BURNING ISSUES:
EX PARTE COMMUNICATIONS

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State Bar of Texas
14TH ANNUAL ADVANCED MEDICAL MALPRACTICE COURSE
March 15-16, 2007
Santa Fe

CHAPTER __

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BURNING ISSUES: EX PARTE COMMUNICATIONS

I. INTRODUCTION

This paper will discuss whether Section 74.052 authorizes ex parte communications by defense lawyers with a plaintiff's non-party treating physicians. Plaintiff's lawyers should seek an order prohibiting ex parte communications with non-party treating physicians as soon as possible after filing suit. A "burning issue" is whether a trial court's order prohibiting ex parte communications constitutes an abuse of discretion. At the time of the writing of this paper, the Twelfth Court of Appeals in Tyler, Texas has pending before it *In Re: Lester Collins, M.D.* Cause No. 12-06-00078-CV in which the Tyler Court of Appeals is called upon to determine whether the trial court abused its discretion in granting plaintiff's motion for protective order prohibiting the defendants, their attorneys, agents, insurance agents, representatives, investigators, and all other persons associated with the defendants from having any ex parte contact with any non-party treating physician of the plaintiff in a medical malpractice case.

As a practical matter, it is both common knowledge and a common practice for a medical malpractice defendant's lawyer to have *ex parte* communications with an injured claimant's prior and subsequent treating physicians in order to obtain information that goes beyond what is contained in the plaintiff-patient's medical records. More to the point, the defense bar encourages the practice and teaches it. *See,* Keith S. Dubanevich, *Medical Authorizations: A Useful Informal Discovery Tool,* TEX. BAR. J., Oct. 1986, at 1022; *See also,* Max E. Freeman, *Discovery of Subsequent Treating Physicians,* in The Cutting Edge of Medical Liability B-1 (Southern Methodist University School of Law Continuing Legal Education Program 1995).

The *ex parte* communications by a medical malpractice defendant can and do occur in a variety of ways. For, example, they occur through the defendant himself or herself, through the defense lawyer or someone acting on his or her behalf, through the defendant's experts, and even through the defendant's insurance carrier, especially if the same carrier represents both the defendant and the treating physician. In many instances, but not all, the plaintiff-patient's privacy rights are invaded. Moreover, information is frequently obtained in a manner that circumvents the traditional methods of discovery prescribed by the Rules of Civil Procedure, and then is used as a surprise tactic at trial. For example, a well-recognized tactic is for the defendant to elicit, through *ex parte* communication, expert opinions that go beyond what is contained in the treating physician's medical records on one or more of the issues in the case. The defendant will then generically list, in Rule 194 disclosures, all of plaintiff's treating physicians as "potential" witnesses who "may" testify with regard to the treatment provided to the plaintiff as well as the issues of liability, causation, or damages. Perhaps no other designation will be made, and no reports will be filed with defendant's designation of experts. The defendant will then call the treating physician to testify at trial about matters not contained in the physician's medical records. The plaintiff is then left in the unenviable position of hearing for the first time at trial "surprise" opinion testimony not previously disclosed.

To be sure, the problem is real and it happens in almost every case of this type. Moreover, the strategy and tactics employed in these *ex parte* meetings are less than subtle. Typically, with a wink and a smile, the defense lawyer will start with a perfunctory "You're under no obligation to talk to me, and I only want to discuss those things that are relevant to the issues in the lawsuit." The treating physician may then be presented with a copy of the original petition and the defendant's

answer and affirmative defenses, with a comment along the lines of "This is what the plaintiff alleges and this is what we are saying." From there the discussion becomes a full fledged fishing expedition for a non-retained expert, and a headlong foray into everything but the care and treatment provided to the plaintiff. Unfortunately, to emphasize the point, it is all done under the guise of what the defense lawyer unilaterally decides is "relevant" to the issues in the lawsuit.

II. THE FILING OF A MEDICAL MALPRACTICE CASE DOES NOT COMPLETELY WAIVE THE PHYSICIAN-PATIENT PRIVILEGE

The Texas Supreme Court has held that in a medical malpractice case, it is an abuse of discretion for a trial court to order the Plaintiff to sign an authorization permitting the Defendant's attorney to discuss the medical care and treatment of the patient with the treating physicians and health care providers. In *Mutter v. Wood*, 744 S.W. 2d 600 (Tex 1988) the Texas Supreme Court conditionally granted the patient's Petition for Writ of Mandamus where Judge Wood ordered them to sign an authorization that "completely waives their physician-patient privilege as to all physicians who provided care or treatment." The Court reviewed the physician-patient privilege and the exceptions to the privilege in this medical malpractice case and concluded that:

> **"...the privilege was waived completely as to the defendant doctors and partially as to the treating doctors. To the extent, however, that the treating doctors had records or communications which were not relevant to the underlying suit, they remained privileged until the Judge ordered their complete waiver. The question, then, is whether Judge Wood abused her discretion in ordering Mutter to execute a 509 (d)(2) waiver of the privilege. We hold that she did.**
>
> **Judge Wood's order should have been drawn more restrictively to respect whatever privilege, communications or records might exist after suit was filed and to allow those privileges to be preserved."**

The Texas Supreme Court could not have made it more clear. When a medical malpractice plaintiff files suit, the physician-patient privilege remains protected except that:

1. The privilege is waived completely as to the defendant doctor; and

2. The privilege is waived partially as to all other healthcare providers to the extent that the records or communications are "relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which any party relies upon the condition as a part of the parties claim or defense."

The limited nature of the waiver of the physician-patient privilege was again recognized by the Texas Supreme Court in *R. K. v. Ramirez*, 887 S.W. 2d 836 (Tex 1994).

III. TRIAL COURT'S CAN AND SHOULD GRANT MOTIONS PROHIBITING EX PARTE

In *R.K. v. Ramirez,* 887 S.W. 2d 836 (Tex 1994) the Texas Supreme Court addressed "what" is protected and emphasized the important role of the trial court in protecting a communication or record of a patient that is not "part" of a claim or defense. The Court admonished that "even if the trial court is convinced that this first step is satisfied.....the Court must ensure that the production of documents ordered, if any, is no broader than necessary, considering the competing interests at stake." The Supreme Court further admonished that "courts reviewing claims of privilege.....should be sure that the request for records and the records disclosed are closely related in time and scope to the claims made, *see Mutter v. Wood,* 744 S.W. 2d 600, 601(Tex. 1988), *so as to avoid any unnecessary incursion into private affairs." R.K. v. Ramirez* at 843.

But "how" can a patient make certain that disclosure of communications and records is not "broader than necessary" when the defense lawyer engages in *ex parte* communications with her non-party treating physicians? How can the trial court fulfill its

role in safeguarding privileged communications and records of the patient *"so as to avoid any unnecessary incursion into private affairs"* if the disclosure of protected communications and records has already occurred in the context of an ex parte communication? The answer to "how" is found in *Mutter v. Wood,* 744 S.W. 2d 600 (Tex. 1988).

In *Mutter v. Wood, supra* the Texas Supreme Court said that a patient can preserve his or her privileged and confidential communications between the physician and the patient by moving for a protective order requiring "the examining or treating doctors not to be questioned out of his presence." *Mutter v. Wood at 601 citing Martinez v. Rutledge* 592 S.W. 2d 398 (Tex.Civ.App.- Dallas 1979, writ ref'd n.r.e).

IV. THE TEXAS LEGISLATURE DID NOT INTEND TO MODIFY TEXAS RULE OF EVIDENCE 509 OR EXISTING CASE LAW BY ENACTING SECTION 74.052

The legislative history of Section 74.052 of the Texas Civil Practice and Remedies Code is recorded in the Senate Journal of June 1, 2003. The following exchange between Senator Hinojosa and Senator Ratliff is recorded:

HINOJOSA: How, how about in Article 10, dealing with authorization for medical information. In the authorization, a patient who brings a suit has to sign, when they send notice of intent to sue a health care provider, there's a place for the patient to object to providing records that aren't relevant to the case. What about records that may be irrelevant but are, nevertheless privileged under law, like mental health records. What is the status under the, under the bill?

RATLIFF: Well, noth-we, ***we certainly don't intend to change the law of privilege for a patient.*** If, if there are privileged records that are not subject to disclosure, those wouldn't be, wouldn't be in-intended, ***we wouldn't intend to change that law unless the court rules, ruled that such would, would have to be furnished over the patient's objection.***

HINOJOSA: So, I guess the patient could still decline to authorize the disclosure until they got a court order.

RATLIFF: Until the court orders otherwise.

This exchange between Senator Hinojosa and Senator Ratliff makes it clear that the Texas Legislature in enacting Section 74.052 of the Texas Civil Practice and Remedies Code:

1. Did not intend to change existing law or modify Texas Rule of Evidence 509;

2. Recognized that even after signing the authorization form that specifically includes disclosure of the "verbal as well as the written", the patient could still object to disclosure of health information that remained privileged under Texas Rule of Evidence 509; and

3. Recognized the Court's role as the final arbiter in determining what communications or records are relevant to a party's claim or defense and what communications or records are not.

V. TEXAS LAW PROHIBITS EX PARTE AND NO COURT OF APPEALS HAS EVER HELD THAT EX PARTE COMMUNICATIONS WITH TREATING PHYSICIANS WAS *PERMISSIBLE* UNDER RULE 509

Durst v. Hill Country Memorial Hospital, 70 S.W. 3d 233, 237-38 (Tex. App. - San Antonio 2001, no pet.) declined to hold ex parte communication improper under current rules. The *Durst* Court did not state that ex parte communications were *permissible*. *Rios v. Texas Dept. of Mental Health and Mental Retardation,* 58 S.W. 3d 167, 169-70 (Tex. App.- San Antonio 2001, no pet.) similarly did not hold that ex parte communications were *permissible* under Rule 509. *Rios* simply allowed the admissibility of a doctor's deposition that was taken ex parte when the plaintiff was not represented by counsel and the plaintiff had signed an authorization for release of medical records but could point to no confidential or privileged medical information that was elicited ex parte. Similarly, *Hogue v. Kroger Store No. 107,* 875 S.W. 2d 477, 480 (Tex. App.- Houston [1st Dist.] 1994, writ denied) did not conclude that ex parte communications with treating

physicians are *permissible* under Rule 509. *Hogue* upheld the trial court's discretion to limit cross examination regarding ex parte communications.

The only case that expressly addresses whether ex parte communications with treating physicians is permissible under Rule 509 of the Texas Rules of Evidence is *Perkins v. United States*, 877 F. Supp. 330, 333-34 (E.D.Tex. 1995) which held that under Texas law "in a personal injury suit a defense lawyer **may not** contact ex parte a plaintiff's non-party treating physician without the plaintiff's authorization."

Importantly, none of the Texas appellate cases cited on this issue involves a situation where the trial judge entered a protective order on the motion of the plaintiff prohibiting ex parte communications. The law in the State of Texas is simply this: While there may be no law or rule expressly prohibiting ex parte communications other than *Perkins*, there is no authority in Texas law that holds ex parte communications are permissible. It is therefore within the sound discretion of the trial court to enter a protective order prohibiting ex parte communications with non-party treating physicians when the plaintiff/patient moves for such a protective order. *Mutter v. Wood*, supra. This was the law of the State of Texas at the time of the enactment of House Bill 4 and the Texas Legislature expressly stated with reference in the legislative history to Section 74.052 "we certainly don't intend to change the law of privilege for a patient."

VI. IF SECTION 74.052 AUTHORIZES EX PARTE COMMUNICATIONS IT VIOLATES HIPAA

In a healthcare liability claim, the Texas Legislature has mandated an authorization form that must be executed without revocation or modification in any judicial proceeding against a healthcare provider. It is therefore not a "voluntary" authorization under 45 C.F.R. 164.508. A claimant *must* execute the authorization in the prescribed form and provide it to a healthcare provider defendant before suit and the claimant is not permitted to modify or revoke the authorization without penalty. Failure to provide the authorization or modification or revocation of the authorization results in abatement of the *proceedings*. Civil Practice and Remedies Code Section 74.052(a)(b). Since the authorization form prescribed by Section 74.052 is therefore a method by which protected health care information is released *in the course of a judicial proceeding*, it must be construed against the strict requirements of 45 C.F.R. 164.512(e).

While the Section 74.052 form allows a non-party treating physician to release verbal as well as written health information, the statute does not state that those verbal communications must, may or even can occur ex parte. If Section 74.052 were construed as allowing ex parte communications with non-party treating physicians then Section 74.052 is preempted by HIPAA because there are no provisions in Section 74.052 that would bring ex parte communications in compliance with 45 C.F.R. 164.512(e) requiring either a court order or notice and an opportunity to object before disclosure of protected health information. If Section 74.052 is construed so as to permit ex parte communications with non-party treating physicians in a judicial proceeding then Section 74.052 would be less stringent than HIPAA because there are no provisions requiring an order of a court that expressly limits the information authorized to be disclosed or provisions for notice to the patient and an opportunity to seek a qualified protective order.

Where state law (statutory or common law), allows ex parte communications, the courts have squarely held that in the absence of strict compliance with HIPAA, ex parte communications between counsel for defendants and treating physicians with regard to "protected health information" was prohibited. *Law v. Zuckerman*, 307 F. Supp. 2d 705 (D. MD 2004); *Crenshaw v. Mony Life Ins. Co.*, 18 F. Supp. 2d 1015 (S.D. CA 2004). In *Croskey v. BMW of North America, Inc.*, No. 02CV73747DT, 2005 WL 1959452, the court permitted ex parte communications but only after entering a protective order that strictly adhered to the requirements of HIPAA.

In *EEOC v. Boston Market Corp.*, Case No. CV 03-4227 (LDW) (WDW), 2004 U.S. Dist. LEXIS 27338 (EDNY Dec. 16, 2004) the court observed that HIPAA "does not expressly prohibit ex parte communications with health providers for an adverse party, but neither does it authorize such communications." *Id. at 16.* The court briefly examined the treatment of the issue by *Law, supra.* and *Crenshaw, supra Id. at 16-18.* The

court ultimately held that ex parte contact was prohibited under HIPAA because it "creates .... too great a risk of running afoul of the statute's strong federal policy in favor of protecting the privacy of patient medical records." *Id. at 18.*

The lesson from the federal courts is clear. If ex parte communications are not permitted by state law, they will not be allowed under HIPAA. If ex parte communications are permitted by state law they will be allowed but only if they strictly adhere to HIPAA requirements.

Under Texas law ex parte communications are not permitted. *Perkins v. United States,* 877 F. Supp. 330, 333-334 (E.D. Tex. 1995.) (The Texas Appellate decisions do not authorize ex parte communications. Those cases address the issue of the appropriateness of the trial court's actions after ex parte communications have occurred.) Likewise, Section 74.052 does not authorize ex parte communications. Since Texas law does not permit ex parte communications, the federal decisions make it clear that HIPAA will not authorize ex parte communications in Texas.

Assuming for the sake of argument however that the authorization form prescribed by Section 74.052 authorizes ex parte communications because it states that the health information to be obtained extends to and includes "the verbal as well as the written", ex parte communications under Section 74.052 would be prohibited by HIPAA because there are no provisions requiring strict compliance with HIPAA. The form required by Section 74.052 (c) does not require strict compliance with HIPAA and contains none of the safeguards required by 45 C.F.R. 164.512 (e). It states simply that the medical authorization "shall be *construed* in accordance with HIPAA." To construe Section 74.052 as authorizing ex parte communications without specific provisions requiring strict adherence to HIPAA and without the provisions required by 45 C.F.R. 164.512(e). "creates too great a risk of running afoul of that statute's strong federal policy in favor of protecting the privacy of patient medical record." See *EEOC v. Boston Market Corp.*, supra.

VII. HIPAA DOES NOT PRECLUDE ORDERS PROHIBITING EX PARTE COMMUNICATIONS

In a judicial proceeding in Texas, a trial court has the authority to enter an order prohibiting ex parte communications so that the trial judge can determine what communications between a patient and physician remain privileged and what communications are waived by the filing of the lawsuit. Although HIPPA neither prohibits nor specifically authorizes ex parte communication, this safeguard of protected health information established in *Mutter v. Wood* in 1988 is consistent with the strong federal policy in favor of protecting the privacy of health information and the safeguards of 45 C.F.R. 164.512(e). Since Texas common law allows a trial judge to prohibit ex parte communications and Section 74.052 did not modify this procedural safeguard, Texas law is also more stringent than HIPAA and HIPAA therefore does not preempt Texas state law authorizing a trial court to enter a protective order prohibiting ex parte communications.

VIII. OTHER REASONS TO "JUST SAY NO" TO EX PARTE COMMUNICATIONS

There are also several other good reasons to "just say no" to defense counsel having *ex parte* communications with plaintiff's treating physicians. First and foremost, the patient may have disclosed to her physician extremely personal information deserving sensitive treatment. It is not for the defense lawyer to decide what is and is not personal. Second, the defense lawyer may influence the physician's conclusions. Third, restricting the manner of contact limits the opportunity for arm-twisting or intimidation. *See, e.g.*, *L'Orange v. Medical Protective Co.*, 394 F.2d 57 (6th Cir. 1968) (expert threatened with cancellation of professional liability insurance); *Agnew v. Parks*, 172 Cal. App.2d 756 (1959)(testifying physician allegedly threatened with expulsion from county medical association). Fourth, privately contacting a physician may expose the physician to civil liability. HIPAA and the Texas Medical Practice Act creates civil remedies against a physician for unauthorized disclosure. Occupations Code, Subtitle B. Physicians, Chapter 159. Physician-Patient Communication. Fifth, the physician may violate his oath of confidentiality, exposing him to professional sanctions. Sixth, the Texas Rules of Civil Procedure do not allow Defendants' counsel to violate the physician-patient relationship through a private interview. Rule 192.1 lists forms of "permissible discovery." Ex *parte* interviews of patients' physicians

by defense counsel is not on the list. Rule 194 (j) states that medical records and bills reasonably related to the injuries or damages asserted are available through an authorization, but it does not include a requirement that the authorization allow for *ex parte* interviews in violation of the physician-patient privilege.

Lastly, to underscore convention, many states hold that a defense attorney who contacts a plaintiff's treating physician without authorization violates state law, professional ethics, or the physician-patient privilege of confidentiality. *See, e.g., Harlan v. Lewis*, 982 F.2d 1255 (8th Cir. Ark.), cert. denied, 114 S. Ct 94; *Horner*, 153 F.R.D. at 602 (Texas); *Manion v. N.P.W. Medical Ctr.*, 676 F. Supp 585 (M.D. Pa. 1987); *Alston v. Greater S.E. Community Hosp.*, 107 F.R.D. 35 (D.D.C. 1985); *Weaver v. Mann*, 90 F.R.D. 443 (D.N.D. 1981); *Garner v. Ford Motor Co.*, 61 F.R.D. 22 (D. Alaska 1973); *Duquette v. Superior Court*, 778 P.2d 634 (Ariz. App 1989); *Torres v. Superior Court*, 221 Cal. App.3d 181 (Cal. App. 1990); *Fields v. McNamara*, 540 P.2d 327 (Colo. 1975); *Porchow v. Commonwealth Edison Co.*, 587 N.E.2d 589 (Ill. 1992); *Roosevelt Hotel Ltd. Partnership v. Sweeney*, 394 N.W.2d 353 (Iowa 1986); *Schwartz v. Goldstein*, 508 N.E.2d 97 (Mass. 1987); *Jaap v. District Court*, 623 P.2d 1389 (Mont. 1981); *Woytus v. Ryan*, 776 S.W.2d 389 (Mo. 1989); *In re New York County DES Litigation*, 182 A.D.2d 445 (N.Y. 1992); *Crist v. Moffatt*, 389 S.E.2d 41 (N.C.)

IX. Proposed TRE 514

The Supreme Court Advisory Committee has been working on proposed Texas Rule of Evidence 514 for several years. The proposed rule would prohibit ex parte communications unless there was a written authorization or a court order that complies with HIPAA. The last meeting on this topic was held August 27, 2005. The transcript is available at www.supreme.courts.state.tx.us/rules/scac/archives/2005/transcripts/08.27.05.pdf pages 14430-14440. Members of the subcommittee do not believe that the authorization form allowed under Section 74.052 authorizes ex parte communications. (See page 14434 of the transcript.)

X. Conclusion

Defense lawyers who engage in ex parte communications do so at great peril to themselves and the plaintiff's non-party treating physicians. Trial court's should grant motions prohibiting ex parte communications because until proposed Texas Rule of Evidence 514 is adopted by the Texas Supreme Court, orders prohibiting ex parte communications are the clearest method and means available to assure that Texas lawyers and healthcare providers do not run afoul of the federal statute's strong federal policy in favor of protecting the privacy of patient's medical information.