANN. § 78-24-8(4) (1992); VT. R. EVID. 503, VT. STAT. ANN. tit. 12, § 1612 (Supp. 1993); VA. CODE ANN. § 8.01-399 (Michie Supp. 1993); WASH. REV. CODE ANN. § 5.60.060 (West Supp. 1994); WIS. STAT.

Physician-patient privilege statutes share a number of characteristics. First, the privilege statutes are generally evidentiary in nature and usually govern only testimony, whether given in court or during formal discovery.[48] Therefore, physician-patient privilege statutes ordinarily do not regulate extra-judicial disclosures such as ex parte communications.[49] Second, the privilege belongs to the patient and can only be invoked, or waived, by the patient; the physician cannot use the privilege for his or her own benefit.[50] Third, "the

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ANN. § 905.04 (West Supp. 1993); WYO. STAT. § 1-12-101 (1977).

48. Shuman, *supra* note 39, at 678 (citing CLINTON DEWITT, PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT 27-28 (1958)). *See also* UNIF. R. EVID. 503, 13A U.L.A. R. 503 (1986); *infra* notes 53-56 and accompanying text.

49. Shuman, *supra* note 39, at 678 (stating that such extrajudicial disclosures are governed by professional ethics). It should be noted that many courts do not distinguish between a physician-patient privilege that relates to testimony and the physician-patient confidential relationship that concerns extra-judicial disclosures of confidential information. It is not clear in all cases whether courts do not distinguish between the "privilege" and the "confidential relationship" or whether they merely decline to use terminology that will distinguish the relationships. For example, in Church's Fried Chicken No. 1040 v. Hanson, 845 P.2d 824, 828 (N.M. Ct. App. 1992), *cert. denied*, 844 P.2d 827 (N.M. 1993), the court stated that "[j]urisdictions which have upheld the right to conduct ex parte interviews of a plaintiff's treating physician have generally premised such right upon their determination that commencement of an action for personal injuries constitutes a waiver by the plaintiff of the physician-patient privilege in that proceeding." This conclusion that a waiver of the physician-patient privilege is the premise upon which ex parte communications is allowed is clearly incorrect. Only the physician-patient confidential relationship applies to ex parte communications—the physician-patient privilege applies only to testimony. *But cf.* Manion v. N.P.W. Medical Ctr. of N.E. Pa., Inc., 676 F. Supp. 585, 590 (M.D. Pa. 1987) ("[The physician-patient privilege statute] applies to the general disclosure of information rather than the limited area of testimony."); However, some courts have expressly stated that only the physician-patient privilege exists and refuse to recognize a confidential relationship. *See id.* at 590 ("[The physician-patient privilege statute] applies to the general disclosure of information rather than the limited area of testimony."); *Nelson*, 534 A.2d at 721-23 (stating that the physician-patient privilege statute creates a confidential relationship that bars ex parte conferences); *Domako*, 475 N.W.2d at 34 n.8 (finding that if a separate fiduciary relationship between doctor and patient existed, it was "subsumed by the physician-patient privilege").

50. MCCORMICK, *supra* note 41, § 103, at 219; Shuman, *supra* note 39, at 678. *See also* NEV. REV. STAT. § 49.235 (1991) ("1. The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. 2. The person who was the doctor may claim the privilege but only on behalf of the patient. His authority so to do is presumed in the absence of evidence to the contrary."); Sarphie v. Rowe, 618 So. 2d 905 (La. Ct. App. 1993) (holding that a chiropractor may claim the privilege on behalf of the patients in disallowing the

privilege is not absolute" and all jurisdictions provide for a waiver of the privilege in certain circumstances.[51]

B. The Physician-Patient Confidential Relationship

The physician-patient confidential relationship is distinct from the physician-patient privilege and differs in several ways.[52] First, the physician-patient privilege is more narrow in scope than the confidential relationship—whereas the privilege governs the disclosure of confidential information during testimony, the confidential relationship is concerned with extra-judicial disclosures of confidential information.[53] Second, in contrast to the privilege, which is purely statutory,[54] the confidential relationship is generally not derived from statute, but is a "court-created effort to preserve the treating physician's fiduciary responsibilities during the litigation process."[55] Finally,

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plaintiff to gain access to the chiropractor's patient lists); Klieger v. Alby, 373 N.W.2d 57, 60 (Wis. Ct. App. 1985) ("[The] privilege is owned by the patient, not the medical doctor."); UNIF. R. EVID. 503(c) (same).

51. Shuman, *supra* note 39, at 678. *See also* Stempler v. Speidell, 495 A.2d 857, 861 (N.J. 1985) (stating that the physician-patient is not absolute).

For statutory waivers of the physician-patient privilege, see *e.g.* GA. CODE ANN. § 24-9-40 (Harrison 1990); HAW. R. EVID. 504(d)(3); TEX. REV. CIV. STAT. ANN. art. 4495b, § 508 (West 1976 & Supp. 1994); UNIF. R. EVID. 503(d)(3).

For case law waiving the physician-patient privilege in the absence of statute or rule of evidence, see Jordan v. Sinai Hosp. of Detroit, Inc., 429 N.W.2d 891, 899-900 (Mich. Ct. App. 1988) (stating that the privilege is not waived upon filing the lawsuit, but only when the party chooses "between the existing privilege and the desired testimony"); Loudon v. Mhyre, 756 P.2d 138, 140 (Wash. 1988) ("A patient may waive this privilege by putting his or her physical condition in issue.").

See also infra notes 105-07 and accompanying text.

52. Crist v. Moffatt, 389 S.E.2d 41, 45 (N.C. 1990). *See also* Manion v. N.P.W. Medical Ctr. of N.E. Pa., Inc., 676 F. Supp. 585, 593 (M.D. Pa. 1987) ("The prohibition against unauthorized contacts between defense counsel and a plaintiff's treating physician is, moreover, completely separate and distinct from the statutory physician-patient privilege.").

However, some courts fail to distinguish between the confidential relationship and the privilege. *See supra* note 49.

53. *Manion*, 676 F. Supp. at 590 (stating that the testimonial privilege is more limited than the confidential relationship); Horne v. Patton, 287 So. 2d 824, 828 (Ala. 1973) ("[W]hether or not testimony may be barred at trial does not necessarily control the issue of liability for unauthorized extra-judicial disclosures by a doctor.").

54. *Crist*, 389 S.E.2d at 45.

55. *Manion*, 676 F. Supp. at 593. *See* Church's Fried Chicken No. 1040 v. Hanson, 845 P.2d 824, 829 (N.M. Ct. App. 1992), *cert. denied*, 844 P.2d 827 (N.M. 1993) (ex parte communications are improper because of public policy considerations,

"[t]he statutory privilege determines whether certain information may be disclosed" whereas the confidential relationship "affects defense counsel's methods, not the substance of what is discoverable."[56] For example, the confidential relationship may dictate whether defense counsel can conduct an ex parte interview or whether he or she must depose the doctor, but will not determine what information may be discovered or introduced into evidence.

The starting point in defining the physician-patient confidential relationship is the physician's ethical duty not to disclose confidential information. "[T]he established ethical code of the medical profession itself unequivocally recognizes the confidential nature of the doctor-patient relationship."[57] The physician's code of ethics generally forbids disclosure of a patient's medical record without consent of the patient.[58] Breach of this

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despite the nonexistence of a physician-patient privilege statute at the time the lawsuit was commenced).

56. *Manion*, 676 F. Supp. at 593.

57. *Horne*, 287 So. 2d at 829.

58. The physician's code consists of three prongs: "(1) [T]he Hippocratic Oath; (2) the American Medical Association's (AMA) Principles of Medical Ethics; and (3) The Current Opinions of the Judicial Council of the AMA (1984 ed.)." Petrillo v. Syntex Lab., Inc., 499 N.E.2d 952, 957 (Ill. App. Ct. 1986), *appeal denied*, 505 N.E.2d 361 (Ill. 1987), *cert. denied*, 483 U.S. 1007 (1987) (limited in Morgan v. County of Cook, 625 N.E.2d 136, 954-55 (Ill. App. Ct. 1993)).

The first prong of the physician's code of ethics, the Hippocratic Oath, states: "[A]ll that may come to my knowledge in the exercise of my profession or outside of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal." STEDMAN'S MEDICAL DICTIONARY 717 (25th ed. 1990).

The second prong, the AMA's Principles of Medical Ethics states: "[A] physician shall respect the rights of patients, of colleagues, and of other health professionals, and shall safeguard patient confidences within the constraints of the law." THE AMERICAN MEDICAL ASSOCIATION, PRINCIPLES OF MEDICAL ETHICS, *quoted in Petrillo*, 499 N.E.2d at 958.

The third prong, the Current Opinions of the Judicial Council of the AMA, states: "[T]he information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree . . . . The physician should not reveal confidential communications or information without the express consent of the patient, unless required to do so by law." THE AMERICAN MEDICAL ASSOCIATION, CURRENT OPINIONS OF THE JUDICIAL COUNCIL § 5.06, *quoted in Petrillo*, 499 N.E.2d at 958 [hereinafter CURRENT OPINIONS].

However, in most instances the filing of a lawsuit by a patient that concerns a medical issue will constitute consent to disclosure to certain third persons. *See* Jacqueline M. Asher et al., *Ex Parte Interview with Plaintiff's Treating Physicians—The Offensive Use of the Physician-Patient Privilege*, 67 U. DET. L. REV. 501, 506-07 (1990).

ethical duty may cause the state body that governs medical licensing to censure the doctor, or to suspend or revoke his or her license.[59] However, conduct that is unethical does not necessarily subject the physician to legal liability and does not govern the legal issue of whether extra-judicial disclosures are allowed during the course of a lawsuit.[60] Therefore it is necessary to determine the extent to which the physician-patient confidential relationship is defined by state law.

Most jurisdictions recognize the existence of the physician-patient confidential relationship as a matter of state law,[61] and generally provide a cause of action against the physician for the unauthorized disclosure of confidential information.[62] There are four theories under which courts have recognized the existence of the physician-patient relationship and have allowed recovery for the breach of this relationship.[63]

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59. *See* OR. REV. STAT. § 677.190(5) *as quoted in* Humphers v. First Interstate Bank of Or., 696 P.2d 527, 535 (Or. 1985)) ("disqualifying or otherwise disciplining a physician for 'wilfully or negligently divulging a professional secret'"); Anker v. Brodnitz, 413 N.Y.S.2d 582, 585 (N.Y. Sup. Ct. 1979) ("A doctor who discloses his patient's confidences without authority opens himself to a charge of professional misconduct."); Quarles v. Sutherland, 389 S.W.2d 249, 250 (Tenn. 1965) ("[A] doctor's license may be revoked when the licensee has been guilty of unprofessional conduct, and such conduct is defined as 'the willful betraying of a professional secret.'"); Wenninger v. Muesing, 240 N.W.2d 333, 337 (Minn. 1976) ("[A] physician who discloses confidential information about his patient to another in a private interview may be subject to . . . professional discipline for unprofessional conduct.").

60. Bryant v. Hilst, 136 F.R.D. 487, 492 (D. Kan. 1991) ("The court finds the code of ethics inapplicable to the issues before the court. First, it is not binding law. Second, the issue is not whether the physician-patient relationship is confidential, it is whether there is a privilege in the patient to prevent the disclosure of information related to the patient."); Bryson v. Tillinghast, 749 P.2d 110, 114 (Okla. 1988) (concluding that "ethical standards are aspirational in nature and not enforceable by law").

Moreover, acts that are prohibited by law are not necessarily unethical. *Manion*, 676 F. Supp. at 595 (noting that the physician who engaged in ex parte communications did not necessarily act unethically, but was not allowed to make such contacts as a matter of public policy).

61. *See infra* notes 64-74 and accompanying text. *But see* Garner v. Ford Motor Co., 61 F.R.D. 22, 23 (D. Alaska 1973) (asserting that state law is not "germane to a determination of the proper means of discovery in an action once it has been removed to federal court"); Domako v. Rowe, 475 N.W.2d 30, 34 n.8 (Mich. 1991) (finding that if a separate fiduciary relationship between doctor and patient existed, it was "subsumed by the physician-patient privilege").

62. See *infra* notes 64-74 and accompanying text.

63. *See generally* Mary Droll Feighny, *The Physician-Patient Privilege: May Defense Counsel Conduct Ex Parte Interviews with Plaintiff's Treating Physician?*, J.

First, some states assert that the physician's duty of confidentiality is contractual in nature, and the unauthorized disclosure of confidential information is a breach of an implied contract.[64] These courts find that most patients are aware of the physician's ethical duty of confidentiality and therefore expect any information revealed to the physician not to be disclosed.[65] It is this expectation of secrecy that is protected by imposing an implied contract.[66]

Second, a number of jurisdictions have held that a physician's extra-judicial disclosures of a plaintiff's medical information is an invasion of

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KAN. B. ASS'N, Sept./Oct. 1992, at 8; Lonette E. Lamb, Note, *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, *Physician's Tort Liability for Unauthorized Disclosure of Confidential Information About Patient*, 48 A.L.R. 4th 668 (1986); and *infra* notes 64-74 and accompanying text. *But see* Berry v. Moench, 331 P.2d 814, 818-19 (Utah 1958) (treating unauthorized extra-judicial disclosure of confidential information as a case in defamation, and treating the confidential relationship merely as a factor in determining whether doctor had qualified privilege under defamation).

64. *Horne*, 287 So. 2d at 831-32; *Petrillo* 499 N.E.2d at 961 ("There is an implied promise, arising when the physician begins treating the patient, that the physician will refrain from engaging in conduct that is inconsistent with the 'good faith' required of a fiduciary."). *See also* Hammonds v. Aetna Casualty & Sur. Co., 243 F. Supp. 793, 801 (N.D. Ohio 1965); Jordan v. Sinai Hosp. of Detroit, Inc., 429 N.W.2d 891, 900 (Mich. Ct. App. 1988). *But see* Pierce v. Caday, 422 S.E.2d 371, 374 (Va. 1992) (expressly rejecting a contract cause of action for breach of confidential relationship by physician).

65. *Hammonds*, 243 F. Supp. at 801 ("Almost every member of the public is aware of the promise of discretion contained in the Hippocratic Oath . . . ."); *Horne*, 287 So. 2d at 832:

> [P]ublic knowledge of the ethical standards of the medical profession or widespread acquaintance with the Hippocratic Oath's secrecy provision or the AMA's Principles of Ethics or . . . [licensing requirements] . . . singly or together may well be sufficient justification for reasonable expectation on a patient's part that the physician has promised to keep confidential all information given by the patient.

Cf. CURRENT OPINIONS, *supra* note 58, § 5.07, *quoted in Petrillo*, 499 N.E.2d at 958 ("Both the protections of confidentiality and the appropriate release of information in records is the rightful expectation of the patient. A physician should respect the patient's expectations of confidentiality concerning medical records that involve the patient's care and treatment.").

66. *Hammonds*, 243 F. Supp. at 801 ("The promise of secrecy is as much an express warranty as the advertisement of a commercial entrepreneur."); *Horne*, 287 So. 2d at 831 (quoting *Hammonds*, 243 F. Supp. at 801).

privacy.[67] Jurisdictions that recognize this cause of action generally find that extra-judicial disclosures of a patient's medical information through ex parte communications can constitute a "public disclosure of private facts about the plaintiff."[68] The reasoning behind recognizing an invasion of privacy cause of action is that disclosures "of intimate details of a patient's health may amount to unwarranted publicization of one's private affairs with which the public has no legitimate concern such as to cause outrage, mental suffering, shame, or humiliation to a person of ordinary sensibilities."[69]

Third, some jurisdictions find that the confidential relationship merely exists based on public policy.[70] These states assert that extra-judicial disclosures of a plaintiff's medical information constitute a tortious breach of confidence or breach of fiduciary relationship.[71] This tort is usually based upon the fiduciary relationship that exists between the physician and patient.[72] This cause of action has been extended in some states so that an

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67. *Horne*, 287 So. 2d at 831-32; Allen v. Smith, 368 S.E.2d 924, 926 (W. Va. 1988) (supposing that mental health patient would have cause of action for invasion of privacy when psychiatrist released her medical records to her husband in divorce proceeding, but not deciding the issue since such an action was barred by the statute of limitations). *But see* Martin v. Baehler, Civ. A. No. 916-11-008, 1993 WL 258843, at *1 (Del. Super. Ct. May 20, 1993) (rejecting an invasion of privacy claim); Alberts v. Devine, 479 N.E.2d 113, 121 (Mass.), *cert. denied*, 474 U.S. 1013 (1985) (stating that there can be no recovery under invasion of privacy for a "physician's violation of the duty of confidentiality"); *Humphers*, 696 P.2d at 532 (rejecting an invasion of privacy claim when a physician made an unauthorized disclosure of confidential information). *Cf. Wenninger*, 240 N.W.2d at 337.

68. *See, e.g.*, *Horne*, 287 So. 2d at 830; *Martin*, 1993 WL 258843, at *1 (rejecting plaintiff's invasion of privacy claim, but stating that the only possible action would lie in the category of public disclosure of private facts).

There are four types of invasion of privacy actions recognized at common law: (1) appropriation of plaintiff's name or likeness; (2) intrusion upon plaintiff's privacy or private affairs; (3) public disclosure of private facts about the plaintiff; and (4) placing the plaintiff in a false light in the public eye. *Id.*

69. *Horne*, 287 So. 2d at 830. *See also Wenninger*, 240 N.W.2d at 337.

70. *E.g.*, *Pierce*, 422 S.E.2d at 372 (confidentiality is imposed in the doctor/patient relationship without any agreement).

71. *Hammonds*, 243 F. Supp. at 801 ("By its very definition, the term 'fiduciary relationship' imports the notion that if a wrong arises, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the cestui que trust."); *Horne*, 287 So. 2d at 828; *Alberts*, 479 N.E.2d at 116; *Pierce*, 422 S.E.2d at 372. *Cf. Anker*, 413 N.Y.S.2d at 585 (finding that "a cause of action exists against a doctor who without authority discloses his patient's confidences," but failing to precisely state the nature of the action).

72. *E.g.*, Alexander v. Knight, 177 A.2d 142, 146 (Pa. Super. Ct. 1962) ("We are of the opinion that members of a profession, especially the medical profession, stand

action will lie against anyone who, "with the requisite state of mind, induces a violation of the physician's duty of confidentiality."[73]

Finally, some states find that the confidential relationship is either expressly or impliedly created by statute and establish a cause of action in response to an unauthorized disclosure of confidential information that is in violation of such a statute.[74]

C. *Ex Parte Communications Between Plaintiff's Treating Physicians and Defense Counsel*

As previously stated, ex parte interviews of nonparty witnesses are a common practice used by attorneys in preparing witnesses.[75] However, many states have established an exception to this practice by finding that the confidential nature of the physician-patient relationship prohibits such ex parte communications without the patient's express consent.[76] The states are split as to whether ex parte communications between a plaintiff's treating physicians and defense counsel are allowed as a matter of state law.[77] The

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in a confidential or fiduciary capacity to their patients.").

73. *Alberts*, 479 N.E.2d at 119. *See also Hammonds*, 243 F. Supp. at 803 ("[P]articipation in breaches of trust must also apply to one who participates in or induces the breach of any fiduciary duty."). *Cf. Anker*, 413 N.Y.S.2d at 585 (finding that a cause of action did lie against an insurer who induced a doctor to disclose confidential information, but failing to define the nature of the cause of action). *But see Alexander*, 177 A.2d at 146 (those who induce a physician to breach the confidential relationship should merely have their actions "condemned").

74. *Martin*, 1993 WL 258843 at *4 (finding a confidential relationship based on Delaware's evidentiary privilege and stating that "the breach of this duty constitutes a tort"); *Jordan*, 429 N.W.2d at 899 (basing prohibition of ex parte interviews in part on interpretation of MICH. CT. R. 2.302(b)(1)(b)); Simonsen v. Swenson, 177 N.W. 831, 832 (Neb. 1920) (finding an implied cause of action from the state's licensing statute); Munzer v. Blaisdell, 49 N.Y.S.2d 915 (N.Y. Sup. Ct. 1944), *aff'd*, 58 N.Y.S.2d 359 (N.Y. App. Div. 1945) (finding a cause of action in a state statute prohibiting disclosure of mental institution records); Shaffer v. Spicer, 215 N.W.2d 134, 136 (S.D. 1974): *Berry*, 331 P.2d at 817 (reading the Utah privilege statute as creating a confidential relationship); Loudon v. Mhyre, 756 P.2d 138, 140 (Wash. 1988) (reading the physician-patient privilege as prohibiting ex parte interviews).

75. *See supra* note 3 and accompanying text.

76. *See generally* Daniel P. Jones, Annotation, *Discovery: Right to Ex Parte Interview with Injured Party's Treating Physician*, 50 A.L.R. 4th 714 (1986). *See infra* note 77.

77. *See generally* Zelin, *supra* note 63.

The following jurisdictions do not allow ex parte communications between a plaintiff's treating physicians and defense counsel: Louisiana, LA. CODE EVID. ANN.

distinction between the states that allow ex parte communications and those

art. 510(E) (West 1991 & Supp. 1993) (Revised June 25, 1993, by 1993 La. Acts 988, limiting any waiver of the physician-patient privilege only to testimony at trial or formal discovery. There is no case interpreting this provision in Louisiana.); North Dakota, Bohrer v. Merrill-Dow Pharmaceutical, Inc., 122 F.R.D. 217, 218 (D.N.D. 1987); Ohio, Hammonds v. Aetna Casualty & Sur. Co., 243 F. Supp. 793 (N.D. Ohio 1965); Alabama, Horne v. Patton, 287 So. 2d 824 (Ala. 1973); Arizona, Duquette v. Superior Court, 778 P.2d 634 (Ariz. Ct. App. 1989); California, Torres v. Superior Court, 270 Cal. Rptr. 401 (Cal. Ct. App. 1990); Colorado, Fields v. McNamara, 540 P.2d 327 (Colo. 1975); Florida, Phillips v. Ficarra, 618 So. 2d 312 (Fla. Dist. Ct. App. 1993); Illinois, Petrillo v. Syntex Lab., 499 N.E.2d 952 (Ill. App. Ct. 1986), *appeal denied*, 505 N.E.2d 361 (Ill.), *cert. denied*, 483 U.S. 1007 (1987) (limited in Morgan v. County of Cook, 625 N.E.2d 136, 954-55 (Ill. App. Ct. 1993)) (allowing ex parte communications between employer medical facility and employee doctor when the medical facility was allegedly vicariously liable); Iowa, Roosevelt Hotel Ltd. Partnership v. Sweeney, 394 N.W.2d 353 (Iowa 1986) (the court refused to force plaintiff to issue authorization for ex parte contacts); Montana, Jaap v. District Court of the Eighth Judicial Circuit, 623 P.2d 1389, 1392 (Mont. 1981); New Hampshire, Nelson v. Lewis, 534 A.2d 720 (N.H. 1987); New Mexico, Church's Fried Chicken No. 1040 v. Hanson, 845 P.2d 824 (N.M. Ct. App. 1992), *cert. denied*, 844 P.2d 847 (N.M. 1993); New York, Stoller v. Moo Young Jun, 499 N.Y.S.2d 790 (N.Y. App. Div. 1986); North Carolina, Crist v. Moffat, 389 S.E.2d 41 (N.C. 1990); South Dakota, Schaffer v. Spicer, 215 N.W.2d 134 (S.D. 1974) (by implication); Washington, Loudon v. Mhyre, 756 P.2d 138 (Wash. 1988); Wisconsin, Klieger v. Alby, 373 N.W.2d 57 (Wis. 1985); Wyoming, Wardell v. McMillan, 844 P.2d 1052, 1066 (Wyo. 1992) (by implication in dictum).

The following jurisdictions do allow ex parte communications between a plaintiff's treating physician and a defendant's attorney: Arkansas, King v. Ahrens, 798 F. Supp. 1371 (W.D. Ark. 1992); South Carolina, Felder v. Wyman, 139 F.R.D. 85 (D.S.C. 1991); Kansas, Bryant v. Hilst, 136 F.R.D. 487 (D. Kan. 1991); District of Columbia, Alston v. Greater S.E. Community Hosp., 107 F.R.D. 35 (D. D.C. 1985); Alaska, Langdon v. Champion, 745 P.2d 1371 (Alaska 1987); Delaware, Green v. Bloodsworth, 501 A.2d 1257 (Del. Super. Ct. 1985); Georgia, Orr v. Sievert, 292 S.E.2d 548 (Ga. Ct. App. 1982) (by implication); Idaho, Pearce v. Ollie, 826 P.2d 888 (Idaho 1992); Kentucky, Roberts v. Estep, 845 S.W.2d 544 (Ky. 1993); Michigan, Domako v. Rowe, 475 N.W.2d 30 (Mich. 1991); Minnesota, Blohm v. Minneapolis Urological Surgeons, 449 N.W.2d 168 (Minn. 1989) (applying MINN. STAT. § 595.02 (1988), which expressly allows "informal discussion" between treating physicians and defense attorneys in medical malpractice actions); Missouri, Brandt v. Medical Defense Assoc., 856 S.W.2d 667 (Mo. 1993); New Jersey, Stempler v. Speidell, 495 A.2d 857 (N.J. 1985); Oklahoma, Bryson v. Tillinghast 749 P.2d 110 (Okla. 1988) (holding that the physician-patient privilege does not extend to extra-judicial disclosures made in criminal cases); Rhode Island, Lewis v. Roderick, 617 A.2d 119 (R.I. 1992); Tennessee, Quarles v. Sutherland, 389 S.W.2d 249 (Tenn. 1965) (refusing to recognize a physician-patient privilege at all).

that prohibit them is not whether a confidential relationship exists,[78] 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.[79] The choice of whether or not to extend the physician-patient privilege[80] or the physician-patient confidential relationship to prohibit ex parte communications as a matter of law customarily requires balancing of competing policy considerations.[81] A court generally weighs "the patient's privacy interest in non-disclosure, on the one hand, and the public's interest in full disclosure to obtain a just disposition of the controversy, on the other."[82]

The policy arguments favoring the prohibition of ex parte communications are broad and diverse in scope.[83] The first policy justification for prohibiting ex parte interviews is that the confidential nature of the physician-patient relationship ensures that "the patient will receive the best medical treatment by encouraging full and frank disclosure of medical history and symptoms by a patient to his doctor" and ex parte contacts jeopardize such free disclosure.[84] A second argument advanced is that ex parte contacts

78. On the contrary, most of the states that allow ex parte communications also recognize the confidentiality of the physician-patient relationship. *See King*, 798 F. Supp. at 1380; *Alston*, 107 F.R.D. at 37 n.2 ("[B]y bringing an action . . . a plaintiff waives the physician-patient privilege, but only to the extent that attending physicians may be required to testify on pretrial deposition with respect to the injuries sued upon."); *Stempler*, 495 A.2d at 861. *See also infra* note 108.

79. *See infra* notes 108-10 and accompanying text.

80. *See supra* note 49.

81. Courts that prohibit ex parte communications by a physician usually state "public policy" as a justification. *See King*, 798 F. Supp. at 1373 ("Cases supporting the prohibition of ex parte communications exhibit concern for the existence of public policy considerations"); Manion v. N.P.W. Medical Ctr. of N.E. Pa., Inc. 676 F.Supp. 585, 593 (M.D. Pa. 1987) ("[T]he basis of the prohibition is public policy").

82. Mull v. String, 448 So. 2d 952, 954 (Ala. 1984). *See also Stempler*, 495 A.2d at 861 (The patient does not enjoy "an absolute right, but rather he possesses a limited right against such disclosure, subject to exceptions prompted by the supervening interest of society."). *Cf.* Shuman, *supra* note 39, at 661 ("The need for personal privacy in communications and the need for probative evidence at trials are like separate melodies within the same musical composition.").

83. *See Crist*, 389 S.E.2d at 45 ("The rationales underlying the rule prohibiting ex parte contacts with nonparty treating physicians encompass and extend beyond those purposes enumerated [to support the physician-patient privilege] to embrace other grounds as well.").

84. *Duquette*, 778 P.2d at 640 (citation omitted). *See also Horne*, 287 So. 2d at 830; *Petrillo*, 499 N.E.2d at 962; Wenninger v. Muesing, 240 N.W.2d 333, 337 (Minn. 1976); *Crist*, 389 N.E.2d at 45; *Stempler*, 495 A.2d at 860 (unwarranted disclosures may deter the patient from revealing his or her symptoms during treatment).

should be prohibited because "the public has a widespread belief that information given to a physician in confidence will not be disclosed to third parties absent legal compulsion . . . and the public has a right to have this expectation realized."[85] Third, ex parte contacts should be disallowed in order to protect the physician.[86] Even though the physician has a right to refuse to engage in an ex parte interview, such a right of refusal does not sufficiently protect the physician from the pressure "brought to bear on the physician when he or she is faced with a request for an ex parte interview by a defense attorney."[87] Additionally, a physician is not trained in legal matters and may not realize the scope of his or her ability to engage in an ex parte conference,[88] and overstepping those bounds may result in a breach of the physician's code of ethics,[89] charges of professional misconduct,[90] and

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85. *Duquette*, 778 P.2d at 640. *Accord Horne*, 287 So. 2d at 831; *Petrillo*, 499 N.E.2d at 960 ("[T]he public, and specifically a patient, has the right to rely on physicians to adhere to medical ethics and thereby protect the confidential relationship existing between a patient and his physician."); *Anker*, 413 N.Y.S.2d at 584; *Crist*, 389 S.E.2d at 46 (quoting *Duquette*, 778 P.2d at 640). *Cf.* notes 64-65, *supra*.

86. *King*, 798 F. Supp. at 1373; *Duquette*, 778 P.2d at 640-41; *Crist*, 389 N.E.2d at 47.

87. *Duquette*, 778 P.2d at 640 (stating that a physician is not legally trained and may not understand the distinction between formal and informal discovery, and that substantial overlap between the insurer defending the medical malpractice defendant and the insurer of the physician witness might make a physician witness feel compelled to cooperate with the defense). *Accord King*, 798 F. Supp. at 1373; *Manion*, 676 F. Supp. at 594-95 (large potential for impropriety exists when defense counsel represents the insurance carrier of the treating physician); *Pearce*, 826 P.2d at 907 (Bistline, J., concurring in part, dissenting in part); *Roosevelt Hotel Ltd. Partnership*, 394 N.W.2d at 357; Anker v. Brodnitz, 413 N.Y.S.2d 582, 585 (N.Y. Sup. Ct. 1979); *Crist*, 389 S.E.2d at 47 (same).

88. *Duquette*, 778 P.2d at 641; *Pearce*, 826 P.2d at 908; *Roosevelt Hotel Ltd. Partnership*, 394 N.W.2d at 357 ("We do not mean to question the integrity of doctors and lawyers or to suggest that we must control discovery in order to assure their ethical conduct. We are concerned, however, with the difficulty of determining whether a particular piece of information is relevant to the claim being litigated . . . . Asking the physician, untrained in law to assume this burden . . . is unfair to the physician."); *Crist*, 389 S.E.2d at 47 (quoting *Duquette*, 778 P.2d at 641.).

Some courts have also said that the defense, although trained in legal issues, cannot accurately determine the scope of the plaintiff's waiver of the privilege. *Roosevelt Hotel Ltd. Partnership*, 394 N.W.2d at 357; *Anker*, 413 N.Y.S.2d at 585 ("[I]t would . . . often be difficult for the defense to determine on its own if and to what extent the physician-patient privilege was waived.").

89. *See King*, 798 F. Supp. at 1373; *Duquette*, 778 P.2d at 641; *Pearce*, 826 P.2d at 908; Jordan v. Sinai Hosp. at Detroit, Inc., 429 N.W.2d 891, 900 (Mich. Ct. App. 1988) (physician's ethical duty favors a bar on ex parte interviews).

legal liability for breach of confidential relationship.[91] Fourth, many courts disallow ex parte communications, in part, out of respect for the physician's ethical duty of confidentiality.[92] Fifth, some courts state that discovery procedures are sufficiently broad to allow the defense to acquire all the information they need from a plaintiff's treating physicians, and resort to "informal discovery" is neither necessary or mandated under the rules of civil procedure.[93]

Advocates favoring ex parte communications between plaintiff's treating physicians and defense counsel generally present the following policy qualifications. First, ex parte interviews are quicker and more efficient than formal discovery in that they reduce the time needed to prepare for trial.[94] They "eliminate the cost and difficulties involved in holding and scheduling formal depositions with all parties present,"[95] provide "a cost-efficient way of completely excluding nonessential witnesses from the list,"[96] and facilitate "early evaluation and settlement of claims,"[97] thereby reducing the expense of litigation. Second, many courts recognize as "a general proposition . . .

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90. *Duquette*, 778 P.2d at 641. *See also Pearce*, 826 P.2d 908; *Anker*, 413 N.Y.S.2d at 585; *Quarles*, 389 S.W.2d at 250.

91. *Duquette*, 778 P.2d at 641. *See also Pearce*, 826 P.2d at 908; *Roosevelt Hotel Ltd. Partnership*, 394 N.W.2d at 357.

92. *Hammonds*, 243 F. Supp. at 797 (finding public policy prohibits ex parte communications and that such public policy is based, in part, on the code of medical ethics and the State Medical Licensing Statute); *Horne*, 287 So. 2d at 829 ("When the wording of Alabama's state licensing statute is considered alongside the accepted precepts of the medical profession itself, it would seem to establish clearly that public policy in Alabama requires that information obtained by a physician in the course of a doctor-patient relationship be maintained in confidence . . . ."); *Jordan*, 429 N.W.2d at 900 ("The physician's ethical duty of loyalty and the implied promise of confidentiality which arise upon treatment favor a bar on ex parte interviews . . . ."). *See also Duquette*, 778 P.2d at 640; *Petrillo*, 499 N.E.2d at 958-59.

93. *See* Garner v. Ford Motor Company, 61 F.R.D. 22, 24 (D. Alaska 1973) (Rabinowitz, J., concurring); *King*, 798 F. Supp. at 1373; Weaver v. Mann, 90 F.R.D. 443, 445 (D.N.D. 1981); *Fields*, 540 P.2d at 328; *Roosevelt Hotel Ltd. Partnership*, 394 N.W.2d at 357; Stoller v. Moo Young Jun, 499 N.Y.S.2d 790, 791 (N.Y. App. Div. 1986).

See also Jacqueline M. Asher et al., *supra* note 58, at 512 ("In virtually every case barring ex parte contact, the most compelling argument against such contact was that the formal rules of civil procedure do not provide for informal ex parte interviews.").

94. *King*, 798 F. Supp. at 1373; Doe v. Eli Lilly & Co., Inc., 99 F.R.D. 126, 128 (D.D.C. 1983); *Langdon*, 745 P.2d at 1373; *Lewis*, 617 A.2d at 122.

95. *Lewis*, 617 A.2d at 122.

96. *Id.*

97. *King*, 798 F. Supp. at 1373.

[that] no party to litigation has anything resembling a proprietary right to any witness's evidence. Absent a privilege no party is entitled to restrict an opponent's access to a witness . . . ."[98] This is basically a fairness argument: the plaintiff should not have free access to a witness without the defense being accorded similar treatment, and the plaintiff should not be able to use the confidential relationship as both a shield and a sword.[99] Third, "court rules in [some] jurisdiction[s] [do] not expressly prohibit such ex parte interviews."[100] Related to this argument is the notion that allowing ex parte contacts is consistent with the purpose of discovery rules, which is to "secure the just, speedy, and inexpensive determination of every action."[101] Fourth, the physician can refuse to engage in ex parte communications, and may use discretion in deciding how much information to disclose, thus protecting his or her ethical duties.[102]

D. Waiver of the Physician-Patient Privilege and the Physician-Patient Confidential Relationship

A finding that the physician-patient privilege and the physician-patient confidential relationship have been waived[103] is the legal mechanism by

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98. *Doe*, 99 F.R.D. at 128. *Accord Stempler*, 495 A.2d at 864 (quoting *Doe*, 99 F.R.D. at 128.); *King*, 798 F. Supp. at 1373-74.

99. For an example of a plaintiff using the physician's duty of confidentiality unfairly, see *Domako*, 475 N.W.2d at 34 n.5 (stating that certain actions of the plaintiff were apparently "designed to obtain a tactical advantage, not to protect confidentiality").

100. *Lewis*, 617 A.2d at 122. *See also King*, 798 F. Supp. at 1379; *Green*, 501 A.2d at 1258.

101. FED. R. CIV. P. 1. *See also Bryant*, 136 F.R.D. at 492 ("The court believes that the mandate of FED. R. CIV. P. 1 is best observed by permitting ex parte communications with fact witnesses, including plaintiff's treating physicians."); *Green*, 501 A.2d at 1258 ("This Court will not condone the use of the formal discovery rules as a shield against defense counsel's informal access to a witness when these rules were intended to simplify trials by expediting the flow of litigation."); *Domako*, 475 N.W.2d at 35-36 ("[T]his Court has repeatedly emphasized that discovery rules are to be liberally construed . . . to further the ends of justice. Restricting parties to formal methods of discovery would not aid in the search for the truth, and it would only serve to complicate trial preparation. . . . Discovery should . . . promote the discovery of the true facts and circumstances of a controversy, rather than aid in their concealment.") (citation omitted); *Stempler*, 495 A.2d at 863 ("The policy of law is to allow all competent, relevant evidence to be produced, subject only to a limited number of privileges.").

102. *See infra* note 113.

103. See *supra* note 49 for discussion of judicial recognition of a separate

which a court allows ex parte communications between a plaintiff's treating physicians and defense counsel.[104]

Generally, the plaintiff waives the physician-patient privilege upon the filing of a lawsuit in which the plaintiff's medical condition is an issue.[105]

"privilege" and "confidential relationship."

104. *E.g.*, Church's Fried Chicken No. 1040 v. Hanson, 845 P.2d 824, 828 (N.M. Ct. App. 1992), *cert. denied*, 844 P.2d 847 (N.M. 1993) ("Jurisdictions which have upheld the right to conduct ex parte interviews of a plaintiff's treating physician have generally premised such right upon their determination that commencement of an action for personal injuries constitutes a waiver by the plaintiff of the physician-patient privilege in that proceeding."). Note that the court here seems to use the term "privilige" to refer to the whole physician-patient relationship. *See supra* note 49.

105. WIGMORE, *supra* note 46, § 2389 ("The whole reason for the privilege is the patient's supposed unwillingness that the ailment should be disclosed to the world at large; hence the bringing of a suit in which the very declaration, and much more the proof, discloses the ailment to the world at large, is of itself an indication that the supposed repugnancy to disclosure does not exist."). *See also* Mattison v. Poulen, 353 A.2d 327, 330 (Vt. 1976) ("But it is neither human, natural, nor understandable to claim protection from exposure by asserting a privilege for communications to doctors, at the very same time when the patient is parading before the public the mental or physical condition as to which he consulted the doctor, by bringing an action for damages arising from such condition."). *Accord* Collins v. Bair, 268 N.E.2d 95, 98 (Ind. 1971); State v. Long, 165 S.W. 748, 755 (Mo. 1914); Stempler v. Speidell, 495 A.2d 857, 859 (N.J. 1985). See *infra* notes 106-07 for citation of some states that allow for such a waiver. *But see* Bond v. Independent Order of Foresters, 421 P.2d 351, 353 (Wash. 1966) ("The bringing of an action for personal injuries does not constitute a waiver of the [physician-patient privilege] statute.") However, Washington has since amended its privilege statute to provide that upon filing a lawsuit, the plaintiff must expressly waive the privilege within ninety days. *See* WASH. REV. CODE ANN. § 5.60.060 (West Supp. 1993).

Many states provide for such a waiver by statute,[106] but a few states provide for a waiver of the privilege through judicially created doctrine.[107]

A waiver of the physician-patient privilege does not necessarily mean that the physician-patient confidential relationship has been waived as well.[108] States that prohibit ex parte communications hold that the filing of a lawsuit is not a constructive waiver of the physician-patient confidential relationship, even if the physician-patient privilege has been constructively waived by the plaintiff placing his or her medical condition at issue.[109] Only those states

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106. *E.g.* Georgia, GA. CODE ANN. § 24-9-40 (Harrison 1990); Kansas, KAN. STAT. ANN. § 60-427(d) (1993); Michigan, MICH. R. CIV. P. 2.314(B)(2)(stating that if a party asserts the physician-patient privilege with regard to confidential medical information, then that party may not later present any evidence relating to that information), MICH. COMP. LAWS ANN. § 600.2157 (West Supp. 1993); Texas, TEX R. CIV. EVID. 509(d)(4), TEX. REV. CIV. STAT. ANN. art. 4495b § 5.08(g)(4) (West Supp. 1994); Vermont, VT. R. EVID. 503(d)(3) (1983). *See also* Lewis v. Roderick, 617 A.2d 119, 121 (R.I. 1992) (concluding that the legislature's intent was "to create a qualified, nonabsolute privilege that would protect a patient's interest in privacy and yet not hamper discovery in medical-malpractice actions"). *But see* State *ex rel.* Grimm v. Ashmanskas, 690 P.2d 1063, 1067 (Or. 1985) (interpreting OR. R. EVID. 511 as providing that waiver does not occur upon the commencement of a lawsuit, but upon deposition of a treating physician by the plaintiff).

107. *Collins*, 268 N.E.2d at 98; Sagmiller v. Carlsen, 219 N.W.2d 885, 894, 897 (N.D. 1974) (holding that an implied waiver occurs at the "initiation of a malpractice action" and refusing to decide whether such an implied waiver occurs in other types of proceedings); *Mattison*, 353 A.2d at 330 (however, the Vermont physician-patient privilege statute has been revised since this case and now expressly provides for a waiver upon commencement of a lawsuit when the plaintiff's medical condition is an issue); Wardel v. McMillan, 844 P.2d 1052, 1066 (Wyo. 1992).

108. Roosevelt Hotel Ltd. Partnership v. Sweeney 394 N.W.2d 353, 356 (Iowa 1986) ("[W]e cannot accept . . . that the plaintiff's suit totally waives the confidential nature of the physician-patient relationship. It only waives the application of the privilege, which is confined by the statute to a testimonial setting, and does not speak to ex parte communications in a nontestimonial setting."); State *ex rel.* Stufflebam v. Appelquist, 694 S.W.2d 882, 885 (Mo. Ct. App. 1985), *overruled by* State ex rel. Woytus v. Ryan, 776 S.W.2d 389 (Mo. 1989) ("Waiver of the physician-patient privilege does not terminate all effects of the physician-patient relationship."); State *ex rel.* Woytus v. Ryan, 776 S.W.2d 389, 393 (Mo. 1989), *abrogated by* Brandt v. Pelican, 856 S.W.2d 658 (Mo. 1993). *See supra* note 78.

109. "Constructive waiver" is the waiver that is deemed to occur upon the filing of a lawsuit in which the plaintiff's medical condition is an issue. Manion v. N.P.W. Medical Ctr. of N.E. Pa., Inc., 676 F. Supp. 585, 594 (M.D. Pa. 1987); Horne v. Patton, 287 So. 2d 824, 828 (Ala. 1973); Duquette v. Superior Court, 778 P.2d 634, 637 (Ariz. Ct. App. 1989); Jordan v. Sinai Hosp. of Detroit, Inc., 429 N.W.2d 891, 899 (Mich. Ct. App. 1988); Loudon v. Mhyre, 756 P.2d 138, 140 (Wash. 1988).

that allow ex parte communications find that the physician-patient confidential relationship has been waived upon the filing of a lawsuit in which the plaintiff's medical condition is an issue.[110]

Once the plaintiff has filed a lawsuit in which his or her medical condition is an issue, a court that allows ex parte contacts may use one of two methods to permit such contacts. Some courts require the plaintiff to issue written authorizations to his or her treating physicians consenting to their future ex parte disclosures of information before the defendant can interview them.[111] In other states, the court takes a passive role with respect to ex parte communications and finds that authorizations are not necessary before a physician can engage in ex parte communications.[112] Whichever method is used, the physician's participation in an ex parte interview is voluntary, and the physician retains the right to refuse to take part in an ex parte interview.[113]

E. Development of Missouri Law Concerning the Physician-Patient Relationship and Ex Parte Communications

In 1835, Missouri became the second state[114] to recognize the physician-patient privilege by enacting "An Act Concerning Witnesses."[115] The

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110. Bryant v. Hilst, 136 F.R.D. 487, 492 (D. Kan. 1991); Doe v. Eli Lilly & Co., Inc., 99 F.R.D. 126, 128 (D.D.C. 1983) (finding a constructive waiver of the whole physician-patient relationship without making a distinction between the testimonial privilege and the confidential relationship); Langdon v. Champion, 745 P.2d 1371, 1373 (Alaska 1987); Green v. Bloodsworth, 501 A. 2d 1257, 1259 (Del. Super. Ct. 1985).

111. *See Doe*, 99 F.R.D. at 129; *Green*, 501 A.2d at 1259; *State ex rel. Stufflebam*, 694 S.W.2d at 888; *Stempler*, 495 A.2d at 864 ("Since it is unrealistic to anticipate that [plaintiff's] physicians will participate in such interviews without plaintiff's consent, plaintiff's counsel should provide written authorization to facilitate the conduct of interviews."). *See generally* Jones, *supra* note 76, § 4.

112. *See* King v. Ahrens, 798 F. Supp. 1371, 1378 (W.D. Ark. 1992); Bohrer v. Merrill-Dow Pharmaceutical, Inc., 122 F.R.D. 217, 218 (D.N.D. 1987); Alston v. Greater Southeast Community Hospital, 107 F.R.D. 35, 38 (D.D.C. 1985).

113. *Bryant*, 136 F.R.D. at 492-93; *Bohrer*, 122 F.R.D. at 218 ("[I]t appears that the refusal to communicate is the personal choice of the physician."); *Alston*, 107 F.R.D. at 38; *Langdon*, 745 P.2d at 1374; *Stempler*, 495 A.2d at 864.

114. WIGMORE, *supra* note 46, § 2380, at 820. New York enacted the first physician-patient privilege statute in 1828. *See also supra* note 40.

115. 1835 MO. LAWS An Act Concerning Witnesses, § 17, p. 623. The act read:

> No person authorized to practice physic or surgery shall be required or allowed to disclose any information which he may have acquired from any patient while attending him in a professional character, and which

current physician-patient privilege, which is codified at Missouri Revised Statutes section 491.060(5), states:[116]

> The following persons shall be incompetent to testify . . . (5) A physician licensed under chapter 334, RSMo, a licensed psychologist or a dentist licensed under chapter 332, RSMo, concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe and provide treatment for such patient as a physician, psychologist or dentist.[117]

Early Missouri cases found that this statutory privilege was absolute, and that the plaintiff did not have the power to waive the privilege.[118] In *Harriman v. Stowe*,[119] the plaintiff claimed that she sustained injuries attributable to the defendant's negligence.[120] The plaintiff's treating physician attempted to testify regarding the extent of her injuries upon her request, but the trial court disallowed the testimony, finding that the physician-patient privilege rendered him incompetent to testify.[121]

The first case allowing the patient to waive the privilege was *Groll v. Tower*,[122] decided by the Missouri Supreme Court in 1884. The *Groll* court based its decision to allow waiver of the privilege by the plaintiff upon decisions in other jurisdictions, and "the reason of the rule."[123] In *State v. Long*,[124] the court expanded upon the scope of the waiver found in *Groll*, and held that once a plaintiff called one physician to testify, she had waived

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information was necessary to enable him to prescribe for such a patient as a physician, or do any act for him as a surgeon.

116. Even though the statute is phrased in terms of "incompetency," it is clearly a privilege rather than a rule of incompetency. *See* MCCORMICK, *supra* note 41, §§ 72-73.

117. MO. REV. STAT. § 491.060(5) (Supp. 1993).

118. Harriman v. Stowe, 57 Mo. 93 (1874); State *ex rel.* McNutt v. Keet, 432 S.W.2d 597, 600 (Mo. 1968).

119. 57 Mo. 93 (1874).

120. *Id.* at 94-95.

121. *Id.* at 95. The Missouri Supreme Court ended up allowing the testimony under the theory of *res gestae*. However, the supreme court did not overrule the trial court's determination that the privilege was absolute. *Id.* at 96-97.

122. Groll v. Tower, 85 Mo. 249 (1884). *See McNutt*, 432 S.W.2d at 600 (stating that *Groll* was the first case allowing waiver of the privilege).

123. *Groll*, 85 Mo. at 256.

124. 165 S.W. 748 (Mo. 1914).

the physician-patient privilege as to *all* physicians concerning that issue.[125] In *St. Louis Little Rock Hospital, Inc. v. Gaertner*,[126] the Missouri Court of Appeals for the Eastern District further delineated the scope of the waiver when it found that "[t]he privilege can only be waived by the patient and that the doctor must protect the patient by asserting the privilege when applicable."[127]

Historically, Missouri courts have not found that the privilege has been waived until the plaintiff has testified as to his or her condition and about the treatment given, or until the physician has actually been called as a witness.[128] The Missouri Supreme Court changed that rule and expanded the scope of the physician-patient privilege waiver in *State ex rel. McNutt v. Keet*.[129] In *McNutt*, the court found that the material effect of the waiver was "largely a matter of timing as to when the waiver, inevitably to occur, is to be recognized,"[130] and held that "once the matter of plaintiff's physical condition is in issue under the pleadings, plaintiff will be considered to have waived the privilege under section 491.060(5) so far as information . . . bearing on that issue is concerned."[131] However, the *McNutt* court did limit the waiver in that it did not "automatically exten[d] to every doctor or hospital record a party has had from birth regardless of the bearing or lack of bearing, as may be, on the matters in issue."[132]

Missouri courts have been inconsistent in determining whether a "McNutt waiver"[133] is a waiver of just the privilege or a waiver of the privilege *and* the confidential relationship.[134] In *State ex rel. Stufflebam v. Appelquist*,[135] the Missouri Court of Appeals for the Southern District found that the plaintiff had waived the privilege upon filing suit and also found that a "[w]aiver of

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125. *Id.* at 753. *Accord* Weissman v. Wells, 306 Mo. 82, 267 S.W. 400 (Mo. 1924).

126. 682 S.W.2d 146, 151 (Mo. Ct. App. 1984).

127. State v. Beatty, 770 S.W.2d 387, 391 (Mo. Ct. App. 1989) (citing St. Louis Little Rock Hospital v. Gaertner, 682 S.W.2d 146, 151 (Mo. Ct. App. 1984)).

128. *See* Baker v. Baker, 251 S.W.2d 31, 33 (Mo. 1952); Epstein v. Pennsylvania R.R., 156 S.W. 699, 705 (Mo. 1913).

129. 432 S.W.2d 597 (Mo. 1968).

130. *Id.* at 601.

131. *Id.*

132. *Id.* at 602.

133. "McNutt waiver" is a term the Missouri Supreme Court used in *Brandt II* to refer to the situation in which a plaintiff files a lawsuit that has his or her medical condition as an issue. *Brandt II*, 856 S.W.2d at 671-72. The *McNutt* court had held that by filing such pleadings, a plaintiff was deemed to have waived the physician-patient privilege. *McNutt*, 432 S.W.2d at 601.

134. *See infra* notes 135-50 and accompanying text.

135. 694 S.W.2d 882 (Mo. Ct. App. 1985).

the physician-patient privilege does not terminate all effects of the physician-patient relationship."[136] After balancing the competing interests in determining whether ex parte communications should be allowed as a matter of policy, the *Stufflebam* court determined that ex parte interviews were not improper; thus, the physician-patient confidential relationship, as well as the physician-patient privilege, had been waived.[137] The *Stufflebam* court then required the trial court to compel the plaintiff to issue medical authorizations to his or her treating physicians stating the plaintiff's consent to ex parte contacts between the physicians and the defendant's attorney(s).[138] The *Stufflebam* court noted that although the trial court could compel the authorizations, it could not compel the plaintiff's treating physician to engage in ex parte interviews.[139]

Stufflebam was overruled by the Missouri Supreme Court in *State ex rel. Woytus v. Ryan.*[140] Like the Southern District in *Stufflebam*, the supreme court in *Woytus* maintained that a waiver of the physician-patient privilege did *not* necessarily constitute a waiver of the physician-patient relationship, and that "[t]he physician's ethical obligations continue, as do the physician's fiduciary obligations" after the privilege has been waived.[141] Noting that the discovery rules neither expressly allowed nor prohibited ex parte communications, the *Woytus* court determined that "[a] public policy assessment is

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136. *Id.* at 885. Missouri courts have long recognized that a fiduciary relationship exists between a doctor and patient. State *ex rel.* McCloud v. Seier, 567 S.W.2d 127, 128 (Mo. 1978) ("'The relationship is one of trust and confidence; . . . it is the duty of the physician to exercise the utmost good faith in dealing with his patient, not only in professional matters, but in all other relationships.' [T]his duty contemplates the physician's undivided loyalty to his patient . . . .") (quoting 70 C.J.S. *Physicians & Surgeons* § 36 (now § 58) (1987))); Moore v. Webb, 345 S.W.2d 239, 243 (Mo. Ct. App. 1961) ("A physician occupies a position of trust and confidence as regards his patient—a fiduciary position.").

137. *Id.* at 886-89. The *Stuffelbam* court weighed the doctor's ethical duties of non-disclosure, the possibility of "undue pressure" being brought to bear upon the physician, the possibility that the physician may be liable to the plaintiff for breach of confidence, and the prospect that the doctor's disclosures in an ex parte conference may have constituted an invasion of privacy, on one hand, against the policy that "no party to litigation has anything resembling a proprietary right to any witness's evidence," *id.* at 888, the probability that the parties would engage in unethical behavior, the ease of scheduling and reduced cost of informal witness interviews, and the possibility of work-product violations, on the other hand. *Id.* at 886-88.

138. *Id.* at 888.

139. *Id.* "I would emphasize that a decision to grant an interview is not without risk, and must be strictly voluntary." *Id.* at 889 (Hogan, J., concurring).

140. 776 S.W.2d 389, 390 (Mo. 1989).

141. *Id.* at 393.

required to resolve the question" of whether ex parte communications are allowable.[142] The court balanced the "conservation of both medical and legal resources," the increased "spontaneity and candor" during ex parte contacts that would aid in discovering the truth, and the increased probability for "early evaluation and settlement of cases" against "the harm to the physician-patient relationship inherent in ex parte discussion"[143] and the opportunity for compromising "the physician's duty of loyalty to the patient,"[144] and determined that the defendant should be confined to the use of discovery enumerated in the rules of civil procedure.[145] Therefore, the waiver of the physician-patient confidential relationship applied only to formal discovery. In reaching that holding, the *Woytus* court stated that the trial court lacked authority to compel plaintiff to issue medical authorizations to his physicians.[146]

The Missouri Court of Appeals for the Western District applied the *Stufflebam* rule in *McClelland v. Ozenberger*,[147] even though *Stufflebam* had been overruled by *Woytus*,[148] and determined that ex parte communications between the plaintiff's treating physician and defense counsel were improper because defendant did not make a motion to compel the plaintiff to issue medical authorizations.[149] However, the court stated in dicta that it agreed with the policy as expressed in *Woytus* and that ex parte discussions should be discouraged.[150]

In summary, the law in Missouri regarding the physician-patient relationship prior to the *Brandt* cases was that: (1) the physician-patient privilege was waived upon the plaintiff filing a lawsuit in which his or her medical condition was an issue as to all relevant medical issues and all physicians who treated the plaintiff for injuries concerning those issues; (2) such a "McNutt waiver" did not necessarily waive the physician's fiduciary

142. *Id.* at 394.

143. *Id.* As a part of this harm, the court identified the possibility that there may be "disclosure of irrelevant, privileged medical information" and that, assuming plaintiff can determine such inappropriate disclosure occurred, no relief can "restore the patient's trust and confidence in the physician." *Id.* at 394-95.

144. *Id.* at 394. Included in this discussion was the potential for unethical conduct on the part of defense attorneys. *Id.*

145. *Id.* at 395.

146. *Id.* The court did not answer the question of whether ex parte communications without judicially compelled authorization were improper.

147. 805 S.W.2d 264 (Mo. Ct. App. 1991).

148. Since the facts in *McClelland* arose before *Woytus* was handed down, the appellate court determined that *Stufflebam*, rather than *Woytus*, applied. *Id.* at 267.

149. *Id.* at 268.

150. *Id.*

duty of confidentiality; and (3) a court could not compel the plaintiff to issue medical authorizations allowing the plaintiff's treating physicians to engage in ex parte communications. Whether ex parte communications between a plaintiff's treating physician and defense counsel were permissible without a court-compelled or voluntary authorization was not clear under the law.

IV. INSTANT DECISIONS

A. Brandt v. Pelican [Brandt I]

The decision in *Brandt I* addressed the question of whether the plaintiff was entitled to a new trial when his treating physicians engaged in unauthorized ex parte interviews with defense counsel. The Missouri Supreme Court, in a majority opinion, determined that prior cases concerning the issue of ex parte communications had incorrectly assumed that Missouri Revised Statutes section 491.060(5) "encompasse[d] all of the law of physician-patient privilege."[151] The court concluded that section 491.060(5) prohibited only the "disclosure of confidential medical information by testimony in court or by formal discovery."[152] Therefore, there was no statutory or common law authority in Missouri for granting the plaintiff a new trial because of his physicians' ex parte conferences. However, the court did state that a physician was bound by a fiduciary obligation not to disclose confidential medical information.[153] However, the court noted that such an obligation was not determinative of whether the plaintiff was entitled to a new trial.[154] The court deferred the question of whether ex parte communications between a plaintiff's treating physicians and defense counsel might give rise to civil damages to its decision in *Brandt II*.[155]

B. Brandt v. Medical Defense Associates [Brandt II]

In *Brandt II*, the Missouri Supreme Court held that absent waiver, a plaintiff's treating physician who engages in ex parte communications with

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151. *Brandt I*, 856 S.W.2d at 661. Since both *Stufflebam* and *Woytus* used a balancing test to determine whether ex parte communciations were allowable and recognized that the physician had a duty of confidentiality beyond the physician-patient privilege, it is not clear upon what bases the court reached this conclusion. *See supra* notes 136-37 and 141-46 for those courts' conclusions.

152. *Id.*

153. *Id.* at 662.

154. *Id.*

155. *Id.*

defense counsel is liable to the plaintiff for civil damages.[156] The *Brandt II* court reiterated its holding in *Brandt I* and stated that Missouri Revised Statutes section 491.060(5) does not create a fiduciary duty of confidentiality; it creates only a testimonial privilege.[157] The court did find that the physician had a fiduciary duty not to disclose confidential information, but this "fiduciary duty of confidentiality" was based upon public policy, not the physician-patient privilege statute or upon common law.[158] The court found that seven statutes which permit disclosure of confidential information by a physician in limited circumstances expressed the policy that physicians have a fiduciary duty to keep their patient's medical information confidential.[159]

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156. *Brandt II*, 856 S.W.2d at 674. Note that in Brown v. Hamid, 856 S.W.2d 51 (Mo. 1993), a case handed down by the Missouri Supreme Court on the same day as the *Brandt* cases, the court held that no confidential relationship or privilege exists between a plaintiff and a physician who is to testify on behalf of the plaintiff as an expert, but never treated the plaintiff in a professional capacity. *Id.* at 54. Therefore, ex parte communications with such a physician are permissible without the limitations enumerated in the *Brandt* cases. *Id.*

157. *Brandt II*, 856 S.W.2d at 669.

158. *Id.* at 670-71. The "fiduciary duty of confidentiality" is the same as the "physician-patient confidential relationship."

159. *Id.* The court gave the following summary of the seven cited statutes:

> See § 578.353, RSMo 1986 (a physician is immune from civil liability when making report that a patient was treated for a gunshot wound); § 334.265, RSMo Supp. 1992 (notwithstanding the rules of confidentiality, a physician who treats a patient who appears to be intoxicated for injuries sustained in an automobile accident may make a report to the highway patrol); § 192.067, RSMo Supp. 1992 (a physician may give the department of health information concerning a patient for epidemiological studies to safeguard the health of citizens of Missouri and will not be held either civilly or criminally liable for divulging confidential information); § 191.737, RSMo Supp. 1992 (notwithstanding the physician-patient privilege, a physician may report to the department of health children who may have been exposed to a controlled substance and is immune from civil liability); § 188.070, RSMo 1986 (a physician who does not maintain the confidentiality of records pertaining to abortions is guilty of a misdemeanor and is to be punished as required by law); § 191.743, RSMo 1992 (if a physician receives consent from a high-risk pregnant woman to make a report to the department of health, this consent is deemed a waiver of the physician-patient privilege and the physician has immunity from civil liability); § 191.656, RSMo Supp. 1992 (a patient's HIV infection status or the results of HIV testing shall be kept strictly confidential by a physician unless there is an explicit exception provided by this statute. If an exception applies, the physician will not be civilly liable.

Id.

Additionally, the existence of the physician's ethical duty of nondisclosure expressed a policy favoring the existence of a fiduciary duty of confidentiality on the part of a physician.[160] Consequently, the court found that when confidential medical information is disclosed and the "duty of confidentiality has not been waived, the patient has a cause of action for damages in tort against the physician."[161]

Therefore, the main issue decided by the court in determining the allowability of ex parte interviews was whether a "McNutt waiver" waived the fiduciary duty of confidentiality as well as the testimonial privilege. The court revisited its decision in *State ex rel. McNutt v. Keet*,[162] in which it held that the plaintiff was deemed to have constructively waived the privilege by filing a lawsuit that placed his or her medical condition at issue.[163] The court noted that *McNutt* did not distinguish between the testimonial privilege and the physician's fiduciary duty of confidentiality.[164] To resolve this issue, the *Brandt II* court considered whether a constructive waiver could only be a partial one.[165] The court recognized that it had always rejected the idea of a partial waiver,[166] thus necessitating the conclusion that a patient could not waive the physian-patient privilege without also waiving the physician's fiduciary duty of confidentiality. Therefore, ex parte communications were not improper after the plaintiff placed his or her medical condition at issue.[167]

The *Brandt II* court pointed to several practical reasons why this outcome was justified. In support of the notion that any waiver is a full waiver, the court reasoned that once any confidential information is disclosed, that information is no longer confidential, thus leaving nothing for the fiduciary duty of confidentiality to protect.[168] Additionally, the court relied on the evidentiary maxim that a patient should not be allowed to use a privilege as both "a shield and a dagger at one and the same time,"[169] and concluded that

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160. *Id.* at 670-71.

161. *Id.* at 670. Also, it should be noted that the *Brandt II* decision did not consider the plaintiff's invasion of privacy claim, thus rejecting by implication an invasion of privacy cause of action for a breach of fiduciary duty of confidentiality.

162. 432 S.W.2d 597 (Mo. 1968). See *supra* notes 129-32 and accompanying text for a discussion of *McNutt*.

163. *Brandt II*, 856 S.W.2d at 671. *See also supra* notes 129-32.

164. *Brandt II*, 856 S.W.2d at 671.

165. *Id.* at 672.

166. *Id.* ("[O]nce there is a waiver, it is a full waiver.") (citing Baker v. Baker, 251 S.W.2d 31 (Mo. 1952) and Elliott v. Kansas City, 96 S.W. 1023 (Mo. 1906)).

167. *Id.*

168. *Id.*

169. *Id.* (quoting *McNutt*, 432 S.W.2d at 601, and citing Smart v. Kansas City,

the physician should be able to receive input from all parties to a lawsuit, and that "the physician's fiduciary duty of confidentiality should [not] be used to manipulate or in any way influence the testimony of the physician."[170] Moreover, the physician's fiduciary duty to the plaintiff does not include the duty to give favorable testimony.[171] The "primary obligation that the treating physician or any other witness owes in a trial is to tell the truth."[172] The court also recognized that doctors are more difficult to deal with than other witnesses because they are usually very busy and the scheduling of depositions is extremely difficult.[173] Finally, because of the technical and scientific nature of the physician's testimony, a large amount of advance preparation is often necessary.[174]

Therefore, the *Brandt II* court held that when a plaintiff places his or her medical condition at issue in a lawsuit, the plaintiff waives the physician-patient privilege as well as the physician's fiduciary duty of confidentiality.[175] However, as an addendum, the court defined the scope of this waiver by stating that the physician can only disclose confidential information that is at issue in the lawsuit.[176] Any disclosure that exceeds the scope of the waiver will subject the physician to liability under the tort of "breach of fiduciary duty."[177]

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105 S.W. 709, 722 (Mo. 1907) (Lamm, J., dissenting).

170. *Id.* at 673.

171. *Id.*

172. *Id.*

173. *Id.* at 674.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* On March 29, 1994, the Eastern District of the Missouri Court of Appeals decided the first post-*Brandt* case concerning ex parte communications between plaintiff's treating physician(s) and defense counsel. State *ex rel.* Norman v. Dalton, No. 64834, 1994 WL 97765 (Mo. Ct. App. Mar. 29, 1994). *Norman* involved action for personal injury arising from a automobile accident. The plaintiff issued a medical authorization for release of medical records to her physicians but stated that she did not consent to ex parte communications with defense counsel. The trial judge found this restriction in the authorization to be proper. The defendant brought an action for a writ of prohibition in the court of appeals. The Eastern District applied the supreme court's ruling in the *Brandt* cases and determined that it was improper for the trial judge to allow such a restriction in the authorization, finding that the plaintiff had waived the physician's duty of confidentiality as well as the physician-patient privilege by filing a lawsuit in which her medical condition was an issue. *Id.* at *2.

C. Concurrences[178]

Judge Covington concurred in the result in both *Brandt I*[179] and *Brandt II*[180] but disagreed with the majority's reasoning. Judge Covington expressed the view that the physician-patient confidential relationship should not be waived merely by the filing of a lawsuit by the plaintiff that places his or her medical condition at issue.[181] Judge Covington expressed concern that the physician would be placed in the dilemma of being pressured by the plaintiff not to engage in ex parte conferences and by the defendant to participate in ex parte conferences.[182] As a solution to this dilemma, she proposed a rule that ex parte conferences could not occur until the physician's deposition was taken by the defense.[183] Judge Covington claimed that this compromise would give protection to the plaintiff and physician, while allowing the defendant time to prepare the physician for testimony if it is desired by the defendant.[184]

Judge Holstein concurred in the result of *Brandt II*, stating that the plaintiff's petition did not state a valid cause of action for breach of fiduciary duty.[185] However, he disagreed with the majority's ruling that ex parte interviews are allowable, positing that permitting such contacts is prejudicial to the plaintiff.[186]

V. COMMENT

A. The Court's Legal Analysis

A distinguishing feature of the *Brandt* cases is that the court did not expressly balance competing policy interests in reaching its result that ex parte communications between a plaintiff's treating physicians and defense counsel

178. Judge Covington concurred to both *Brandt I* and *Brandt II* in a single concurrence at the end of *Brandt I*. *Brandt I*, 856 S.W.2d at 665-67 (Covington, J., concurring). Judge Holstein joined Judge Covington in her concurrence to *Brandt I*, but concurred separately in *Brandt II*. *Brandt II*, 856 S.W.2d at 675-76 (Holstein, J., concurring).

179. *Brandt I*, 856 S.W.2d at 665-67 (Covington, J., concurring).

180. *Brandt II*, 856 S.W.2d at 675 (Covington, J., concurring) (stating the reasons for concurrence in *Brandt II* in the concurrence to *Brandt I*).

181. *Brandt I*, 856 S.W.2d at 666 (Covington, J., concurring).

182. *Id.*

183. *Id.* at 666-67 (Covington, J., concurring).

184. *Id.*

185. *Brandt II*, 856 S.W.2d at 675 (Holstein, J., concurring).

186. *Id.* at 676.

are permissible.[187] The courts in every other jurisdiction, and every previous Missouri decision that has considered this issue, have engaged in a balancing test that weighed "the patient's privacy interest in non-disclosure, on the one hand, and the public's interest in full disclosure to obtain a just disposition of the controversy, on the other [hand]."[188] However, instead of looking to policy,[189] the *Brandt* court focused on established evidentiary rules to determine whether a waiver of the confidential relationship had occurred.[190] It decided as a matter of evidentiary law that a waiver cannot be a partial one, and that an established theory behind the rules of evidence is that a patient cannot use a privileged relationship as a tactical advantage.[191] The justifications the court gave for its decision were practical in nature and not policy based.[192]

In addition to resolving the ex parte issue, the court definitively stated that a physician has a fiduciary duty to maintain the confidential nature of information disclosed by a patient, and any breach of this fiduciary duty gives

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187. However, in their concurrances, Judges Covington and Holstein did adopt balancing tests in concluding that ex parte communications between a plaintiff's treating physicians and defense counsel should be disallowed. *Brandt I*, 856 S.W.2d at 666; *Brandt II*, 856 S.W.2d at 675.

188. Mull v. String, 448 So. 2d 952, 954 (Ala. 1984). See *supra* notes 137 and 142-44 and accompanying text for prior Missouri decisions using a balancing test. See *supra* notes 84-102 and accompanying text for courts in other jurisdictions using a balancing test.

189. Note that in determining whether Missouri recognized the physician's fiduciary duty of confidentiality as a matter of state law the court did look to policy as evidenced in statutes that supported the existence of the confidential relationship by implication and prior court decisions, *Brandt II*, 856 S.W.2d at 670, but the issue of whether a physician has a fiduciary duty of confidentiality towards his or her patient is distinct from whether that duty of confidentiality is waived upon the patient filing a lawsuit in which his or her medical condition is an issue.

190. *Id.* at 672-73.

191. *Id.*

192. *Id.* at 672-74. See *supra* notes 168-74 and accompanying text for a summary of the *Brandt II* court's practical justifications. Note that the line between a resulting practical benefit and a public policy determination is a fine one to draw. The distinction is that a practical justification is an after-the-fact benefit of an established rule, whereas a policy consideration helps to establish the rule. For example, in *Brandt II*, the court stated that allowing ex parte communications would make it easier for the defendant to coordinate physicians as witnesses. *Brandt II*, 856 S.W.2d at 674. The court called this benefit a "practical reason" since it was justifying the rule it had established previously in the decision, and not a policy consideration, since it was not a factor the court claimed to have considered in determining the rule that ex parte communications were allowable.

rise to an action in tort against the physician.[193] The significance of this determination should not be overlooked. By establishing a clear and definite fiduciary relationship and a corresponding cause of action, the court is expanding the physician-patient confidential relationship. Now, a patient is assured of the confidentiality of the information disclosed to a doctor (unless the patient expressly or constructively consents to disclosure), whereas before the *Brandt* decisions there were conflicting determinations as to whether the confidential relationship was subject to judicial protection outside the testimonial privilege.[194] Furthermore, the conclusion that an unauthorized disclosure of confidential information constitutes a tort is preferable to the other causes of actions, such as implied contract, invasion of privacy, or implied cause of action based on statute, that have been recognized in some other jurisdictions.[195] These other causes of action are inadequate to protect the interests of the wronged patient.[196]

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193. *Id.* at 670.

194. *Compare* State v. Beatty, 770 S.W.2d 387, 392 (Mo. Ct. App. 1989) (finding that the privilege statute only applied to "testimony," and extra-judicial disclosures of confidential information by a psychiatrist were not prohibited because of the limited nature of the statute) *with* State *ex rel.* Woytus v. Ryan, 776 S.W.2d 389, 395 (Mo. 1989) (finding that the physician-patient relationship extended beyond testimony and barred court-compelled waivers authorizing ex parte communications between plaintiff's treating physicians and defense counsel).

195. See *supra* notes 64-74 and accompanying text for a discussion of possible causes of action for unauthorized disclosure of confidential information by a physician.

196. Invasion of privacy is deficient because it protects interests that "only partially overlap with the interests present in a confidential relationship." Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1439 (1982). Moreover, the invasion of privacy requirement of publication is not normally met in unauthorized disclosure of confidential information cases; the invasion of privacy requirement that the disclosure be "highly offensive" is hard to meet, and the "legitimate public interest" and "public figure" doctrines also limit the ability of an invasion of privacy cause of action to protect a patient's confidential disclosures of information. *Id.* at 1439-44.

An implied contract cause of action is ill suited to enforce a confidential relationship because "[t]he duty present in a confidential relationship and the injury suffered when that duty is violated are characteristic of the duties and injuries associated with tort law and are foreign to contract law" and many times a physician-patient relationship is created when there is no consideration that can give rise to a contractual relationship. *Id.* at 1444-45. Tort-type damages are better suited than contract-type damages to compensate a patient injured by unauthorized disclosure, and contract defenses such as statute of frauds, parol evidence rule, capacity, and lack of consideration may bar a patient's recovery. *Id.* at 1445-46.

An implied statutory cause of action is deficient in that it causes the court to "undertake the uncertain business of trying to determine what the legislature intended

B. Practical Justifications

In determining whether ex parte communications between a plaintiff's treating physicians and defense counsel were permissible, the Missouri Supreme Court had three possible rules it could have adopted concerning when the physician-patient relationship was waived.[197] It could have found: (1) that the entire physician-patient relationship[198] is constructively waived upon a plaintiff filing a lawsuit in which his or her medical condition is at issue;[199] (2) that the entire physician-patient relationship may be constructively waived either in whole or in part, and that the scope of the waiver is to be determined on a case-by-case basis; or (3) that there may be a constructive waiver of the physician-patient relationship as to testimony and formal discovery, but there can never be a constructive waiver of the relationship as to extra-judicial disclosures.

By holding that ex parte communications are permissible once the plaintiff has joined his or her medical condition as an issue to a lawsuit, the *Brandt* court adopted the first option as the rule in Missouri. This option is preferable to the other possible rules. Although the second option, determining the extent of constructive waiver on a case-by-case basis, may provide the most equitable result,[200] it would furnish little guidance to physicians on

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or would have intended had it thought of the situation at bar" and many times the purpose of a statute is not relevant to the particular issue in question when there is an unauthorized disclosure of confidential information. *Id.* at 1447-48.

197. *See also* Paul M. Brown and Paul A. Kidwell, *Righting the Wrong of* Woytus*: A Proposal for Adoption of a Rule in Missouri Creating a New Category of Depositions Which May be Used for Discovery Purposes Only*, 56 MO. L. REV. 76 (1991) (suggesting the use of "discovery depositions" as a solution to the inequity created by disallowing ex parte contacts between defense counsel and plaintiff's treating physicians).

198. The physician-patient relationship includes the physician-patient testimonial privilege and the physician-patient confidential relationship (also called the physician's fiduciary duty of confidentiality).

199. "Constructive waiver" is the waiver that is deemed to occur upon the filing of a lawsuit in which the plaintiff's medical condition is an issue. *See supra* notes 108-10 and accompanying text.

200. The physician-patient relationship exists in large part to encourage the patient to disclose potentially embarrassing and private information to a physician. *See supra* notes 41-45 and accompanying text; Chafee, *supra* note 37, at 609. Therefore, it would make sense for the physician to be held to a lesser standard of care in guarding the disclosure of confidential information when medical information does not concern a particularly embarrassing or private condition—such as a broken leg—as opposed to requiring a greater standard of care concerning a condition that is potentially embarrassing or private—such as gonorrhea. *See generally* Morgan, *supra* note 41, at

what information they could legally disclose without a breach of fiduciary duty, or to lower courts for determining under what circumstances the fiduciary duty of confidentiality has been breached. The rule adopted by the *Brandt* court, that all aspects of the physician-patient relationship can be constructively waived, is superior in that it is a bright line rule that is easy to understand and it provides ample guidance to physicians and lower courts. The third option, that the testimonial privilege is constructively waived, but the confidential relationship outside of testimony is never constructively waived, is the rule followed by most jurisdictions that do not allow ex parte communications between a plaintiff's treating physicians and defense counsel.[201] Although this option, like the rule adopted by the *Brandt* court, provides a bright line, it goes too far in attempting to preserve the confidential nature of the physician-patient relationship. The physician's ethical duties provide substantial protection of a patient's confidential information,[202] but most courts that prohibit ex parte interviews with a plaintiff's treating physician overlook this inherent protection found in the physicians' ethical code. More often, those courts prohibit such communications, citing the physicians' ethical code as a reason for the prohibition,[203] instead of viewing the physicians' ethical code as an additional protection of confidential information. Furthermore, a rule disallowing ex parte communications with a plaintiff's treating physicians attempts to ensure the confidentiality of the physician-patient relationship at the expense of the defendant. Allowing a plaintiff to have free access to potentially important facts and/or expert witnesses while requiring the defendant to use more expensive, inconvenient, and burdensome formal discovery methods tilts the litigation playing field in favor of the plaintiff.[204] Moreover, although the defendant may have access

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290. A balancing test when a patient's interest in nondisclosure is weighed against society's interest in the fair and efficient determination of lawsuits can be truly accurate only when performed on a case-by-case basis, since the plaintiff's interest in nondisclosure necessarily varies with the type of medical condition being litigated, and since society's interest in a fair and efficient determination of the lawsuit arguably varies with the gravity and possible collateral effects of the claim being litigated.

201. *See supra* notes 108-09 and accompanying text.

202. Violation of the physicians' code of ethics may result in censure, or suspension or revocation of the doctor's medical license. *See supra* note 59.

203. These courts claim that ex parte communications with physicians must be forbidden in order to protect the physicians from inadvertently violating their ethical and fiduciary obligations to patients. *See supra* notes 87-92 and accompanying text. However, it seems more reasonable to view the physician's ethical and fiduciary duties as protection of confidential information. With the physician's ethical duty not to disclose already protecting the patient's confidential medical information, there seems to be little reason to prohibit ex parte communications with defense counsel.

204. *See supra* notes 94-97 and accompanying text (stating that not requiring

to greater resources than does the plaintiff, a lawsuit most likely will personally cost the defendant more than it will the plaintiff.[205] This apparent inequity makes it essential that the defendant be provided with equal access to witnesses. Related to this argument is the conclusion that any reduction in the cost of litigation for defendants that results by allowing ex parte interviews with a plaintiff's treating physicians will correspondingly reduce the number of frivolous medical malpractice and personal injury lawsuits, since any reduced cost of litigation to the defendant will decrease the "nuisance value" of those kinds of actions.[206]

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formal discovery results in decreased litigation costs and preparation for a lawsuit).

205. Since a plaintiff usually pays his or her lawyer on a contingent fee basis, litigation is near risk-free to the plaintiff. However, the defendant usually must pay his or her attorney by the hour, resulting in great expense regardless of the outcome of the case. *See* Dennis McLellan, *Surfeit of Civil Suits Is a Crime, Advocate of Tort Reform Says*, L.A. TIMES, Aug. 15, 1990, at E1 ("All of this [the litigation explosion] 'is partly based on the fact that we have the contingency fee system of litigation. . . . The fact that litigation is risk free means the plaintiff can attack you and put you through the legal mill for five years or more without any real risk,'. . . ." (quoting Robert V. Wills, author of LAWYERS ARE KILLING AMERICA: A TRIAL LAWYER'S APPEAL FOR GENUINE TORT REFORM (1990))).

This is not to say that all or most claims by plaintiffs are "frivolous." However, the contingent fee system does increase the propensity of frivolous claims. William Raspberry, *Outlandish Claims, Outrageous Settlement*, WASH. POST, Jan. 31, 1986, at A19; Jeffrey O'Connell and Michael Horowitz, *The Lawyer Will See You Now: Health Reform's Tort Crisis*, WASH. POST, June 13, 1993, at C3. ("'No one involved has any incentive to moderation or reasonableness. The victim has every reason to exaggerate his losses. It is some other person's insurance company that must pay. . . . Delay, fraud, [and] contentiousness are maximized, and in the process the system becomes grossly inefficient and expensive.'") (quoting Professor (later Senator) Daniel P. Moynihan). *But see* William Mullen, *In U.S., Court Is Now The First Resort*, CHI. TRIB., July 21, 1991, at 1. (citing Stanford University Law Professor Lawrence Friedman, and stating that before the contingent fee system, wealthy defendants had an advantage over plaintiffs, and could spend them to death).

206. "Nuisance value" is generally the cost of the litigation to the defendant. The theory is that defendants will be willing to settle for at least what the litigation would cost them if it went through full litigation. *See also* WIGMORE, *supra* note 46, § 2380, at 831 (stating that in "actions on policies of life insurance where the deceased's misrepresentations of his health are involved, [and] actions for corporal injuries where the extent of the plaintiff's injury is at issue . . . the advancement of fraudulent claims is notoriously common").

VI. CONCLUSION

The state of the law concerning the physician-patient relationship is one of confusion and contradiction. Most states recognize the physician-patient privilege whereas most experts question the necessity and desirability of such a privilege. Some courts distinguish between the physician-patient testimonial privilege and the physician-patient confidential relationship; other courts find that the testimonial privilege also applies to extra-judicial disclosures.[207] Some courts that allow ex parte communications between plaintiff's treating physicians and defense counsel require the plaintiff to issue authorizations; other courts that allow ex parte contacts do not require authorizations.[208]

Moreover, since most courts use a balancing test of public policy considerations[209] in determining the permissibility of ex parte contacts with plaintiff's treating physicians, it is difficult to predict which side of ex parte issue any one court will fall. Predicting the judicial determination of a physician-patient relationship issue is even more difficult when the frequency of reversals in this area of the law is considered.[210]

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207. *See supra* note 49.

208. *See supra* notes 111-13 and accompanying text.

209. *See supra* note 82.

210. For instance, in Missouri, the *Brandt* decisions overrule State *ex rel.* Woytus v. Ryan, 776 S.W.2d 389 (Mo. 1989), which in turn overruled State *ex rel.* Stuffelbam v. Applequist, 694 S.W.2d 882 (Mo. Ct. App. 1985). In Michigan, Domako v. Rowe, 475 N.W.2d 30 (Mich. 1991), overruled Jordan v. Sinai Hosp. of Detroit, Inc., 429 N.W.2d 891 (Mich. Ct. App. 1988). In Montana, Callahan v. Burton, 487 P.2d 515 (Mont. 1971), was overruled by Jaap v. District Court of the Eighth Judicial Circuit, 623 P.2d 1389 (Mont. 1981).