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Ex Parte Contacts Between Plaintiff's Physician and Defense Attorneys: Protecting the Patient-Litigant's Right to A Fair Trial

*Philip H. Corboy**

I. INTRODUCTION

A long-departed TV game show took for its title one of life's tough questions: "Who Do You Trust?" The physician whose hands may hold the very thread of life surely is at the top of the list. But the bonds of trust easily are broken. Too frequently, trust falls victim to the pressures of adversarial litigation when the patient's injury or disease becomes the subject of a lawsuit.

The signs of betrayal may be subtle. The plaintiff's treating physician becomes less than cooperative during preparation of the case. Calls are not returned; meetings declined. In deposition, the doctor is reticent, while defense counsel asks few probing questions. Prior to trial, the plaintiff's attorney may find the doctor's name on the defendant's list of proposed witnesses. In other cases, the plaintiff calls the physician, and the damage is done in cross-examination. That damage could be a dramatic announcement that the plaintiff's injury was not caused by defendant's alleged negligence. Or it could take the form of a carefully contoured explanation of the medical records, drawing every inference in support of the defendant's theory and subtly undermining the plaintiff's evidence. That the plaintiff's own doctor testifies adversely may itself doom the plaintiff's well-prepared case in the eyes of the jury. It becomes painfully obvious that the doctor has been meeting with the defendant's attorney. Understandably, plaintiffs and the lawyers who represent them view this practice as an outrageous betrayal of trust.[1]

Ex parte contacts[2] are a "hardball" tactic long favored by the

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1. One plaintiff's lawyer likens this realization to the hurt amazement in Julius Caesar's exclamation, "Et tu, Brute," which he freely translates as "Why you dirty, two-faced son of a bitch!" Farage, *Ex Parte Interrogation: Invasive Self-Help Discovery*, 94 DICKINSON L. REV. 1, 10 (1989).

2. *Ex parte* is defined as "[o]n one side only; by or for one party. . . ." BLACK'S LAW DICTIONARY 517 (5th ed. 1979). The term is used in this article to refer to communica-

defense bar, particularly in medical malpractice suits. A significant number of courts have held that, in the absence of a rule or statute to the contrary, courts may not prohibit *ex parte* discussions between the plaintiff's physician and defense counsel.[3] Recent state court decisions, including several overruling prior precedent, now reflect a strong majority view that condemns *ex parte* conferences.[4] A clear turning point was a pair of decisions by the Appellate Court of Illinois, *Petrillo v. Syntex Labs.* and *Karsten v. McCray*.[5] Indeed, the reasoning set forth in these two opinions has shaped the debate in nearly every subsequent case around the country.

Judicial analysis of *ex parte* interviews of plaintiff's physicians has evolved from a fairly narrow focus on the statutory physician-patient privilege, beginning with *Petrillo-Karsten*, and moving to recognition of strong public policy interests in preserving the sanctity of the physician-patient relationship. At the heart of this struggle is the role of confidentiality in the adversary system of

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tions between plaintiff's physician and defense counsel outside the presence of plaintiff or plaintiff's attorney and without plaintiff's consent.

3. Doe v. Eli Lilly & Co., 99 F.R.D. 126 (D.D.C. 1983); Romine v. Medicenters of America, 476 So. 2d 51 (Ala. 1985); Arctic Motor Freight v. Stover, 571 P.2d 1006 (Alaska 1977); Green v. Bloodsworth, 501 A.2d 1257 (Del. Super. Ct. 1985); Coralluzzo v. Fass, 450 So. 2d 858 (Fla. 1984); Orr v. Sievert, 162 Ga. App. 677, 292 S.E.2d 548 (1982); Davenport v. Ephraim McDowell Mem. Hosp., 769 S.W.2d 56 (Ky. Ct. App. 1989); Covington v. Sawyer, 9 Ohio App. 3d 40, 458 N.E.2d 465 (1983); Moses v. McWilliams, 379 Pa. Super. 150, 549 A.2d 950 (1988), *appeal denied*, 521 Pa. 631, 558 A.2d 532 (1989); *cf.* Stempler v. Speidell, 100 N.J. 368, 495 A.2d 857 (1985) (*ex parte* conferences permissible, but only upon notice to plaintiff and opportunity to seek protective order to safeguard privileged matters).

4. Alston v. Greater Southeast Comm. Hosp., 107 F.R.D. 35 (D.D.C. 1985); Weaver v. Mann, 90 F.R.D. 443 (D.N.D. 1981); Duquette v. Superior Court, 161 Ariz. 269, 778 P.2d 634 (Ct. App. 1989); Fields v. McNamara, 189 Colo. 284, 540 P.2d 327 (1975); Petrillo v. Syntex Laboratories, 148 Ill. App. 3d 581, 499 N.E.2d 952 (1st Dist. 1986), *appeal denied*, 505 N.E.2d 361, *cert. denied sub nom* Tobin v. Petrillo, 438 U.S. 1007 (1987); Roosevelt Hotel Ltd. Partnership v. Sweeney, 394 N.W.2d 353 (Iowa 1986); Schwartz v. Goldstein, 400 Mass. 152, 508 N.E.2d 97 (1987); Jordan v. Sinai Hosp., 171 Mich. App. 328, 429 N.W.2d 891 (1988), *appeal denied*, 432 Mich. 912 (1989); Wenninger v. Muesing, 307 Minn. 405, 240 N.W.2d 333 (1976); Missouri *ex rel.* Woytus v. Ryan, 776 S.W.2d 389 (Mo. 1989); Jaap v. District Court, 623 P.2d 1389 (Mont. 1981); 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 582 (1979), *aff'd*, 73 A.D.2d 589, 422 N.Y.S.2d 887 (App. Div. 1979), *appeal dismissed*, 432 N.Y.2d 364, 411 N.E.2d 783, 51 N.Y.S.2d 703 (1980); Johnson v. District Court, 738 P.2d 151 (Okla. 1987); Mutter v. Wood, 744 S.W.2d 600 (Tex. 1988); Loudon v. Mhyre, 110 Wash. 2d 675, 756 P.2d 138 (1988); Wisconsin *ex rel.* Klieger v. Alby, 125 Wis. 2d 468, 373 N.W.2d 57 (1985).

5. 148 Ill. App. 3d 581, 499 N.E.2d 952 (1st Dist. 1986), *appeal denied*, 505 N.E.2d 361, *cert. denied sub nom.* Tobin v. Petrillo, 483 U.S.1007 (1987); 157 Ill. App. 3d 1, 509 N.E.2d 1376 (2d Dist.), *appeal denied*, 117 Ill. 2d 544, 517 N.E.2d 1086 (1987).

justice.[6]

Increasing insistence by defense attorneys on discussions with doctors without the presence of the plaintiff or plaintiff's lawyer will carry this debate to other courts. The public policy of safeguarding the confidential and fiduciary physician-patient relationship, as well as the countervailing arguments raised by the defense bar, undoubtedly will be further refined. Courts also will be called upon to define the scope of the rule against *ex parte* contacts and fashion sanctions for its violation. Constitutional privacy considerations may yet be raised. This Article will examine these issues with an emphasis on the practical realities of modern personal injury litigation. The implications reach to the fundamental fairness in the manner in which our adversary system affords justice to injured victims.[7]

II. Two Paths to the Truth: Confidentiality in an Adversary System

A. Ex Parte Contacts as an Evasion of the Safeguards of Formal Discovery

Confidentiality and conflict — each represents a means of fostering the disclosure of the truth in matters of social importance. Our society appears to hold them in equally high esteem. Confidentiality is essential to candid communication with one's attorney, confessor, or analyst. Candor, in turn, is essential to the social benefits

6. It is perhaps due to an erroneous view that the issue is one of "mere" trial practice or discovery procedures that these developments have attracted scant attention in the legal literature. The few articles on the subject have come from the pens of trial lawyers, rather than academic commentators. *See* Farage, *supra* note 1; Hayes & Monahan, *Do Ex Parte Interviews Threaten Patient Privacy?*, 17 THE BRIEF, 6 (Fall 1987); Quinn & Smith, *Physician-Patient Privilege: Interviews Between Plaintiffs' Physicians and Defense Attorneys*, 66 CHI. BAR RECORD 146 (1984); McVisk, *A More Balanced Approach to Ex Parte Interviews by Treating Physicians*, 20 LOY. U. CHI. L.J. 819 (1989); King & Hall, *Waiver of the Physician-Patient Privilege in South Dakota — May Defense Counsel Conduct Ex Parte Interviews of Plaintiffs' Treating Physicians?*, 33 S.D.L. REV. 260 (1988); Turner, *Confidences of Malpractice Plaintiffs: Should Their Secrets Be Revealed?*, 28 S. TEX. L. REV. 71 (1987); Bower, *Unauthorized Interviews With the Plaintiff's Physicians: "Anker" Revisited*, 20 TRIAL LAW. Q. 30 (Summer 1989).

7. The importance of "personal injury law" to the social fabric that binds and defines Americans should not be underestimated. Tort law vindicates individual rights, facilitates the workings of the market economy, resolves individual conflict, and preserves social values. THE SPECIAL COMMITTEE ON THE TORT LIABILITY SYSTEM, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW ch. 3 (1984) (Report to the American Bar Association).

of these relationships.[8] The relationship between patient and physician obviously depends upon confidentiality as a means of uncovering the truth. The American Medical Association has expressed the profession's view:

> Much of the information related by patients to their physicians is highly personal. Patients have every right to expect that intimate personal information communicated to physicians will remain private . . . the assurance of confidentiality encourages patients to be candid with their physicians and candor is essential to effective diagnosis and medical management of the patient's ailments.[9]

The law, frequently life's mirror, has afforded a large measure of protection to the trust between doctor and patient. Confidentiality is guarded not only by the patient's evidentiary privilege,[10] but also by the confidentiality requirements of state medical licensing laws,[11] statutory safeguards surrounding medical records and patient information,[12] and recognition by some states of tort liability

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8. The law of privileges reflects this theorem, expressed in Dean Wigmore's classic list of the elements for a valid evidentiary privilege:

> (1) The communications must originate in a *confidence* that they will not be disclosed. (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties. (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*. (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

8 J. WIGMORE, EVIDENCE § 2285 (McNaughton rev. 1961 and Supp. 1989) (emphasis in original).

9. Privacy of Medical Records Hearings on H.R. 2979 and H.R. 3444. Before Government Information and Individual Rights Subcommittee, House Committee on Government Operations, 96th Cong., 1st Sess. 1129 (1979). *See also* Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793, 801 (N.D. Ohio 1965) ("Since the layman is unfamiliar with the road to recovery, he cannot sift the circumstances of his life and habits to determine what is information pertinent to his health. As a consequence, he must disclose all information in his consultations with his doctor — even that which is embarrassing, disgraceful, or incriminating. To promote full disclosure, the medical profession extends the promise of secrecy. . . .").

10. Forty states and the District of Columbia have enacted statutory patient privileges. *Developments in the Law — Privileged Communications*, 98 HARV. L. REV. 1450, 1532 (1985). *See also* 8 J. WIGMORE, *supra* note 8, at § 2380 (collecting and excerpting statutes). The patient privilege in Illinois is set forth at ILL. REV. STAT. ch. 110, para. 8-802 (1987).

11. State laws have long provided that a physician's license "may be revoked for 'betrayal of a professional secret to the detriment of the patient.' " Note, *Liability of a Physician for Revealing Out of Court His Patient's Confidences*, 34 HARV. L. REV. 312, 313 (1921). More recently, courts have viewed these enactments as expressions of the strong public policy favoring confidentiality. *See, e.g.*, Wenninger v. Muesing, 307 Minn. 405, 411, 240 N.W.2d 333, 337 n.3 (1976); Missouri *ex rel.* Woytus v. Ryan, 776 S.W.2d 389, 392 (Mo. 1989).

12. *See, e.g.*, ILL. ANN. STAT. ch. 111 1/2, para. 7309 (Smith-Hurd, 1989) (prohibiting disclosure of identity or results of HIV blood test). For a compilation of state laws

for disclosure of patient confidences.[13]

In litigation, however, the path to truth is conflict. The adversary system of justice is based on an act of faith: that the truth is best served when each side presents its best case, subject to probing challenge by the opposing party, to a neutral tribunal.[14] It claims right to every person's evidence and does not abide secrets gladly.[15]

Rules governing the adjudication of claims by injured victims necessarily must accommodate these competing values. The choice, however, is *not* between truth and secrecy. It is instead a balance of interests that seeks to maximize disclosure of information when society needs to ascertain the truth. To allow plaintiffs to demand compensation for personal injury, while denying the defense access to information regarding that injury, obviously subverts the truth-seeking function of litigation. It is equally clear, however, that exacting too high a price from injured victims impedes frank disclosure within the physician-patient relationship.

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protecting patient information, *see* NATIONAL COMMISSION ON CONFIDENTIALITY OF HEALTH RECORDS, HEALTH RECORDS CONFIDENTIALITY LAW IN THE STATES (1979).

Important federal safeguards of the confidentiality of medical records are in the stringent non-disclosure provisions of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act, 42 U.S.C. § 290dd-3 (1989), and the Drug Abuse Office and Treatment Act of 1972, 42 U.S.C. § 290 ee-3 (1989). The federal and state legislation and regulations enacted in the past 20 years has resulted in "unprecedented" protection of the confidentiality of health care information. Turkington, *Legal Protection for the Confidentiality of Health Care Information in Pennsylvania: Patient and Client Access; Testimonial Privileges; Damage Recovery for Unauthorized Extra-Legal Disclosure*, 32 VILL. L. REV. 259, 263 (1987).

13. *See, e.g.*, Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793 (N.D. Ohio 1965); Horne v. Patton, 291 Ala. 701, 287 So. 2d 824 (1973); *see generally* Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426 (1982); Annotation, *Physician's Tort Liability, Apart From Defamation, For Unauthorized Disclosure Of Confidential Information About Patient*, 20 A.L.R.3d 1109 (1968).

14. Hence Wigmore's exuberant tribute to cross-examination as "beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 J. WIGMORE, *supra* note 8, at § 1367. *See also* FED. R. EVID. 701 advisory committee's note:

> The rule assumes that the natural characteristics of the adversary system will generally lead to an acceptable result, since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness.

See Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 415-17 (1952).

15. As explained by former Chief Justice Burger, "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive . . . . The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." United States v. Nixon, 418 U.S. 683, 709 (1974). As for evidentiary privileges, "these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Id.* at 710. *Accord* Branzburg v. Hayes, 408 U.S. 665, 668 (1972).

Moreover, a rule that deters victims from pursuing meritorious claims also hides the truth from juries and undermines their role in achieving the compensatory and deterrent goals of the substantive law.

The balance struck by most legislatures has been to remove the shield of privilege to the limited extent necessary to reach the truth in litigation, while relying upon the adversary system itself to safeguard those limits. Virtually every state in which patient confidences are protected has adopted the "patient-litigant" exception. A patient who has placed his or her physical condition at issue in a lawsuit is deemed to have waived the privilege as to medical information relating to that condition.[16] The opposing party is entitled to discover that information by deposition, interrogatory, and other means provided by the rules of procedure, while other matters remain privileged.[17] Formal discovery, of course, assures the plaintiff's lawyer access to the information provided to the defendant and an opportunity to challenge improper lines of inquiry. Thus, the adversarial process, which necessitates the limited exception to confidentiality, also ensures that discovery stays within its proper limits. Indeed, the safeguards provided by formal discovery are essential to the balance struck by the legislature. The argument that the patient-litigant waiver gives defense counsel carte blanche to discuss plaintiff's case with his or her physician:

> ignores the protection afforded the confidentiality of information told a physician by formal discovery methods. It is this protection, rather than the mere fact that a patient has filed suit, which justifies the disclosure of otherwise confidential information told a physician once a patient has filed a suit putting his mental or physical condition at issue.[18]

The rules of procedure in most states, like the Federal Rules of Civil Procedure, do not expressly provide that the enumerated methods of discovery are the exclusive means of obtaining informa-

16. *See, e.g.*, Jones v. Superior Ct., 119 Cal. App. 3d 534, 174 Cal. Rptr. 148 (1981); Koump v. Smith, 25 N.Y.2d 287, 250 N.E.2d 857, 303 N.Y.S.2d 858 (1969). The patient-litigant exception is incorporated in Illinois' privilege statute. ILL. REV. STAT. ch. 110, para. 8-802(4) (1987).

17. "A patient may waive this privilege by putting his or her physical condition in issue. Waiver is not absolute, however, but is limited to medical information relevant to the litigation." Loudon v. Mhyre, 110 Wash. 2d 675, 677, 756 P.2d 138, 140 (1988) (citation omitted). *See also infra* note 68 for further discussion of patient waiver.

18. Ritter v. Rush-Presbyterian-St. Luke's Med. Ctr., 177 Ill. App. 3d 313, 319, 532 N.E.2d 327, 330 (1988) (citing Petrillo v. Syntex Labs., 148 Ill. App. 3d at 590-93, 499 N.E.2d at 952 (1986), *appeal denied*, 505 N.E.2d 361, *cert. denied sub nom.* Tobin v. Petrillo, 483 U.S. 1007 (1987)).

tion from plaintiff's treating physician.[19] Defense attorneys have seized upon this omission to make an end run around the protections built into the rules. In a typical scenario, defense counsel receives notice of the personal injury suit against the client and immediately obtains the plaintiff's medical records. The attorney then calls or visits the plaintiff's doctors "to discuss the case." The plaintiff's authorization for release of medical records often is sufficient to convince the doctor of the requisite patient consent.[20] What transpires at these meetings is, of course, a large part of the problem. The plaintiff's counsel rarely is notified and may learn of the interviews only much later. It is virtually impossible to determine whether disclosure of privileged confidences or other improprieties occurred during the interviews.[21] In essence, defense counsel has been able to take advantage of the limited waiver of the patient privilege while evading the adversarial safeguards embodied in formal discovery.

B. The Practical Impact of Ex Parte Interviews on the Right to a Fair Trial

At the outset, it is crucial to emphasize that the issues at stake are not merely discovery matters. It must be recognized that *ex*

19. *See* Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128, (D.D.C. 1983) (the federal rules "have never been thought to preclude the use of such venerable, if informal, discovery techniques as the *ex parte* interview of a witness . . . ."). An exception is Louisiana's privilege statute, which provides that disclosure may be made only through procedures authorized by the rules. LA. REV. STAT. ANN. § 13-3734(D) (West Supp. 1987).

On June 24, 1985, the Illinois legislature passed H.B. 1269 as an amendment to the patient privilege, prohibiting disclosure except in accord with authorized methods of discovery under the rules. Governor Thompson amendatorily vetoed H.B. 1269 on Sept. 19, 1985.

20. Firestone, *The Physician-Attorney as Co-Counsel,* 20 TRIAL 76, 78 (May 1984). Some plaintiffs have begun using specific language in medical authorization forms expressly denying consent to *ex parte* discussions with defense attorneys. *Id. See also* Turner, *supra* note 6, at 89 n.109 (recommending that plaintiff's attorney direct a separate letter to treating physicians asking that they not discuss the case with defense counsel). Apparently, this does not always do the job. *See* Bower, *supra* note 6, at 31-31 (summarizing trial court sanctions imposed upon defense counsel who engaged in *ex parte* contacts despite an express prohibition); Brief for Plaintiff-Relator at 19-20, Missouri *ex rel.* Woytus v. Ryan, 776 S.W.2d 389 (Mo. 1989) (defense attorney met secretly with plaintiff's physician despite express prohibition in medical authorization authored by defense counsel; the plaintiff claimed that the defense attorney used a notice of deposition as a "ruse" to obtain the *ex parte* meeting).

21. Indeed, courts have held that a plaintiff is not entitled to discover what occurred at *ex parte* interviews on the grounds that the information is protected by the work-product doctrine. Frantz v. Golebiewski, 407 So. 2d 283 (Fla. Ct. App. 1981); Moses v. McWilliams, 379 Pa. Super. 150, 549 A.2d 950 (1988), *appeal denied*, 521 Pa. 631, 558 A.2d 532 (1989).

parte contacts erode the fundamental right of injured victims to a fair trial, in order to give the proper weight to the policy reasons underlying the ban on such communications.

Virtually every issue in the controversy surrounding *ex parte* contacts is present in *Karsten v. McCray*.[22] A close examination of *Karsten* is of particular interest to trial practitioners for an additional reason. Most appellate opinions address the issue in the discovery context, where parties have appealed a ruling on a defense motion to compel the plaintiff to authorize *ex parte* interviews.[23] Personal injury lawyers know too well that the courtesy of notice is not everyday practice. By the time the plaintiff's attorney usually discovers or deduces that the conferences have occurred, he or she is less likely to be discussing the fine points of discovery with the court than to be frantically attempting to minimize the prejudice to the client's case. In this respect, *Karsten* is more representative of the problems confronting trial lawyers.

Moreover, the posture of the case colors the judicial assessment of the policy issues at stake. An appeal from a pretrial order concerning "informal discovery" does not paint a full picture of the prejudicial impact of *ex parte* contacts. Interestingly, the doctor in *Petrillo* argued:

> Although this Court is repeatedly told by plaintiffs that an *ex parte* interview can become a "strategic or tactical advantage" and that the interview may develop into "something else," this Court is never informed by plaintiffs of the specific harms that will result from the *ex parte* interview.[24]

Karsten presented the appellate panel with a graphic demonstration that this issue is not a mere discovery matter, but an assault on the fundamental right to a fair trial.

Joan Karsten, an active and otherwise healthy 45-year-old woman, visited an emergency room complaining of stomach pain.[25] Dr. McCray, a general surgeon, diagnosed acute appendicitis and admitted her. The next day, he diagnosed a ruptured appendix. Nevertheless, he did not perform an appendectomy until five hours

22. Karsten v. McCray, 157 Ill. App. 3d 1, 509 N.E.2d 1376 (2d Dist.), *appeal denied*, 117 Ill. 2d 544, 517 N.E.2d 1086 (1987).

23. *E.g.* Langdon v. Champion, 745 P.2d 1371 (Alaska 1987); Fields v. McNamara, 189 Colo. 284, 540 P.2d 327 (1975); Green v. Bloodsworth, 501 A.2d 1257 (Del. Super. Ct. 1985); 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); *Ryan*, 776 S.W.2d 389; Nelson v. Lewis, 130 N.H. 106, 534 A.2d 720 (1987); Smith v. Ashby, 106 N.M. 358, 743 P.2d 114 (1987).

24. Contemnor's Reply Brief at 17, *Petrillo*, 148 Ill. App. 3d 581, 499 N.E.2d 952.

25. 157 Ill. App. 3d at 4, 509 N.E.2d at 1377.

later. He found an abscess and left the wound open for draining. The wound was still open and draining ten days later, when Dr. Asselmeier discharged Joan Karsten without an antibiotic.[26] The next week, Joan experienced jerking and slurred speech, and Dr. Asselmeier reluctantly admitted her for tests. Dr. Menet, an internist, concluded that she had sepsis, an infection in the bloodstream.[27] A few days later, Joan suffered a grand mal seizure and lapsed into a coma that lasted for more than six weeks. She is left with permanent quadriparesis, impaired speech and coordination, and brain damage. In discharging Joan to a rehabilitative facility, Dr. Menet recorded that her condition was due to sepsis.[28]

The plaintiff brought suit against McCray and Asselmeier and against Glen Ellyn Clinic, their employer, alleging negligent delay in performing the appendectomy and negligence in treating the related infection.[29] At some point, the attorney representing both McCray and the clinic met with Dr. Menet without the knowledge of the plaintiff or her attorney.[30] Defense counsel also learned that in 1972, Joan Karsten had consulted with Dr. Dominguez, an orthopedic surgeon formerly associated with the clinic. She had complained of weakness in her left arm, but Dr. Dominguez was unable to diagnose any cause at that time.[31] The defense pursued a theory that Joan Karsten's injuries were not the result of the infection associated with her appendicitis, but were a manifestation of some preexisting condition, perhaps multiple sclerosis or thrombotic thrombocytopenia purpura (T.T.P.), a rare blood disease, which had come out of remission.[32] After meeting with defendants' counsel, Dominguez and Menet agreed to testify in support of the defense.

When the defense listed Dominguez and Menet as witnesses, the plaintiff's attorney unsuccessfully moved to bar their testimony based on the unauthorized *ex parte* discussions. The plaintiff also moved in limine to bar any reference to a preexisting disorder. Based on defense counsel's representation that an expert would testify that Joan Karsten did suffer from a disorder in 1972 that was

26. *Id.* at 5, 509 N.E.2d at 1377.
27. *Id.* at 5, 509 N.E.2d at 1378.
28. Brief for Plaintiffs-Appellants at 70, *Karsten*, 157 Ill. App. 3d 1, 509 N.E.2d 1376 [hereinafter Brief for Joan Karsten]. Dr. Menet was the doctor primarily caring for Joan during the second hospitalization. Brief for Defendants-Appellees at 11, *Karsten* [hereinafter Brief for Dr. McCray].
29. 157 Ill. App. 3d at 6, 509 N.E.2d at 1378.
30. *Id.* at 7, 509 N.E.2d at 1379.
31. *Id.* at 8-9, 509 N.E.2d at 1381.
32. Brief for Joan Karsten, *supra* note 28, at 37-38.

causally related to her present injuries, the trial judge denied the motions.[33]

With this green light, defendants' counsel embarked upon a carefully planned scenario in which the physicians who treated plaintiff were to play crucial roles. It is important to recognize the obstacles facing defense counsel in constructing the preexisting condition defense. The "condition" consisted of Joan's vague complaint of weakness in her left arm seven years before her appendectomy which her doctor could not diagnose, which apparently resolved itself, and which bore no resemblance to her condition following surgery. Against this was the absence of any diagnosis of multiple sclerosis or TTP in the medical records; the testimony of two highly qualified general surgeons that the defendants' care was negligent and led to sepsis causing Joan's injuries; and Dr. Menet's own diagnosis of sepsis.[34]

Defense counsel set the stage in his opening statement, emphasizing that, despite the entries in Joan's medical records, her doctors were unable to find the "real" cause of her condition.[35] As early as 1972, he stated, her doctors "were concerned that she might have multiple sclerosis."[36] He announced that the most likely cause, as the evidence would show, was a rare but tragic blood disease, TTP, which the defendants could not have uncovered, even using due care.[37] It was up to the plaintiff's doctors to build upon this theory while avoiding direct contradiction of their earlier statements that would damage their credibility. For example, McCray testified that he considered the possibility of MS as a cause.[38] Dominguez testified that Joan Karsten "looked like a person who might have MS."[39] The court found "numerous" other references wafted into the jury box during the presentation of evidence, examination of witnesses, and closing arguments.[40] The promised expert, whose link between the supposed preexisting condition and Joan's current injuries was the premise for this stream of hints and innuendoes, never materialized.[41] The plaintiff was left with the task of rebutting the shadows of a diagnosis that was

33. *Karsten*, 157 Ill. App. 3d at 6-7, 509 N.E.2d at 1378.
34. Brief for Joan Karsten, *supra* note 28, at 20-27.
35. *Id.* at 36.
36. *Id.*
37. *Id.* at 37-38.
38. *Karsten*, 157 Ill. App. 3d at 8, 509 N.E.2d at 1380.
39. *Id.* at 10, 509 N.E.2d at 1381.
40. *Id.* at 6, 509 N.E.2d at 1379.
41. *Id.*

never made and the opinion of an expert who never took the stand. The jury returned a verdict in favor of the defendants.

In effect, Joan Karsten's trial was itself infected by a toxic stream of prejudicial hints and references to a preexisting disease that had no foundation in evidence. The appellate court found that "defendants' breach of a promise to call a witness to support statements made throughout the trial was itself prejudicial error."[42] It is obvious that defense counsel could not have carried out this type of strategy without the support of plaintiff's treating physicians and the careful preparation of their testimony.[43] *Ex parte* contact with those doctors to recruit them as defense witnesses and coordinate their testimony clearly was essential.[44]

This situation, which conveniently might be labeled the *Karsten* problem, is a one that plaintiffs' lawyers face all too frequently. The plaintiff's doctor has huddled with defense counsel, but it is unknown whether privileged information was disclosed. The doctor has thrown his or her allegiance to the defense, but it cannot be known whether improper influences were at work. The testimony itself violates no rule of evidence or privilege, and yet, the prejudice to the plaintiff's case is devastating. In the eyes of jurors, the plaintiff's own doctor is the most credible of witnesses, being most intimately familiar with the patient's condition, ethically committed to the patient's best interests, and having no interest in the lawsuit. That the doctor testifies against the patient is in itself damning. That this testimony conforms neatly with the defense theory imparts an unmistakable ring of truth to speculations and bare assertions that have little basis in the evidence.

Confidentiality, once breached, cannot be restored. The *Karsten* problem involves preventing the subtle results of *ex parte* conferences from infecting the plaintiff's case in the minds of the jury. The answer provided by the appellate court is clearly stated: "We believe that plaintiffs in the instant action have adequately shown prejudicial error such that they were denied a fair trial . . . . Drs. Menet and Dominguez should have been barred from testifying at the initial trial of this cause."[45]

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42. *Id.* at 9, 509 N.E.2d at 1381 (citing Charpentier v. City of Chicago, 150 Ill. App. 3d 988, 997, 502 N.E. 2d 385, 391 (1986)).

43. Brief for Joan Karsten, *supra* note 28, at 71.

44. "Plaintiffs do not suggest that a defendant be barred from ever calling a treating physician. The method employed by defendants in this case, and the surreptitious recruitment of treating physicians as adverse witnesses, should be condemned." Brief for Joan Karsten, *supra* note 28, at 66-67.

45. *Karsten*, 157 Ill. App. 3d at 8, 15, 509 N.E.2d at 1379, 1384.

III. *EX PARTE* INTERVIEWS OF PLAINTIFF'S TREATING PHYSICIAN: AN ASSAULT ON THE PHYSICIAN-PATIENT RELATIONSHIP

A. The Confidentiality of the Physician-Patient Relationship and the Scope of Implied Waiver of Patient Privilege

During the pendency of Joan Karsten's appeal, the appellate court handed down its decision in *Petrillo v. Syntex Laboratories*,[46] holding that *ex parte* contacts were contrary to public policy as violating both the duty of confidentiality and the fiduciary duty of physicians to patients. *Petrillo* provided the *Karsten* court with a principled basis for decision, and the court adopted it without reservation.[47]

Petrillo is a watershed in the evolution of judicial views concerning *ex parte* contacts. It marks the departure from a narrow view of confidentiality, limited to the statutory physician-patient privilege, to one that recognizes and protects far broader public interests in safeguarding both the confidential and fiduciary nature of the physician-patient relationship. An examination of this development is worthwhile.

Generally, the parties to a civil suit are entitled to discovery of any relevant information that is not privileged.[48] Though patient communications were not protected at common law, about forty jurisdictions have enacted statutory privileges.[49] Their primary purpose is to protect public health by fostering the candid communication between patient and physician that is essential to effective medical diagnosis and treatment.[50] These statutes represent a strong public interest in preserving the confidentiality of patient

46. 148 Ill. App. 3d 581, 499 N.E.2d 952 (1st Dist. 1986), *appeal denied*, 505 N.E.2d 361, *cert. denied sub nom.* Tobin v. Petrillo, 483 U.S.1007 (1987).

47. *Karsten*, 157 Ill. App. 3d at 14, 509 N.E.2d at 1384.

48. *See, e.g.*, FED. R. CIV. P. 26 and advisory committee note.

49. *See*, 8 J. WIGMORE, *supra* note 8, at § 2380 (collecting and excerpting statutes). The Illinois privilege is at ILL. REV. STAT. ch. 110, para. 8-802 (1987). *See* Parkson v. Central DuPage Hosp., 105 Ill. App. 3d 850, 854, 435 N.E.2d 140, 143 (1st Dist. 1982) (privilege encourages "free disclosure between the physician and patient and protect[s] the patient from the embarrassment and invasion of privacy which disclosure would entail").

50. *See, e.g.*, Missouri *ex. rel.* Woytus v. Ryan, 776 S.W.2d 389, 392 (Mo. 1989) ("The purpose of the physician-patient privilege is to enable the patient to secure complete and appropriate medical treatment by encouraging candid communication between patient and physician, free from fear of the possible embarrassment and invasion of privacy engendered by an unauthorized disclosure of information."); Duquette v. Superior Ct., 161 Ariz. 269, 275 778 P.2d 634, 640 (Ct. App. 1989) (the purpose is to ensure that "the patient will receive the best medical treatment by encouraging full and frank disclosure of medical history and symptoms by a patient to his doctor" (quoting Lewin v.

communications, worthy of judicial protection.[51] Academic writers, notably Dean Wigmore, have criticized the privilege, lamenting the loss of relevant evidence and expressing doubt that confidentiality is that important to the general public.[52] The public and their lawmakers, however, are of a decidedly different view. Not only has there been a clear lack of enthusiasm to repeal existing patient privileges,[53] but state and federal laws and regulations during the past two decades have resulted in "unprecedented" protection of the confidentiality of patient information.[54] Fear of social stigma associated with acquired immune deficiency syndrome ("AIDS"), abortion, drug abuse, child abuse, and other medical situations suggests that the principle that confidentiality is essential to candor is as valid as ever.[55]

Jackson, 108 Ariz 27, 31, 492 P.2d 406, 410 (1972))). *See also supra* note 9, and accompanying text.

Although this "utilitarian" rationale is dominant, an important secondary basis is protection of the patient's right of privacy. *Developments, supra* note 10, at 1544; Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61, 85-94 (1973).

51. "We believe the public has a widespread belief that information given to a physician in confidence will not be disclosed to third parties absent legal compulsion, and we further believe that the public has a right to have this expectation realized." *Duquette*, 161 Ariz. at 275, 778 P.2d at 640. *See also* Dillenbeck v. Hess, 73 N.Y.2d 278, 536 N.E. 2d 1126, 539 N.Y.S.2d 707 (1989) (despite criticism, the patient privilege is supported by strong public policy).

52. 8 J. WIGMORE, *supra* note 8, at § 2380a ("The injury to justice by the repression of the facts of corporal injury and disease is much greater than any injury which might be done by disclosure." In "actions for corporal injuries where the extent of the plaintiff's injury is at issue, . . . the medical testimony is absolutely needed for the purpose of learning the truth."). *See also*, Chafee, *Privileged Communications: Is Justice Served or Obstructed By Closing the Doctor's Mouth on the Witness Stand?*, 52 YALE L.J. 607 (1943).

It should be recognized, however, that "no solid empirical data exists to support the estimates of either critics or proponents as to either the costs or the benefits of privileges." *Developments, supra* note 10, at 1474. *Accord*, Turkington, *supra* note 12, at 351.

53. *See* Turner, *supra* note 6, at 77 ("not one state has repealed its physician-patient statute").

54. Turkington, *supra* note 12, at 263. One commentator finds that "protection of confidential medical information is a more important concern now than it has been in the past." Gellman, *Prescribing Privacy: The Uncertain Role of the Physician in the Protection of Patient Privacy,* 62 N.C.L. REV. 255, 257, 278 (1984) (citing the extensive governmental studies and hearings on the issue and the numerous and varied state laws governing patient information).

55. *See, e.g.*, The Presidential Commission on the Human Immunodeficiency Virus Epidemic, Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic, 126 (1988) ("Rigorous maintenance of confidentiality is considered critical to the success of the public health endeavor to prevent the transmission and spread of HIV infection."); Dunlap, *AIDS and Discrimination in the United States: Reflections on the Nature of Prejudice in a Virus*, 34 VILL. L. REV. 909 (1989) (rational and irrational fear of AIDS leads to discrimination against victims); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 766 (1986) ("A woman and her physi-

Because the primary objection to the patient privilege is the loss of *relevant* evidence, rather than the plaintiff's entire medical history,[56] the legislative response has been a very pragmatic one: lift the veil of secrecy to the limited extent necessary to provide the factfinder with the evidence necessary to resolve the issues in the lawsuit. Nearly every jurisdiction that confers a medical privilege also has adopted the "patient litigant" exception: the privilege does not extend, or is deemed to be waived, as to matters relating to a physical condition that the patient places in issue in litigation.[57] Hence, by filing a complaint seeking damages for personal injury (or death), plaintiff relinquishes, to a limited extent, the protection of the privilege.[58] The nature and scope of this waiver provides the key to the confidentiality controversy regarding *ex parte* contacts.[59]

For the courts that permit *ex parte* contacts, the fact of waiver generally ends the matter. Frequently cited is an early federal case, *Doe v. Eli Lilly & Company*,[60] in which the court held that the manufacturer of diethylstilbestrol ("DES") was entitled to conduct *ex parte* discussions with the physicians of plaintiffs allegedly injured by the drug. In the district judge's view, waiver removed any distinction between a treating physician and any other witness.[61] Other courts have followed this reasoning to conclude that the patient-litigant exception removes any bar against *ex parte* contacts with plaintiff's treating physician.[62] Because the rules of civil pro-

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cian will necessarily be more reluctant to choose an abortion if there exists a possibility that her decision and her identity will become known publicly."); Whalen v. Roe, 429 U.S. 589, 595 (1977) (state requirement to report prescriptions of certain narcotics led some patients to discontinue treatment or obtain prescriptions out-of-state to avoid being labeled "drug addicts"). On the human tendency to transfer fear of disease to those afflicted, see S. SONTAG, ILLNESS AS METAPHOR (1978).

56. 8 J. WIGMORE, *supra* note 8, at § 2380a.

57. *See Id.* at § 2389 (collecting statutes and decisional authority); Donaldson, Henson & Jordan, *Jurisdictional Survey of Tort Provisions of Washington's 1986 Tort Reform Act*, 22 GONZAGA L. REV. 47, 55 n.35 (1986/87) (collecting statutes); Annotation, *Commencing Action Involving Physical Condition of Plaintiff or Decedent As Waiving Physician-Patient Privilege As To Discovery Proceedings*, 21 A.L.R.3d 912 (1968).

58. "The situation in which a patient loses the privilege because she affirmatively places her physical or emotional condition at issue is technically a 'waiver' because the availability of the privilege depends on the actions of the patient." *Developments, supra* note 10, at 1537 n.39.

59. In those few jurisdiction in which a plaintiff does not automatically waive the privilege by filing suit, any unconsented discussion with plaintiff's physician is, of course, impermissible. *E.g.*, Jordan v. Sinai Hosp., 171 Mich. App. 328, 429 N.W.2d 891 (1988), *appeal denied*, 432 Mich. 912 (1989).

60. 99 F.R.D. 126 (D.D.C. 1983).

61. *Id.* at 128.

62. *E.g.*, Green v. Bloodsworth, 501 A.2d 1257, 1259 (Del. Super. Ct. 1985) ("Once the physician-patient privilege has been waived, the physician becomes available for inter-

cedure do not expressly forbid *ex parte* communications, this reasoning goes, the court is without authority to forbid them.[63] Silence, however, is ambiguous. Other courts hold with equal force that, because the rules do not authorize *ex parte* contacts, the practice is not acceptable.[64] Neither position is satisfactory, because both essentially shift to the legislature the task of resolving an issue that is clearly within the expertise of the judiciary.[65] Most courts, therefore, have addressed the issue as a judicial matter to be decided on public policy grounds.[66]

Courts in a growing number of jurisdictions have attacked the fairly obvious fundamental fallacy of *Doe* and its followers.[67] The patient-litigant exception does not deprive the patient of the protection of the privilege entirely. The waiver is limited to matters relating to the physical condition plaintiff has put in issue.[68] Also, the patient is everywhere the holder of the privilege, entitled to

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view just like any other witness."); Orr v. Sievert, 162 Ga. App. 677, 679-80, 292 S.E.2d 548, 550 (1982) ("Once a patient places his care and treatment at issue in a civil proceeding[], there no longer remains any restraint upon a doctor in the release of medical information concerning the patient within the parameters of the complaint."); Langdon v. Champion, 745 P.2d 1371 (Alaska 1987); Cates v. Wilson, 321 N.C. 1, 361 S.E.2d 734 (1987); Covington v. Sawyer, 9 Ohio App. 3d 40, 458 N.E.2d 465 (1983); Moses v. McWilliams, 379 Pa. Super. 150, 549 A.2d 950 (1988), *appeal denied*, 521 Pa. 631, 558 A.2d 532 (1989).

Courts have employed the same reasoning to permit *ex parte* contacts in states having no physician-patient privilege. *E.g.*, Romine v. Medicenters of America, 476 So. 2d 51 (Ala. 1985); Coralluzzo v. Fass, 450 So. 2d 858 (Fla. 1984).

63. *See, e.g.*, Trans-World Investments v. Drobny, 554 P.2d 1148 (Alaska 1976); Green v. Bloodsworth, 501 A.2d 1257 (Del. Super. Ct. 1985); Coralluzzo v. Fass, 450 So. 2d 858 (Fla. 1984).

64. *See, e.g.*, Weaver v. Mann, 90 F.R.D. 443 (D.N.D. 1981); Fields v. McNamara, 189 Colo. 284, 540 P.2d 327 (1975); Jaap v. District Court, 623 P.2d 1389 (Mont. 1981); Johnson v. District Court, 738 P.2d 151 (Okla. 1987); Wisconsin *ex rel.* Klieger v. Alby, 125 Wis. 2d 468, 373 N.W.2d 57 (1985). *Cf.* Alston v. Greater Southeast Comm. Hosp., 107 F.R.D. 35, 38 n.7 (D.D.C. 1985) (*ex parte* interviews "incongruous" with the thrust of Rule 35).

65. One court framed the issue somewhat differently: "The addition of a new discovery method, the court enforced waiver of privilege leading to ex parte informal interviews with physicians, should be accomplished by a change in the Rules of Civil Procedure, rather than by judicial fiat." Roosevelt Hotel Ltd. Partnership v. Sweeney, 394 N.W.2d 353, 356 (Iowa 1986).

66. Missouri *ex rel.* Woytus v. Ryan, 776 S.W.2d 389, 394 (Mo. 1989) ("the mere silence of the *Rules* is not determinative. A public policy assessment is required to resolve the question").

67. The continuing validity of Doe is questionable in light of Alston v. Greater Southeast Comm. Hosp., 107 F.R.D. 35 (D.D.C. 1985), which prohibited *ex parte* discussions.

68. 8 J. WIGMORE, *supra* note 8, at § 2389; *Developments*, *supra* note 10, at 1537; Turkington, *supra* note 12, at 308-09. *See* Loudon v. Mhyre, 110 Wash. 2d 675, 677, 756 P.2d 138, 140 (1988). Even courts that permit *ex parte* contacts recognize that the scope of the waiver of the patient privilege extends only to matters relevant to the condition

assert its protection as to those matters not within the limited waiver. *Ex parte* discussions deprive patients of this right.[69] In the absence of the plaintiff's counsel, there is a genuine risk that the physician will disclose privileged information.[70] The doctor, untrained in the law, is ill-equipped to determine whether specific information is within the scope of the waiver, and defense counsel not only does not know the contents of the doctor's answers, but has no reason to enforce the privilege on behalf of the patient.[71] Therefore, a ban against *ex parte* discussions is essential to preserve the limited scope of the inquiry and guard against disclosure of matters that remain privileged.[72] The presence of the plaintiff's counsel also serves to protect doctors against breach of ethics and possible tort liability for unauthorized disclosures.[73]

This reasoning, while a welcome reaffirmation of the rights of patients, does not resolve the *Karsten* problem. True, a plaintiff

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that plaintiff has placed in issue. *See, e.g.*, Langdon v. Champion, 745 P.2d 1371, 1373 (Alaska 1987), 745 P.2d at 1373.

69. *See* Wisconsin *ex rel.* Klieger v. Alby, 125 Wis. 2d 468, 474, 373 N.W.2d 57, 61 (1985) ("If the court orders private conferences outside the scope of discovery, the patient loses control of the privilege, a result the statutes clearly do not contemplate."); Jaap v. District Court, 623 P.2d 1389 (Mont. 1981); King & Hall, *supra* note 6, at 262.

70. *See Ryan*, 776 S.W.2d at 394 ("The first and most obvious danger is that the discussion may result in the disclosure of irrelevant, privileged medical information."); *Loudon*, 110 Wash. 2d at 678, 756 P.2d at 140 ("The danger of an *ex parte* interview is that it may result in disclosure of irrelevant, privileged medical information.").

71. *See* Roosevelt Hotel Ltd. Partnership v. Sweeney, 394 N.W.2d 353, 357 (Iowa 1986), ("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."); Duquette v. Superior Court, 161 Ariz. 269, 276, 778 P.2d 634, 641 (Ct. App. 1989) ("resolution of that dispute is left to the defense attorney and the physician witness. We believe that this scenario places both the defense attorney and the physician in an untenable position"); *see also* Nelson v. Lewis, 130 N.H. 106, 534 A.2d 720 (1987); Anker v. Brodnitz, 98 Misc. 2d 148, 413 N.Y.S.2d 582 (1979); *Loudon*, 110 Wash. 2d 675, 756 P.2d 138.

72. *See* Wenninger v. Muesing, 307 Minn. 405, 240 N.W.2d 333 (1976); Mutter v. Wood, 744 S.W.2d 600 (Tex. 1988); and authorities cited *supra*, notes 70 & 71.

73. *See Duquette*, 161 Ariz. at 276, 778 P.2d at 641 ("a physician who allows himself to be interviewed *ex parte* embarks, perhaps unknowingly, on a course which may involve a breach of professional ethics and potential liability"); *Wenninger*, 307 Minn. at 411, 240 N.W.2d at 337 ("The presence of the patient's attorney during the doctor's examination also helps protect the doctor from unwittingly and improperly disclosing medical information about his patient. We note without deciding that a physician who discloses confidential information about his patient to another in a private interview may be subject to tort liability for breach of his patient's right to privacy or to professional discipline for unprofessional conduct."); Alston v. Greater Southeast Comm. Hosp., 107 F.R.D. 35, 37 (D.D.C. 1985) (same); Annotation, *Physician's Tort Liability for Unauthorized Disclosure of Confidential Information About Patient*, 48 A.L.R.4th 668 (1986).

who learns of defense counsel's intent to meet with the plaintiff's doctor can block the interview based on the danger of violating the privilege.[74] But in the more common circumstance, the plaintiff learns of the *ex parte* discussions long after the fact, when the more immediate concern is infection of the plaintiff's fair trial. Even if counsel can show that privileged communications were divulged, a court is likely to conclude that, because the patient was afforded the opportunity to assert the privilege at trial, any improper disclosure did not affect the verdict.[75]

A rule based solely on protecting the privilege does not address the root of the *Karsten* problem, which is not the substance of the disclosures by the plaintiff's doctors but the very fact that clandestine meetings occurred and allowed defense counsel to recruit and prepare the doctors as witnesses against their own patient. Plaintiffs are in the ironic position of having a right to lock the door against invasion by defense lawyers but without a way of knowing that they are coming in and no remedy for the damage they do.

By grounding its prohibition against *ex parte* communications in the strong public policy of preserving both the confidential and fiduciary nature of the physician-patient relationship, *Petrillo* provided the *Karsten* court with a far more effective means of safeguarding the rights of the patient as plaintiff. This public policy, the *Petrillo* court discerned, is neither created nor limited by the statutory medical privilege. It "arises from the fact that society possesses an established and beneficial interest in the sanctity of the physician-patient relationship."[76] In the court's view, two separate indicia reflect that public policy: the ethical obligation of the medical profession to protect patient confidentiality, and the fiduciary

74. *See, e.g.*, Fields v. McNamara, 189 Colo. 284, 540 P.2d 327 (1975); *Roosevelt Hotel*, 394 N.W.2d 353; *Wenninger*, 307 Minn. at 405, 240 N.W.2d at 333; *Ryan*, 776 S.W.2d 389; Nelson v. Lewis, 130 N.H. 106, 534 A.2d 720 (1987); Smith v. Ashby, 106 N.M. 358, 743 P.2d 114 (1987); *cf. Duquette*, 161 Ariz. 269, 778 P.2d 634 (order precluding testimony of doctors vacated in view of previously unsettled state of the law).

75. *See* Yates v. El-Deiry, 160 Ill. App. 3d 198, 513 N.E.2d 519, 523 (3d Dist. 1987), *appeal denied*, 520 N.E.2d 394 (1988) (defense contended that "because the plaintiff was unable to show that improper conduct or actual prejudice to her resulted from the *ex parte* communications, she is not entitled to a new trial"); Covington v. Sawyer, 9 Ohio App. 3d 40, 458 N.E.2d 465 (1983) (plaintiff unable to show that improper discussions occurred or that they prejudiced the trial); Moses v. McWilliams, 379 Pa. Super. 150, 549 A.2d 950, 959 (1988), *appeal denied*, 521 Pa. 631, 558 A.2d 532 (1989) ("If disclosures are neither pertinent nor material, they will be inadmissible at trial."). Indeed, the court may prevent plaintiff from discovering what was discussed during the *ex parte* meeting. *See* Farage, *supra* note 1, at 13-15.

76. Petrillo v. Syntex Laboratories, 148 Ill. App. 3d 581, 587 499 N.E.2d 952, 957 (1st Dist. 1986), *appeal denied*, 505 N.E.2d 361, *cert. denied sub nom.* Tobin v. Petrillo, 483 U.S. 1007 (1987).

obligation of physicians to their patients recognized by law.[77]

The promulgated code of ethics that governs the medical profession, "and upon which the public relies to be faithfully executed so as to protect the confidential relationship between a patient and his physician,"[78] is composed of three prongs. First, the Hippocratic Oath, conceived in the fifth century B.C. and solemnly recited by every medical school graduate today, acknowledges the obligation to keep a patient's confidences in trust.[79] Secondly, the AMA's Principles of Medical Ethics dictate that the physician owes the patient an obligation of honesty as well as confidentiality.[80] Finally, the Current Opinions of the Judicial Council of the AMA emphasize that the consent of the patient is essential before any disclosure of information.[81] *Ex parte* discussions without the patient's consent destroy the confidential relationship between physician and patient.[82]

The legislature's adoption of the medical privilege and the patient-litigant exception reflects "both society's desire for privacy and its desire to see that the truth is reached in civil disputes."[83] This leads the court logically and inevitably to a crucial insight regarding the scope of the privilege:

> Of key importance is the legislature's determination that it be the patient who, by affirmative conduct, (the filing of a lawsuit) con-

77. *Id.*

78. *Id.*

79. "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." 1 HIPPOCRATES 164-65 (W. Jones trans. 1923). *See also* Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793, 801 (N.D. Ohio 1965) ("Almost every member of the public is aware of the promise of discretion contained in the Hippocratic Oath, and every patient has a right to rely upon this warranty of silence.").

80. Principle II provides: "A physician shall deal honestly with patients and colleagues . . . ." Principle IV states: "A physician shall respect the rights of patients, of colleagues, and of other health professionals, and shall safeguard patient confidences within the constraints of the law." American Medical Association, Principles of Medical Ethics (1977). For a historical view of the development of the AMA code of ethics, see Gellman, *supra* note 54, at 267-71.

81. "The information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree. . . . The physician should not reveal confidential communications or information without the express consent of the patient, unless required to do so by law." Judicial Council, American Medical Association, Current Opinions of the Judicial Council of the American Medical Association § 5.05 (1984). "The patient's history, diagnosis, treatment, and prognosis may be discussed with the patient's lawyer with the consent of the patient. . . ." *Id.* § 5.06.

82. *Petrillo*, 148 Ill. App. 3d at 591, 499 N.E.2d at 959.

83. *Id.* at 603, 499 N.E.2d at 967.

> sents to the disclosure of his previously confidential medical information. Thus, members of the public who file suit regarding a specific condition realize that upon doing so, the *information regarding that condition* will be lawfully disclosed not only to their adversary, but to the public forum as well.[84]

This insight cuts through the *Karsten* problem. The legislature did not intend the waiver "to apply to anything more than the *information* necessary to ascertain the truth."[85] The plaintiff waives confidentiality only as to the information itself, not as to the means the defendant may employ to obtain it. Because all relevant information can be obtained in formal discovery, the purpose of the waiver is thereby satisfied. There is no societal interest to be served by permitting the further loss of confidentiality represented by *ex parte* communications.[86] Therefore, it follows that:

> The patient's implicit consent . . . is obviously and necessarily limited; he consents only to the release of his medical information (relative to the lawsuit) *pursuant to the methods of discovery authorized by Supreme Court Rule 201(a)* (87 Ill.2d R. 201(A)). A patient certainly does not, by simply filing suit, consent to his physician discussing that patient's medical confidences with third parties outside court authorized discovery methods, nor does he consent to his physician discussing the patient's confidences in an *ex parte* conference with the patient's legal adversary.[87]

A measure of the soundness of this insight is found in its adoption in subsequent decisions.[88]

B. Fiduciary Nature of the Physician-Patient Relationship

The second indicia of the public policy prohibiting *ex parte* conferences, in the *Petrillo* analysis, is the well-settled fiduciary relationship between physician and patient. The special trust that a patient places in a physician gives rise to a legal duty of good

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84. *Id.* (emphasis in original).

85. *Id.* (emphasis added).

86. *Id.*

87. *Id.* at 591, 499 N.E.2d at 959 (emphasis in original).

88. *See, e.g.*, Manion v. N.P.W. Med. Ctr., 676 F. Supp. 585, 593 (M.D. Pa. 1987) (prohibition against *ex parte* contacts "affects defense counsel's methods, not the substance of what is discoverable"); Duquette v. Superior Court, 161 Ariz. 269, 272, 778 P.2d 634, 637 (Ct. App. 1980) ("even where the physician-patient privilege has been impliedly waived, the holder of the privilege waives *only* his right to object to discovery of pertinent medical information which is sought through the formal methods of discovery authorized by the applicable Rules of Civil Procedure") (emphasis in original); Roosevelt Hotel Ltd. Partnership v. Sweeney, 394 N.W.2d 353, 356 (Iowa 1986) (filing suit "only waives the application of the privilege, which is confined . . . to a testimonial setting, and does not speak to ex parte communications in a nontestimonial setting").

faith.[89]

> There is an implied promise, arising when the physician begins treating the patient, that the physician will refrain from engaging in conduct that is inconsistent with the "good faith" required of a fiduciary. The patient should, we believe, be able to trust that the physician will act in the best interests of the patient thereby protecting the sanctity of the physician-patient relationship.[90]

The court concluded that *ex parte* conferences violate the duty of a fiduciary. The patient:

> should have the right to expect that his physician will provide the medical information sought by the patient's adversary *pursuant only to court authorized methods of discovery*.[91]

Of great potential significance to plaintiffs facing the *Karsten* problem is the court's interpretation of the fiduciary duty of physicians as extending beyond the obligation to act in the best *medical* interests of the patient to include the duty, at minimum, to avoid conduct that is adverse to the patient's *legal* interests.[92] The court's citations to *Miles v. Farrell* and *Alexander v. Knight* are instructive. The court in *Alexander* stated:

> Physicians owe their patients more than just medical care for which payment is exacted; there is a duty of total care; that includes and comprehends a duty to aid the patient in litigation, to render reports when necessary and to attend court when needed. That further includes a duty to refuse affirmative assistance to the patient's antagonist in litigation.[93]

Miles is a case of considerable interest in its own right as a precursor of *Karsten*. In *Miles*, the plaintiff's doctor continued to treat the plaintiff after agreeing to testify as an expert witness for the defense in the patient's malpractice action. The district court granted the plaintiff's motion to bar the doctor from testifying at

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89. "The relationship between physician and patient is 'a fiduciary one of the highest degree . . . involv[ing] every element of trust, confidence and good faith.' " Loudon v. Mhyre 110 Wash.2d 675, 679, 756 P.2d 138, 141 (1988) (quoting Lockett v. Goodill, 71 Wash. 2d 654, 656, 430 P.2d 589 (1967)). *See also* Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793, 802 (N.D. Ohio 1965) ("all reported cases dealing with this point hold that the relationship of physician and patient is a fiduciary one," citing cases); *Duquette*, 161 Ariz. 269, 778 P.2d 634; Missouri *ex. rel.* Woytus v. Ryan, 776 S.W.2d 389, 393 (Mo. 1989) (" 'A physician occupies a position of trust and confidence as regards his patient — a fiduciary position. It is his duty to act with the utmost good faith' ") (quoting Moore v. Webb, 345 S.W.2d 239, 243 (Mo. App. 1961)).

90. *Petrillo*, 148 Ill. App. 3d at 595, 499 N.E.2d at 961.

91. *Id.* (emphasis in original)(citing Miles v. Farrell, 549 F. Supp. 82 (N.D. Ill. 1982); Alexander v. Knight, 197 Pa. Super. 79, 177 A.2d 142 (1962)).

92. *Id.*

93. Alexander v. Knight, 197 Pa. Super. 79, 177 A.2d 142, 146 (1962).

trial. It is likely, the district court indicated, "that a physician owes a duty of loyalty to his patient which would prevent him from testifying as an expert against his patient."[94] The *Petrillo* court's reference to *Alexander* and *Miles* is a clear indication that, in the court's view, the fiduciary duty owed a patient may include a duty to refrain from testifying as an expert for the patient's legal adversary.

Assessing the impact of *ex parte* interviews on the fiduciary nature of the physician-patient relationship is far more useful, both conceptually and pragmatically, than focusing solely on confidential communications.[95] Thus, even in states that do not recognize a medical privilege, courts have banned *ex parte* contacts as violative of the fiduciary physician-patient relationship.[96] Following *Petrillo*, courts increasingly have looked beyond the confines of the evidentiary patient privilege to recognize that this practice violates both the confidential and fiduciary aspects of the physician's duty to the patient.[97]

For plaintiffs seeking just compensation for injury, the immediate concern is the impact of the doctor's breach of trust on the jury. By asserting the privilege at trial to exclude improper testimony, capable trial counsel can minimize the impact that disclosure of privileged matters has on the jury. *Karsten* demonstrates, however, that a physician whose loyalty is no longer undividedly with the patient can wreak havoc on the fairness of the plaintiff's

94. Miles v. Farrell, 549 F. Supp. 82, 84 (N.D. Ill. 1982). *See also* Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793, 799 (N.D. Ohio 1965) ("It cannot be questioned that part of a doctor's duty of total care requires him to offer his medical testimony on behalf of his patient if the patient becomes involved in litigation over the injury or illness which the doctor treated. Thus, during the course of such litigation, in addition to the duty of secrecy, there arises the duty of undivided loyalty.").

95. One district judge noted the changed direction of the law subsequent to *Petrillo*. The prohibition against *ex parte* contacts is "an emerging court-created effort to preserve the treating physician's fiduciary responsibilities during the litigation process," and "completely separate and distinct from the statutory physician-patient privilege . . . ." Manion v. N.P.W. Med. Ctr., 676 F. Supp. 585, 593 (M.D. Pa. 1987).

96. *E.g.*, Smith v. Ashby, 106 N.M. 358, 743 P.2d 114 (1987).

97. *See, e.g.*, Duquette v. Superior Court, 161 Ariz. 269, 275, 778 P.2d 634, 640 (Ct. App. 1980), 161 ("We believe that *ex parte* communications between defense attorneys and plaintiffs' treating physicians would be destructive of both the confidential and fiduciary natures of the physician-patient relationship."); Missouri *ex rel.* Woytus v. Ryan, 776 S.W.2d 389, 393 (Mo. 1989) ("Although the patient is deemed to have waived the statutory privilege with regard to certain information, the ongoing confidential and fiduciary relationship between physician and patient continues to require protection from conduct that might jeopardize the sanctity of that relationship."); Jordan v. Sinai Hosp., 171 Mich. App. 328, 429 N.W.2d 891 (1988), *appeal denied*, 432 Mich. 912 (1989); Smith v. Ashby, 106 N.M. 358, 743 P.2d 114 (1987); Loudon v. Mhyre, 110 Wash. 2d 675, 756 P.2d 138 (1988).

trial without disclosing a single confidence. Jurors are inclined to credit the physician with the fiduciary good faith they observe in their own doctors. In reality, the physician may well have divided loyalties.

Meetings shrouded in secrecy provide fertile ground for all manner of mischief. The plaintiff's obvious fear is that defense counsel will influence the physician's testimony. It is no slur on the medical profession to state that doctors are particularly vulnerable to defense counsel's influence. A sad consequence of the heated "insurance crisis" controversy is that, when it comes to litigation, a doctor may be persuaded for reasons of professional and economic self-interest to assist the defense. As one court notes:

> This court will not overlook the current concerns in the medical malpractice insurance industry and the attitudes of physicians and carriers alike. 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. The potential for impropriety grows even larger when defense counsel represents the treating physician's own insurance carrier. . . .[98]

This danger is particularly acute in the area of medical malpractice, where, in many states, a majority of physicians are insured by the same carrier.

> We also note that in Arizona, a substantial number of physicians are insured by a single "doctor-owned" insurer . . . the physician witness may feel compelled to participate in the *ex parte* interview because the insurer defending the medical malpractice defendant may also insure the physician witness.[99]

One plaintiff's attorney described the scenario more graphically:

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98. *Ryan*, 776 S.W.2d at 395 (quoting *Manion*, 676 F. Supp. at 594-95). In *Manion*, defense counsel had represented two of plaintiff's treating physicians in prior malpractice cases; following the *ex parte* meetings both became witnesses for the defense and refused further contact with plaintiff. 676 F. Supp. at 587 nn.1-2. The tactic of turning the physician against the patient-plaintiff is not uncommon. *See, e.g.*, Brief of Amicus Curiae Arizona Trial Lawyers Assoc., at 28-30, *Duquette*, 161 Ariz. 269, 778 P.2d 634 (citing instances from trial courts).

99. *Duquette*, 161 Ariz. at 276, 778 P.2d at 641; *see also* Anker v. Brodnitz, 98 Misc. 2d 148, 153, 413 N.Y.S.2d 582, 585 (1979) ("Moreover, a doctor who is himself insured by the same carrier that insurers a defendant may wrongfully 'feel compelled to make improper disclosures to the carrier. Compliance with formal discovery procedures would insulate a physician against such improper pressures."); 1 D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE ¶ 8.02 (1984 Supp.) (*ex parte* conferences invite questionable conduct and improper influences on physician who is often insured by same carrier and knows defense attorney); Ward, *Pre-Trial Waiver of the Physician/Patient Privilege*, 22

> Indeed, we have heard on more than one occasion of investigators approaching a plaintiff's physician as follows: "Doctor, I'm calling you on behalf of the Medical Malpractice Defense Insurance Company. Our records show that you are insured with us, just as Dr. X, who is being sued by your patient, John Doe. Doctor X is in the same specialty as yourself, a member of your professional risk pool. We do not believe that Doctor X did anything wrong. Perhaps you would be so kind as to tell us what you know of patient John Doe and of Dr. X's treatment, so that we can effectively mount a defense for Dr. X, thereby helping us keep malpractice premiums down." The not-so-subtle point that it is in the physician's financial interest to help his insurer defeat his patient's claim is not lost of the physician.[100]

This conflict of interest was a source of prejudice in *Karsten*. The court observed that:

> Dr. Menet wore two hats and those two persons were diametrically opposed to each other. He was an attending physician of Joan Karsten, a confidant and fiduciary of a disabled and brain damaged woman, cloaked with the credibility that position endows. This capacity, however, he chose to ignore, or at best, subvert to his position as an employee, an officer and a shareholder in the defendant corporation of which the defendant physicians were fellow shareholders and officers.[101]

At the very least, some courts have noted, the physician may become reluctant to testify on behalf of the plaintiff.[102] It is no answer that ethical rules deal with abuses, occurring as they do in secret.[103] Providing the occasion for a breach of confidence and fiduciary duty should itself be condemned. Sunlight, it has been

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GONZAGA L. REV. 59, 64 (1986/87) (defense counsel may have prior professional relationships with plaintiff's physician).

100. Bower, *supra*, note 6, at 32. Defense counsel apparently view the *ex parte* conference as a legitimate opportunity to persuade the doctor to testify against the patient. "The primary practical effect of a rule prohibiting *ex parte* conferences between defense counsel and a plaintiff's treating physicians is to prevent a defendant from utilizing the treating physician as an expert witness." Brief for Contemnor, at 24, Petrillo v. Syntex Labs., 148 Ill. App. 3d 581, 499 N.E.2d 952 (1st Dist. 1986).

101. Brief for Joan Karsten, *supra* note 28, at 69-70.

102. Alston v. Greater Southeast Comm. Hosp., 107 F.R.D. 35, 37 (D.D.C. 1985); Weaver v. Mann, 90 F.R.D. 443, 445 (D.N.D. 1981).

103. Loudon v. Mhyre, 110 Wash. 2d 675, 679, 756 P.2d 138, 140-41, (1988) (protective orders would also burden the courts with supervising every *ex parte* interview for compliance). As one plaintiff's lawyer argues: "But how can plaintiff's attorney get a protective order before he knows that an ex parte meeting is even contemplated, or, indeed, has been held. Obtaining a protective order after the ex parte interview is over is hardly protective. It is locking the barn after the horse has been stolen." Farage, *supra* note 1, at 7.

observed, is a powerful disinfectant.[104] The plaintiff's attorney should be present both to detect and deter improper influence.

IV. Public Policy Arguments in Favor of *Ex Parte* Contacts

Proponents of *ex parte* interviews themselves raise public policy considerations. The various arguments fall almost invariably into three categories: greater access to the truth, more cost-efficient discovery, and protection of defense counsel's work product. Some proponents also argue that it is simply unfair to deprive the defense of the same access to the plaintiff's physician that the plaintiff's counsel enjoys. These assertions are, at best, dubious.

The access-to-truth rationale was articulated ably by the defense attorney in *Petrillo*:

> The treating physician is often the person most capable of refuting a plaintiff's unfounded claims. If the treating physician's information and opinions are not equally available to both sides, the total flow of probative information is decreased, and consequently early evaluation and settlement of cases is made much less likely, and the burden on already crowded court dockets will be increased.[105]

A number of courts have accepted this assertion.[106] Yet, the argument founders on a single indisputable fact: *ex parte* interviews cannot provide defense counsel with any legitimate information

104. Wilk v. American Med. Ass'n, 635 F.2d 1295, 1299 (7th Cir. 1981). *See also* Duquette v. Superior Court, 161 Ariz. 269, 274, 778 P.2d 634, 639 (Ct. App. 1980), ("Although it is true that any discovery device is subject to abuse, realistically, we believe that the presence of the plaintiff's attorney at an interview between plaintiff's treating physicians and defense attorneys will substantially reduce the potential for abuse.").

105. Brief for Contemnor at 21, *Petrillo*, 148 Ill. App. 3d 581, 499 N.E.2d 952. Implicit in this argument, of course, is the premise that plaintiffs are so likely to lie that extraordinary countermeasures are warranted. One of the *Karsten* defendants is even more blunt: "It is common knowledge that plaintiffs in personal injury actions often do not tell the truth in making their claims." Brief for Defendant-Appellee Asselmeier at 39, *Karsten*, 157 Ill. App. 3d 1, 509 N.E.2d 1376.

106. *See*, Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128 (D.D.C. 1983) ("no party to litigation has anything resembling a proprietary right to any witness's evidence"); Trans-World Investments v. Drobny, 554 P.2d 1148, 1152 (Alaska 1976) ("informal methods are to be encouraged, for they facilitate early evaluation and settlement of cases, with a resulting decrease in litigation costs, and represent further the wise application of judicial resources"); Green v. Bloodsworth, 501 A.2d 1257, 1258-59 (Del. Super. Ct. 1985) ("encourage the production of evidence"); Moses v. McWilliams, 379 Pa. Super. 150, 549 A.2d 950, 958-59 (1988), *appeal denied* 521 Pa. 631, 558 A.2d 532 (1989) ("Meritless medical malpractice claims can be disposed of at the earliest possible stage of litigation by allowing free access to material and relevant facts once a claimant has filed suit."). *See also*, Hayes & Monahan, *supra* note 6, at 11.

that counsel could not obtain by other means. The *Petrillo* court answers the defense argument this way:

> It is not the *ex parte* conference *in and of itself* that leads to the early settlement of a case. Rather, it is the *information* that is obtained during that *ex parte* conference that leads to a case's settlement. . . . [Formal discovery] will provide defense counsel with the same information that they would obtain in an *ex parte* conference (and thus facilitate the early evaluation and settlement of cases) without jeopardizing that physician's fiduciary obligation to his patient.[107]

The *Karsten* court emphasized this point:

> We note that in *Petrillo*, defense counsel could not identify a single piece of information or evidence that he would be able to obtain through a witness interview that he could not obtain through conventional methods of discovery. Similarly, in the instant case, defendants obtained nothing through their interview of Joan's treating physicians they could not have obtained through regular discovery methods. The fact that a party may obtain the same information through formal discovery as can be obtained informally *supports* the use of discovery *when it is necessary to protect a privileged communication*, such as between a physician and patient.[108]

Indeed, there is no reported case in which defense counsel could point to information that could not have been obtained in formal discovery.[109] Some have argued that *ex parte* interviews are preferable because the physician is likely to be more candid and spontaneous in his or her remarks.[110] Spontaneity is not often a characteristic that is highly prized in one's physician. More to the point, it is precisely this danger, that the physician will inadvertently disclose privileged information, that requires the presence of plaintiff's counsel.[111] Thus, the contention that *ex parte* contacts

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107. *Petrillo*, 148 Ill. App. 3d at 601, 499 N.E.2d at 965-66 (emphasis in original). *See also*, Missouri *ex rel.* Woytus v. Ryan, 776 S.W.2d 389, 394 (Mo. 1989) ("As for early evaluation and settlement of a case, it is the information obtained, rather than the *ex parte* discussion itself, that leads to resolution.").

108. *Karsten*, 157 Ill. App. 3d at 14, 509 N.E.2d at 1384 (emphasis in original).

109. *See, e.g.*, Jordan v. Sinai Hosp., 171 Mich. App. 328, 344, 429 N.W.2d 891, 899 (1988), *appeal denied*, 432 Mich. 912 (1989) ("The fact that defense attorneys are able to obtain all relevant evidence via the discovery rules shows that there is no need for ex parte interviews."); Nelson v. Lewis, 130 N.H. 106, 111, 534 A.2d 720, 723 (1987) ("The defendant has given us no reason to believe that he cannot obtain all necessary information through the formal discovery methods for which our procedural rules provide."); Smith v. Ashby, 106 N.M. 358, 743 P.2d 114 (1987) (similar).

110. *Ex parte* discussion "is conducive to spontaneity and candor in a way depositions can never be . . . ." *Doe*, 99 F.R.D. at 128.

111. *Karsten*, 157 Ill. App. 3d at 14, 509 N.E.2d at 1384.

provide greater access to truth, with all the concomitant benefits of detection of fraud, early settlements, and trimming court dockets, is specious.

The argument that *ex parte* conferences are more cost-efficient stands on no firmer ground. Proponents argue that the practice is far less expensive and time consuming than formal discovery methods.[112] Not all defense attorneys enjoy a reputation of frugality with client expenses, but there is some merit to these concerns, particularly where the case involves several physicians in distant locations. Fortunately, depositions are not the sole alternative to *ex parte* interviews. As several courts have pointed out, interrogatories and depositions upon written questions are less expensive substitutes.[113] Frequently, plaintiffs may consent to defense counsel's informal interview of the physician provided that plaintiff's attorney is present.[114] Moreover, as another court states, *ex parte* discussions do not necessarily conserve judicial resources.[115]

Indeed, it may be anticipated that widespread use of *ex parte*

112. *See, e.g., Doe*, 99 F.R.D. at 128 ("it is less costly and less likely to entail logistical or scheduling problems"); Green v. Bloodsworth, 501 A.2d 1257, 1258 (Del. Super. Ct. 1985) (similar); Lazorick v. Brown, 195 N.J. Super. 444, 455, 480 A.2d 223, 229 (1984) ("It is not only costly to all parties to litigation but it may be impractical and inefficient to produce all treating doctors for depositions without knowing in advance whether their testimony will be useful or helpful in resolving disputed issues."); Moses v. McWilliams, 379 Pa. Super. 150, 549 A.2d 950, 959 (1988), *appeal denied*, 521 Pa. 631, 558 A.2d 532 (1989) ("a cost-efficient method of eliminating non-essential witnesses in a case where a plaintiff might have a number of treating physicians").

113. *See* Missouri *ex rel.* Woytus v. Ryan, 776 S.W.2d 389, 394 (Mo. 1989) ("The information obtained by *ex parte* discussion can be obtained through the discovery devices specifically enumerated in the *Rules*, for example, production of documents or depositions upon oral examination or written question. Moreover, there is nothing to prevent plaintiff's counsel from agreeing to an informal interview with both counsel present."); *see also* Alston v. Greater Southeast Comm. Hosp., 107 F.R.D. 35, 37 n.3 (D.D.C. 1985) ("any meaningful information could also be ascertained preliminarily by a few questions using the procedure of deposition upon written questions pursuant to Rule 31"); Loudon v. Mhyre, 110 Wash. 2d 675, 756 P.2d 138 (1988), (similar); Smith v. Ashby, 106 N.M. 358, 743 P.2d 114 (1987) (suggesting written interrogatories).

114. *See, e.g.*, Jaap v. District Court, 623 P.2d 1389 (Mont. 1981); *Smith*, 106 N.M. 358, 743 P.2d 114.

115. In *Ryan*, the court stated:

> It is not clear that *ex parte* discussion ultimately results in the conservation of resources. The defendant must expend time and effort to prepare the authorization and move for the court order compelling execution. The defendant will spend further time and effort to secure and review the plaintiff's medical records so that the defendant has an intelligent basis upon which to have an *ex parte* discussion with the physician. Simultaneously, the plaintiff must respond to the motions and orders and brief the physician on the limits of permissible disclosure. The physician, in turn, must cull the patient's records, confer with the patient's attorney, and then confer with the defendant's attorney. It is likely that the physician will later be questioned by the plaintiff's attorney about the

interviews may lead to more litigation, rather than less. The physician risks violating professional ethics and incurring tort liability for unauthorized disclosure.[116] The defendant's insurer may also face liability for inducing a breach of confidentiality.[117] There is a genuine potential for "satellite" lawsuits that would not otherwise arise.[118] *Ex parte* contacts also foster greater use of protective orders,[119] and gives plaintiffs an incentive to engage in a "preemptive first strike" by deposing treating physicians as early as possible to guard against later inconsistent testimony.[120]

Even if it could be demonstrated that the interviews would save some time and money for defendants, it is hardly self-evident that these interests outweigh the societal interests in protecting the confidential and fiduciary nature of the physician-patient relationship.[121]

Further, it is argued that the right to interview without the pres-

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discussion. Notwithstanding this time and effort, defendant still may deem it prudent to depose the physician.

776 S.W.2d at 394.

116. Horne v. Patton, 291 Ala. 701, 287 So. 2d 824 (1973). *See generally* Note, *Breach of Confidence: An Emerging Tort,* 82 COLUM. L. REV. 1426 (1982); Annotation, *supra* note 13, at 1109.

117. *See* Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793, on reconsideration of 237 F. Supp. 96 (N.D. Ohio 1965); Anker v. Brodnitz, 98 Misc. 2d 148, 413 N.Y.S.2d 582 (1979).

118. *See* Manion v. N.P.W. Med. Ctr., 676 F. Supp. 585, 596 n.10 (M.D. Pa. 1987) (expressing concern whether reliance on separate tort actions to safeguard confidentiality "adequately protects the plaintiff/patient and his treating physician and whether it encourages unnecessary litigation"); *Anker,* 98 Misc. 2d at 153, 413 N.Y.S.2d at 585 ("A rule against the private interviews obtained in the case at bar will reduce unnecessary lawsuits for wrongful disclosure against doctors and insurers.")

119. *Loudon,* 110 Wash. 2d at 679, 756 P.2d at 141 (resort to protective orders would be routine in every *ex parte* situation).

120. Bower, *supra* note 6, at 36 (" 'preemptive first strike' of interviewing or deposing plaintiff's physicians at the initiation of suit "so that neither side is caught by surprise by the doctors' position at trial"). *Ex parte* interviews also present the potential problem that defense counsel will be placed in the position of witness. *See* Alston v. Greater Southeast Comm. Hosp., 107 F.R.D. 35, 38 (D.D.C. 1985) ("*ex parte* interviews could put a lawyer in the potential role of being a witness as to a damaging admission by a doctor or as an impeachment witness, should a doctor give testimony different significantly from what he told the lawyer in the informal interview"); Nelson v. Lewis, 130 N.H. 106, 534 A.2d 720 (1987) (same); *Loudon,* 110 Wash. 2d 675, 756 P.2d 138 (same).

121. Duquette v. Superior Court, 161 Ariz. 269, 274, 778 P.2d at 639 (Ct. App. 1980) ("we do not believe that such practical concerns as cost efficiency and ease of scheduling are of paramount concern to a proper resolution of the issue"); Missouri *ex rel.* Woytus v. Ryan, 776 S.W.2d at 389, 395 (Mo. 1989); *Nelson,* 130 N.H. at 111, 534 A.2d at 723 (While *ex parte* interviews may be less expensive and time-consuming, "these interests are insignificant when compared with the patient-plaintiff's interest in maintaining the confidentiality of personal and possibly embarrassing information, irrelevant to the determination of the case being tried.").

ence of opposing counsel is necessary to protect the work product of defense counsel.[122] Plaintiff's attorney, it is claimed, might be able to deduce defense theories and strategies from the questions put to the treating physician.[123] This is an extraordinarily broad definition of work product, which is generally held to protect the attorney's notes and memoranda reflecting the mental impressions or theories the attorney has formed.[124] The implication that the court should go to such lengths to enable the defense to conduct trial by ambush is "out of step with modern discovery."[125] Additionally, the argument proves far too much. If counsel's *questions* are protected work product, all deposition practice — as well as interrogatories, requests for admissions, and most other forms of discovery under the rules — would be suspect.

Finally, some proponents argue, it is unfair to prohibit defense counsel from *ex parte* contacts with the plaintiff's physician while permitting unlimited access of the plaintiff's attorney.[126] The notion that there should be a mutuality of access overlooks the fact that the physician is not a neutral witness. He or she owes a preexisting duty of confidentiality to the patient-plaintiff. Meetings with plaintiff's counsel jeopardize no duty to the defendant. It is only the rights of plaintiffs that are at risk.

V. Scope and Enforcement of the Rule Against *Ex Parte* Contacts

A. Scope of the Ban: How Big an Umbrella

The Petrillo court based the rule against *ex parte* contacts on the public policy interests in preserving the sanctity of the physician-patient relationship, without any indication that this policy might vary with the particular connection between the physician and the litigation.[127] Nevertheless, one defense attorney has suggested in a

122. *See* McVisk, *supra* note 6, at 828; Hayes & Monahan, *supra* note 6, at 10.

123. *Id. See also* Doe v. Eli Lilly & Co., 90 F.R.D. 126, 128-29 (D.D.C. 1983); Missouri *ex rel.* Stufflebam v. Appelquist, 694 S.W.2d 882, 888 (Mo. Ct. App. 1985).

124. Hickman v. Taylor, 329 U.S. 495 (1947).

125. *See* Roosevelt Hotel Ltd. Partnership v. Sweeney, 394 N.W.2d at 353, 358 (Iowa 1986) ("Arguments based on invasion of attorney work product and trial strategy are unpersuasive and somewhat out of tune with our modern discovery process."); *Loudon*, 110 Wash. 2d 675, 756 P.2d 138 (similar).

126. *See Doe*, 99 F.R.D. at 128-29. This argument was forcefully made by defendant in *Karsten*. Brief for McCray at 58, *Karsten*, 157 Ill. App. 3d 1, 509 N.E.2d 1376.

127. Given the growing importance of members of the allied health professions in the health care delivery system, it might well be argued that society has a beneficial interest in preserving the confidentiality of communications to, for example, nurses. See Turkington, *supra* note 12, at 309-10 (advocating protection of confidential communications to

recent article the situations to which the prohibition should not apply:

> [F]irst, when the physician to be interviewed is a party to the litigation or might become a party to a suit; second, when the physician is employed by a party or potential party; and third, when the physician was involved in the events out of which the suit arose.[128]

The opinions in *Petrillo* and *Karsten* give no support for these exceptions.[129] Moreover, none of the reasons offered in their support is consistent with the public policy basis for the ban on *ex parte* contacts.

That the defendant in a medical malpractice case is entitled to confer with counsel without the presence of plaintiff's attorney is beyond argument, though for reasons that have little to do with *Petrillo*. The plaintiff's waiver of the patient privilege is not the litigant exception, but rather it is the separate statutory waiver applicable to filing an action against one's physician.[130] The purpose of the waiver is to enable the defendant to prepare the case and to protect the attorney-client relationship. The scope of implied consent is coextensive with these broad purposes.

This same reasoning, however, militates against an exception for a doctor "who fears that legal action might be undertaken against him for an incident which occurred during the course of treatment."[131] The primary rationale for the exception, that the doctor who must wait until suit is filed may be unable to remember important details,[132] is rather weak. Doctors record important matters

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nonphysician health professionals). *See also* Hadley, *Nurses and Prescriptive Authority: A Legal and Economic Analysis,* 15 AM. J. OF LAW & MED. 245 (1989).

Petrillo, however, relies heavily on "the physician's unique role in society." Petrillo v. Syntex Labs., 148 Ill. App. 3d 581, 593, 499 N.E.2d 952, 960 (1st Dist. 1986), *appeal denied,* 505 N.E.2d 361, *cert. denied sub nom.* Tobin v. Petrillo, 483 U.S. 1007 (1987). *Cf.* Tomasovic v. American Honda Motor Co., 171 Ill. App. 3d 979, 525 N.E.2d 1111, *appeal denied,* 122 Ill. 2d 595, 530 N.E.2d 266 (1988) (*Petrillo* rule not applicable to emergency room intern who took plaintiff's history following accident). Extension of the ban on *ex parte* contacts in nonphysician settings would entail an independent analysis beyond the scope of this Article.

128. McVisk, *supra* note 6, at 830.

129. Indeed, in Karsten, plaintiff's physician, Dr. Menet, was an employee of defendant and involved in the event giving rise to the lawsuit.

130. ILL. REV. STAT. ch. 110, para. 8-802(2)(1987) provides that the privilege does not apply in malpractice cases against the physician. The patient-litigant exception is set forth in paragraph 8-802(4). On the distinction between the two exceptions, see Turkington, *supra* note 12, at 308-09; *cf. Developments, supra* note 10, at 1537 (situations analogous, since plaintiff places physical condition at issue in each).

131. McVisk, *supra* note 6, at 831.

132. *Id.*

to prevent just such a loss. More importantly, until suit is filed, there is no patient consent to disclosure. Consent, the *Petrillo* court emphasized, is an essential element of the medical profession's ethical code upon which the public relies.[133] The limitation on the medical privilege, under either the malpractice exception or the patient-litigant exception, rests on the patient's implied consent by virtue of the affirmative act of filing a lawsuit.[134] Regardless of how strong or well-founded the physician's fear of an impending lawsuit may be,[135] the decision to relinquish the protection of the patient privilege is not the physician's.[136]

The second proposed limitation, an "employees-of-defendant" exception, presents a far greater threat to the rights of injury victims. The typical application would arise in suits against institutional defendants, such as hospitals or clinics, when the treating physician is not a defendant.[137] The author, in proposing this limitation, asserts that a plaintiff in that circumstance has no legitimate expectation that his or her physician will preserve the fiduciary relationship to the patient. Mr. McVisk states that "[i]n seeking or accepting treatment from a physician employed by a hospital, the patient can be expected to recognize that the physician has a fiduciary relationship with his employer and that the employer has the right to control its employee's work."[138] This dubious proposition[139] misconstrues the essential premise of *Petrillo*. It is not the

133. *Petrillo*, 148 Ill. App. 3d at 589, 499 N.E.2d at 957-58.

134. *Id.* ("Of key importance is the legislature's determination that it be the patient who, by affirmative conduct (the filing of a lawsuit) consents to the disclosure of his previously confidential information."). *See also supra* note 58.

135. "In the climate of paranoia which prevails today, many physicians picture the malpractice suit as a 'boogeyman' lurking under every bed and behind every door. Therefore the disclosure of a patient's confidential records to a doctor's medical insurer should not be permitted solely because the doctor believes that the patient might commence a malpractice suit." Rea v. Pardo, 133 Misc. 2d 516, 518, 507 N.Y.S.2d 361, 362, *rev'd*, 132 A.D.2d 442, 522 N.Y.S.2d 393 (1986).

136. The impact of *ex parte* contacts on plaintiff's fair trial rights in this circumstance, however, generally will be minimal. If plaintiff ultimately files suit against the doctor, the anticipatory discussions are unlikely to have seriously prejudiced plaintiff. If no suit is filed, the attorney's ethical duties prohibit further disclosure. *See* McVisk, *supra* note 6, at 831. If, however, plaintiff brings an action against another physician involved in the same course of treatment who, as frequently happens, is represented by the same attorney, that attorney may have the improper advantage of confidential information concerning the patient.

137. In *Karsten*, Dr. Menet was an employee and shareholder in the defendant clinic. *See also* Jordan v. Sinai Hosp., 171 Mich. App. 328, 429 N.W.2d 891 (1988) (plaintiff's treating physicians were staff doctors at defendant hospital), *appeal denied*, 432 Mich. 912 (1989).

138. McVisk, *supra* note 6, at 835.

139. Most employees would be astonished to learn that they owe their employer the

public's expectation of confidentiality that gives rise to the public policy interest, but rather the medical profession's own code of ethics that "affirmatively advertise[s] to the public that a patient can properly expect his physician to protect those medical confidences which are disclosed during the physician-patient relationship."[140] The ethical obligations identified by the court are not conditioned on the nature of the physician's practice.

The court that decided *Petrillo* has declined to limit its application. In *Ritter v. Rush-Presbyterian-St. Luke's Medical Center*,[141] counsel for defendant hospital conducted *ex parte* conferences with plaintiff's physicians, who were staff doctors at the hospital. Appealing a judgment of contempt and exclusion of the physician's testimony at trial, the defense argued that the rule impeded patient care by halting the "dialogue" between a hospital and its medical staff. The court pointed out that the "dialogue" at issue was not communication among the medical staff for the purpose of providing care, but rather it was communication to the hospital's lawyers for purposes of defending a lawsuit.[142] The court also refused to elevate the interest in communications among hospital staff above the interest in protecting confidential communications between patients and their physicians, noting that "agency principles cannot abrogate the physician-patient privilege."[143]

The policy reasons advanced in favor of *ex parte* conferences carry even less weight when the physician is the defendant's employee. Any information that the physician may legitimately impart, as discussed above, can be obtained through authorized discovery.[144] The expense, investment of time, and scheduling difficulties attributed to deposing the plaintiff's doctor are far less onerous when the physician is the defendant's employee. On the other hand, the potential for improper influence is magnified. Not only is the physician's economic self-interest naturally aligned with that of the defendant-employer, but, as Mr. McVisk recognizes, the physician and the hospital usually will be covered by the same in-

high degree of loyalty and care demanded of a fiduciary. Neither does McVisk cite support for the notion that patients expect less of a hospital-employed physician than of a self-employed doctor.

140. *Petrillo*, 148 Ill. App. 3d at 588, 499 N.E.2d at 957.

141. 177 Ill. App. 3d 313, 532 N.E.2d 327 (1st Dist. 1988).

142. *Id.* at 317, 532 N.E.2d at 329.

143. *Id.* In dicta, the *Ritter* court indicated that where the hospital's liability was premised solely on vicarious liability for the alleged negligence of the plaintiff's physician it may be necessary to lift the ban on *ex parte* consultations to allow the hospital to defend itself. *Id.* at 318, 532 N.E.2d at 329-30.

144. *See supra* notes 107-109 and accompanying text.

surer and represented by the same attorney.[145]

The third proposed limitation, that "physicians or medical care personnel who are involved in the conduct leading up to or immediately following an injury occurring in a hospital or as the result of medical care should not be subject to the *Petrillo* rule[,]"[146] is particularly ill-conceived. To the extent that this category largely overlaps with the proposed exceptions for potential defendants and employees of defendants, it is objectionable for the reasons discussed above.[147] Mr. McVisk argues further, however, that once a malpractice suit is filed, all participants in the medical care should be entitled to join in defending the action.[148] This "right" of a physician to subordinate the fiduciary duty to the patient to the desire to aid of a hospital or fellow professional is utterly without support.[149] The proposal also overlooks the fairly obvious fact that the legal interests of other participants in the care of plaintiff are likely to be adverse to defendant's. The defense may well allege that the conduct of the treating physician was a preexisting, intervening, or contributing cause of the alleged injury.[150]

B. Enforcement of the Rule: How Big a Stick?

Rights are empty without a means to enforce them. One line of reasoning holds that improper discussions between plaintiff's doctor and defense attorneys are a matter for medical ethics and disciplinary bodies.[151] A related approach is to require the patient-plaintiff to pursue a separate action against the physician or de-

145. McVisk, *supra* note 6, at 833; *see supra* notes 98-100 and accompanying text.

146. McVisk, *supra* note 6, at 836.

147. *See supra* notes 137-43 and accompanying text.

148. McVisk, *supra* note 6, at 837.

149. The author cites various cases holding that communications between actual or prospective codefendants and their attorneys concerning matters of mutual interest remain protected by the attorney-client privilege. McVisk, *supra* note 6, at 837 n.74. *Ex parte* conferences do not involve defense communications, but rather the privileged communications between the plaintiff and his or her physician. The nexus between the authorities cited and the proposition is, at best, obscure.

150. *See* Alston v. Greater Southeast Comm. Hosp., 107 F.R.D. 35, 38 (D.D.C. 1985) ("Treating or consulting physicians who have dealt with a patient after his alleged injury or trauma may be potential third-party defendants for indemnity or contribution if that doctor's treatment has exacerbated the patient's condition or may have been an intervening or superseding cause for his present complaints.").

151. *See* Coralluzzo v. Fass, 450 So. 2d 858, 859 (Fla. 1984) ("The focal point of petitioner's distress seems to be Dr. Magnacca's failure to fulfill his fiduciary duty toward his patient . . . . Whether he has violated the ethical standards of his profession is a matter to be addressed by the profession itself. Such standards have not been codified and we therefore have no jurisdiction on this matter.").

fense counsel for unauthorized disclosure.[152]

This approach evinces far too little regard for the practical difficulties of discovering breaches of confidence.[153] More importantly, it overlooks the prejudice that can infect a trial as a result of *ex parte* conferences. If indeed strong public policy demands the preservation of the confidential and fiduciary nature of the physician-patient relationship, it would make little sense to permit the defense to enjoy the benefits of violation of that policy. Apart from any other remedy, it seems clear that the *Karsten* problem requires that the plaintiff's doctors who have engaged in clandestine conferences with defense counsel should, on motion of the plaintiff, be barred from testifying in the action. The *Karsten* court properly concluded:

> While *Petrillo* did not expressly state that the fruits of such unauthorized interviews should be barred from being introduced, allowing such testimony to stand would render the *Petrillo* holding hollow and meaningless. We therefore further hold that barring the testimony of plaintiff's treating physician is an appropriate sanction to protect the physician-patient privilege from defense interviews outside formal discovery. While an order barring the testimony or evidence resulting from such unauthorized conferences would not remedy the breach of trust addressed by *Petrillo,* it would nevertheless be an appropriate sanction to protect the patient's confidences and to preclude such conferences from taking place, which was in fact the goal sought by that court.[154]

VI. Constitutional Dimensions of the Protection of the Physician-Patient Relationship

Recognition of the strong public policy basis for the prohibition against *ex parte* contacts leads ineluctably to the question of

152. *See* Schwartz v. Goldstein, 400 Mass. 152, 508 N.E.2d 97 (1987) (finding that exclusion of testimony is too severe a remedy, suggesting instead a separate action against the physician for breach of confidentiality); Moses v. McWilliams, 379 Pa. Super. 150, 549 A.2d 950 (1988), *appeal denied*, 521 Pa. 671, 558 P.2d 532 (1989) (similar). *But see* Manion v. N.P.W. Med. Ctr., 676 F. Supp. 585, 596 n.10 (M.D. Pa. 1987), (expressing concern "whether the *Schwartz* approach adequately protects the plaintiff/patient and his treating physician and whether it encourages unnecessary litigation").

153. *See supra* note 75 and accompanying text (difficulties discussed).

154. Karsten v. McCray, 157 Ill. App. 3d 1, 14, 509 N.E.2d 1376, 1384 (2d Dist.), *appeal denied*, 117 Ill.2d 544, 517 N.E.2d 1086 (1987); *see also, Manion*, 676 F. Supp. at 596 (exclusion of testimony by treating physicians only effective remedy for damage resulting from *ex parte* contacts); Yates v. El-Deiry 160 Ill. App. 3d 198, 203, 513 N.E.2d 519, 523 (3d Dist. 1987) ("Prejudice and improper conduct can be implied from the fact that the plaintiff's treating physician has violated his ethical and fiduciary obligations owed to his patient by engaging in *ex parte* conferences concerning the patient with the patient's legal adversary, and without the patient's consent.").

whether there are constitutional underpinnings to the rule. No court yet has held that *ex parte* conferences between the plaintiff's doctor and defense counsel are unconstitutional, though several have hinted that the right to privacy may be implicated.[155] Constitutional principle being more protective than public policy,[156] plaintiffs' attorneys likely will advance constitutional arguments in support of the rights of patients.

The right to privacy clearly is recognized as grounded in the constitution.[157] The United States Supreme Court has explained that this right protects two distinct interests: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."[158] Both facets of privacy are implicated in compelled disclosure of medical information. In a case involving disclosure of medical records, one court has stated that "[i]nformation about one's body and state of health is matter which the individual is ordinarily entitled to retain within the 'private enclave where he may lead a private life.' . . . Therefore, we hold that it falls within one of the zones of privacy entitled to protection."[159]

Medical decisions are sufficiently important to personal auton-

155. Disclosure of confidences made by a patient to a physician, or even of medical data concerning the individual patient could, under certain circumstances, pose such a serious threat to a patient's right not to have personal matters revealed that it would be impermissible under either the United States Constitution or the Pennsylvania Constitution.

Moses, 379 Pa. Super 150, 549 A.2d at 954 (quoting *In re* June 1979 Allegheny County Investigating Grand Jury, 490 Pa. 143, 149-53, 415 A.2d 73, 77-78 (1980)). The *Petrillo* court itself identified the state constitution as a source of public policy. *Petrillo*, 148 Ill. App. 3d at 587, 499 N.E.2d at 956; *see also* Dillenbeck v. Hess, 73 N.Y.2d 278, 536 N.E.2d 1126, 1131, 539 N.Y.S.2d 707, 712 (1989) (citing Whalen v. Roe, 429 U.S. 589, 598-99, for the proposition that "government disclosure of private medical information implicates constitutional right to privacy.").

156. *See* Turkington, *supra* note 12, at 270-71 & n.16.

157. "[A] right of personal privacy, or a guarantee of certain areas or zones of personal privacy, does exist under the Constitution." Roe v. Wade, 410 U.S. 113, 152 (1973). That right is deemed "fundamental." *Id.* at 154; *see also* Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

158. Whalen v. Roe, 429 U.S. 589, 599-600 (1977). "Informational" privacy — an interest in keeping personal matters out of public view — and "substantive" privacy — an interest in making decisions about private matters free from government interference — both spring from Justice Brandeis' concept of a "right to be let alone" in Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Protection of these two interests has developed along parallel, but distinct lines. *See* Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 745 n.47 (1989). Both interests, however, may be viewed as aspects of "personal autonomy" essential to a free society. A. WESTIN, PRIVACY AND FREEDOM 32-37 (1973).

159. United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980).

omy to support a substantive privacy right to noninterference in the physician-patient relationship. In *Doe v. Bolton*, Justice Douglas stated:

> The right of privacy has no more conspicuous place than in the physician-patient relationship. . . . The right to seek advice on one's health and the right to place reliance on the physician of one's choice are basic to Fourteenth Amendment values.[160]

Roe v. Wade and subsequent abortion decisions frequently have identified, in addition to a woman's own right to privacy, a right to medical consultation unfettered by government restraint.[161] Relying upon this line of authority, the American Medical Association recently argued to the Court that "[i]ndividuals have a fundamental right to make decisions about their medical care, and state laws which interfere with that right can be justified only if they are narrowly tailored to further a compelling state interest."[162]

A guarantee of privacy in the physician-privilege relationship also may rest on independent state constitutional grounds. State constitutions may, of course, afford greater protection of individual rights than that demanded by the federal constitution.[163] Ten

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Those resisting collection or release of patient information generally have relied on the informational right of privacy. Turkington, *supra* note 12, at 269.

160. 410 U.S. 179, 219-20 (1973) (Douglas, J., concurring).

161. *Roe*, 410 U.S. at 165 (Court stated that its decision on constitutional right of privacy "vindicates the right of the physician to administer medical treatment according to his professional judgment"). *Compare* Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (upholding an informed consent provision that enhanced the physician-patient relationship) *with* Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 445 (1983) (striking down a requirement that physicians give an anti-abortion message as intruding "upon the discretion of the pregnant woman's physician") *and* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 763, (1986) (striking down a similar requirement because "it officially structures — as it obviously was intended to do — the dialogue between the woman and her physician"). *See also Whalen*, 429 U.S. at 603 (requirement that doctors report prescriptions of certain substances upheld since "the decision to prescribe, or to use, is left entirely to the physician and the patient.")

162. Brief of Amici Curiae American Medical Association, et al. at 25, Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989). This contention was advanced even more forcefully in Brief of Amici Curiae Bioethicists For Privacy at 4, *Webster*. The plurality in *Webster*, however, declined to engage in a " 'great issues' debate" concerning the constitutional right to privacy, 109 S. Ct. at 3057, over the strenuous disapproval of *Roe*'s author, Justice Blackmun. 109 S. Ct. at 3072 (Blackmun, J., dissenting).

163. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); MOSK, THE STATE COURTS IN AMERICAN LAW: THE THIRD CENTURY 216 (1976); Note, *State Constitutional Guarantees As Adequate State Ground: Supreme Court Review and Problems of Federalism*, 13 AM. CRIM. L. REV. 737 (1976).

Justice Linde, of the Oregon Supreme Court points out that it is now recognized that state courts have a responsibility to assess statutes against their own state constitutions

states have incorporated an express guarantee of the right to privacy in their state constitutions.[164] A number of others have found the right implicit in their state charters.[165] Indeed, state courts have conferred constitutional privacy protection more liberally and in more varied circumstances than has the United States Supreme Court.[166] Several state courts, for example, have held that court-ordered discovery of psychotherapist-patient information may violate the state constitutional right to privacy.[167] The identities of blood donors has been held to be undiscoverable under the state right to privacy.[168]

A recognition that the confidentiality of the physician-patient relationship is safeguarded, not only as a matter of public policy but also by the right to privacy, would sound the death knell for the practice of *ex parte* contacts. Infringement of the right to privacy implicates the liberty component of the due process clause.[169] Though *ex parte* discussions are referred to as "informal discovery," the practice places the court in the position of compelling the

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before considering constitutionality under federal law. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980). From 1970 to 1985, according to one study, over 250 decisions were issued by state courts that afforded citizens greater rights under state constitutions than required by the minimum requirements of the U.S. Constitution. Collins, *Reliance on State Constitutions*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 2 (1985).

164. ALASKA CONST. art. I, § 22; ARIZ. CONST. art II, § 8; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23; HAWAII CONST. art I, § 6; ILL. CONST. art. I, § 12; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; S.C. CONST. art 1, § 10; WASH. CONST. art. I, § 7. These vary widely in formulation. The Montana guarantee provides: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." MONT. CONST. art. II, § 10. Illinois' provision states: "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, *privacy*, property or reputation." ILL. CONST. art. I, § 12 (emphasis added).

165. *See* Hubener, *Rights of Privacy in Open Courts: Do They Exist?*, 2 EMERGING ISSUES IN STATE CONSTITUTIONAL LAW 189, 196 (1989); Note, *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 FLA. ST. U.L. REV. 631 (1977).

166. *See Developments in the Law — The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1431-35 (1982) (cases invoking state constitutional rights of privacy have addressed situations that have not been presented to federal courts and have expanded privacy rights beyond those recognized under the U.S. Constitution).

167. *In re* Lifschutz, 2 Cal. 3rd 415, 85 Cal. Rptr. 829, 467 P.2d 557 (1970); *In re* "B", 482 Pa. 471, 394 A.2d 419 (1978). *See* Smith, *Medical and Psychotherapy Privileges and Confidentiality: On Giving With One Hand and Removing With the Other*, 75 KY. L.J. 473, 499-502 (1986-87); Turkington, *supra* note 12, at 355-59.

168. *See* Rasmussen v. South Florida Blood Service, 500 So. 2d 533 (Fla. 1987); *see also* Turkington, *Confidentiality Policy For HIV-Related Information: An Analytical Framework For Sorting Out Hard and Easy Cases*, 34 VILL. L. REV. 871, 900-02 (1989).

169. Whalen v. Roe, 429 U.S. 589, 598-99 n.23 (1977). The due process clause applies in civil suits, for the benefit of both parties. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

patient to consent.[170] This is sufficient state action to implicate the right to privacy.[171] The right to privacy is, of course, not absolute. It is a fundamental right, however, so that any infringement must be shown to be necessary to further a compelling state interest.[172]

Infringement on fundamental rights warrants strict scrutiny.[173] Fundamental rights also include state constitutional rights express or implied.[174] For purposes of triggering strict scrutiny, it is not essential to prove a direct violation of the constitutional right to privacy.

> [T]he Court has applied strict scrutiny to state or federal legislation *touching upon* constitutionally protected rights. Each of our prior cases involved legislation which "deprived," "infringed," or "interfered" with the free exercise of some such fundamental personal right or liberty.[175]

Under the first prong of the constitutional analysis, a rule permitting *ex parte* conferences can be sustained only where the state establishes that the practice is necessary to further a compelling state interest.[176] Even assuming for the purpose of argument that *ex parte* interviews save defendants time and money and afford greater protection to work product, it strains credulity to deem these goals to be compelling state interests. Moreover, the *ex parte* contacts fail the second prong of strict scrutiny: There are other less intrusive methods reasonably available. One commentator has followed the constitutional analysis to this conclusion:

> *Ex parte* contacts violate the patient's due process rights because the patient's interest in maintaining the privacy of her relationship with her physician far outweighs any conceivable state interest in private consultations.[177] Permitting the physician to testify

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170. *See, e.g.*, Doe v. Eli Lilly & Co., 99 F.R.D. 126 (D.D.C. 1983) (issuing order to plaintiff to execute the appropriate authorization forms evidencing consent to *ex parte* discussions); Green v. Bloodsworth, 501 A.2d 1257 (Del. Super. Ct. 1985) (same).

171. Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (first amendment applicable to discovery in civil action).

172. *See supra* note 162 and accompanying text.

173. "Fundamental rights," for purposes of strict scrutiny, include those that are explicitly or implicitly guaranteed by the Constitution. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973).

174. *See, e.g.*, Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984) (abrogation of discovery rule violative of equal protection under strict scrutiny triggered by infringement of state constitutional guarantee against limitation of recovery).

175. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. at 37-38 (emphasis added).

176. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1451-54 (2d ed. 1988); Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

177. Ward, *supra* note 99, at 64.

adversely to the patient is error of constitutional magnitude, requiring reversal of an adverse judgment unless the *defendant* can demonstrate that it was harmless.

VII. CONCLUSION

Secret meetings between defense lawyers and treating physicians are an affront to both the rights of patients, who are entitled to place their trust in their doctors, and the rights of plaintiffs to a fair trial of their claims against alleged wrongdoers. Sensitivity to these rights undoubtedly will lead other courts to condemn the practice, based on the patient privilege, the broader dictates of public policy, or even constitutional privacy considerations. Courts also will be faced with the logic of the *Karsten* court that enforcement of the rule requires reversal of judgments affected by its violation.

The rights of Americans are secured by an adversarial system of justice. The most corrosive abuses tend to be those that undermine the adversarial system itself. The philosopher John Rawls proposed the theory that the fundamental fairness of a society is best judged by its treatment of the least advantaged.[178] Basic fairness in the manner in which the justice system treats injured victims demands that the practice of *ex parte* contacts be outlawed.

178. J. RAWLS, A THEORY OF JUSTICE (1971).