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Stuart L. Kellner

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COMMENTS

DISCOVERY AND THE DOCTOR: EXPANSION OF RULE 35(b)

Stuart L. Kellner

INTRODUCTION

The Supreme Court of Montana recently reached a decision upon an appeal from the dismissal of a malpractice action which, in effect, creates a new rule of discovery.[1] The result of this decision not only deviates from established and adequate procedures, but also does immeasurable damage to the indispensable but tenuous relationship between attorneys and physicians.

The purpose of this note is to examine the reasoning underlying this rule-making decision and to consider the possible repercussions if this procedural anomoly is commonly applied in the district courts of this state.

THE FACTS

Carolyn Callahan brought suit in the district court of Silver Bow County against her opthalmologist for malpractice. She complained that he had failed to diagnose, during routine examinations of her eyes, a malignant melanoma of her left eye.

During the normal course of discovery, defense counsel took depositions from Dr. Lensink, one of the plaintiff's examining physicians. The plaintiff's counsel did not object to the deposition, but did object when the defense subsequently attempted to set up a conference with Dr. Lensink from which the plaintiff and her counsel would be excluded. The defendant's counsel then moved for an order permitting a private conference under Rule 35(b)(2), Montana Rules of Civil Procedure.[2] On April 28, 1970, the court ruled by order as follows:

> The Court being fully advised of the facts and the law, found that Rule 35(b) (2) of the Montana Rules of Civil Procedure was adopted to expedite and to effectuate full and complete discovery of an opponent's case; that the purpose of the rule would be defeated if counsel were not given the opportunity to interview a treating and attending physician on the same basis of any other witness; that the plaintiff by filing her action alleging personal injuries and damages as a result of the negligence of the defendant waived any privilege she might have as to any of her treating and attending physicians and specifically Doctors Lensink and Casebeer; further, that the plaintiff, by agreeing to the deposition of Dr. Lensink had specifically waived any physician-patient privilege she might have had with regard to Dr. Lensink. It is therefore ordered that Poore, McKenzie & Roth, the law firm representing the defendant, be

[1]Callahan v. Burton, 157 Mont. 513, 487 P.2d 515 (1971).
[2]M.R.Civ.P. 35(b)(2) [hereinafter cited as rule 35(b)(2)].

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> permitted to interview Doctors Lensink and Casebeer outside the presence of counsel for plaintiff and that any physician-patient privilege existing between Carolyn Callahan and said Doctors has been waived.[3]

Pursuant to this order, and prior to trial, defense counsel conducted private interviews with the medical witnesses. During the trial the plaintiff called both Dr. Casebeer and Dr. Lensink as witnesses. In the cross-examination, which was made without any question of privilege being raised, the defendant's counsel did not attempt to impeach or discredit the doctors' testimony.

At the conclusion of the plaintiff's case in chief the defendant moved to dismiss the action. Finding that the plaintiff had failed to present any credible evidence of the existence of the cancerous condition in a reasonably diagnosable condition during the period of the opthalmologist's treatment, the court granted the defendant's motion and denied the plaintiff's motion for a new trial. From the judgment entered on the district court's order dismissing her case against the defendant, the plaintiff appealed to the Montana supreme court on June 17, 1971.

THE DECISION

The issues on appeal were two. Primarily the plaintiff assigned error to the district court's order of dismissal. The supreme court's obviously correct resolution of this matter in favor of the district court bears no particular relevance to the subject of this note.

Secondly, the plaintiff assigned error to the trial court's order which allowed the defendant's attorneys to examine the plaintiff's medical witnesses other than by deposition and interrogatories. Again the district court action was upheld, the supreme court stating that there was no error in permitting defense counsel an exclusive interview before trial with the plaintiff's medical witnesses. The court's affirmation of this procedural deviation is the subject of this note.

A dissection of the rationale of this novel decision necessarily begins with a precise statement of the issue before the court.

No better statement can be made than that of the court; "The plaintiff assigns error to the court's allowing the defendant's attorneys to examine the plaintiff's medical witnesses other than by deposition and interrogations."[4]

[3]Callahan v. Burton, *supra* note 1 at 521. It should be noted that it was error for the district court to consider the plaintiff's objection to the defendant's request for a private interview, an attempt to deprive defense counsel of the opportunity to interview the plaintiff's attending physician on the "same basis of any other witness." By deposing the plaintiff's doctors the defendant had already exercised, to the statutory limits, his rights of access to an adverse witness. Thus the plaintiff's witnesses had in fact been interviewed on the "same basis" as any other witness.

[4]Callahan v. Burton, *supra* note 1 at 520.

The plaintiff realized that by commencing the malpractice action, under rule 35(b)(2), she waived any physician-patient privilege she might have. Thus on appeal, the plaintiff did not deny that the privilege had been waived, she merely questioned the method by which the district court allowed the defendant to take advantage of that waiver.

The court's discussion[5] of the narrow issue actually raised by the plaintiff noticeably lacked supporting authority. Close scrutiny of the cases the court relied on reveal that they are not authority for allowing a private interview between defense counsel and plaintiff's doctors. The cornerstone of the opinion is a Michigan decision.[6] Labeling this an "all fours"[7] case the Montana supreme court said:

> In that case, upon defendant's motion, the court authorized a private interview with plaintiff's doctors in a malpractice suit and concluded: "We find no error in authorizing defendant's counsel to interview plaintiff's physician."[8] [emphasis added]

The supreme court accurately quoted the Michigan court, but nowhere in the Michigan opinion is there any reference to a *private interview* of the plaintiff's medical witnesses by the defendant's counsel. Moreover, the Michigan opinion applies Michigan statutes[9] that provide for the taking and use of witnesses' depositions. The interview authorized by the Michigan court was merely an oral deposition process,[10] substantially similar to that prescribed in the Montana Rules of Civil Procedure,[11] whereby both parties have an equal right to be in attendance. Thus, it appears that the court's reliance on *Gailitis* is misplaced.

This judicial oversight would be inconsequential if the opinion advanced some authority upon which the holding could solidly rest. It is important then to determine whether the court relied on any other legal basis sufficient to support its decision.

In effect this decision amounts to an amendment of rule 35(b). If in fact that was the court's purpose, an appellate decision was an improper manner to implement the change. The court's failure to comply with the established amending procedures[12] completely removes that process from the list of possible justifications for the decision.

[5] *Id.* at 523. Notwithstanding the court's concise statement of the issue before it, much of the opinion is reasoned as if the plaintiff had denied the waiver. Therefore, although the court correctly analyzed and resolved such issue consistently with the present state of the law, that portion of the decision is of no particular relevance to the ultimate resolution of the actual issue before the court, or the subject of this note.

[6] Gailitis v. Bassett, 5 Mich.App. 382, 146 N.W.2d 708 (1966).

[7] Callahan v. Burton, *supra* note 1 at 524.

[8] *Id.* at 524.

[9] MICH. GEN. COURT RULES §§ 302.1, 302.4. The language of these rules providing deposition procedures is substantially similar to M.R.Civ.P. 26. The Michigan rules have no provision for an exclusive interview.

[10] As additional support for this author's position that the Michigan court in *Gailitis* was not authorizing a private interview, *see, supra* note 6 at 382.

[11] M.R.Civ.P. 26.

[12] Laws of Montana 1963, Chap. 16.

On the other hand, if, as the court implied,[13] the opinion merely interprets rule 35(b)(2), the decision would be supportable only if the rule required judicial interpretation and the court complied with recognized canons of statutory construction.

The amendment, subdivision (b)(2), to rule 35 was adopted by the supreme court pursuant to the authority conferred on it by the legislature.[14] Therefore, if in fact the court was interpreting the subdivision, it was not faced with the usual constructional problem of ascertaining legislative intent, for the amendment embodied the court's own intent. Correspondingly, it is only reasonable to require the court to adhere strictly to the "plain, unambiguous, direct and certain"[15] language of the rule. Where such language has been used there is nothing left for the court to construe.[16]

Rule 35(b)(2) speaks only to the waiver of the physician-patient privilege. It is silent as to the means to be employed in discovering the information made available upon such waiver. If the supreme court intended to add the private interview to the usual tools of discovery already set forth in 35(b), the amendment should not have been adopted until the draft included an express provision for such private interview. As adopted the amendment included no provision for a private interview. It is at the time of adoption that the court should have acted, for it is not the court's function when construing a statute, as it apparently did here, to insert that which has been omitted.[17]

The rules expressly provide for discovery by deposition,[18] interrogatories,[19] and through the production of documents and other articles for inspection.[20] Nowhere do they provide that upon a party's motion a court may order a private, exclusive interview for him with any person or another party. Nor is there any language in rule 35(b)(2) to indicate that discovery thereunder is to proceed in a manner other than that provided for in the deposition and discovery portion of the rules. The court's construction to the contrary is unnecessary,[21] unnatural,[22] and therefore insufficient as a foundation for this rule-making decision.

[13]Callahan v. Burton, *supra* note 1 at 525. This author's inference arises from the court's statement that ". . . some members of this Court . . . believe that Rule 35(b) (2) . . . should be *interpreted* so that a court may not order an exclusive interview as here." [emphasis added]

[14]Laws of Montana 1963, Chap. 16.

[15]Montana Assn. of Tobacco and Candy Distributors v. State Board of Equalization, 156 Mont. 108, 476 P.2d 775 (1970).

[16]*Id.*

[17]Dunphy v. Anaconda Co., 151 Mont. 76, 438 P.2d 660 (1968).

[18]M.R.Civ.P. 26, 27, 28, 29, 30.

[19]M.R.Civ.P. 31, 33.

[20]M.R.Civ.P. 34.

[21]Mont. Assn. of Tobacco and Candy Distributors v. State Board of Equalization, *supra* note 15.

[22]Dunphy v. Anaconda Co., *supra* note 17.

[23]Callahan v. Burton, *supra* note 1 at 525.

To those members of the court who questioned the wisdom of affirming an order permitting an exclusive interview, the court responded, "This view however, does not detract from our holding here as to the result because in any event, if there was error, it was harmless."[23] Is this decision then ultimately to find justification upon the theory of harmless error? The facts stated in the opinion appear to support the supreme court's conclusion that the trial judge's determination that an exclusive interview was within the contemplation of the rules of discovery, did not materially affect the substantial rights of the plaintiff. Therefore, with respect to this plaintiff, the supreme court's affirmance of the result of the trial was warranted.[24]

However, harmless error only sustains the result of the litigation, it does not justify the holding of this opinion, nor does it mitigate the holding's prospective effects. The court held, "Judge McClernan did not err . . . in permitting defense counsel to interview medical witnesses before trial."[25] As has been indicated, there is no authority permitting a district court, or any other court, to order a party's medical witnesses to submit to a private interview with an adverse party's counsel. Thus there was no authority for the action taken by the district court.

Had the supreme court expressly branded the granting of the order as error, explained that the facts rendered it harmless, and then affirmed the result reached by the district court, justice would have been served. Unfortunately the court failed to condemn the district court order, and, although justice was served, it was at the expense of setting a dangerous precedent, one which may eventually return to haunt the court.

THE EFFECT

Notwithstanding the absence of authority for the holding in this case, the fact remains that upon the authority of *Callahan* a district court in a civil action may now order a party's medical witnesses to submit to a private interview with the adverse party's counsel.

Prior to commencing an examination of the practical impact of this decision it is necessary to develop some perspective of the law existing in the area of the physician-patient privilege. Involved are the statute which established the physician-patient privilege in civil actons,[26] and

[23] *Cf.*, Wolfe v. Northern Pac. Ry., 147 Mont. 29, 409 P.2d 528 (1966). It was held there that the supreme court will revise the trial judge's determination of what constitutes compliance and noncompliance with the rule authorizing the use of interrogatories for purposes of pretrial discovery, and what sanctions, if any, are to be imposed only when his judgment may materially affect substantial rights of appellant and allow a possible miscarriage of justice. This analogous holding appears to be sufficient authority for the result in *Callahan*.

[25] Callahan v. Burton, *supra* note 1 at 525.

[26] REVISED CODES OF MONTANA, § 93-701-4(4) (1947) [hereinafter cited as R.C.M. 1947]: "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

the rule of civil procedure,[27] which, in the best interests of justice, expedited the discovery process by substantially modifying the privilege conferred in the former statute.

A logical method to arrive at a point of departure for a practical analysis of the *Callahan* decision is to briefly trace the historical evolution of both the statute and the rule, their interpreting cases, and their necessary interrelationship.

In terms of the advantage conferred on either plaintiffs or defendants by these statutes, with respect to the strategic use of medical testimony, it appears that with the rule laid down in *Callahan* the legal process has completed an about-face.

With the enactment of the physician-patient privilege statute in 1867,[28] Montana initially conferred an advantage upon plaintiffs. Relying upon this statute, a plaintiff could exclude from trial, usually to the financial detriment of the defendant, any medical testimony which might embarass his efforts to prove his allegations of injury. Although subsequent decisions have strictly interpreted the requirements for application of the privilege[29] and have been liberal in their findings of a waiver of the privilege,[30] taken together, these have had no significant erosive effect on the physician-patient privilege. Thus, standing alone this statute preserves a plaintiff's initial advantage.

Fortunately, this privilege statute does not stand alone. The evolution of the Montana Rules of Civil Procedure, especially rule 35 and the other rules of discovery, has had substantial influence on the privi-

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4. A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient.''

[27]M.R.Civ.P. 35 [hereinafter cited as rule 35]. Subdivision (a) provides that a court may order a party whose physical or mental condition is at issue to submit to an examination. Subdivision (b)(1) provides for the production and use of the report of the examining physician. Subdivision (b)(2) provides that a party waives his physician-patient privilege if he requests a copy of the physician's report, takes the examining physician deposition or commences an action which places in issue the plaintiff's physical or mental condition.

[28]Laws of Montana 1867, § 376 [hereinafter cited as Laws 1867] (now R.C.M. 1947, § 93-701-4(4).

[29]Garrett v. City of Butte, 69 Mont. 214, 221 P. 537 (1923). Before the physician-patient privilege could be invoked the court required that two things be shown: first, that the relation of physian-patient existed at the time the information was communicated to the physician; and two, that the information given the physician was necessary to enable him to prescribe or act for the patient. Thus in this case the patient was not allowed to invoke the privilege to exclude his description to the physician of the exact location of the fall that caused the injury in question. Montana v. Campbell, 146 Mont. 251, 405 P.2d 978 (1965).

[30]In *May v. Northern Pac. Ry.*, 32 Mont. 522, 81 P. 328 (1905) [hereinafter cited as May v. N.P.R.R.], the court explained that a patient-plaintiff's calling of a physician to testify in any civil action as to the plaintiff's condition was understood to constitute a waiver of the plaintiff's physician-patient privilege. *Hier v. Farmers' Mutual Fire Ins. Co.*, 104 Mont. 471, 67 P.2d 831 (1937), held that those persons who represent a person after his death may, for the purpose of protecting rights acquired by him, waive his physician-patient privilege.

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lege. As this area of the legal process developed, equality between plaintiff and defendant, in terms of access to highly relevant medical testimony, was finally achieved.

To elaborate, originally, and as re-enacted, the statutory ancestors of rule 35[31] were not intended as tools of discovery, but merely provided a method for preserving the testimony of witnesses who, for certain specified reasons, would be absent or unable to testify at trial.

In a case that arose in 1905, *May v. Northern Pacific Railway*,[32] the Montana supreme court reached a decision that was the harbinger of the judicial and legislative action that was ultimately to transform this innocuous deposition statute into the potent provision that is today rule 35. As framed by the court in *May* an issue was whether a district court, in an action for personal injuries, could compel the plaintiff to submit to a physical examination by a physician appointed by the court.[33] After an exhaustive discussion of the conflicting authorities on both sides of the issue, the court turned to an analysis of the possible sources of such judicial authority in Montana.[34] Finding neither an express nor implied conferral of such authority in either the constitution or statute, the court concluded that the power to order a physical examination was not authorized by law.[35]

However, the court commented that arguments in favor of such power might be more cordially received in the legislature.[36] As foreseen by the court, the legislature acted in 1933 by amending the existing deposition statute[37] to provide the procedure whereby the physical examination sought in *May* could be obtained.[38] As amended, this enactment was the forerunner of the present rule 35(a). This minimal encroachment on the plaintiffs' advantageous physician-patient privilege conferred partial parity on defendants with respect to obtaining physicians' testimony.

Following this small blow for procedural equality, nothing of substantial legal consequence occurred in this area until the enactment in 1959 of an enabling act which empowered the Montana supreme court to recommend civil rules of procedure.[39] The purpose of the act was, ". . .

[31]Laws of Montana 1864, § 341 (repealed Laws of Montana 1961, Ch. 13, § 84, effective Jan. 1, 1962). Laws of Montana 1877, § 657, (repealed Laws of Montana 1961, Ch. 13, § 84, effective Jan. 1, 1962).

[32]May v. N.P.R.R., *supra* note 27.

[33]It is interesting that if this issue were redrafted in the form of an affirmative statement it would constitute a concise summary of the concept that is embodied in M.R.Civ.P. 35(a) [hereinafter cited as rule 35(a)].

[34]May v. N.P.R.R., *supra* note 27 at 533.

[35]*Id.* at 537.

[36]*Id.* at 538.

[37]Revised Codes of Montana, § 10651 (1921) (repealed Laws of Montana 1961, Ch. 13, § 84, effective Jan. 1, 1962).

[38]Laws of Montana 1933, Chap. 94 (now M.R.Civ.P. 35(a)).

[39]Laws of Montana 1959, Chap. 255.

to make possible the adoption of the Federal Rules of Civil Procedure so far as seems practicable to the existing Montana Code. . . ."[40]

Rule 35 was adopted in 1961[41] pursuant to the procedures set in motion by this act in a form which deviated only slightly from its federal counterpart.[42] This rule expressly modified the existing physician-patient privilege only to the extent that it provided that attempts by the patient-litigant to discover information concerning the results of the physical examination to which he had been ordered to submit would constitute a waiver of the privilege.[43] Thus, the privilege remained a strategic weapon in the patient-plaintiff's trial arsenal,[44] subject only to the condition precedent that he refrain from employing certain specified discovery techniques.

However, the physician-patient privilege continued to enjoy its favored position in the law only until 1968. In February of 1967 the supreme court gave notice to all licensed attorneys in Montana that an amendment had been proposed to rule 35 which would abolish the privilege whenever the patient commenced:

> . . . an action which places in issue the mental or physical condition of the party bringing the action . . . regarding the testimony of every person who has treated, prescribed, consulted or examined or may thereafter treat, consult, prescribe or examine such party in respect to the same mental or physical condition. . . .[45]

With the adoption of this proposed amendment,[46] Montana surpassed the federal rules[47] and assumed a position with respect to waiver of the physician-patient privilege taken by no other jurisdiction.[48]

With this step the legal process provided for the complete and automatic disclosure of all medical information relevant to the ascertainment of the true cause, nature, and extent of the injuries at issue. The vestige of plaintiffs' advantage was finally removed.

[40] *Id.* at § 1.

[41] Laws of Montana 1961, Chap. 13.

[42] Rule 35, prior to Jan. 1, 1968, differed from Fed.R.Civ.P. 35 only in respect to the sanctions provided the court to insure compliance with its orders under this section. Montana relies on the court's contempt power, while the federal courts may exclude a resisting party's testimony from trial.

[43] Rule 35(b)(2), prior to Jan. 1, 1968, provided, "By requesting and obtaining a report of the examination so ordered [pursuant to rule 35(a)] or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect to the same mental or physical condition."

[44] *See,* Johnson v. St. Patrick's Hospital, 152 Mont. 300, 448 P.2d 729 (1968).

[45] Rule 35(b)(2).

[46] SUPREME COURT ORDER No. 10750-6, Sept. 29, 1967 (effective Jan. 1, 1968).

[47] Fed.R.Civ.P. 35(b)(2) remained essentially the same as M.R.Civ.P. 35(b)(2) had been prior to the supreme court's order.

[48] Since 1968, Indiana and Alaska have, in judicial decisions, assumed a similar position with respect to waiver of physician-patient privilege. *See,* Collins v. Bair, 252 N.E.2d 448 (1969); Machis v. Hilderbrand, 416 P.2d 8 (1966).

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Although creating procedural equality between plaintiffs and defendants, this amendment also creates some problems. The Advisory Committee's note to the amendment explains that it "extends the existing modification by rule 35"[49] of the physician-patient privilege statute. The committee appears to have euphemistically described the fatal judicial thrust at the privilege, for in the wake of this amendment, and considering the other encroachments on the privilege,[50] it is extremely difficult, if not impossible, to conceive of a situation in which the privilege could still be invoked. However there have been no definitive decisions on the matter, and until such time as there are, affirmations of either the continued existence or total demise of the privilege must necessarily remain mere conjecture.

In *Callahan* the supreme court was presented with the opportunity to conclusively resolve the paradoxical situation created by the simultaneous existence of the statutory physician-patient privilege and rule 35. Instead of grasping the opportunity, the court compounded the ambiguity in this area of the law by seemingly creating a discovery tool exclusively for the use of defendants proceeding under rule 35. As mentioned, with this decision the legal process has come completely about-face. Defendants now appear to have the advantage with respect to the use of medical testimony that plaintiffs formerly enjoyed.

The foregoing provides historical perspective and a point from which a practical analysis of this procedural anomoly can proceed. The novelty of this decision is most obvious when contrasted with the existing federal and Montana discovery procedures.

The major discovery provisions under both federal[51] and Montana[52] rules are largely self-executing.[53] Notwithstanding the procedural informality generally expressed in the discovery rules, in addition to the federal and Montana rule 35, there remain a few provisions, more under Montana[54] than federal[55] law, whereby the discovery process is effectuated only through court order after a showing of good cause.

Although sometimes judicial implementation is required, it never goes so far as to allow a party to obtain a court order setting up a private interview with an adverse witness.[56] More particularly consider rule 35 and the differences in the Montana and federal versions.

[49]Advisory Committee's Note to rule 35(b)(2) — 1967 Amendment [hereinafter cited as advisory note].

[50]There are certain areas in which the physician-patient privilege has been expressly abolished or severely restricted: see, R.M.C. 1947 §§ 69-4604, 4610 (veneral disease), 92-609 (workmans' compensation), 54-122 (narcotic drugs), 10-902, 905 (child abuse).

[51]Fed.R.Civ.P. 26, 30, 31, 33, 34 and 35.

[52]M.R.Civ.P. 26, 30, 31, 33, 34 and 35.

[53]*Compare,* M.R.Civ.P. 26 and 33, *with* Fed.R.Civ.P. 26 and 33.

[54]*E.g.,* M.R.Civ.P. 30(b) and 34.

[55]Fed.R.Civ.P. 26(c).

[56]*See,* the deposition and discovery sections (rules 26-37) of both Fed. and Mt. Rules of Civil Procedure.

Under the federal rule, by requesting and obtaining a report of the examination ordered by the court or by taking a deposition of the examiner, the party examined waives any physician-patient privilege he may have in regard to the condition at issue.[57]

As was mentioned earlier, Montana provides that, in addition to those actions constituting a waiver under the federal rule, the party who commences an action placing in issue his mental or physical condition also waives his physician-patient privilege.[58]

Excluding the Montana extension, the two actions constituting waiver under each version of rule 35 are also the *only* two methods by which a party can discover relevant medical information in the hands of an adverse party's physician. Access to the physician is either through a request for a report of his examination of the adverse party, or through the deposition process.

In neither the Montana nor federal rule 35 is there an express provision for a private interview. Nor does the existence in the Montana rule of the additional method of waiver imply that the waiver is to be taken advantage of in a manner other than the two expressly set forth.

However, the court decided otherwise in *Callahan*. The effect of this decision does nothing to advance Montana's prominent position in the area of the discovery of medical testimony. The tools of deposition, interrogatory, and those for the production of documents and records have proven more than adequate for the complete discovery of all relevant medical testimony. The addition of the private interview serves only to create unnecessary problems in the already sensitive relationship between attorneys and physicians.

The special concurring opinion in *Callahan* raises one such problem. The author of that opinion is particularly concerned with the element of surprise that the secret interview might possibly inject into the trial.[59]

Theoretically, the plaintiff need not be surprised at trial by the fruits of the defendant's private interview with his medical witnesses. To avoid such surprise, following the exclusive interview plaintiff's attorney need only to submit the doctor to an intensive interrogation to ascertain the content of his disclosures to the opposition. Unfortunately, as a practical matter, that is impossible. The content of the initial interview could not be reconstructed in a form capable of revealing to plaintiff's counsel an amount of information equivalent to that he would have gathered had he been present, as in the normal deposition proceed-

[57]Fed. R. Civ.P. 35(b)(1),(2).

[58]Rule 35(b)(2).

[59]Callahan v. Burton, *supra* note 1 at 525. "The vice of this order lies in barring plaintiff's counsel from knowledge of the fruits of her adversary's discovery under Rule 35 thereby opening the way for surprise at the trial."

ing, or aware of the questions to be asked, as with the use of interrogatories. Moreover, the type of effort necessary to be productive along this line would only further weaken the normally tenuous relationship between attorneys and physicians.

To avoid alienating his own medical witness, the plaintiff would necessarily have to refrain from intensive investigative examination. This restraint would then expose him to the possibility of surprise at trial. This elaboration reveals that the cause of the concern expressed in the concurrence is not imaginary. There will probably be cases where surprise would not arise, but the mere possibility that it might is sufficient to warrant measures that will ensure its nonoccurence in every situation. Simply, the measures are compliance with the rules of civil procedure as they now stand with respect to discovery of adverse medical testimony.

In addition to the dual advantage of preserving procedural simplicity and facilitating the search for truth, such compliance would ensure the continued availability of competent medical testimony, especially in personal injury cases,[60] and assure potential medical witnesses that their valuable time would not be wasted in extra-judicial cross examination.[61]

The decision raises other questions, the answers to which this author can only speculate. For example, there is the issue of whether the use of exclusive interview method of discovery is reserved solely to defense counsel. Assuming litigation in which defendant's physical condition is at issue, and a waiver of whatever physician-patient privilege he might have, may plaintiff's attorney obtain an order granting him a private interview with defendant's medical witnesses? It is reasonable to assume that, since the rules not expressly limited to one party are equally applicable to both, this rule-making decision would likewise be applicable to both parties.

Since this discovery tool was conceived in the context of a malpractice action there is the question of whether its development is to be confined to just those types of suits. Again the court is silent, but it does not seem likely that the use of the method will be so restricted in the light of the fact that the court founded its decision on rule 35, a rule which is not so limited.

CONCLUSION

For the sake of the practicing bar it is essential these questions be answered and the ambiguities resolved. Definitive statements can come

[60]Advisory Note, *supra* note 34. The adoption of the 1967 amendment adequately serves this purpose, thus it need not be supplemented by a decision like *Callahan*.

[61]Since the appearance of medical witnesses is absolutely essential to the determination of truth in personal injury cases, it is in the best interests of justice that courts do everything in their power to make it as simple as possible for physicians to offer their irreplacable services. Thus decisions that alienate the already suspicious medical profession, if not overruled, do irreparable injury to the cause of justice.

only from the supreme court. If the tool of the exclusive interview is commonly used, it is likely that the question of its propriety will soon reconfront the court. A second challenge to the use of the exclusive interview will present the court with the opportunity to more clearly define the boundaries of discovery in cases involving medical testimony. It is suggested that a great service would be done if, at the same time, the court would thoroughly examine the physician-patient privilege as a whole.

If after that examination it is concluded that the physician-patient privilege no longer serves a purpose, the code section embodying the privilege should be repealed. If on the other hand there exist situations in which the privilege is still of value they should be expressly set forth.

As the court in *Callahan* noted, "The physician-patient privilege is an anachronism which has come under considerable criticism and attack as the great volume of personal injury suits increase."[62] The commentator relied on by the court offers an explanation.

> It is certain that the practical employment of the privilege has come to mean little but the suppression of useful truth—truth which ought to be disclosed would never be suppressed for the sake of any inherent repugnancy in the medical facts involved. 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. In none of them is there any reason for the party to conceal the facts, except as a tactic maneuver in litigation.[63]

Montana has gone farther than any other jurisdiction in removing the physician-patient privilege from the realm of legal tactics. For that we are to be commended and hopefully followed. However, far from being a positive contribution to our pioneering efforts in this area, *Callahan* instead, substantially confounds the law of the discovery of medical testimony. For that reason, the private interview should be removed from the case law of Montana at the earliest opportunity.

[62]Callahan v. Burton, *supra* note 1 at 522.

[63]8 J. WIGMORE, EVIDENCE § 2380 (McNaughten rev. 1961).