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What's the Harm in Asking: A Discussion of Waiver of the Physician-Patient Privilege and Ex Parte Interviews with Treating Physicians

Adrienne M. Fox

Robin L. Tatum

WHAT'S THE HARM IN ASKING?: A DISCUSSION OF WAIVER OF THE PHYSICIAN-PATIENT PRIVILEGE AND *EX PARTE* INTERVIEWS WITH TREATING PHYSICIANS

BY ADRIENNE M. FOX AND ROBIN L. TATUM*

I. INTRODUCTION

The law of evidentiary privileges is in a state of flux.[1] While North Carolina has recently enacted a large number of statutory privileges,[2] the General Assembly and the courts have recognized that privileges should be strictly limited to the furtherance of their narrow purpose, so as not to impair the search for truth.[3]

In cases involving a plaintiff's physical condition, personal injury and medical malpractice, the physician-patient privilege raises many questions. Among these questions are: 1) what actions constitute a waiver by the plaintiff; 2) what stage of the litigation the waiver may occur; 3) when and how is the scope of any waiver determined; and, 4) who should make

* This article has been jointly written by Professor Adrienne M. Fox, of the North Carolina Central University Law Faculty and Robin L. Tatum, J.D. candidate, May, 1990, North Carolina Central University School of Law.

The views encouraging judicial determination of waiver and impropriety of allowing *ex parte* conferences with treating physicians are those of Professor Fox.

The views encouraging early waiver of the physician-patient privilege and the propriety of *ex parte* communications are those of Ms. Tatum, who acknowledges the assistance of Poyner and Spruill, counsel to the North Carolina Association of Defense Attorneys.

1. Courts throughout the country have recently created new exceptions to the traditional law of privileges, limiting the scope of these privileges. Specific examples include new exceptions to the husband-wife privilege, see U.S. v. Parker, 834 F.2d 408 (4th Cir. 1987) (recognizing the joint participant privilege for separated, although not divorced parties) and to the attorney-client privilege, see *In re* Grand Jury Investigation, 842 F.2d 1223 (11th Cir. 1987) (finding that legal representation was part of a continuing criminal enterprise thus abrogating the attorney-client privilege under the crime-fraud exception).

2. North Carolina has codified evidentiary privileges at North Carolina General Statutes sections 8-53 through 8-58.1 (1986). These include the physician-patient, psychotherapist-patient, husband-wife, and clergyman-communicant, as well as the more unusual privileges for school counselor and marital therapist.

3. Except for the priest-penitent privilege, all of the statutory privileges in North Carolina contain language which allows a court to waive the privilege "if the interests of justice so requires." *See, e.g.*, N.C. GEN. STAT. § 8-53 (1986). In addition, North Carolina courts have recognized the need to order waiver in situations not contemplated by the legislature. In *In re* Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818, *cert. denied*, 298 N.C. 297, 259 S.E.2d 298 (1979), the North Carolina Supreme Court ordered a waiver of the physician-patient and psychotherapist-patient privilege when no action had been filed and no crime had been charged.

the determination that waiver has occurred.[4] Separate from the statutory evidentiary privilege, the fiduciary and confidential relationship between physician and patient is also deserving of protection.[5]

Although the physician-patient privilege is a testimonial privilege, generally thought to apply at trial, issues of waiver during discovery may have serious consequences for the course of civil litigation.[6] Due to lengthy pre-trial discovery, waiver issues more frequently arise during that stage. How is a waiver during discovery determined? Other significant issues deal with the relationship between the privilege and the special rules of discovery for expert witnesses.[7] Finally, questions arise once the privilege is waived, as to the propriety of *ex parte* interviews by opposing counsel.

North Carolina courts have not yet squarely addressed many of the issues involved with waiver. The supreme court, however, did speak to the *ex parte* question in the recent case of *Crist v. Moffatt*,[8] holding that defense counsel may not contact plaintiff's treating physicians *ex parte*, regardless of waiver, without plaintiff's consent.

This article will discuss the history of the physician-patient privilege and the confidential, fiduciary relationship existing between a physician and his patient. The manner in which the privilege may be waived pretrial will also be discussed and analyzed from all points of view. Finally, the article will discuss, in point-counterpoint fashion, the consequences of allowing *ex parte* interviews of a plaintiff's physician by defense counsel.

II. ORIGIN AND BACKGROUND OF RULES ON PHYSICIAN-PATIENT CONFIDENTIALITY

A. *Statutory Privilege*

Although many evidentiary privileges were recognized at common law, the physician-patient privilege is purely a creature of statute.[9] North Carolina first adopted a physician-patient privilege statute in 1885.[10]

4. The recent case of Cates v. Wilson, 321 N.C. 1, 361 S.E.2d 734 (1987) held that waiver may be implied on the facts and circumstances of the case.

5. *See infra* text accompanying notes 16-21.

6. Almost 90% of all cases are settled before trial, therefore, discovery is a significant stage of the litigation process. Landers, Martin & Yeazell, Civil Procedure 39 (2d ed. 1988).

7. *See* N.C. GEN. STAT. § 1A-1, R. Civ. P. 26 (b)(4) (1983); Turner v. Duke University, 325 N.C. 152, 381 S.E.2d 706 (1989).

8. 326 N.C. 326, 389 S.E.2d 41 (1990).

9. *See* WIGMORE, EVIDENCE §§ 2380-91 (McNaughton rev. 1961); State v. Martin, 182 N.C. 846, 109 S.E. 74 (1921).

10. The privilege is currently codified at N.C. GEN. STAT. § 8-53 (1986):

> No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or

The privilege applies to information communicated by the patient to her physician that is necessary to treatment by the physician.[11]

The privilege belongs to the patient who may elect to waive it.[12] The decision to waive the privilege cannot be made by the physician; however, a court may compel disclosure upon a finding that "disclosure is necessary to a proper administration of justice."[13]

The privilege is a testimonial privilege, that is, one which exempts the witness from the testimonial duty.[14] The purpose of the statute is "to induce the patient to make full disclosure that proper treatment may be given, to prevent public disclosure of socially stigmatized diseases, and in some instances to protect patients from self-incrimination."[15]

B. *Professional and Ethical Obligations of Physician*

In addition to the testimonial privilege, other rules emanate from the unique relationship between physician and patient. Among these are regulations and duties relating to medical ethics, all of which foster, as a matter of public policy, the confidential and fiduciary relationship between doctor and patient.[16] The basis for this code of medical ethics is found in the Hippocratic Oath, the American Medical Association's (AMA) Principles of Medical Ethics, and the Current Opinions of the Judicial Council of the AMA.[17] Additionally, the Medico-Legal Guidelines of North Carolina, which contain suggested rules of conduct for both professions, address release of medical reports, and states: "no information should be furnished by the physicial to the attorney or any other person other than the patient, without the authorization of the patient, except where the physician-patient privilege has been abrogated by statute . . . ."[18] The physician-patient privilege and the physician's code

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to do any act for him as a surgeon, and no such information shall be considered public records under G.S. 132-1. Confidential information obtained in medical records shall be furnished only on the authorization of the patient, or if deceased, the executor, administrator, or in, the case of unadministered estates, the next of kin. Any resident or presiding judge in the district, either at the trial or prior thereto, or the Industrial Commission pursuant to law may, subject to G.S. 8-53.6, compel disclosure if in his opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge.

11. Smith v. John L. Roper Lumber Co., 147 N.C. 62, 60 S.E. 717 (1908). *See also* CLEARY, MCCORMICK ON EVIDENCE § 99 (5th ed. 1984) (communications with a physician for purposes other than treatment are not privileged).

12. Sims v. Charlotte Liberty Mutual Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

13. N.C. GEN. STAT. § 8-53 (1986); Carter v. Colonial Life & Accident Ins. Co., 52 N.C. App. 520, 278 S.E.2d 893, *cert. denied*, 304 N.C. 193, 285 S.E.2d 96 (1981).

14. WIGMORE, *supra* note 9, at § 2196. It should be recognized, however, that a physician owes the patient a duty of confidentiality, above and beyond any testimonial rule of evidence created by statute. *See infra* text accompanying notes 16-21.

15. Sims v. Charlotte Liberty Mutual Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

16. Hammond v. Aetna Casualty & Surety Co., 243 F. Supp. 793 (N.D. Ohio 1965).

17. Medico-Legal Guidelines of North Carolina, Medical Reports (1986).

18. *Id.*

of ethics operate separately and in tandem to protect a patient from revelation of confidences disclosed during the physician-patient relationship.

The Hippocratic Oath, dating to the fifth century B.C., states: "Whatever, in connection with my professional practice or not in connection with it, I see or hear, in the life of men, which ought not to be spoken abroad, I will not divulge, as reckoning that all such should be kept secret."[19] The oath clarifies the physician's obligation of confidentiality to his patient, independent of any statutory privilege.

The AMA's Principles of Medical Ethics also state: "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."[20]

Finally, the Current Opinions of the Judicial Council of the AMA, emphasize that revealing confidences requires the "express consent of the patient," that discussions may be held with the patient's lawyer only with the "consent of the patient" and that information may be disclosed to an insurance company representative only if the patient "has consented."[21]

With this understanding of the basis for the patient's expectation of confidentiality, it is necessary to examine the manner in which the privilege may be waived.

III. Expression of Consent by the Patient Prior to Disclosure of Confidences by his Physician

A. *Patient Holds the Privilege*

Under North Carolina law, the physician-patient privilege rests with the patient, and he must waive the privilege prior to any disclosure by the physician. When the physician is named as a defendant by his patient, the privilege is waived.[22] The more difficult questions arise as to the scope of the privilege for a physician who has treated the plaintiff, but is not a party to the lawsuit. What action by the plaintiff is necessary to waive her privilege as to this physician? At what stage of the litigation may this waiver occur? Also, once the privilege is waived, may the treating physician be deposed as an ordinary witness? May he be interviewed informally on an *ex parte* basis? May he testify to both facts and opinions at trial?[23] Assuming an affirmative answer to any of these questions,

19. Crist v. Moffatt, 326 N.C. 326, 389 S.E.2d 41 (1990); Petrillo v. Syntex Laboratories, Inc., 148 Ill. App. 3d 581, 589, 499 N.E.2d 952, 957-58 (1986).

20. Principle IV of the AMA's Principles of Medical Ethics (1977).

21. *Petrillo*, 148 Ill. App. 3d 581, 589, 499 N.E.2d 952, 958 (1986).

22. As a general rule, all privileges are inapplicable to the extent that the person holding the information must reveal it to protect himself from civil or criminal liability. *See, e.g.*, Model Rules of Professional Conduct 1.6(b)(2) (1987).

23. Some of these questions were indirectly addressed by the North Carolina Supreme Court in

a determination must be made as to the scope of the waiver and as to how much of the plaintiff's medical history becomes fair game.

B. *Commencement of the Lawsuit as Waiver of the Privilege*

Jurisdictions, other than North Carolina, have taken various approaches in determining exactly what conduct of the plaintiff operates as a waiver of the physician-patient privilege. Of course, filing a lawsuit against the treating physician is an absolute waiver of the privilege in all jurisdictions.[24] In other types of personal injury actions, the majority rule finds a waiver upon the mere filing of the action.[25] The idea behind the rule is that once the personal injury action has been commenced, the plaintiff himself has voluntarily placed his physical condition into issue and it would be manifestly unjust to allow him to select which aspects of that condition will be revealed to the jury. This approach is especially supportable if it could be assured that all physicians and lawyers were capable of consistently drawing a line which would allow the waiver to operate only regarding the physical conditions at issue. This is, however, not always the case and for that reason other jurisdictions, including North Carolina, have expressly rejected this approach.[26]

C. *Explicit Waiver of the Privilege*

Waiver of the physician-patient privilege may be either express or implied.[27] The express waiver of the privilege by the patient provides certainty to all involved in the lawsuit. If a plaintiff, during discovery, expressly waives the privilege, this gives the go-ahead to defense counsel to proceed with discovery on issues relating to the patient's treatment. Although not required, the express waiver should be in writing to send a clear and re-assuring signal to the plaintiff's non-party physicians that they are free to testify without fear of violation of the privilege or of their own professional ethical obligations.[28]

Turner v. Duke University, 325 N.C. 152, 381 S.E.2d 706 (1989) and Cates v. Wilson, 321 N.C. 1, 361 S.E.2d 706 (1987).

24. *See supra* note 22.

25. This approach gained notoriety in the oft-cited case, City of San Francisco v. Superior Court, 37 Cal. 2d 227, 232, 231 P.2d 26, 28 (1951) where the court stated that the plaintiff-patient "cannot have his cake and eat it too." At least thirty-three states currently adhere to this approach. *See, e.g.*, Trans-World Investments v. Drobny, 554 P.2d 1148 (Alaska 1976); Collins v. Bair, 252 N.E.2d 448 (Ind. App. 1971); Sagmiller v. Carlsen, 219 N.W.2d 885 (N.D. 1974); Livreri v. Whitehead, 122 App. Div. 2d 838, 505 N.Y.S.2d 708 (1986); Dennie v. University of Pittsburgh School of Medicine, 638 F. Supp. 1005 (W.D. Pa. 1986). *See also* Unif. R. Evid. 503. This rule, originally proposed by the Supreme Court, but not adopted as part of the Federal Rules of Evidence, would find a waiver when the patient's physical condition is an element of the patient's claim or defense. As enacted, however, the federal rules leave privilege issues to the states.

26. Cates v. Wilson, 321 N.C. 1, 361 S.E.2d 734 (1987).

27. *Id.*

28. Physicians need to know that discussing a patient's condition does not violate their ethical

D. *Implied Waiver of the Privilege*

Implied waiver is more controversial. North Carolina and other jurisdictions have held that various types of conduct may constitute waiver, even absent express consent. These approaches and a discussion of their propriety is set out below.

1. North Carolina

North Carolina law is unsettled as to what constitutes an implied waiver. Several interpretations can be inferred from the case law.

a. Waiver Must Be At Trial

In *Cates v. Wilson*,[29] the court held that questions of waiver must be resolved "largely by the facts and circumstances of the case on trial." This statement from *Cates* suggests that a determination of waiver by implication can be made only "at trial," that is during the actual trial of the case. This position recognizes that the privilege is testimonial and contemplates exclusion of evidence at trial. Moreover, this statement from *Cates* carries the recognition that a party does not actually suffer from the exclusion of evidence by operation of the privilege until the privilege is actually asserted at trial in opposition to proffered evidence.

In *Cates*, the Court found that "certain situations, however, necessarily constitute an implied waiver."[30] These include: 1) when the patient calls the physician as a witness and examines him as to the patient's physical condition; 2) where the patient fails to object when the opposing party causes the physician to testify; 3) where the patient testifies to the communication between himself and his physician; and 4) when the patient voluntarily goes into detail regarding the nature of his injuries and testifies to what the physician did or said while in attendance.

The first two examples of the "facts and circumstances" constituting waiver in *Cates* are appropriately used only to cover questions of waiver at trial. The test is inadequate when one seeks to apply it to pre-trial waivers which may or may not occur during discovery because it sets out a trial, not a pre-trial scenario. The test is also inappropriately applied to discovery because it does not require a clear expression of waiver by the

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obligation and will not subject them to a civil suit in tort or contract for violating the duty not to disclose. A written waiver will certainly protect the physician in this context, as well as diminish the risk of subsequent controversy as to whether there has been an express waiver.

An article written to advise physicians suggested that the lawyer who represents an injured patient should clearly inform the patient's treating physicians of the privilege, any waiver, and the scope of the waiver. Firestone, *Sh! Patient Privacy and Confidentiality in a Lawsuit — Physician Privilege v. Discovery*, 13 LEGAL ASPECTS OF MEDICAL PRACTICE #2 at 1 (1985).

29. 321 N.C. 1, 14, 361 S.E.2d 734, 742 (1987) (citing Capps v. Lynch, 253 N.C. 15, 23, 116 S.E.2d 137, 141 (1960).

30. *Id.*

plaintiff. A rule which allows for pre-trial waiver needs to be clear in order to be fair to all parties involved.

Under North Carolina cases, a plaintiff can offer evidence of his physician's treatment without fear that a blanket waiver of the physician-patient privilege has occurred. In *Neese v. Neese*,[31] the court allowed plaintiff to use his physician's affidavit recounting his mental condition in support of a motion for a temporary restraining order. Despite the plaintiff's affirmative offer of the testimony of Dr. Epple, the court refused to find this to be a blanket waiver of the physician-patient privilege.

b. Waiver May Be Pre-Trial

In support of allowing pre-trial waiver, it should be recognized that an early waiver could result in the discovery of evidence that might otherwise go undetected if the waiver issue were postponed until an actual trial on the merits. North Carolina courts have yet to clarify the meaning of the facts and circumstances test set out in *Cates*. The language of the case refers to determining waiver by the "facts and circumstances of the case on trial," not the case "at trial." Arguably, the "case on trial" begins the moment the plaintiff files suit.[32] The *Cates* "facts and circumstances" of testifying to the communication between plaintiff and physician or voluntarily going into detail about injuries, could occur at a deposition or even during settlement discussions.[33] The language in *Cates* does not exclude this scenario.

It should also be recognized that while under the facts of *Neese*, the court did not find waiver from the physician's affidavit, this case does not pronounce an absolute rule that waiver could never be effected by an affidavit. The court placed significance on the fact that the plaintiff in *Neese* had never testified or otherwise revealed information relating to his treatment. Moreover, despite the finding that this affidavit did not *per se* constitute waiver, the court retained its statutory power to order disclosure of otherwise privileged communications "in the interest of justice."[34]

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31. 1 N.C. App. 426, 161 S.E.2d 841 (1968).

32. The testimonial aspect is not the only context in which the privilege arises. *See supra* text accompanying notes 16-21. Theoretically, the plaintiff could waive the privilege before trial by expressing that she no longer considers the matter confidential. This could allow immensely valuable discovery to the defendant, regardless of whether the facts were ultimately admissible at trial. *See* N.C. GEN. STAT. § 1A-1, R. Civ. P. 26(a)(1) (1983).

33. Karp v. University of North Carolina, 78 N.C. App. 214, 336 S.E.2d 640 (1984) (attorneys answers to interrogatories were binding on plaintiff, as agent of plaintiff). Under the *Karp* analysis, the attorney, as agent for his client, could make an admission of fact under N.C.R. Evid. 801 (d) which could operate as a waiver.

34. N.C. GEN. STAT. § 8-53 (1986).

2. Other Jurisdictions

a. Actions Indicating Waiver

In contrast to the rule which finds waiver upon the filing of the lawsuit, a more limited rule holds that the action must be stayed until the patient consents to a waiver.[35] This is not a viable solution, however, because it forces the plaintiff to choose between obtaining no redress or waiving the privilege.

Attempts have been made to limit waiver to the condition at issue. Some courts have held that waiver of the privilege as to one physician waives it to all other physicians who have treated the same condition.[36] If properly monitored, this would be a fair approach.[37] The court in *Sklagen v. Greater Southeast Community Hospital*[38] explained this theory. The plaintiff had released medical records of physicians who treated her after her injury, but refused to release any records from those physicians who had treated her for the same conditions before the injury occurred. In finding a waiver, the court concluded that it would be "unfair to allow plaintiff to invoke the privilege to shield materials which are potentially damaging."[39] The plaintiff was using the privilege to control the manner in which the defense could develop its case.[40]

Another approach finds that specific affirmative conduct by the plaintiff operates as a waiver. So long as the facts and circumstances approach is used in North Carolina,[41] this is a likely direction the courts here will take.[42]

Some states find that releasing medical reports constitutes a waiver of the physician-patient privilege. For example, in *Scharlack v. Richmond Memorial Hospital*,[43] the court held that the plaintiff waived the physician-patient privilege by introducing her medical records at trial. How-

35. Marine v. Great Lakes Dredge & Dock Co., 202 F. Supp. 430 (N.D. Ohio 1962); Autry v. United States, 27 F.R.D. 399 (S.D.N.Y. 1961).

36. Sklagen v. Greater Southeast Community Hosp., 625 F. Supp. 991 (D.D.C. 1984).

37. *See* CLEARY, MCCORMICK ON EVIDENCE, § 103 at 255-56 (5th ed. 1984).

38. 625 F. Supp. 991 (D.D.C. 1984).

39. *Id.* at 992.

40. These facts demonstrate that allowing a waiver only at trial could result in prejudice to the defendant. *See also* Jimerson v. Prendergast, 697 P.2d 804 (Colo. App. 1985) (providing testimony of one physician waives the privilege to others treating the same condition).

41. Cates v. Wilson, 321 N.C. 1, 361 S.E. 2d 734 (1987).

42. As cases are appealed, certain conduct will be found to amount to a waiver, while other conduct will not. Under a facts and circumstances test, precedent may prove unreliable as to what is a waiver and what is not. In Crist v. Moffatt, 326 N.C. 326, 389 S.E.2d 41 (1990), the supreme court "assumed," but did not specifically "decide" that plaintiff had waived the privilege by her pre-trial conduct of cooperating with discovery. Even assuming waiver, the court held that *ex parte* contacts were improper.

43. 102 A.D.2d 886, 477 N.Y.S.2d 184 (1984). *See also* Schuler v. United States, 113 F.R.D. 518 (W.D. Mich. 1986) (a Michigan statute requires that the plaintiff accompany any release of medical records with a written response asserting the privilege or it is waived); Clark v. Clark, 220 Neb. 771, 371 N.W.2d 749 (1985) (privilege waived by allowing a third party to review medical

ever, even in these jurisdictions, the determination of whether waiver has occurred is generally based on an analysis of the facts and circumstances of each case, rather than the application of a bright-line rule.

b. Depositions

Certain pre-trial actions, such as testifying at a deposition, have also been found to constitute waiver. However, some courts draw a distinction between depositions given by the plaintiff to preserve testimony and a true adversarial discovery deposition.[44]

Some courts have held that a plaintiff's testimony at a deposition constitutes waiver.[45] The rationale underlying these cases is that testimony at a deposition is no more confidential than at trial. The purpose of the privilege no longer exists once the patient has expressed an intent to reveal the medical information rather than to keep it a secret. Consequently, the exact point in time that a plaintiff chooses to disclose confidential information is not controlling. There is also authority that orally discussing privileged information at a pre-trial conference waives the privilege.[46]

i. Involuntary Deposition Testimony and Compliance with Discovery Does Not Constitute Waiver.

Some cases make a distinction as to discovery depositions taken not for perpetuation of testimony at the plaintiff's instance, but taken by the defendant for discovery. One rationale for this differing treatment is set out in *Hemminghaus v. Ferguson*,[47] where the court held that a party's admissions must be voluntary in order to waive the privilege, and that is not the case when the admissions are made to an adverse party. Similar results apply when the court finds that the plaintiff's testimony is obtained by compulsion, and not voluntarily.[48] Generally, a person's testi-

records); Loudon v. Mhyre, 110 Wash. 2d 675, 756 P.2d 138 (1988) (court order required even though plaintiff voluntarily produced medical records).

44. This distinction may be merely ephemeral in that a deposition contemplated as a discovery deposition could be admitted as trial testimony if the witness becomes unavailable. *See* N.C. GEN. STAT. § 1A-1, R. Civ. P. 32 (1983).

45. Patania v. Silverstone, 3 Ariz. App. 424, 415 P.2d 139 (1966) (waiver occurred when patient discussed the substance of her communication with her physician at a deposition); Covington v. Sawyer, 9 Ohio App. 3d 40, 458 N.E.2d 465 (1983) (decedent's privilege waived when she testified about her condition and the physician's treatment in a video deposition before she died). Neither of these cases indicated whether a pre-trial ruling had waived the privilege. *See also* Green v. M. Nirenberg Sons, Inc. 166 Misc. 652, 3 N.Y.S.2d 81 (1938) (holding that waiver was accomplished by patient's intention to use the deposition at trial); *In re* Roberto, 106 Ohio App. 303, 151 N.E.2d 37 (1958); *In re* Loewenthal's Petition, 101 Ohio App. 355, 134 N.E.2d 158 (1956) (privilege waived for deposition, but decision did not extend to determination of waiver at trial).

46. Whitman v. United States, 108 F.R.D. 5 (D.N.H. 1985) (self-evaluative privilege waived).

47. 358 Mo. 476, 215 S.W.2d 481 (1948).

48. Hughes v. Kackas, 3 App. Div. 2d 402, 161 N.Y.S.2d 541 (1957).

mony on cross-examination is found to be involuntary, and therefore not a waiver of the privilege.[49] A party's appearance at a deposition pursuant to subpoena or the adverse party's notice of deposition is also considered involuntary, and therefore not a valid, intentional waiver.[50]

Waiver of the physician-patient privilege during discovery has been addressed by courts in other jurisdictions. In *Phipps v. Sasser*,[51] the patient's pre-trial deposition, answers to written interrogatories, and voluntary supplying of medical records to defendant were found not to constitute waiver of the privilege in the absence of a showing that the patient intended to waive the privilege. The Washington court analyzed opinions from the federal courts whose rules of civil procedure and discovery are virtually the same as that state's.[52] The Washington court, like the federal courts cited, refused to adopt a blanket rule of accelerated or pre-trial waiver whenever a plaintiff files suit and puts her medical condition in issue.

The Washington court noted approvingly the practice of one federal court which provided for notice to plaintiff once it appeared that the privilege had been waived in discovery, stating that waiver would be deemed to have occurred "unless within five days from receipt of this ruling the plaintiff, in writing, informs the court that such waiver is not intended and will not occur."[53] A practice like this has the benefit of announcing to all involved that a determination of waiver is being made. A clear indication of waiver is highly preferable to the uncertain situation created by the "facts and circumstances" test. The unilateral decision on waiver made by defense counsel inadequately protects plaintiff's privilege and also inadequately protects the physicians contacted who may become liable to plaintiff for tortious breach of the privilege.[54]

The *Phipps* court also focused on the purpose of discovery and the adversary use of depositions. The court refused to find that plaintiff's

49. Mariner v. Great Lakes Dredge & Dock Co., 202 F. Supp. 430 (D.C. Ohio 1962).

50. Bond v. Independent Order of Foresters, 69 Wash. 2d 879, 421 P.2d 351 (1966). *See also* Buffa v. Scott, 147 Ariz. 140, 142, 708 P.2d 1331, 1333 (1985); State *ex rel.* Grimm v. Ashmanskaus, 298 Or. 206, 690 P.2d 1063 (1984); Phipps v. Sasser, 74 Wash. 2d 439, 445 P.2d 624 (1968); Annotation, *Pretrial Testimony or Disclosure on Discovery by Party to Personal Injury Action as to Nature of Injuries or Treatment as Waiver of Physician-Patient Privilege*, 25 A.L.R.3D 1401 (1966).

51. 74 Wash. 2d 439, 445 P.2d 624 (1968).

52. This is also the case in North Carolina. *See* N.C. GEN. STAT. § 1A-1 (1983).

53. *Phipps*, (citing Greene v. Sears, Roebuck & Co., 40 F.R.D. 14, 16 (N.D. Ohio, 1966)).

54. *See* Firestone, supra note 28. Many jurisdictions have recognized a tort claim by the patient against the physician for wrongfully divulging confidential communications. *See, e.g.*, Horne v. Patton, 291 Ala. 701, 287 So. 2d 824 (1974); Vassiliades v. Garfinckel's, 492 A.2d 580 (D.C. App. 1985); Alberts v. Devine, 395 Mass. 9, 479 N.E.2d 113 (1985); Simonsen v. Swenson, 104 Neb. 224, 177 N.W. 831 (1920); Watts v. Cumberland County Hosp. Sys., Inc., 75 N.C. App. 1, 330 S.E.2d 242 (1985); Humphers v. First Interstate Bank, 298 Or. 706, 696 P.2d 527 (1985); Smith v. Driscoll, 94 Wash. 441, 162 P. 572 (1917). *See generally*, Comment, *To Tell or Not To Tell; Physicians' Liability for Disclosure of Confidential Information About a Patient*, 13 CUMB. L. REV. 617 (1983); Comment, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426 (1982).

testimony in a pre-trial deposition as to the extent and nature of his injuries constituted a waiver. The decision rested on the fact that the testimony was in response to the defendant's pretrial subpoena (or notice of deposition), because the plaintiff is being examined as an adverse witness in such a situation.[55] The difference between a deposition and trial testimony is significant. In *Cates v. Wilson*, the North Carolina Supreme Court was concerned that plaintiff at trial had voluntarily, on her own behalf, in her case-in-chief, testified about her medical condition, and only later during the defense case had asserted physician-patient privilege in response to testimony by her physicians for defendant. The *Cates* court expressed fear that a plaintiff would try to use the privilege as a sword rather than a shield.[56] That concern is valid at trial, but when a plaintiff testifies in a deposition as an adverse witness, there can certainly be no valid accusation that this is an attempt to use the privilege as a sword.

ii. Failure to Assert Privilege During a Deposition or Discovery Does Constitute Waiver

The counter-argument, however, is that the patient need only object or assert the privilege when the question is asked.[57] It would then be clear that no waiver had occurred. This is certainly true in the context of other privileges. There is no bar to assertion of the privilege merely because of the adversarial nature of the proceeding or the form of questioning. For example, on cross-examination, a witness retains his right to assert the privilege against self-incrimination.[58]

The patient is afforded the privilege for her own protection. She may assert it and refuse to speak regardless of the context in which a question is addressed. Once she has chosen to speak, however, allowing the remaining relevant and related information to be protected by the privilege is permitting the privilege to be used as a sword rather than a shield. The plaintiff is no more authorized to make unilateral decisions than is the defendant. This is, however, what occurs when the plaintiff can essentially decide that only favorable testimony regarding her claim will be disclosed, but the privilege can operate to allow any potentially damaging information to remain secret.[59]

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55. *Phipps*, 74 Wash. 2d 439, 445 P.2d 624 (1968).

56. Cates v. Wilson, 321 N.C. 1, 361 S.E.2d 734 (1987).

57. *See* CLEARY, *supra* note 11, at § 103. Failure to assert the privilege, even within the adversarial setting, is a persuasive argument for finding waiver, especially when plaintiff is represented by counsel.

58. N.C. GEN. STAT. § 8C-1, R. Evid. 608(b) (1988). "The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when [cross] examined with respect to matters which relate only to credibility."

59. *See also* North Carolina State Bar Annotated Rules of Professional Conduct Rule 7.2 (7)

E. *Who Should Determine That a Waiver Has Occurred?*

Another debated issue is who should determine whether there has been a waiver of the physician-patient privilege. One approach finds that a judge is the only proper person to make this decision. The other allows defense counsel to make the determination, without interference by the court.

1. Judicial Determination Is Necessary

The "facts and circumstances" test is inadequate in its failure to offer a "bright-line" test for determining when waiver by implication has occurred. More significant is the problem of who is to act as the fact-finder to determine that one of these conditions has been met — the plaintiff, his attorney, the defendant, his attorney, the physician who is asked to testify as a result of a purported waiver, or a sitting judge? In both *Cates* and *Capps*, questions of facts and circumstances constituting implied waiver arose during trial and the trial judge made the determination. Reference to the statute, which specifically allows a sitting judge to waive the privilege underscores the obvious answer that a trial judge must be involved in the determination that the "facts and circumstances" of waiver have been met. The unilateral decision by defense counsel that waiver by implication has occurred is dangerous because of the absence of protection for the plaintiff and the danger to the physicians whose conversations with defense counsel could be actionable.

A review of cases involving a sitting judge's order waiving the physician-patient privilege confirms that a judge can become involved at any stage of litigation to make determinations of waiver.[60] North Carolina courts have the authority to compel disclosure of privileged information when "disclosure is necessary to a proper administration of justice."[61] This power exists prior to trial, and in a criminal case, even prior to the filing of criminal charges.[62] Clearly, the statutory privilege is a qualified one, and waiver can be determined and even ordered by the trial court — but not unilaterally by opposing counsel.

Under North Carolina cases interpreting the physician-patient privilege, it has been held that only a sitting judge has the authority to compel disclosure of privileged information prior to trial. In *Carter v. Colonial*

(1988). The rule forbids an attorney from obstructing another party's access to evidence. Asserting the privilege once waiver clearly has occurred arguably runs afoul of this Rule.

60. *See* Loudon v. Mhyre, 110 Wash. 2d 675, 756 P.2d 138 (1988) (plaintiff had voluntarily produced medical records, however, a court order was required to support the claim of voluntary waiver of the privilege).

61. N.C. GEN. STAT. § 8-53 (1986).

62. *In re* Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818, *cert. denied*, 298 N.C. 297, 259 S.E.2d 298 (1979).

Life and Accident Insurance Company,[63] the court reasoned:

> The statute allows the judge to override the physician-patient privilege when he believes the proper administration of justice so requires. In order to protect the privilege from abusive treatment by those not directly involved in the case, it is important that only the trial judge, either at trial or prior to trial, be the one to order disclosure by a physician of privileged information.[64]

Even though North Carolina General Statute section 8-53[65] has been amended since this decision, the amendment affects only the "trial" judge's authority to compel disclosure. Under current law, any resident or presiding judge can now order disclosure. The amendment changed only *who* can order disclosure, not the requirement that determinations of waiver and disclosure be only by judicial determination.

The wisdom of a clear determination of privilege is reinforced by an examination of North Carolina cases applying privilege law in other areas. In a recent case applying the husband-wife testimonial privilege, the North Carolina Supreme Court cautioned trial judges that there should be an on-the-record determination that the testifying spouse understood her privilege not to testify and made the waiver knowingly.[66]

North Carolina law now provides for and requires the active determination by a judge that the physician-patient privilege has been waived by implication or should be waived in the interests of justice. The court should clearly indicate that this same procedure applies to a waiver during discovery, and that unilateral determinations by opposing counsel, with their obvious interest and zeal in defending their own clients, is improper and dangerous to the legally protected interests of all parties involved.

2. Judicial Determination is Not Necessary

The counter-argument to the requirement of judicial determination recognizes that in order to protect the defendant's interest, there should be a quick and easy way to determine waiver at an early stage of the

63. 52 N.C. App. 520, 279 S.E.2d 873 (1981).

64. *Id.* at 528, 279 S.E.2d at 897.

65. No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a 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, and no such information shall be considered public records under G.S. 132-1. Confidential information obtained in medical records shall be furnished only on the authority of the patient, or if deceased, the executor, administrator, or, in the case of unadministered estates, the next of kin. Any resident or presiding judge in the district, either at the trial or prior thereto, or the Industrial Commission pursuant to law may, subject to G.S.8-53.6, compel disclosure if in his opinion disclosure is necessary to a proper administration of justice. If the case is in district court, the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge.

N.C. GEN. STAT. § 8-64 (1986).

66. State v. Britt, 320 N.C. 765, 360 S.E.2d 660 (1987).

litigation without a judicial ruling. Requiring the question to be resolved at trial or to subject the defendant to a lengthy and expensive procedure once the patient has demonstrated that she no longer considers the information privileged, is an unfair burden on the defendant and on the court system.

The privilege is important, but so is the right of the defendant to adequately prepare his case before going to trial. Requiring every waiver question to be decided by a judge is a waste of time and judicial resources. This is especially true in situations where the plaintiff has clearly engaged in conduct that prior courts have held to be an implied waiver. In uncertain situations, a judicial determination may prevent subsequent controversies but is by no means mandatory. Admittedly, defense counsel cannot compel disclosure as a trial judge could, but he is capable of evaluating whether a plaintiff has chosen to make her condition public. Once this has occurred, the burden should be on the plaintiff to show why her partial disclosure is not a divisible waiver, an approach expressly rejected by the court in *Cates*.[67]

IV. PROPRIETY OF *EX PARTE* COMMUNICATIONS WITH PHYSICIANS ONCE THE PRIVILEGE HAS BEEN WAIVED

The North Carolina Supreme Court recently addressed the issue of the propriety of *ex parte* communications by defense counsel with plaintiff's non-treating physicians. In *Crist v. Moffatt*,[68] the court held that *ex parte* contact is improper without first obtaining plaintiff's consent or utilizing the statutory methods of discovery, for reasons totally separate from the physician-patient privilege. This section is not an attempt to re-argue *Crist*, but rather to examine its implications.[69]

Other jurisdictions which have decided the issue are split on the propriety of *ex parte* interviews. Arguments for and against involve the balance between the plaintiff's interest in confidentiality and the opposing party's right to obtain all relevant evidence and adequately prepare his case.

A. Ex Parte *Interviews Should Not Be Allowed*

Many strong arguments exist for refusing to allow *ex parte* communi-

67. "A divisible waiver could enable plaintiffs to elicit from their physicians factual details underlying their cases and then preclude the physician from placing this information in a relevant context." *Cates*, 321 N.C. at 16, 361 S.E.2d at 743. The plaintiff cannot use the privilege defensively and offensively at the same time. Once the plaintiff reveals information about her treatment, "the privilege evaporates." *Id.* at 14, 361 S.E.2d at 742. This occurs whether a judge decides it or not.

68. 326 N.C. 326, 389 S.E.2d 41 (1990). *Ex parte* in this context refers to defense counsel speaking with these witnesses on an informal basis without the plaintiff or his attorney being present.

69. In *Crist*, the court forbid the *ex parte* interviews based primarily on considerations of public policy.

cations with a plaintiff's treating physician, even after a clear waiver of the physician-patient privilege by the patient. The majority of jurisdictions have refused to sanction *ex parte* interviews. This is because of

> the broad privacy interest underlying the physician-patient relationship, the potential tort liability of physicians for invasion of privacy, the potential that defense counsel may seek to improperly influence plaintiff's treating physicians or may discourage the physician from testifying, the duty of loyalty from the physician to the plaintiff, and the view that discovery rules determine the extent of waiver of the physician-patient privilege.[70]

First, even if the privilege is waived by the patient, the waiver is not absolute, but only exists as to information which is relevant to the lawsuit.[71] Who is to inform the physician of the scope of the waiver, and who is to enforce it? This limitation is necessary to assure that highly personal, irrelevant and possibly prejudicial information is not inadvertently released by the physician to opposing counsel.[72] Not only could this be damaging to the plaintiff at trial, but it could severely affect settlement as in the situation where the patient has an unrelated mental or psychological condition which would make the trauma of living through a trial very difficult. Is this information which correctly belongs in the hands of defense counsel?

This issue has been addressed by other courts and the following discussion is instructive:

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

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70. Annotation, *Discovery: Right to Ex Parte Interview with Injured Party's Treating Physician*, 50 A.L.R.4th 714, 717 (1986). In Crist v. Moffatt, 326 N.C. 326, 389 S.E.2d 41 (1990), the court affirmed the trial court's remedial order requiring defense counsel to disclose to plaintiff the substance of all conversations with plaintiff's physicians, but refused to rule on the admissibility at trial of information learned through *ex parte* contacts on the basis on prematurity. Some courts have even gone so far as to impose an exclusionary rule barring the introduction of any evidence that was the fruit of the *ex parte* interview. Karsten v. McCray, 147 Ill. App. 3d 1, 509 N.E.2d 1379 (1987), *cert. denied*, 115 Ill. Dec. 400, 520 N.E.2d 394 (1987); Yates v. El-Deiry, 160 Ill. App. 3d 190, 201, 513 N.E.2d 519, 521 (1987), *cert. denied* 117 Ill. 233, 520 N.E.2d 394 (1988); Piller v. Kovarsky, 194 N.J. Super. 392, 476 A.2d 1279, 1282 (1988).

71. Loudon v. Mhyre, 756 P.2d 138 (Wash. 1988); Annotation, *Discovery: Right to Ex Parte Interview with the Injured Party's Treating Physician*, 50 A.L.R.4TH 714 (1986).

72. Crist v. Moffatt, 326 N.C. 326, 389 S.E.2d 41 (1990). *See also* Wenninger v. Muesing, 307 Minn. 405, 240 N.W.2d 333 (1976).

party is present and the court is available to settle disputes.[73]

The physician who is contacted by defense counsel on an *ex parte* basis is put in an extremely difficult situation when the defendant-physician is a member of the same profession. There is subtle, unspoken pressure to cooperate with the defendant who has been sued and "There but for the grace of God go I" is not an infrequent response. Typically, the defense counsel represents a medical malpractice carrier, who is often the carrier for the physician-witness as well. The pressure on the treating physician could lead him to unwittingly become an advocate for his colleague. This problem has been recognized:

> An unauthorized *ex parte* interview could disintegrate into a discussion of the impact of a jury's award upon a physician's professional reputation, the rising cost of malpractice insurance premiums, the notion that the treating physician might be the next person to be sued, and other topics which might influence the treating physician's views.[74]

The most commonly asserted rationale for precluding *ex parte* interviews is that it is not a specified method allowed by the discovery rules. Defense counsel is, therefore, limited to the formal devices set out by the rules of civil procedure.[75] Several courts have held that even upon waiver of the physician-patient privilege, the patient has only waived his right to object to formal methods of discovery prescribed by the rules of civil procedure.[76] In the absence of some authorization, the trial court has no power to allow the interviews.[77] Since conventional discovery methods do remain available to defense counsel, they should refrain from *ex parte* interviews altogether.[78]

Another problem with *ex parte* communications is recognition of the fact that, despite the recent dictum in *Turner v. Duke University*,[79] a physician who has treated a party to a lawsuit is not an ordinary "facts and

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73. Loudon v. Mhyre, 110 Wash. 2d 675, 678, 756 P.2d 138, 141 (1988) (quoting Roosevelt Hotel Ltd. Partnership v. Sweeney, 394 N.W.2d 353, 357 (Iowa 1986)).

74. Manion v. N.P.W. Medical Center of N.E. Pa., Inc., 676 F. Supp. 585, 594-95 (M.D. Pa. 1987) (quoted in Crist v. Moffatt, 326 N.C. 326, 389 S.E.2d 41 (1990)).

75. Namely, depositions, interrogatories, physical examinations, requests for production of documents, etc. *See, e.g., Crist*, 326 N.C. 326, 389 S.E.2d 41 (1990).

76. *Crist*, 326 N.C. 326, 389 S.E.2d 41 (1990). *See also* Weaver v. Mann, 90 F.R.D. 443 (D.N.D. 1981); Hammonds v. Aetna Casualty & Sur. Co., 243 F. Supp. 793 (N.D. Ohio 1965); Duquette v. Superior Court, 778 P.2d 634 (Ariz. Ct. App. 1989); Wenninger v. Muesing, 307 Minn. 405, 240 N.W.2d 333 (1976); Jaap v. District Court, 623 P.2d 1389 (Mont. 1981); Anker v. Brodnitz, 98 Misc. 2d 148, 413 N.Y.S.2d 582 (1976).

77. *See* Stoller v. Moo Young Jun, 118 A.D.2d 637, 499 N.Y.S.2d 791 (1986); Johnson v. District Court of Oklahoma County, 738 P.2d 151 (Okla. 1987) (the court has no power to order discovery by methods not specifically enumerated in the rules of civil procedure).

78. *Crist*, 326 N.C. 326, 389 S.E.2d 41 (1990). *See also* Weaver v. Mann, 90 F.R.D. 443 (D.N.D. 1981). Moreover, formal discovery will not reveal defense counsel's work-product. Discovery depositions are taken everyday and experienced counsel are well aware of how to take a deposition without disclosing one's strategy to his adversary. Suplee, *Depositions: Objectives, Strategies, Tactics, Mechanics and Problems*, THE REVIEW OF LITIGATION, 255, 270 (1982).

79. 325 N.C. 152, 381 S.E.2d 706 (1989).

circumstances" witness like the good Samaritan who just happened to witness a fender bender.[80] The physician has, through the course of his professional treatment of the plaintiff, developed a relationship of trust and confidence.[81] Even if the privilege is waived, the relationship of trust and confidence is seriously undermined if the patient learns that her physician has been talking to her adversary "behind her back."[82] The medical profession should be alarmed by this development, especially as it impinges on the requirements of medical ethics and the Hippocratic Oath.[83] The confidential and fiduciary relationship between physician and patient has been found to be deserving of protection, independent of any statutory evidentiary privilege.[84]

The suggestion that the patient may have a cause of action against an offending physician begs the question and certainly ignores the resulting loss of the therapeutic relationship that had existed between the physician and patient. As a matter of public policy, *ex parte* communications should not be allowed to impinge on this relationship.[85]

The argument that an easier, less formal, and more economical means for gaining information from doctors is needed and that only *ex parte* communications allow for this fails to consider the ethical restrictions put on plaintiff's counsel when the defendant is a corporation.[86] Counsel

80. Of course, plaintiff's counsel can designate the treating physician as an expert, and therefore limit discovery by the adversary. *See* N.C.R. Civ. P. 26(b)(4). Rule 11 limits arbitrary designation of treating physicians as experts to circumvent "wide-open" discovery, but it is very hard to determine when the designation was not made in good faith. *See* N.C.R. Civ. P. 11. Merely failing to call the physician as a witness is not enough, because many factors influence the ultimate decision of what experts to use at trial.

81. The physician-patient relationship has been referred to as "a fiduciary one of the highest degree . . . involving every element of trust, confidence and good faith." Lockett v. Goodill, 71 Wash. 2d 654, 656, 430 P.2d 589, 591 (1967).

82. The Illinois Supreme Court recognized this problem and stated: "[W]e find it difficult to believe that a physician can engage in an *ex parte* conference with the legal adversary of his patient without endangering the trust and faith invested in him by his patient." Petrillo v. Syntex Labs., Inc. 148 Ill. App. 3d 595, 581, 499 N.E.2d 952, 962 (1986). *See also* Wenninger v. Muesing, 307 Minn. 405, 240 N.W.2d 333 (1976); Smith v. Ashby, 106 N.M. 358, 743 P.2d 114 (1987).

83. *See infra* text accompanying notes 15-18.

84. Crist v. Moffatt, 326 N.C. 326, 389 S.E.2d 41 (1990); Black v. Littlejohn, 312 N.C. 626, 325 S.E.2d 469 (1985); Kennedy v. Parrott, 243 N.C. 355, 90 S.E.2d 754 (1956); Watts v. Cumberland County Hospital System, Inc., 75 N.C. App. 1, 330 S.E.2d 242, *aff'd in part, rev'd in part*, 317 N.C. 321, 345 S.E.2d 201 (1986); Mazza v. Huffaker, 61 N.C. App. 170, 300 S.E.2d 833 (1983).

85. The North Carolina courts have zealously protected the physician-patient relationship in a number of situations. *See, e.g.*, Hewett v. Bullard, 258 N.C. 347, 128 S.E.2d 411 (1962) (the court extended special protection to the patient involved in financial dealings with his own physician because of the unique nature of the confidential relationship); Kennedy v. Parrott, 243 N.C. 355, 90 S.E.2d 754 (1956) (the relationship between patient and treating physician is that of a "status" rather than one created merely be contract).

86. *See* North Carolina State Bar Annotated Rules of Professional Conduct Rule 7.4 (1988). This rule prohibits an attorney from contacting an adverse party who is represented by counsel. If the defendant is an organization, this includes its managers, any employee for whom the organization could be liable under principles of respondeat superior or an employee whose statement would constitute an admission by the organization.

is forbidden from communicating directly with an adversary. In a medical negligence case, typically the adversary is a hospital — corporate defendant. It is not unusual for the plaintiff to have received treatment from other doctors at the hospital, who would fall into the category of treating, non-defendant physicians. But because of Rule of Professional Conduct 7.4, plaintiff's counsel will be forbidden from using inexpensive and informal interviews to learn what the witness knows. Allowing *ex parte* interviews would only exacerbate any perceived inequity or lack of reciprocity regarding access to witnesses.[87]

In medical malpractice cases, the defendant has a privilege which is virtually indestructible by the plaintiff. The peer review privilege or medical review committee privilege protects all records of hospital Medical Review Committees relating to the evaluation of the quality of health care from discovery and from admissibility.[88]

Moreover, *ex parte* conferences with physicians are fraught with danger for defense counsel. For instance, if the physician testifies at trial in a manner inconsistent with the informal statements,[89] defense counsel is in the untenable situation of having to withdraw as counsel in order to testify to impeach the physician-witness.[90]

B. Ex Parte *Interviews Should Be Allowed*

The North Carolina Supreme Court erroneously decided *Crist* and *ex parte* contact with plaintiff's non-treating physicians should be allowed. Courts which allow *ex parte* interviews "have identified a number of factors and policies for allowing such informal methods of discovery . . . ."[91] A variety of these reasons are outlined and explained below.

87. An interesting situation developed in Washington where a formal ethics opinion had held that a lawyer could interview a physician in the same manner as any other witness and a supreme court opinion had held that opposing counsel could interview employees of the corporation so long as such employees were neither authorized to speak for the corporation nor in a management position. *See* Washington State Bar Association Formal Ethics Opinion 180 (1985); Wright v. Group Health Hosp., 103 Wash. 2d 192, 691 P.2d 564 (1984). Even in light of that precedent, the Washington Supreme Court held that *ex parte* communications with a physician, even after waiver of the privilege, were improper and that the direct involvement of counsel was necessary in any contact between defense counsel and a plaintiff's physician because of "the unique nature of the physician-patient relationship and the dangers which *ex parte* interviews pose." Loudon v. Mhyre, 110 Wash. 2d 675, 681, 756 P.2d 138, 142 (1988).

88. The privilege is found at North Carolina General Statute section 131E-95 (1988) and has been interpreted in Shelton v. Morehead Memorial Hosp., 318 N.C. 76, 347 S.E.2d 824 (1986).

89. *See Loudon*, 110 Wash. 2d 675, 756 P.2d 138 (1988).

90. N.C. State Bar Annotated Rules of Professional Conduct 5.2 (1988).

91. Annotation, *Discovery: Right to Ex Parte Interview with Injured Party's Treating Physician*, 50 A.L.R.4TH 714 (1986). *See also* Sterchi and Sheppard, *Defendant's Right to Secure Medical Information and Records Concerning the Plaintiff*, 53 U.M.K.C.L. REV. 46, 46 (1984). "Defense counsel . . . should insist on the execution of release of medical information and records which allow counsel to discuss the claimant's care and treatment rendered by the treating physician without the presence of opposing counsel." *Id.*

One of the most compelling and frequently asserted arguments for allowing *ex parte* interviews is that no party has any proprietary right in a witness.[92] Forbidding access to these witnesses places the defendant at a disadvantage, in that his access to relevant and non-privileged information has been unduly hindered.[93] As a general rule, counsel are not restricted from interviewing the opposing party's witnesses in a civil or criminal trial in the absence of an applicable privilege.[94]

Several jurisdictions have allowed *ex parte* contact based upon this rationale. In *Doe v. Eli Lilly & Company*,[95] the court found defense counsel's *ex parte* interviews with non-treating physicians to be entirely proper. The court stated:

> 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, however partial or important to him, by insisting upon some notion of allegiance. Even an expert whose knowledge has been purchased cannot be silenced by the party who is paying him on that ground alone. Unless impeded by privilege, an adversary may inquire in advance of trial, by any lawful manner to learn what the witness knows if other appropriate conditions the witness alone may impose are satisfied.[96]

Following waiver of the physician-patient privilege, the physician is on the same ground as any other fact or occurrence witness, and must be treated as such.[97] It has long been recognized that counsel has a right to interview the opposing party's witnesses in private, with no record being made. If there has been a waiver, confidentiality regarding that matter no longer exists.

In a recent North Carolina Supreme Court case, *Turner v. Duke Uni-*

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92. *See id.* at 55. A party is not entitled to instruct the witnesses to refuse to cooperate with opposing counsel. *See also* North Carolina State Bar Annotated Rules of Professional Conduct Rule 7.9(d) (1988) which states: "A lawyer shall not . . . [r]equest a person other than a client to refrain from voluntarily giving relevant information to another party unless (1) the person is a relative or employee or other agent of the client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information." A treating physician obviously falls without any of the exceptions, therefore, the plaintiff's attorney would be subject to discipline for attempting to instruct the treating physicians not to speak with defense counsel.

93. Amicus Curiae Brief (North Carolina Society for Obstetricians and Gynecologists) for Appellant at 13, Crist v. Moffat, 324 N.C. 543, 380 S.E.2d 769 (1989) (No. 69PA89).

94. Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966) (citing Model Rule of Professional Ethics, Canon 39).

95. 99 F.R.D. 126 (D.D.C. 1983).

96. *Id.* at 128. The witness himself may refuse to cooperate. This choice should be made independently, without influence from plaintiff or plaintiff's counsel. *See supra* note 92 for the ethical repercussions.

97. Turner v. Duke University, 325 N.C. 152, 381 S.E.2d 706 (1989). *See also* Sklagen v. Greater Southeast Community Hosp., 625 F. Supp. 991 (D.D.C. 1984); Green v. Bloodsworth, 501 A.2d 1257 (Del. Super. Ct. 1985); Wesley Medical Center v. Clark, 234 Kan. 13, 669 P.2d 209 (1983); Kurdek v. West Orange Board of Educ., 222 N.J. Super. 218, 536 A.2d 332 (1987).

versity,[98] the court recognized a distinction between the physician witness who is an expert and one who is not. Although the issue did not concern *ex parte* interviews,[99] the court stated: "Although by general definition all doctors may be considered experts in that they possess a specialized knowledge of medicine beyond that of the layman, not every role of a doctor as a witness in a legal controversy is in the capacity of an 'expert'."[100] The commentary to North Carolina Rule of Civil Procedure 26(b)(4)[101] explains that an "expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit . . . should be treated as an ordinary witness."[102] Applying this rationale to the propriety of *ex parte* communications, the physician becomes an ordinary witness once the privilege is waived and there is no remaining reason to treat him differently.

A second justification for allowing *ex parte* contact is that it saves time and money in the often lengthy and expensive discovery process. It provides for "decreased litigation costs, the potential to eliminate non-essential witnesses, early evaluation and settlement of claims and easier scheduling of interviews than depositions."[103] Since the plaintiff can speak with these physicians *ex parte*, he is spared the high cost of depositions. In order to obtain the same information, however, the defendant must bear the expense of a deposition, if *ex parte* interviews are forbidden. This financial advantage definitely weighs unfairly in plaintiff's favor. It is improper to allow the plaintiff to use discovery methods to burden the defendant when they were intended to simplify pre-trial procedures.[104]

The court in *Trans World Investments v. Drobney*,[105] explained that the purpose of the discovery rules is to reduce trial complexity. *Ex parte* interviews certainly advance this purpose more fully than formal depositions. This is especially true in light of the fact that the witness may, in

98. 325 N.C. 152, 381 S.E.2d 706 (1989).

99. The plaintiff had alleged that the defendant had violated an order to identify an expert witness prior to trial. Since the witness in question was not an expert, but a physician testifying to facts and circumstances learned by his treatment of the plaintiff (an "actor" in the events giving rise to the lawsuit), the court found the physician was an "ordinary witness."

100. *Turner*, 325 N.C. at 167-68, 381 S.E.2d at 715.

101. N.C. GEN. STAT. § 1A-1 (1983).

102. *Id.* In *Crist*, the supreme court totally ignored the *Turner* decision. In *Turner*, the court stated that the non-expert physician is an ordinary witness. In *Crist*, it held the opposite by concluding that the physician witness is somehow entitled to additional protection. *See Crist*, 326 N.C. at —, 389 S.E.2d at —.

103. Annotation, *Discovery: Right to Ex Parte Interview with Injured Party's Treating Physician*, 50 A.L.R.4th 714, 717 (1986). *See, e.g.*, Doe v. Eli Lilly & Co., 99 F.R.D. 126 (D.D.C. 1983); Stempler v. Speidell, 100 N.J. 368, 495 A.2d 857 (1985).

104. Green v. Bloodsworth, 501 A.2d 1257 (Del. Super. Ct. 1985).

105. 554 P.2d 1148 (Alaska 1976).

fact, possess no relevant information whatsoever. The plaintiff could discover this *ex parte*, but the defendant would have to depose the witness in order to obtain exactly the same information.[106] Less costly methods of discovery should always be encouraged. Additionally, once there has been a waiver of the privilege, discovery may proceed without judicial interference.[107]

Another principle which should not be forgotten is that physicians are bound by a code of ethics.[108] This should operate to preclude the witness from divulging information beyond the scope of the waiver, *i.e.*, regarding another condition, during the *ex parte* interview. The duty of confidentiality will be adhered to by the physician, therefore, protecting the rights of the plaintiff.[109]

Some courts allow *ex parte* interviews on the basis that if a breach of confidentiality does occur, it is up to the medical profession and not the legal system to deal with it.[110] The patient may always sue the doctor if a breach does occur.[111] Litigation should not, of course, be encouraged, but on the other hand, it is likewise insulting to the professional integrity of the physician to assume a breach will occur before it happens.[112] Bad intentions or motives should never be presumed.[113] There is always a risk that opposing counsel will attempt to improperly influence any witness, but there are sanctions for such conduct.[114] The exclusionary rule is, however, a very extreme remedy, which should only be invoked if absolutely necessary.[115]

If defense counsel is not allowed to interview treating physicians *ex*

106. Arguably, interrogatories could be used, however, these are directed to the plaintiff, rather than to the physician. Though inexpensive, interrogatories do not allow observation of the witness's demeanor, which can be accomplished only by the more expensive formal discovery device of a deposition.

107. Arctic Motor Freight v. Stover, 571 P.2d 1006 (Alaska 1977) (a physician cannot be forbidden from speaking with defense counsel in a candid and common sense manner). In *Crist*, the supreme court stated that it did not intend "to discourage consensual informal discovery." *Crist*, 326 N.C. at —, 389 S.E.2d at —. This is, however, essentially what it has done by requiring plaintiff's consent to *ex parte* interviews.

108. *See supra* text accompanying notes 16-21.

109. Moss v. McWilliams, 379 Pa. Super. 150, 549 A.2d 950 (1988).

110. Coralluzzo v. Fass, 450 So. 2d 858 (Fla. 1984).

111. *Id. See supra* note 54 and accompanying text. North Carolina courts have condoned this cause of action. Watts v. Cumberland County Hosp. System, 75 N.C. App. 1, 330 S.E.2d 242, *disc. review denied as to additional issues*, 314 N.C. 548, 335 S.E.2d 27 (1985), *rev'd in part on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986).

112. The privilege arises from the medical profession, which is in the best position to monitor it. Nothing in an attorney's ethical responsibilities precludes *ex parte* interviews. A.B.A. Comm. on Professional Ethics Informal Op. 892 (1965). *See also* The Medical Legal Guidelines of North Carolina at 574 (1986) (it is ethical to interview witnesses of the opponent so long as there is no breach of confidentiality).

113. Lazorick v. Brown, 195 N.J. Super. 444, 480 A.2d 223 (1984).

114. *See* North Carolina State Bar Annotated Rules of Professional Conduct Rule 7.9 (1988) (prohibiting an attorney from attempting to influence a witness's testimony).

115. Schwartz v. Goldstein, 400 Mass. 152, 508 N.E.2d 97 (1987).

parte, then any information that these witnesses may have must be obtained in the presence of the plaintiff and opposing counsel. This raises another concern; namely that this may be a violation of the work product doctrine.[116] Witness interviews certainly are a part of work product, and because they are not discoverable, should not be so easily made available to opposing counsel. Such interviews are essential to defense counsel as well, to enable interpretation of the plaintiff's medical records and physical condition. At least one court[117] allowed *ex parte* interviews based upon this argument stating that to require the presence of plaintiff's counsel would "lay bare matters of trial strategy and mental or legal theories of the opponent."[118]

Lastly, there is no specific statute, rule of procedure, or rule of evidence which forbids *ex parte* interviews.[119] When this factor is added to the balance between the interest in confidentiality and the right of the defendant to prepare his case, it certainly tips the scales in the defendant's favor. Again, once waiver has occurred and the physician becomes a regular witness, there is no rule or supportable reason which would prevent defense counsel from speaking with these individuals *ex parte*.

V. CONSIDERATION OF COMPETING INTERESTS REGARDING WAIVER AND *EX PARTE* COMMUNICATIONS

A. *The balance favors the public policy of preserving the confidential, fiduciary physician-patient relationship and forbidding* ex parte *interviews*

In considering this issue, many courts have held that the burden on the defendant to use formal discovery is less significant than the societal interest in preserving the fiduciary and confidential relationship between plaintiff and her physician.[120] The physician is not transformed into an ordinary witness, like a lay person, even upon waiver of the physician-

116. An attorney's work product consists of mental impressions, conclusions and legal theories prepared or formulated in anticipation of trial. Generally, work product is not discoverable. *See* N.C. GEN. STAT. § 1A-1, R. Civ. P. 26 (b) (3) (1983). Courts have also recognized that the work product doctrine applies in discovery. *See, e.g.* Shelton v. America Motors Corp., 805 F.2d 1323 (8th Cir. 1986); Sporck v. Peil, 759 F.2d 312 (3d Cir.), *cert. denied*, 754 U.S. 903 (1985).

117. Sterchi and Sheppard, *supra* note 91; State *ex rel.* Stufflebaum v. Appelquist, 694 S.W.2d 882 (Mo. App. 1985) (abrogated to the extent that the court cannot compel the plaintiff to authorize *ex parte* contact). *See* State *ex rel.* Woytus v. Ryan, 776 S.W.2d 389 (Mo. 1989)).

118. *Stufflebaum*, 694 S.W.2d at 888.

119. *See* Stempler v. Speidell, 100 N.J. 368, 495 A.2d 857 (1987); Covington v. Sawyer, 9 Ohio App. 3d 40, 458 N.E.2d 465 (1983).

120. Crist v. Moffatt, 326 N.C. 326, 389 S.E.2d 41 (1990). *See also* State ex rel. Woytus v. Ryan, 776 S.W.2d 389 (Mo. 1989); *See also* Alston v. Greater S.E. Community Hosp., 107 F.R.D. 35 (D.D.C. 1985); Petrillo v. Syntex Laboratories, Inc., 148 Ill. App. 3d 581, 499 N.E.2d 952 (1986); Roosevelt Hotel Ltd. Partnership v. Sweeney, 394 N.W.2d 353 (Iowa 1986); Wenninger v. Muesing, 307 Minn. 405, 240 N.W.2d 333 (1976); Nelson v. Lewis, 130 N.H. 106, 534 A.2d 720 (1987); Smith v. Ashby, 106 N.M. 358, 743 P.2d 114 (1987); Anker v. Brodnitz, 98 Misc. 2d 148, 413 N.Y.S.2d

patient privilege. No other witness is so highly regulated by state licensing procedures, hospital privilege reviews, the Hippocratic Oath, the AMA Guidelines and applicable state Medico-Legal Guidelines. A physician, in our society, is treated differently and his unique relationship with his patient is deserving of protection, even in light of a clear waiver of the physician-patient privilege.

The formal discovery procedures are not unduly burdensome and expensive. They are used every day in every type of case.[121] Defendants in personal injury and medical malpractice cases have no right to evade the use of ordinary discovery procedures. The argument that a less expensive means of discovery is necessary is incongruous with the large damages typically involved in these cases and with the otherwise lavish defense outlays for employing expert witnesses and a whole array of outside consultants. Lastly, the formal discovery devices are the safest and most efficient way to obtain reliable information, given under oath and preserved for eventual use at trial in the absence of the witness or in the event of inconsistent testimony.

Public policy encourages the protection of the confidential, fiduciary relationship between physician and patient. No competing interest can be presented to outweigh this public policy.[122]

B. *The Balance Favors Allowing* Ex Parte *Communications*

A balance must be struck between the patient's right to preserve confidential information and interests served by allowing both parties access to all relevant evidence. The purpose of the privilege is to induce the patient to freely disclose his physical condition to the physician, so that proper treatment may be given.[123] It has been said, however, that the privilege "is a shield and not a sword to those who can or may not speak."[124] Once information has been disclosed by the patient, the need for ascertainment of the truth outweighs interests in confidentiality.

The physician-patient privilege is only triggered if the patient's communication to the physician was for the purpose of seeking treatment.[125] Consultations for insurance examinations or intoxication testing are not

582, *aff'd.*, 73 A.D. 2d 589, 422 N.Y.S.2d 887 (1979); Loudon v. Mhyre, 110 Wash. 2d 675, 756 P.2d 138 (1988).

121. Even though a non-treating physician can only be questioned directly through a deposition under Rule 30, defendant can for the cost of first-class postage send an interrogatory to plaintiff seeking the names of witnesses with relevant information and the facts which are known by the witnesses. *See* N.C. GEN. STAT. § 1A-1, R. Civ. P. 33 (1983).

122. *See supra* text accompanying note 85.

123. Sims v. Charlotte Liberty Mutual Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

124. Capps v. Lynch, 253 N.C. 18, 23, 116 S.E.2d 137, 142 (1960) (quoting Insurance Co. v. Kim, 6 N.E. 12 (Ohio 1935)).

125. CLEARY, MCCORMICK ON EVIDENCE, § 99 (5th ed. 1984).

protected.[126] This is because the policy interests furthered by the privilege are not advanced in these situations. Since the plaintiff is not seeking treatment, no policy is advanced by protecting confidentiality.

Once there has been partial disclosure by the patient, the policy interest in protecting confidentiality is diminished as well. Even though a person may want to shield his private physical condition from the public, "it is not human, natural or understandable to claim protection from exposure by asserting a privilege for communications to doctors, at the very time the patient is parading before the public the mental or physical condition as to which he consulted the doctor."[127] The plaintiff himself chooses to file the action and has no right to then complain that his physical condition has been made public.

Additionally, it has long been recognized that there is "a right to every man's evidence."[128] Privileges are an exception to this maxim, therefore, "are not lightly created or expansively construed, for they are in derogation for the search for the truth."[129] Once the patient's disclosure reaches a certain point, the need for evidence becomes more compelling than preserving confidentiality.

Once a waiver has occurred, there are virtually no supportable reasons to prevent defense counsel from unilaterally contacting treating physicians who are "facts and circumstances" witnesses. The court in *Turner* made it clear that, absent expert status, a treating physician is no different from any other witness. There is nothing that prevents opposing counsel from speaking with an adversary's witness in private, and it is commonly done if the witness is willing. The argument asserted by many courts that *ex parte* interviews are not authorized by the discovery rules and are, therefore, improper is absurd for this reason. Technically, the discovery rules do not authorize witness interviews at all. If this rationale is to be supported, interviews would have to be forbidden entirely, physician or not. Obviously, this will never happen.

Following waiver, the plaintiff should not be allowed to limit the opponent's access to relevant evidence. The defendant has a right to find out all information necessary to defend himself including whether the patient had a pre-existing condition or whether the alleged injury was caused by something other than the defendant's conduct.

The argument that *ex parte* interviews should be prevented to protect the physician is also untenable. First of all, the physician always has the

126. *Id.*

127. *Id.* at § 104 at 256.

128. WIGMORE, EVIDENCE § 2192 (McNaughton rev. 1961).

129. United States v. Nixon, 418 U.S. 683, 710 (1974). This case involved whether the President's conversations with his close advisors were confidential, thus enabling him to quash a subpoena duces tecum of tapes and documents. The Court held that the need for evidence and the fair administration of justice required disclosure.

option to refuse to speak to defense counsel; all witnesses do. As a physician, he, more than anyone, understands the importance of confidentiality. In addition, because of the fear of a suit for breach of confidentiality, the physician will proceed with caution and it is very unlikely that he will reveal anything beyond the scope of the privilege. On the other hand, if the physician does possess relevant, unprivileged information that he wishes to convey to defense counsel, he should be allowed to do so.

Rule of Professional Conduct 7.4[130] does not prevent plaintiff's attorney from contacting any of plaintiff's treating physicians, either. Physicians are generally independent contractors, therefore, not agents of the hospital. The defendant needs to contact these physicians to get any information at all, while the plaintiff himself has first hand knowledge of the physician's treatment.

The fear that the attorney may be forced to testify regarding impeachment is no greater in this situation than with any other witness. If an attorney chooses to interview a witness alone and then the witness testifies in a contrary manner at trial, the attorney is placed in a position of having to testify or forego the impeachment. Consequently, most attorneys know better. The situation is no different when the testifying witness happens to be a physician.

The cost of litigation continues to increase. Every effort should be made to reduce this cost in any way that is fair and reasonable. Allowing *ex parte* interviews furthers this purpose. Requiring depositions to interview treating physicians is an unnecessary expense. In this situation, this cost is imposed on the defendant alone. The plaintiff can talk to these physicians *ex parte*, but the defendant must pay to obtain the same information. This is not only unfair, but serves only to prolong the litigation process, especially when it could have possibly been discovered in a short time that the witness had nothing to say.

In a malpractice action, a physician's personal ability and skill are being attacked. Even if he ultimately prevails, the damage to his reputation in the community can be irreparable. Therefore, at the very least, the physician should be placed on equal footing with his opponent, both financially and substantively. This is how the adversarial system works. Absent a privilege, his attorney must be able to interview all facts and circumstances witnesses *ex parte* to adequately prepare the case for trial. The plaintiff at this stage has no right to oversee the defense and monitor their interpretation of the evidence. The public wants efficient medical care at a reasonable cost as well. Unless the doctor can adequately defend himself from accusations, this becomes increasingly difficult to achieve.

130. North Carolina State Bar Annotated Rules of Professional Conduct Rule 7.4 (1988). *See supra* text accompanying notes 86-87.

VI. CONCLUSION

As the dual approach of this article suggests, the issues of scope of the physician-patient privilege, waiver of the privilege and the propriety of *ex parte* interviews is one that raises significant questions of law, public policy and ethics. Despite the *Crist* decision, the questions that have been raised here are far from being fully answered. Only through further judicial decisions or legislative enactment will the parties be given the information they need to knowingly and intelligently plan how to proceed in this delicate area.