Loyola University Chicago Law Journal

Volume 20
Issue 3 *Spring 1989 Health Care Law Symposium*

Article 7

1989

A More Balanced Approach to *Ex Parte* Interviews by Treating Physicians

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I. INTRODUCTION

Beginning with *Petrillo v. Syntex Laboratories*,[1] several recent Illinois appellate decisions have created a new type of witness privilege that purportedly stems from the physician-patient privilege. Unlike the physician-patient privilege, however, which prohibits the discovery and introduction of evidence regarding confidential communications, this newly developed privilege prohibits only one means of discovering otherwise discoverable evidence and is not limited to protecting confidential communications. Illinois appellate courts have held that the attorney representing a defendant in a personal injury action may not conduct *ex parte* interviews of the plaintiff's treating physicians.[2] The courts have upheld this privilege even though the patient has otherwise waived the physician-patient privilege with respect to that litigation by filing the suit and thereby placing his physical condition at issue.[3]

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1. 148 Ill. App. 3d 581, 499 N.E.2d 952 (1st Dist. 1986), *cert. denied*, 107 S. Ct. 3232 (1987).

2. Presumably these decisions will be applicable equally when the defendant's physical condition is at issue. Because this situation is relatively rare, however, this Article, like the cases creating the privilege, will assume in the interest of simplicity that it is the plaintiff who has placed his physical condition at issue and that the defendants will seek to interview the plaintiff's physicians.

3. *Id. See also* Tomasovic v. American Honda, 171 Ill. App. 3d 979, 525 N.E.2d 1111 (1st Dist. 1988); Karsten v. McCray, 157 Ill. App. 3d 1, 509 N.E.2d 1376 (2d Dist.), *leave to appeal denied*, 117 Ill. 2d 544 (1987); Yates v. El-Deiry, 160 Ill. App. 3d 198, 513 N.E.2d 519 (3d Dist. 1987).

There is a distinct split of authority on this issue in other jurisdictions. The rule prohibiting *ex parte* conferences has been applied in the following cases, among others: Alston v. Greater Southeast Community Hosp., 107 F.R.D. 35 (D.D.C. 1985); Roosevelt Hotel Ltd. Partnership v. Sweeney, 349 N.W.2d 353 (Iowa 1986); Wenneuger v. Muesing, 307 Minn. 405, 240 N.W.2d 333 (1976); Nelson v. Lewis, 130 N.H. 106, 534 A.2d 720 (1987); Smith v. Ashby, 106 N.M. 358, 743 P.2d 114 (1987); Anker v. Brodnitz, 98 Misc. 2d 148, 413 N.Y.S.2d 582 (1979); London v. Mhyre, 110 Wash. 2d 675, 756 P.2d 138 (1988). On the other hand, a number of jurisdictions permit *ex parte* conferences with treating physicians: Manion v. N.P.W. Medical Center, Inc., 676 F. Supp. 585

Unfortunately, the scope of the privilege thus created has not been delineated clearly. Consequently, practitioners cannot easily predict when this new privilege will be applied or in what situations they may be permitted to engage in *ex parte* communications with the physicians who have previously treated the plaintiff. These uncertainties are perhaps most evident in cases involving hospital and medical malpractice, as attorneys representing physicians and hospitals must determine which among the many physicians, employees, and staff members[4] who have cared for the plaintiff may be interviewed outside the presence of the plaintiff's attorneys.

This uncertainty has been exacerbated by the recent decision of the First District Court of Appeals that this privilege should be applied to prohibit counsel for a defendant hospital from conferring with physicians employed by that hospital.[5] An examination of the policies used to justify the prohibition of *ex parte* communications with treating physicians, as well as the legitimate and long recognized interests of defense counsel in conducting some portions of their investigation outside the presence of their adversaries, reveals that the prohibition should be applied only when the physician who treated the plaintiff is not employed by any of the parties and did not participate in any of the actions or care which are alleged to have wrongfully caused the plaintiff's injuries.

II. THE DECISIONS PROHIBITING *EX PARTE* CONFERENCES IN ILLINOIS

A. Petrillo v. Syntex Laboratories

In *Petrillo v. Syntex Laboratories*,[6] the attorney for a manufac-

(M.D. Pa. 1987) (Pennsylvania law applied); Doe v. Eli Lilly & Co., 99 F.R.D. 126 (D.D.C. 1983); Langdon v. Champion, 745 P.2d 1371 (Alaska 1987); Stempler v. Speidell, 100 N.J. 368, 495 A.2d 857 (1985) (interviews allowed after notice to patient or his counsel); Moses v. McWilliams, 379 Pa. Super. 150, 549 A.2d 950 (1988) (in action for invasion of privacy).

4. The physician-patient privilege generally is considered to be limited to licensed physicians. ILL. REV. STAT. ch. 110, para. 8-802 (1987). All of the Illinois appellate court decisions to date have involved physicians. *See supra* note 3. Yet one Illinois trial court decision, now on appeal to the Fifth District Appellate Court, has held the *Petrillo* rule to be applicable to non-physician hospital staff members. Roberson v. Liu, No. 83 L 738 (Cir. Ct. Ill. 20th Cir., St. Clair County, Nov. 2, 1987), *appeal docketed*, No. 5-87-0801 (Ill. App. 5th Dist. Nov. 30, 1987).

5. Ritter v. Rush-Presbyterian-St. Lukes Medical Center, 177 Ill. App. 3d 313, 532 N.E.2d 327 (1st Dist. 1988).

6. 148 Ill. App. 3d 581, 499 N.E.2d 952 (1st Dist. 1986), *cert. denied*, 107 S. Ct. 3232 (1987).

turer of infant formulas, Syntex Laboratories ("Syntex"), advised the trial court that he planned to conduct an *ex parte* interview of one of the plaintiff's treating physicians.[7] The plaintiff's attorney moved for an order barring defense counsel from engaging in *ex parte* conferences with any of the plaintiff's treating physicians.[8] After the plaintiff's motion was granted, defense counsel advised the trial court that he planned to violate the court's order, and the court subsequently held him in contempt of court.[9]

On appeal, counsel for Syntex raised a number of arguments to justify *ex parte* interviews with the plaintiff's treating physician. Most importantly, counsel argued that the physician-patient privilege was inapplicable because it had been waived by the plaintiff by his act of filing suit.[10] This contention was based on the statutory provision that the physician-patient privilege would not apply in "all actions brought by or against the patient . . . wherein the patient's physical or mental condition is an issue."[11]

The *Petrillo* court recognized that the statutory privilege would

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7. *Id.* at 585, 499 N.E.2d at 955.

8. *Id.*

9. *Id.*

10. *Id.* at 603, 499 N.E.2d at 967. In Illinois, the physician-patient privilege is established by statute, and provides:

> No physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve such patient, except only (1) in trials for homicide when the disclosure relates directly to the fact or immediate circumstances of the homicide, (2) in actions, civil or criminal, against the physician for malpractice, (3) with the expressed consent of the patient, or in case of his or her death or disability, of his or her personal representative or other person authorized to sue for personal injury or of the beneficiary of an insurance policy on his or her life, health or physical condition, (4) in all actions brought by or against the patient, his or her personal representative, a beneficiary under a policy of insurance, or the executor or administrator of his or her estate wherein the patient's physical or mental condition is an issue, (5) upon an issue as to the validity of a document as a will of the patient, (6) in any criminal action where the charge is either first degree murder by abortion, attempted abortion or abortion, (7) in actions, civil or criminal, arising from the filing of a report in compliance with the 'Abused and Neglected Child Reporting Act,' approved June 26, 1975, (8) to any department, agency, institution or facility which has custody of the patient pursuant to State statute or any court order of commitment or (9) in prosecutions where written results of blood alcohol tests are admissible pursuant to Section 11-501.4 of the Illinois Vehicle Code.
>
> In the event of a conflict between the application of this Section and the Mental Health and Developmental Disabilities Confidentiality Act, certified January 9, 1979, to a specific situation, the provisions of the Mental Health and Developmental Disabilities Confidentiality Act shall control.

ILL. REV. STAT. ch. 110, para. 8-802 (1987).

11. *Petrillo*, 148 Ill. App. 3d at 603, 499 N.E.2d at 967 (citing ILL. REV. STAT. ch. 110, para. 8-802(4) (1987)).

not apply to either formal discovery procedures or the presentation of evidence concerning communications between the plaintiff and his physicians, because under the statute, the patient implicitly consents to such disclosure by filing suit and placing his physical or mental condition in issue.[12] The court concluded, however, that the statutory waiver of the physician-patient privilege is limited to the provision of medical information sought by the patient's adversary "*pursuant only to court authorized methods of discovery.*"[13]

The court rested this limitation of the statutory exception on two bases. First, the *Petrillo* court found that no significant interest would be furthered by *ex parte* conferences, because *ex parte* conferences "yield no greater evidence, nor do they provide any additional information, than that which is already obtainable through the regular methods of discovery."[14] Second, the court reasoned that allowing *ex parte* conferences with opposing counsel would threaten the fiduciary relationship between a patient and his physician.[15] The court considered confidentiality to be a necessary element of the fiduciary relationship between patient and physician.[16] It explained that a physician's ethical obligations require the patient's express or implied consent before any confidential information can be released.[17] The court reasoned that implied consent under paragraph 8-802(4) should be construed narrowly and should be limited to the release of medical information pursuant to court-authorized discovery methods.[18] The court concluded that a patient does not, simply by filing suit, consent to "his physician discussing the patient's confidences in an *ex parte* conference with

12. *Id.* at 591, 603, 499 N.E.2d at 959, 967.

13. *Id.* at 595, 499 N.E.2d at 961 (emphasis in original). Of course, the use of the term "court authorized" discovery methods to some extent begs the question, because *ex parte* interviews could be "court authorized" if the court ruled differently.

14. *Id.* at 587, 499 N.E.2d at 956.

15. *Id.* at 588, 590-91, 499 N.E.2d at 957-59.

16. *Id.* at 591, 603-04, 499 N.E.2d at 959, 967-68.

17. *Id.*

18. *Id.* at 603-04, 499 N.E.2d at 967-68. It is implicit in the *Petrillo* court's opinion that information beyond the scope of the exception to the privilege would not be disclosed in formal discovery, because the patient's attorney would be notified and could prevent the disclosure of information which is not covered by the exception to the privilege. In contrast, there is no means of protecting confidentiality in an *ex parte* conference, other than to trust in the physician to withhold confidential information and in the defense attorney not to seek such information. The court's reasoning also suggests that a patient's confidence and trust in his physician would not be eroded seriously when the physician discloses the patient's confidential communications to his legal adversary under the compulsion of a subpoena or court order; whereas the *ex parte* interview inherently creates the impression of collusion and bad faith between the defense counsel and the patient's physician.

the patient's legal adversary."[19]

An essential element of the court's holding was its perception that *ex parte* conferences with the patient's legal adversary could undermine the relationship between the physician and patient. As the court explained:

> [W]e find that the entire concept of the *ex parte* conference tends to weaken the compelling obligations of a fiduciary. At the very heart of every fiduciary relationship, including that between a patient and his physician, there exists an atmosphere of trust, loyalty, and faith in the discretion of a fiduciary. That being so, we find it difficult to believe that a physician can engage in an *ex parte* conference with the legal adversary of his patient without endangering the trust and faith invested in him by his patient.[20]

Thus, the court concluded that *ex parte* conferences, which threaten the fiduciary relationship between physician and patient, while providing no additional information to the defendant, are against public policy.[21]

As articulated by the *Petrillo* court, the primary goal behind the prohibition of *ex parte* conferences is to foster the confidential and fiduciary relationship between the physician and patient by avoiding the appearance that the patient's physician may be acting contrary to the patient's interests by engaging in *ex parte* communications with the patient's legal adversary. It may be doubtful that any confidential material which was not already subject to production under the statutory waiver of the physician-patient privilege would actually be disclosed during an *ex parte* conference. Nevertheless, the court in *Petrillo* apparently concluded that the mere appearance of collusion and breach of faith engendered by such conferences is sufficient to cause the patient to lose the confidence in his physician which is necessary to the physician-patient relationship.

The *Petrillo* court emphasized that its decision was based both on the absence of legitimate need for such conferences by the defendant and the damage to the physician-patient relationship it feared would result from such conferences.[22] The court recognized that neither the physician-patient privilege nor the fiduciary rela-

19. *Id.* at 591, 499 N.E.2d at 959.

20. *Id.* at 595, 499 N.E.2d at 962.

21. *Id.* at 596, 499 N.E.2d at 962. The court's conclusion in was strengthened significantly by the factual setting: the physician in question was not employed by any of the parties and was not involved in any of the acts which allegedly caused the plaintiff's injuries. *Id.* at 585, 499 N.E.2d at 955. As will be discussed below, either of these factors would have seriously undermined the court's reasoning.

22. *Id.* at 588, 596, 499 N.E.2d at 957, 962.

tionship between physician and patient is absolute. It further noted that the statutory privilege and its relevant exceptions reflect a sound balancing of the societal need for privacy within the physician-patient relationship against society's "desire to see that the truth is reached in civil disputes."[23]

In view of these two essential bases for the privilege, courts in future cases should consider two questions in determining whether the *Petrillo* privilege should be applied:

1. *Need for Ex Parte Conference*:
   Are there countervailing policy considerations which would make the application of the *Petrillo* rule against the defendants unfair or inequitable by limiting their ability to defend the case?
2. *Damage to Fiduciary Relationship*:
   Has the patient's continued expectation of confidentiality as to the physician been abrogated by filing the suit in question?

An affirmative answer to either of these questions should render the *Petrillo* rule inapplicable.

B. Subsequent Illinois Cases

The *Petrillo* holding has been followed in several subsequent decisions of the Illinois appellate courts.[24] The most expansive reading of the *Petrillo* privilege was that of the First District Appellate Court in the recent decision of *Ritter v. Rush-Presbyterian-St. Luke's Medical Center*.[25] In *Ritter*, the court addressed the situation in which counsel for a defendant hospital interviewed several physicians who had treated the plaintiff after a fall in the hospital. The *Ritter* case is unique in that several of the physicians interviewed were residents employed by the defendant hospital.[26] None of these physicians, however, were involved in the occurrence which gave rise to the lawsuit.[27]

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

24. *See* Tomasovic v. American Honda, 171 Ill. App. 3d 979, 525 N.E.2d 1111 (1st Dist. 1988); Karsten v. McCray, 157 Ill. App. 3d 1, 509 N.E.2d 1376 (2d Dist. 1987); Yates v. El-Deiry, 160 Ill. App. 3d 198, 513 N.E.2d 519 (3d Dist. 1987).

25. 177 Ill. App. 3d 313, 532 N.E.2d 327 (1st Dist. 1988).

26. *Id.* at 316, 532 N.E.2d at 328.

27. *Id.* at 317, 532 N.E.2d at 329. Under the circumstances of *Ritter*, the occurrence was easy to identify, as the plaintiff sustained injuries in a fall from a gurney. *Id.* at 315, 532 N.E.2d at 328. Nevertheless, not all malpractice cases involve such an easily identifiable occurrence. For example, in a case involving a failure to diagnose cancer, there may be numerous examinations by several physicians over the course of a number of years. Before the plaintiff has produced experts for their depositions, it may be impossible to anticipate which of the physicians who have examined the plaintiff will be criticized for failing to recognize the signs of cancer.

After rejecting the defendant's request to reconsider *Petrillo*,[28] the court also rejected the hospital's argument that the *Petrillo* rule should not apply to physicians employed by the defendant hospital.[29] Without specifically considering whether any of the policy considerations behind *Petrillo* justified extending the privilege to the defendant's employees, the court concluded "that any agency principles applicable to the relationship between a hospital and an employee physician [do not] outweigh the public policy considerations underlying the physician-patient privilege. Thus, agency principles cannot abrogate the physician-patient privilege."[30]

The *Ritter* court, however, did recognize that the privilege should not be applied to employee-physicians when the patient seeks to hold the hospital liable for the negligence or malpractice of the employee-physician.[31] The court agreed that in such a situation, "the exclusion of the hospital from the physician-patient privilege would . . . effectively prevent the hospital from defending itself by barring communication with the physician for whose conduct the hospital is allegedly liable."[32]

Essentially, the *Ritter* court's recognition that the *Petrillo* rule should not apply when the defendant hospital's liability is predicated upon the acts of its employee-physicians stems from the fact that there are countervailing policy considerations which would make the application of *Petrillo* unfair. Unfortunately, the *Ritter* court failed to consider a number of legitimate reasons why hospital-defendants must be allowed to interview all of their employee-physicians who have participated in the plaintiffs' care. Moreover, the court failed to consider whether the plaintiff continues to have a legitimate expectation of confidentiality from a physician employed by a hospital when the patient has sued that physician's employer.

III. POLICIES FAVORING *EX PARTE* CONFERENCES WITH CERTAIN WITNESSES

Despite the purportedly strong public policy favoring mainte-

28. *Id.* at 319, 532 N.E.2d at 330.

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

30. *Id.* This statement may reflect confusion on the part of the court, because the *Petrillo* privilege is not coextensive with the physician-patient privilege, at least not as that privilege is embodied in paragraph 8-802, which provides an exception to the privilege in suits where the patient's condition is in issue. ILL. REV. STAT. ch. 110, para. 8-802(4) (1987). *See supra* note 10.

31. *Ritter*, 177 Ill. App. 3d at 317-18, 532 N.E.2d at 329-30.

32. *Id.*

nance of the fiduciary and confidential relationship between patient and physician, the *Petrillo* court left no doubt that this public policy can be outweighed by the need for relevant evidence in a civil lawsuit.[33] Therefore, the limits of the prohibition on *ex parte* conferences should be determined in large measure by the extent to which *ex parte* conferences, in a given situation, do foster the truth finding process or confer some other benefit to litigants in their trial preparation which would outweigh the potential for damage to the fiduciary relationship between physician and patient.

A moment's reflection on the nature of the adversary system reveals a number of situations in which *ex parte* communications between counsel and a potential witness are essential to both truth finding and the adversary process. The most obvious scenario is the need to interview one's own client outside the presence of the adversary. Indeed, courts have long held that attorneys may not only discuss the case with their client *ex parte*, but that those communications will be privileged from disclosure.[34]

The policy underlying the attorney-client privilege "is to encourage a client to fully present the facts of his legal problem to his attorney."[35] Few of the courts considering the issue of the attorney-client privilege have articulated a reason why confidentiality and full disclosure of the facts to the client's attorney are necessary, but the existence of the privilege reflects the recognition that an attorney's effectiveness would be severely undermined if he were unable to obtain a full disclosure of the facts from his client. As Dean McCormick explained, the justification for the attorney-client privilege stems from the fact that claims and disputes in litiga-

33. Commentators have often stated that the physician-patient privilege is out of favor because it is unnecessary, it inhibits the truth-finding process, and so many exceptions have been engrafted upon it that it has been vitiated. *See, e.g.*, C. DEWITT, PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIANS AND PATIENT 31-39 (1958); C. MCCORMICK, EVIDENCE § 105, at 258-59 (Cleary 3d ed. 1984); 8 J. WIGMORE, EVIDENCE § 2380(a) (McNaughten rev. ed. 1961); Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?*, 52 YALE L.J. 607 (1943).

34. *See, e.g.*, People v. Adam, 51 Ill. 2d 46, 48, 280 N.E.2d 205, 207, *cert. denied*, 409 U.S. 958 (1972); Dickerson v. Dickerson, 322 Ill. 492, 500, 153 N.E. 740, 743 (1926) (clients should be safe in confiding most secret facts to their counsel); Thayer v. McEwen, 4 Ill. App. 416, 418 (2d Dist. 1879) (everyone has right to communicate freely with counsel concerning any aspect of a case, and all such communications are privileged).

35. Mooney v. Etheridge, 65 Ill. App. 3d 847, 852, 382 N.E.2d 826, 830 (2d Dist. 1978). *Accord In re* Special Sept. 1978 Grand Jury, 640 F.2d 49, 62 (7th Cir. 1980) (purpose of attorney client privilege "is to encourage clients to make full disclosure to their attorneys"); People v. Adam, 51 Ill. 2d 46, 48, 280 N.E.2d 205, 207, *cert. denied*, 409 U.S. 948 (1972) (privilege exists so that client "may consult freely with counsel without fear of compelled disclosure").

tion can best be handled by "practical experts, namely lawyers, and that these experts can act effectively only if they are fully advised of the facts by the parties whom they represent."[36]

While many commentators have questioned whether this privilege truly is necessary to ensure full disclosure,[37] the courts have continued to uphold the privilege because of their recognition that the effective assistance of counsel mandates that the attorney be allowed to confer with his client in private, without fear that the client's secrets will be disclosed later by the attorney.[38] Although the attorney is not likely to discover any admissible evidence at the *ex parte* interview with his client which could not be discovered through formal discovery, the ability to consult with the client outside the presence of the adversary is essential to effective representation.

Significantly, the matters learned during a conference between a lawyer and client are not likely to remain forever free from disclosure. As a party to litigation, a lawyer's client can be deposed by the opposing counsel, and all of the information which the client has provided to his attorney can be discovered through such an examination unless it is irrelevant to the suit or privileged from disclosure from some other reason. The reason that counsel must obtain this information initially in private is to enable him to consider whether any of it is privileged or so sensitive that its disclosure would have ramifications more significant than its impact on the litigation, and to enable counsel to evaluate the claim, frame

36. C. MCCORMICK, EVIDENCE § 87, at 204-05 (Cleary 3d ed. 1984). *See also* Fisher v. United States, 425 U.S. 391, 403 (1976) (as a practical matter, if a client knows that damaging information is more easily available from his attorney, the client would be reluctant to confide and it would be difficult to obtain fully informed legal advice); Radiant Burners v. American Gas Ass'n, 320 F.2d 314, 318 (7th Cir. 1963).

37. *See, e.g.*, 8 J. WIGMORE, EVIDENCE § 2285, at 527-28 (McNaughten rev. ed. 1961); Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339 (1972); Note, *Evidence — Privileged Communications — The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach*, 69 MICH. L. REV. 360, 364 (1970).

38. *See e.g.*, *Fisher*, 425 U.S. at 403 (in absence of privilege "it would be difficult to obtain fully informed legal advice"); United States v. Louisville & Nashville R.R., 236 U.S. 318 (1915) (enactment compelling disclosure of attorney-client communications "would be a practical prohibition upon professional advice and assistance"); *Radiant Burners*, 320 F.2d at 322-23; American Cyanamid Co. v. Hercules Power Co., 211 F. Supp. 85, 88 (D. Del. 1962) (basis of privilege is "importance of increasing the effectiveness of attorneys by encouraging full disclosure by the client"); A.B. Dick Co. v. Mars, 95 F. Supp. 83, 102 (S.D.N.Y. 1950) ("nor, in the absence of the privilege could lawyers properly represent their clients"); Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill. 2d 103, 117-18, 432 N.E.2d 250, 256 (1982); People v. Adam, 51 Ill. 2d 46, 48, 280 N.E.2d 205, 207, *cert. denied*, 409 U.S. 948 (1972).

his discovery requests, determine areas which need further investigation, and develop evidence to buttress weaknesses in the client's case.[39] In many cases, an *ex parte* interview between the attorney and client is also necessary to point out inconsistencies in the client's statements or between his current statements and past statements, so that the client will realize the damage which can result from faulty memory or lies.[40]

In addition to the need to maintain the secrets of the client, private interviews between the lawyer and his client or between the lawyer and other witnesses are needed to enable counsel to analyze and evaluate a case and to form litigation strategy. This need has been recognized in the context of the attorney's "work product" privilege. As the United States Supreme Court recognized in *Hickman v. Taylor*,[41] a lawyer must work with a certain degree of privacy, without fearing that his analysis of the client's case will be open to scrutiny by the client's adversaries.[42] To represent his client properly, the attorney must be able to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference."[43] A large part of this process involves interviews with potential witnesses, which are likely to be memorialized in memoranda and statements.[44] The process of conducting interviews and preparing memoranda analyzing them is likely to reveal a great deal about the attorney's mental impressions and theories of the case, so privacy is necessary to prevent the adversary from discovering these impressions and gaining an unfair advantage in the litigation.[45] Thus, the Supreme Court held that notes of interviews, witness statements and memoranda reflecting an attorney's interviews, in short the attorney's "work product," should not be subject to discovery except in unusual situations.[46]

The work product doctrine has also been recognized in Illinois.[47]

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39. Comment, *Ex Parte Communications with Corporate Parties: The Scope of the Limitations on Attorney Communications with One of Adverse Interest*, 82 NW. U.L. REV. 1274, 1280-81 (1988).

40. This type of inquiry is also essential between the attorney and any person in an employment relationship with the client, because the client/employer will be responsible for the employee's conduct and admissions under agency principles.

41. 329 U.S. 495 (1947).

42. *Id.* at 510-11.

43. *Id.* at 511.

44. *Id.*

45. *Id.*

46. *Id.* at 511-12.

47. Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill. 2d 103, 110, 432 N.E.2d 250, 252 (1982); Monier v. Chamberlain, 35 Ill. 2d 351, 359, 221 N.E.2d 410, 416 (1966).

As the Illinois Supreme Court stated in *Consolidation Coal Co. v. Bucyrus-Erie Co.*,[48] "notes regarding oral statements of witnesses, whether in the form of attorney's mental impressions or memoranda, necessarily reveal in varying degrees the attorney's mental processes in evaluating the communications."[49] As a result, the court held that an attorney's notes and memoranda of oral conversations with witnesses or employees routinely would not be discoverable.[50]

The work product decisions demonstrate the need for counsel to prepare a case in privacy. The courts' recognition of this need necessarily encompasses a recognition of the legitimate purpose behind private interviews with witnesses: the ability to ascertain the witness's knowledge without at the same time disclosing counsel's theories and mental impressions to the adversary. Thus, notes of witness interviews made by the attorney which include the attorney's mental impressions and case analysis are privileged.[51] Yet this privilege obviously is rendered meaningless if the attorney must conduct the witness interview in the presence of the adversary, as the attorney's mental impressions and case analysis would then be displayed openly to the adversary without the need to give the adversary access to the attorney's notes.[52] As the court in *IBM v. Edelstein*[53] concluded, restrictions on interviewing witnesses "not only impair the constitutional right to effective assistance of counsel but are contrary to time-honored and decision-honored principles, namely, that counsel for all parties have a right to interview an adverse party's witnesses (the witness willing) in private, without the presence of opposing counsel."[54]

Significantly, the facts learned by counsel from a witness are not privileged under the work product doctrine. Rather, the process of sifting these facts and analyzing their impact on the case must remain free from discovery. The need for counsel to sort and analyze facts as they are learned from prospective witnesses makes the *ex parte* conference an essential litigation tool. In private conference with the witness, an attorney may feel free to offer his own inter-

48. 89 Ill. 2d 103, 432 N.E.2d 250 (1982).

49. *Id.* at 109, 432 N.E.2d at 253.

50. *Id.* at 110, 432 N.E.2d at 253.

51. *Id.*

52. IBM v. Edelstein, 526 F.2d 37, 41-42 (2d Cir. 1975) (confidentiality of interviews is needed to maximize unhampered access to information and ensure presentation of best possible case at trial).

53. *Id.*

54. *Id.* at 42.

pretations of facts and suggest their legal ramifications in a manner which cannot be done in the presence of opposing counsel. The knowledge and understanding gained from such a free and private exchange may enable the attorney to examine more effectively the interviewed witness or other witnesses at trial.

Nothing in the analysis of the cases supporting the work product privilege suggests that counsel has any absolute right to interview all potential witnesses outside the presence of opposing counsel. Any witness may refuse to speak with counsel for one party or both, in which case counsel must resort to formal discovery methods. Similarly, each party invariably will refuse *ex parte* discussions of the case with his opponent's counsel. Nevertheless, this does not deny the utility of such conferences when the witness is willing to comply with counsel's informal request or the importance of such conferences in enabling counsel to prepare fully for litigation. The question of whether counsel should be allowed to interview a voluntary witness in private should be determined only after giving substantial weight to the utility of such interviews, balanced against the policies favoring the fiduciary nature of patient-physician relationship.[55]

IV. Application to Specific Situations

There are at least three situations in which a full recognition of the necessity and utility of *ex parte* witness interviews together with a realistic appraisal of the patient's continued legitimate expectation of privacy compels the conclusion that the *Petrillo* privilege should not apply: first, 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.

A. Party to Suit

No court or legal authority has argued that the *Petrillo* rule should be applied when the plaintiff's treating physician is also a party to the suit, as in cases where the patient has sued the treating

55. In addition to protecting the confidentiality of attorney preparations, *ex parte* interviews promote efficiency, as they are less costly and time consuming than depositions, which require at least the presence of counsel for all parties as well as a court reporter. Depositions are also likely to take longer than an informal interview, because an attorney likely will attempt to draw out the proceeding to ensure that every relevant question has been asked. *See* Comment, *supra* note 39, at 1284 n.55.

physician for malpractice.[56] In such cases, the party's right to the effective assistance of counsel, which requires counsel to discuss the case with the defendant in private, becomes paramount. To deny the right of the attorney to confer in private with the client is to deny effective assistance of counsel.

Moreover, in this situation the patient has no legitimate expectation that the physician he has sued will maintain the patient's confidences by refraining from discussing the case with his attorney. Although the physician still must maintain the patient's confidences as to those who are not involved in the litigation, the patient must be expected to recognize that the physician-defendant is his legal adversary and will not refrain from mentioning the patient's confidences to his attorney if those confidences could be important to the lawyer's preparation of the physician's defense.

Nor is there any likelihood that the physician's attorney will obtain confidential information in an *ex parte* interview which could not be ascertained through formal discovery. As the physician-patient privilege is waived when the patient files the complaint, the physician's attorney could subpoena the patient's medical records even if he could not receive them on an *ex parte* basis from his client, and the few confidential communications which are not reflected in the medical records could be discovered through depositions. Consequently, there is no sound basis on which to restrict the attorney's access to his own client.

The same rationale should apply to a physician who fears that legal action might be undertaken against him for an incident which occurred during the course of treatment. Although suit has not yet been filed and, thus, there has been no statutory waiver of the privilege, the physician's defense if suit ultimately is filed is likely to be enhanced significantly by the opportunity to confer with the attorney while events are still fresh in his mind. If the physician must wait until suit is filed before conferring with his attorney, which can often take several years, the ability to remember important details of his treatment or its rationale may be lost. Additionally, as the attorney is bound by professional ethics to maintain the confidentiality of what the physician told him,[57] the extent of the breach of patient-physician confidentiality will be limited. Thus, the *Pe-*

56. The lack of applicability of the *Petrillo* rule to this situation would seem particularly clear, because the statute creates an express waiver of the physician-patient privilege in cases in which the patient has sued the physician for malpractice. ILL. REV. STAT. ch. 110, para. 8-802(2) (1987).

57. CODE OF PROFESSIONAL RESPONSIBILITY Rule 4-101(b), ILL. REV. STAT. ch. 110A, para. 4-101(b) (1987).

trillo rule should not be applied to prevent any physician who is concerned that he will be named a defendant in a malpractice action from discussing the patient's case with his attorney.

B. Employee of Party to Suit

The policy considerations which make the *Petrillo* rule inapplicable to a party to the suit also apply to a party's employee, such as a physician employed by a defendant hospital. Again, the ability to confer privately with the employee is essential for the hospital to receive effective assistance of counsel. Both federal and Illinois courts have recognized the necessity for counsel to confer with employees of corporations, and have thus applied the attorney-client privilege to communications with corporate employees by attorneys for that corporation.[58] As the Supreme Court recognized in *Upjohn Co. v. United States*: "The privilege exists to protect not only the giving of professional advice to those who can act on it, but also the giving of information to the lawyer to enable him to give sound and informed advice."[59] The court further stated that:

> In the corporate context . . . it will frequently be employees beyond the control group . . . who will possess the information needed by the corporation's lawyers. Middle level — and indeed lower level — employees can, by their actions within the scope of their employment, embroil the corporation in serious legal difficulties and it is only natural that these employees would have the relevant information needed by corporate counsel if he is to adequately advise the client with respect to such actual or potential difficulties.[60]

58. Upjohn Co. v. United States, 449 U.S. 383 (1981); Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill. 2d 103, 432 N.E.2d 250 (1982). In *Upjohn*, the Court construed the privilege broadly to include both mid and low-level employees who provided information to the corporation's legal counsel in order for the corporation to gain legal advice concerning corporate matters within the scope of the employee's duties. In contrast, the Illinois Supreme Court rejected the *Upjohn* test and restricted the scope of the privilege to employees within the "control group," *i.e.*, top management and advisors to top management whose role is such that a decision would not usually be made without these employees' advice. *Consolidation Coal*, 89 Ill. 2d at 120, 432 N.E.2d at 258. Both cases, however, recognized the need to confer privately with corporate employees. The Illinois Supreme Court based its restriction of the privilege on its concern that an expansive privilege would enable corporations to cloak all of their actions in the privilege simply by including corporate counsel in all decisions. *Id.* at 116, 432 N.E.2d at 256. This concern seems irrelevant when a hospital's counsel speaks with a physician as part of his investigation of a claim against the hospital, as the mere right to interview the employee does not necessarily mean that the conversations would be privileged. Moreover, because the physician faces personal exposure for his conduct, he would have a personal right to legal representation as well as a personal attorney-client privilege.

59. *Upjohn*, 449 U.S. at 390.

60. *Id.*

Similarly, the Illinois Supreme Court, while narrowing the scope of the employees as to whom the attorney-client privilege is applicable, recognized that it was appropriate to protect consultations with counsel by those who are decision makers or who substantially influence corporate decisions.[61]

Both federal and Illinois courts also have extended the protection of the attorney's work product privilege to an attorney's conversations with the corporation's employees.[62] These decisions recognize the necessity and utility of private conferences between attorneys and the employees of the parties which the attorneys represent.

An important factor underlying the extension of the attorney-client and work product privileges to corporations and similarly justifying the need to interview hospital employees in private, is the fact that under the doctrine of respondeat superior the corporate or non-corporate employer may be held legally responsible for the employee's conduct. Further, under principles of agency law, the hospital employer normally will be held to have knowledge of those matters which are known to the employee[63] and, therefore, the hospital-employer's liability can be predicated on the failure to perform an act which the employee's knowledge made obligatory. As the hospital employer is legally responsible for its employees' acts and is held to knowledge of facts known by its employees, its defense will depend on the ability of its counsel to confer with these employees in private, as though they were also the attorney's client.

In most cases the hospital's liability insurance coverage or self-insurance plan covers both the hospital's and the employee's liability for acts committed within the scope of his employment, so the employee also may be a client of the hospital's attorney. The employee, even if not a named defendant, faces potential personal liability, and may not have been named as a defendant simply because he is not considered likely to have sufficient assets to satisfy a judgment. Whatever the reason that only the hospital-employer has been named, the hospital's attorney must defend the employee to defend the employer successfully. Thus, to prevent the attorney for the hospital-employer from privately discussing the case with the

61. *Consolidation Coal*, 89 Ill. 2d at 118-19, 432 N.E.2d at 257.

62. *Upjohn*, 449 U.S. at 397-402; *Consolidation Coal*, 89 Ill. 2d at 108-11, 432 N.E.2d at 252-54.

63. Protective Ins. Co. v. Coleman, 144 Ill. App. 3d 682, 694, 494 N.E.2d 1241, 1250 (2d Dist. 1986); Kuska v. Folkes, 73 Ill. App. 3d 540, 544, 391 N.E.2d 1082, 1085 (2d Dist. 1979).

employee is tantamount to prohibiting the attorney from discussing the case with his own client.[64] The adoption of a rule which would prevent the hospital's counsel from discussing the case with the employee simply because the employee was not named as a defendant would enable the plaintiff to control the employer's ability to defend the lawsuit by the simple expedient of limiting the individual defendants named in the complaint.

Nor is it sufficient to provide an exception to *Petrillo*, as the court did in *Ritter*, which only applies to cases in which the liability of the hospital-employer is predicated on the acts of the employee. First, such a rule would prevent the attorney from discussing the case with any hospital employee until it has become clear that the plaintiff is basing the hospital's liability on that specific employee's actions. This would prevent communication with any hospital employee before a complaint is filed, because the hospital could not be certain in advance which actions by which employees will form the basis of the patient's complaint. The application of the *Ritter* exception in this manner effectively precludes pre-suit investigation of potential claims. Even after the complaint has been filed, counsel may not be able to discuss the facts of the claim with any employee until the plaintiff's theory of recovery is sufficiently clear to enable defense counsel to identify the allegedly responsible employees.[65] Under the *Ritter* rule, a plaintiff's attorney could ambush defense counsel by either deposing or questioning the hospital's employed physicians before dis-

64. In most cases, the hospital's attorney is retained to represent the employee as well as the hospital, because the hospital or its insurer recognizes that the hospital's interests and those of the employee in defending the action are likely to be identical.

65. Under the Medical Malpractice Reform Act of 1985, ILL. REV. STAT. ch. 110, para. 2-622 (1987) (the "Act"), it may be easier for defense counsel to identify the supposedly responsible employees once suit is filed, because the Act requires a report from a reviewing health care practitioner specifying the basis for the action. *Id.* Nothing in the Act, however, suggests that the plaintiff would be prevented from amending the complaint and providing a revised report if further acts of negligence become apparent after the complaint has been filed. With the existence of liberal pleading rules and the doctrine of *respondeat superior*, there is no reason why such an amendment could not involve conduct by a hospital employee who was unknown to either the plaintiff or defense counsel when the complaint was filed. ILL. REV. STAT. ch. 110, para. 2-616 (1987). Moreover, many of the reports of reviewing health care practitioners contain vague and conclusory allegations which may not be sufficient to enable the allegedly responsible employees to be identified. Finally, The Illinois appellate courts are divided on the issue of whether the Act's requirement that a health care practitioner certify that there is a meritorious cause for filing the action is constitutional. *Compare* DeLuna v. St. Elizabeth's Hosp., Nos. 1-86-2995, 1-87-0831 (Ill. App. 1st Dist. June 13, 1989) *with* Sakovich v. Dodt, 174 Ill. App. 3d 649, 529 N.E.2d 258 (3d Dist. 1988); Alford v. Phipps, 169 Ill. App. 3d 845, 523 N.E.2d 563 (4th Dist. 1988); *and* Bloom v. Guth, 164 Ill. App. 3d 475, 517 N.E.2d 1154 (1987), *appeal denied*, 121 Ill. 2d 567, 526 N.E.2d 827 (1988).

closing his theory of recovery through the reports of expert witnesses, while the hospital's attorney could not confer with these physicians privately to prepare them for their depositions or to determine their potential role in the occurrence.

Furthermore, even when the hospital's liability is not predicated on the acts of a specific employee, the admissions of the hospital-employee will be regarded, both legally and practically, as admissions of the hospital. Statements by a corporation's employee concerning matters over which he has authority or apparent authority are considered to be admissions of the employer.[66] Even in situations in which an employee's statements are not legally binding on the hospital-employer, the fact finder is likely to give substantial weight to statements against the hospital's interest by one of its own employees. By imposing the burdens on the defendant hospital of accepting the employee's statements or testimony as its admissions, while prohibiting the hospital's counsel from discussing the case privately with the employee, the adversarial balance will be shifted dramatically against a hospital defendant.

In contrast, the plaintiff has little legitimate expectation that physicians or other health care workers employed by the hospital will consider their continued fiduciary relationship with the patient to preclude them from discussing the case with their employer's attorneys.[67] In 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,[68] and that the employer has the right to control its employee's work.[69] The ordinary adult patient is likely to have been employed at some time, and should realize that a corporate or hospital employee owes some duty of loyalty to the employer and that when a patient sues the hospital-employer he has, in effect, also sued the

66. *See, e.g.*, Nicholson v. St. Anne Laues, 136 Ill. App. 3d 664, 670, 483 N.E.2d 291, 296 (3d Dist. 1985); Cornell v. Langland, 109 Ill. App. 3d 472, 476, 440 N.E.2d 985, 988 (1st Dist. 1982).

67. It is questionable whether a patient who files a personal injury action has a reasonable expectation of privacy with respect to any of his or her treating physicians. As one court reasoned, "[w]ith the filing of suit, appellant's privacy expectations were reduced to the extent that she could anticipate that her claims would be investigated." Moses v. McWilliams, 379 Pa. Super. 150, —, 549 A.2d 950, 955 (1988). The court concluded that permissible investigation included *ex parte* interviews of the plaintiff's treating physicians. *Id.*

68. Mullaney, Wells & Co. v. Savage, 78 Ill. 2d 534, 545-46, 402 N.E.2d 574, 580 (1980); Corroon & Black, Inc. v. Magner, 145 Ill. App. 3d 151, 160, 494 N.E.2d 785, 790 (1st Dist. 1986).

69. *See, e.g.*, Walker v. Midwest Freight Sys., 119 Ill. App. 3d 640, 646, 461 N.E.2d 1373, 1377 (1st Dist. 1983).

employed physician. Thus, in suing, the patient has created an adversary relationship between himself and the employee physician in addition to that between himself and the hospital-employer.[70]

Similarly, a hospital patient generally will realize that the physician employed by the hospital will share information about the patient with the hospital when it is necessary in the interest of the employment relationship. For example, physicians routinely supply their patient's diagnosis to the hospital billing department to prepare bills and complete insurance forms. Similarly, patients are unlikely to be surprised that reports of unusual incidents are made to the hospital's quality assurance, risk management, and legal departments. Indeed, a hospital would fail to fulfill its duty to its patients if it did not review the performance of its staff physicians by reviewing patients' medical records to ensure that the physicians provided adequate medical care.[71] Thus, few patients would assume that if they sue a hospital, the physicians and nurses employed by the hospital would not confer with the hospital's attorney and assist the attorney in defending the case.

The policies underlying the *Petrillo* decision do not support the extension of its prohibition on *ex parte* conferences to employees of a defendant hospital. Such an extension ignores the practical realities of litigation, which make it essential for hospital counsel to be able to discuss the case with the hospital's employees outside the presence of the opposing counsel in order to prepare his case effectively.

C. Non-Employee Participant in Medical Care Surrounding the Occurrence

Just as physicians who fear that legal action may be taken against them should be exempt from the *Petrillo* rule, 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.

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70. It is ironic that the *Ritter* decision chose to ignore the realities of the employer relationship at the same time that Illinois appellate courts have expanded the scope of a hospital's liability for non-employed physicians through the doctrine of apparent agency, which is essentially based on the assumption that the average patient will assume that certain physicians, such as anesthesiologists and emergency room physicians, are hospital employees. *See* Sztorc v. Northwest Hosp., 146 Ill. App. 3d 275, 496 N.E.2d 1200 (1986).

71. Pickle v. Curns, 106 Ill. App. 3d 734, 739, 435 N.E.2d 877, 881 (2d Dist. 1982); Johnson v. St. Bernard Hosp., 79 Ill. App. 3d 709, 716, 399 N.E.2d 198, 204 (1st Dist. 1979).

This should be true regardless of whether they are employed by one of the parties to the suit.

Participants in the medical care surrounding the occurrence have good reason to fear potential liability for the event, even if they have not been named as defendants in the complaint. Under section 2-616 of the Code of Civil Procedure, the complaint can easily be amended at any time before final judgment for the purpose of conforming the pleadings to the proof or to "introduc[e] any party who ought to have been joined as a plaintiff or a defendant."[72] Moreover, under the Contribution Among Joint Tortfeasors Act, other defendants may name any of the participants in the occurrence as a third-party defendant by filing a third-party claim prior to trial in the original action.[73] Thus, any of the participants in the occurrence are potential defendants and become adverse to the plaintiff as soon as the lawsuit is initiated. As such, they are entitled to legal representation and should be able to join with the hospital or any of the other defendants in defending the action.[74]

In addition, the unnamed participant in the occurrence is likely to have been providing care to the plaintiff jointly with the defendants already named and, therefore, is likely to have been communicating with the defendants concerning the plaintiff's condition while providing medical care. Particularly in the hospital setting, medical care generally is provided by a team of physicians, nurses, and other personnel, all of whom must discuss the patient's condition with each other to provide effective treatment. Consequently, the patient has no reason to expect that the physician or other hos-

72. ILL. REV. STAT. ch. 110, para. 2-616 (1987).

73. ILL. REV. STAT. ch. 70, para. 305 (1987). *See* Laue v. Leifheit, 105 Ill. 2d 191, 473 N.E.2d 939 (1984); Tisoncik v. Szczepankiewicz, 113 Ill. App. 3d 240, 245-46, 446 N.E.2d 1271, 1275 (1st Dist. 1983).

74. *See, e.g.*, United States v. Zolin, 809 F.2d 1411, 1417 (9th Cir. 1987), *modified* 842 F.2d 1135 (1988) (communications among client, attorney, and third party on matter of common interest privileged even though third party not sued and faces no immediate liability); United States v. McPartlin, 595 F.2d 1321, 1335-37 (7th Cir. 1979) (statements to codefendant's attorney are privileged when related to any purpose common to participating codefendants); Hunydee v. United States, 355 F.2d 183, 185 (9th Cir. 1965) (conferences between actual or prospective codefendants and their attorneys concerning common issues to facilitate representation in subsequent proceedings are subject to attorney-client privilege); *In re* Grand Jury Subpoena, Nov. 16, 1974, 406 F. Supp. 381, 389 (S.D.N.Y. 1975) (attorney-client privilege covers communications to prospective or actual codefendants' attorney in interests of joint defense effort); Stanley Works v. Haeger Potteries, Inc., 35 F.R.D. 551, 554-55 (N.D. Ill. 1964) (work product privilege applicable when attorneys for parties with mutual interest in litigation exchange work product); International Bhd. of Teamsters v. Hatas, 287 Ala. 344, 366-67, 252 So. 2d 7, 27-28 (1971); C. MCCORMICK, EVIDENCE § 91, at 219 (Cleary 3d ed. 1984).

pital personnel will maintain his confidences from the other participants in his care.[75] Indeed, the patient likely would hope that his physicians would all be advised of any information relevant to his condition so that their decisions are fully informed. There is no reason for the patient to assume that his decision to name one of the participants in his medical care as a defendant should, by itself, dictate that the medical care providers would stop sharing information about the treatment they jointly provided, when all may fear eventually being named in the suit as a defendant or third party defendant.[76]

V. CONCLUSION

The *Petrillo* court created a new type of witness privilege, which protects the means by which communications are discovered, rather than protecting the communication itself from discovery. In interpreting this privilege, courts should avoid mechanical approaches to new situations, such as the court applied in *Ritter*. If the courts applying the *Petrillo* privilege fail to weigh both the justifications for the privilege and the countervailing problems which the privilege creates, including the inability of potential defendants to prepare their defense effectively with the advice of counsel, the *Petrillo* rule will become another weapon in the plaintiff's arsenal, rather than a method to protect the legitimate expectations of patients that their physicians will continue to fulfill their roles as fidu-

75. There is little reason to believe that most patients expect their physicians to maintain any confidentiality about their condition and treatment, except in unusual cases such as sexually transmitted diseases and psychotherapy. As Wigmore noted:

> Barring the facts of venereal disease and criminal abortion, there is hardly a fact in the categories of medicine in which the patient himself attempts to preserve any real secrecy. Most of one's ailments are immediately disclosed and discussed. The few that are not openly visible are at least explained to intimates.

8 J. WIGMORE, EVIDENCE § 2380(a), at 829 (McNaughten rev. ed. 1961). Thus, it is not at all unusual to hear physicians discussing a patient's condition and treatment on televised news broadcasts when the patients are public figures, have been injured in a newsworthy manner, or have undergone an experimental procedure. It is rare, however, to hear objections to this practice.

76. It is likely to be difficult at the beginning of a lawsuit to determine which physicians took part in the occurrence and, therefore, should be subject to this proposed exemption to *Petrillo*. As discussed above, it is often impossible to determine in advance what will constitute the focus of the plaintiff's criticisms of the medical care he received. In many cases, however, there will be one or more distinct episodes when the patient's condition has taken a dramatic, unexpected turn for the worse, which likely will constitute at least one focus of the plaintiff's complaint. The physicians involved in these incidents, even if not criticized, are likely to fear potential liability and to want to coordinate their defense with other physicians involved in the event. Thus, they should be exempt from the bar on *ex parte* communications with defense counsel.

ciaries after suit has been brought. The court in *Ritter* failed to consider any of the problems its holding would create or whether the patients had any legitimate continued expectation of confidentiality. Therefore, it extended the *Petrillo* rule far beyond its natural boundaries, and should not be followed in future cases.