Navigating the Law of Defense Counsel Ex Parte Interviews of Treating Physicians

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Abstract

The rising costs of litigation have hit those involved in healthcare-related cases — including patients, doctors, the courts and lawyers — perhaps hardest of all. Litigation costs have triggered rising malpractice insurance rates for doctors, extensive risk for malpractice attorneys on both sides of the aisle, clogged dockets for courts, and rising fees for clients. Not surprisingly, there is a constant debate about ways that litigation costs in these cases might be reduced. One practice that may alleviate at least some of this waste would cost nothing to implement and has the potential to create large savings: allowing ex parte interviews of treating physicians. Courts have fractured in regulating these interviews — which has culminated in a confusing legal framework at both the state and federal level. Nearly every state, and many federal jurisdictions, differ in how these interviews are regulated, or if they are even permitted. This article will explore the issue of defense counsel ex parte interviews of treating physicians, and what might be done to standardize the practice and balance the interests of all involved. Section I will explore the bodies of law that many courts and litigants have suggested restrict — or even prohibit — ex parte defense counsel interviews of treating physicians. Section II discusses the state of the law regulating ex parte defense counsel interviews across both the federal and state systems. Section III attempts to wade through the policy arguments raised by various state and federal courts in support of the methods each has used to regulate ex parte interviews of treating physicians. Finally, we offer a first attempt at creating a uniform approach to regulating ex parte defense counsel interviews that balances the policy arguments raised by both sides of the bar as well as the courts.
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1. Introduction

The rising costs of litigation have hit those involved in healthcare-related cases—including patients, doctors, the courts and lawyers. Litigation costs have contributed to an increase in malpractice insurance rates for doctors, increased the risk for malpractice attorneys on both sides of the aisle, clogged court dockets, and have made litigation more costly for clients. Not surprisingly, there is a constant debate about how to control litigation costs.

One practice that may alleviate at least some of this waste would cost nothing to implement and has the potential to create large savings: allowing ex parte interviews of treating physicians. Depositions in complex healthcare-related cases often constitute a significant portion of the litigation costs, and ex parte interviews allow attorneys to reduce the number of depositions and gather relevant information without incurring these excessive costs. While these interviews could be helpful in any civil case where a medical condition is at issue, they are most important in medical malpractice cases—where physician testimony may be used not only to explain issues of medical causation and damages, but also to determine whether the defendant conformed to the applicable standard of care.

Seemingly any time “ex parte” is mentioned, controversy ensues, and ex parte interviews of treating physicians are no
exception. Courts have fractured in regulating these interviews—which has culminated in a confusing legal framework at both the state and federal level. Nearly every state, and many federal jurisdictions, differ in how these interviews are regulated, or if they are even permitted. Some state and federal courts have banned the practice outright, while others allow the interviews only in certain circumstances—and still others impose virtually no special restrictions whatsoever. In fact, there is a nearly-equal divide among the states with about half the courts generally permitting ex parte interviews of treating physicians, and the other half generally disallowing the practice.

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similarly conflicted. Determining whether a defense lawyer will be allowed to interview a treating physician—even to contact a treating physician to schedule a deposition—will often require a careful review of relevant case law, state statutes, and legislative records. And even then, the answer may not be clear.

Although the dilemma perhaps weighs most heavily on the shoulders of those seeking to conduct these interviews, namely defense counsel, the unresolved nature of the law also creates challenges for treating physicians who must respond to interview requests. Plaintiffs and their counsel also have an obvious interest in the resolution of this issue as it affects the patient privilege and other confidentiality rights.

This article will explore the issue of defense counsel ex parte interviews of treating physicians, and what might be done to

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standardize the practice and balance the interests of all involved. In many respects, courts and scholars have recognized that treating physicians in personal injury litigation are usually merely fact witnesses, albeit with special expertise, and allowing plaintiffs to have unfettered access while defendants are relegated to a formal deposition might create a fundamental imbalance in informational power. Moreover, there are significant arguments raised by the defense bar in terms of efficiency and fairness. However, there are clearly risks inherent in allowing defense counsel to have unlimited and unregulated access to treating physicians—particularly the danger that doctors might inadvertently disclose privileged information.

Section I will explore the bodies of law that many courts and litigants have suggested restrict—or even prohibit—ex parte defense interviews. Most important, the patient-physician privilege and other confidentiality rules, as well as HIPPA, will be considered. Section I concludes that, while these doctrines may be relevant to the regulation of the interviews, they certainly do not prevent courts and legislatures from permitting them.

Section II discusses the state of the law regulating ex parte defense interviews across both the federal and state systems. The current state of the law across jurisdictions paints an

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4 In the interest of space and readability, "defense counsel ex parte interviews of treating physicians" will be referred to as "ex parte defense interviews" for the duration of this article.
inconsistent, often confusing portrait. Jurisdictions vary widely on whether these ex parte interviews are even allowed, and even where they are the rules are often so unclear that counsel may struggle to discern what type of interview is permitted. Much of this inconsistency and confusion appears to stem from assumptions about the effects of the doctrines discussed in Section I, or from arguments based on conflicting policy grounds. This is especially true of the patient-physician privilege, which many jurisdictions have cited as the primary reason these interviews should be prohibited. Section II will end by using Nevada law as a prime example of a jurisdiction with a confusing maze of rules based on unclear, and potentially inapplicable grounds.

Section III attempts to wade through the policy arguments raised by various state and federal courts in support of the methods each has used to regulate ex parte defense interviews. The hope is that by looking at the policies behind the different approaches courts and legislatures can make more informed decisions when regulating defense counsel treating physician interviews.

Finally, we offer a first attempt at creating a uniform approach to regulating ex parte defense interviews that balances the policy arguments raised by both sides of the bar as well as the courts.
Ultimately, this article does not suggest a perfect means of regulating these interviews. Rather, we urge legislatures and courts regulating ex parte defense interviews to consider the policy arguments raised by both sides of the bar in crafting a solution. And perhaps most important, to create a measure of uniformity and clarity in this area of the law.

2. The current state of the law on ex parte defense interviews.

State and federal courts, and legislatures, have treated ex parte defense interviews in myriad ways—leaving litigants at sea when it comes to determining whether to conduct one of these interviews. Moreover, it is often unclear what policy rationale courts and legislatures are using to reach their regulatory decisions.

Federal treatment of the issue is complicated by choice of law implications, with federal courts disagreeing about whether a state's procedural application of its substantive privilege law is binding on federal courts hearing a case under diversity.

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5 Depending on the court’s jurisdiction, the applicable privilege law will vary. Interviews can arise within a federal question case, where federal law, specifically FRE 501, provides the applicable privilege law. Alternatively, the interviews can occur within a diversity case, where the federal court will be applying state privilege law. In a federal question case, because there is no federal procedural rule explicitly permitting or prohibiting defense counsel ex parte interviews, whether such an interview will be permitted will be a question of federal common law.
Some federal courts interpret state privilege law as either prohibiting or specifically permitting the interviews. Even where a Federal court applies federal law cases are inconsistent. Most federal courts appear to allow ex parte defense counsel interviews when applying federal law—largely because informal discovery techniques are well-accepted and no federal rule specifically prohibits the activity. However, some federal courts have held the opposite: that the absence of a rule permitting the interviews somehow results in the interviews being prohibited.

States have used a variety of mechanisms to control ex parte defense interviews. Some have enacted statutes explicitly banning the practice, while others have enacted laws explicitly permitting the practice with certain limitations. For example,

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6 In diversity cases where federal courts are applying state privilege law, federal courts disagree about whether state common law bans on defense counsel ex parte interviews are attached to the privilege law so that the federal court should also ban the interviews even if the ban is not in the statute. See, e.g., Felder v. Wyman, M.D., 139 F.R.D. 85, 87–91 (D.S.C.1991) (interpreting South Carolina privilege law to allow ex parte interviews).


8 E.g., Iowa Code x 622.10(3)(a)(2) (2005); Minn. Stat. x595.02, subd. 5 (2003).

9 Idaho's Rule 26(b)(4), was amended to add language explicitly prohibiting ex parte contact with an “adverse expert” which some courts have held applies to treating physicians. New York has recently proposed such a rule: “Ex-parte interviews: In any action involving personal injury, medical, dental, or podiatric malpractice or wrongful death, no party or anyone acting on behalf of a party may either directly or indirectly conduct ex-parte interviews with the treating
Michigan law provides that a defendant in a medical malpractice action or the defendant’s attorney or representative “may communicate” with persons or entities with respect to whom the plaintiff has waived the physician-patient privilege “in order to obtain all information relevant to the subject matter of the claim or action and to prepare the person's or entity's defense to the claim or action.”\textsuperscript{10} The statute also makes clear that a person who discloses such information “does not violate [the statutory patient-privilege] or any other similar duty or obligation created by law and owed to the claimant or plaintiff.”\textsuperscript{11} However, even these statutory schemes can be ambiguous. For example, litigants have argued that the Michigan disclosure rule was only meant to reach written disclosures. Even in jurisdictions with apparently clear patient-disclosure rules on point confusion may exist about when ex parte interviews are, or are not, permitted.\textsuperscript{12}

\textsuperscript{10}MCL 600.2912f(2).
\textsuperscript{11}MCL 600.2912f(3).
\textsuperscript{12}It also remains unclear what information is “relevant” in terms of medical history under the Michigan Statutory scheme. Nevada law, discussed in detail \textit{infra}, has a legislative scheme
Other states have developed common law to deal with ex parte defense interviews.\textsuperscript{13} In these states, litigants are left especially uncertain because the contours of the various common law doctrines are almost impossible to discern without testing them in court—not the optimal practice. For example, the Washington Supreme Court has held that defense counsel ex parte interviews with treating physicians in personal injury cases are prohibited.\textsuperscript{14} But, a recent decision adds a further layer, holding that there is an exception where the treating physician is employed by the defendant.\textsuperscript{15} In \textit{Youngs}, the Supreme Court of Washington explored the intersection of the corporate attorney client privilege and the state’s long established ban on ex parte defense interviews. In consolidated appeals of two cases involving claims against a corporate health provider based on alleged medical malpractice of its employed physicians, the court held permitting disclosure of patient information during an ongoing lawsuit—and it has been subject to litigation regarding whether it was meant to reach non-written disclosures. \textit{See infra} Section III.


\textsuperscript{14} \textit{Loudon v. Mhyre}, 110 Wn.2d 675, 677 (1988).

\textsuperscript{15} \textit{Youngs v. Peacehealth}, No. 87811-1 (Washington 2014).
that defense counsel for the institution could conduct ex parte interviews of physician employees whose treatment of the plaintiff patient had been placed into issue, or who otherwise have direct knowledge of the treatment at issue in the litigation. However, such interviews are limited in scope to the “facts of the alleged incident.” The court explained: “[w]e emphasize that the facts of the alleged negligent incident do not encompass health care that was provided before or after the event triggering the litigation, such as care for preexisting conditions or postevent recovery. This is true even where such care bears on the issue of damages.”

Other states have simply ignored the issue leaving all those involved clueless about what is permitted. Regardless of the approach a state or federal court chooses, it is clear that the state of law is fragmented. A hard look at the underlying law and policy issues is critical to developing an informed, balanced approach to the regulation of ex parte treating physician interviews.

3. Patient privilege, confidentiality, and HIPPA: not automatic bars to ex parte defense interviews.

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16 Id.
17 Id. (internal citations omitted).
18 Nevada is an example, with no explicit statutory language either permitting or banning the practice, and no common law addressing the issue as binding precedent.
A. The patient privilege’s interplay with ex parte interviews

Patient privileges are powerfully interconnected with the ex parte treating physician issue because, at bottom, defense counsel are never permitted to gather information which is privileged absent a specific ruling from a court.\(^\text{19}\) Because states vary so widely in structuring and applying the patient privilege, it becomes even more difficult to determine whether, when, and to what extent defense counsel may interview treating physicians. The patient privilege also challenges courts to ensure that they are not violating the privilege in allowing ex parte defense counsel interviews—an issue which has compelled some courts to simply disallow the practice altogether.\(^\text{20}\)

Although the patient-physician privilege did not exist at common law,\(^\text{21}\) all states today afford their citizens with some sort of privilege that prevents others from accessing or disclosing the private information shared between a patient and physician.\(^\text{22}\) New York became the first state to institute a

\(^{19}\) See, e.g., Kraemer, 342 Ark. at 29.


\(^{22}\) This is true despite a large faction of scholars and commentators that argue the patient-privilege is an anachronism because America’s reliance on medicine outweighs any concern patients have about confidentiality. See, e.g., Zechariah Chafee Jr., Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor’s Mouth on the Witness Stand, 52 YALE L.J. 607, 608 (1943) (stating
patient-privilege statute in 1828. New York’s legislature noted two driving purposes behind the new privilege. First, that protecting confidentiality between doctor and patient would promote the public health by encouraging candor. Second, the legislature analogized to the attorney-client privilege reasoning that a patient has just as much of an expectation of confidentiality as does an attorney’s client.

Generally, the patient-privilege is evidentiary and applies only to testimony. Moreover, almost uniformly, the privilege can

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25 Id.

26 While today most courts treat the patient-privilege as a purely evidentiary shield to prevent privileged testimony, there are a variety of cases 1) distinguishing between an evidentiary privilege and extra judicial confidentiality borne out of a fiduciary duty, 2) lumping both protections together, and 3) not recognizing a privilege for testimony. See generally Daniel W. Shuman, The Origins of the Physician-Patient Privilege and Professional Secret, 39 Sw. L.J. 661, 674-76 (1985). The patient-confidentiality doctrine, not to be confused with the patient privilege, is not analyzed in this note because it has so rarely been brought into the ex parte analysis, but there are some courts which find a patient-confidentiality duty to be the central factor in ex parte interview cases. See Manion v. N.P.W. Medical Ctr. of N.E. Pa., Inc., 676F.Supp. 585, 593 (M.D.Pa.1987) (“The prohibition against unauthorized contacts between defense counsel and a plaintiff’s treating physician is, moreover, completely separate and distinct from the statutory physician-
only be invoked by the patient—not the physician, unless the physician is wielding the privilege on behalf of the patient.\(^{27}\)

Finally, every state qualifies the patient-privilege either with common law waiver doctrines, or privilege-exception statutes,\(^{28}\) which requires waiver of the patient-privilege in certain circumstances.

Although far from universal, a plaintiff will often be found to have effected some sort of waiver of the patient-privilege when he or she voluntarily discloses privileged information to a significant degree.\(^ {29}\) However, in any given state this waiver may or may not be triggered by the institution of a lawsuit—leaving defense counsel uncertain as to when a waiver is in effect absent

\(^{27}\) See, e.g., Nev.Rev.Stat. § 49.235 (1991) (“1. The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. 2. The person who was the doctor may claim the privilege but only on behalf of the patient. His authority so to do is presumed in the absence of evidence to the contrary.”); Sarphie v. Rowe, 618 So.2d 905 (La.Ct.App.1993) (noting that the privilege is held by the patient).


a specific court ruling. Even if a waiver has been triggered, this does not end the privilege quandary, as there will often be questions regarding the waiver’s scope both in terms of subject matter, and in terms of whether it extends to informal discovery such as ex parte interviews. It should be noted, however, that courts may simply require the plaintiff to affirmatively waive her privilege in order to bring her suit—at the time of filing.

As a practical matter, in most states and in most cases, defense counsel will have the right in some manner to access the information held by a treating physician because the plaintiff has instituted a lawsuit and thus waived his or her privilege at least partially. Thus, as long as defense counsel does not seek information related to medical conditions outside of the scope of the current litigation the patient privilege should not act as an automatic-bar to ex parte defense interviews.

30Id.
33It should be noted that a small number of courts prohibit ex parte interviews because of a perceived risk that the physician will disclose more information than the privilege-waiver

The patient privilege does not appear to constitute an automatic bar to ex parte defense counsel interviews. However, that is not to say that the privilege should not be considered when courts or legislatures regulate interviews. The concerns raised by courts, such as those in Arizona, should be addressed within a framework that balances the competing policy interests. At bottom, uncertainty about the scope of the privilege militates for clear rules regarding what defense counsel can and cannot discuss with treating physicians.

reaches. For example, Arizona courts have interpreted the patient privilege as prohibiting ex parte interviews “as a matter of public policy and as a means to preserve the integrity of the privilege.” Benally v United States, 216 F.R.D. 478, 480; see also Roosevelt Hotel Ltd. Partnership v. Sweeney 394 N.W.2d 353, 356 (Iowa 1986) (“[W]e cannot accept ... that the plaintiff’s suit totally waives the confidential nature of the physician-patient relationship. It only waives the application of the privilege, which is confined by the statute to a testimonial setting, and does not speak to ex parte communications in a nontestimonial setting.”). However, the source of these courts’ power to ban defense counsel interviews based solely on a theoretical risk that a physician may disclose information is unclear. Moreover, these courts do not appear to be holding that the patient-privilege prohibits the interviews—the courts are simply choosing to exert their discretionary power to regulate informal discovery based on a perceived policy risk. It should also be noted that the authors could locate no empirical study investigating the extent to which physicians have revealed privileged information to defense counsel.
B. HIPAA, patient confidentiality, and ex parte defense interviews of treating physicians.

The Health Insurance Portability and Accountability Act ("HIPAA") creates even more uncertainty for ex parte treating physician interviews—spurring some courts to outright ban the practice. HIPAA addresses the extent to which a "covered entity," practically a health care professional or health care institution, may disclose a patient’s Protected Health Information (PHI). 34

HIPAA was created with a detailed scheme permitting patient information disclosure in a wide variety of circumstances— including during an ongoing lawsuit. Specifically, HIPAA allows disclosure of PHI “in the course of any judicial or administrative proceeding” either “[i]n response to an order of a court or administrative tribunal” or “[i]n response to a subpoena, discovery request, or other lawful process.” 35 For the latter method, HIPAA requires only that the provider receive adequate assurance that “reasonable efforts have been made … to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or … that reasonable efforts have been made by such party to secure a qualified protective order.” 36 As a result,

36 The seeking party must establish that:“(A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is
HIPAA’s plain language permits disclosure of a patient’s medical information by any “lawful process” once a lawsuit is ongoing. Moreover, there is nothing in the Act—or its legislative history—to suggest that defense counsel ex parte interviews are somehow prohibited. The language of the statute appears to have no effect on ex parte defense counsel interviews—if the jurisdiction allows the process then HIPAA does not interfere.

Shortly after HIPAA’s enactment, many commentators nevertheless predicted that HIPAA signaled the death knell for defense counsel ex parte interviews with treating physicians.37

37 See, e.g., Law, 307 F. Supp. 2d at 705 (decided shortly after HIPAA was enacted, and stating that the "statute has radically changed the landscape of how litigators can conduct informal discovery in cases involving medical treatment").
But, this has generally not been the case. 38 Most courts have continued to either allow or prohibit ex parte defense interviews without addressing HIPAA’s applicability. 39 Some courts have entertained the argument that HIPAA somehow prohibits ex parte defense interviews. Specifically, three cases from jurisdictions that allowed the contacts pre-HIPAA have analyzed the applicability of the statute in detail. Each found that ex parte defense interviews were still permitted. 40 Other courts have entered protective orders before finding that ex parte defense interviews were still permitted.

38 See 53 No. 10 DRI For Def. 30 (“It appears that HIPAA is not the weapon that plaintiffs' attorneys try to make it out to be.”) HIPAA’s ineffectiveness is certainly true in states that prohibit the ex parte contacts, because the state laws are thus more restrictive than HIPAA, and not preempted. National Abortion Federation v. Ashcroft, 2004 WL 292079 (N.D. Ill. 2004). Compare Valentino v. Gaylord Hospital, 1992 WL 43134 (Conn. Super. Ct. Feb. 19, 1992) (banning ex parte defense interviews with defense counsel) with Quadrini v. Sweet, 2007 WL 214605 (D. Conn. 2007) (now allowing the contact after the enactment of HIPAA).


40 Kentucky, New Jersey and Texas have determined that HIPAA and state law can coexist. In re Diet Drug Litigation, 895 A.2d 493 (N.J. Super. Ct. 2005); In re Collins, 286 S.W.3d 911 (Tex. 2009); Roberts v. Estep, 845 S.W.2d 544 (Ky. 1993). This perspective is bolstered by the fact that HIPAA explicitly leaves state privilege law untouched. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82596 (stating that Federal Rules of Evidence and states' rules of evidence dealing with privileges were meant to remain “untouched” by HIPAA).
interviews may proceed. Generally, courts have held that HIPAA, itself, permits defense counsel ex parte contacts in absence of state or federal law to the contrary. However, some courts have

41 See, e.g., Nicholas v. City of Binghamton, N.Y., 3:10-CV-1565, 2013 WL 773328 (N.D.N.Y. Feb. 28, 2013 (“By commencing this litigation and claiming personal injuries, Plaintiff has put her medical condition at issue. Accordingly, Defendants are entitled to explore her medical condition as part of their defense. the Court finds that, provided an appropriate protective order is put in place (which Defendants shall supply to the Magistrate Judge for approval), Defendants may speak with Plaintiff’s treating physicians on an ex parte basis.”)); DO. v. Rasak, 281 Mich. App. 507, 761 N.W.2d 391 (2008) (allowing interviews “[i]f qualified protective order, consistent with Health Insurance Portability and Accountability Act (HIPAA) regulation governing disclosure of protected health information, was in place”).

42 There are exceptional examples of courts finding that HIPAA implicitly prohibits ex parte defense counsel interviews with treating physicians. See, e.g., Piehl v. Saheta, CIV. CCB-13-254, 2013 WL 2470128 (D. Md. June 5, 2013) (finding that HIPAA prohibits ex parte defense counsel interviews with treating physicians, in part, because HIPAA allows only “‘expressly authorized,’ limited, and specifically identified protected health information” which would likely be violated in an ex parte interview; and because Congress created a heightened privacy interest in medical information).

held that HIPAA has created further privacy protections which argues against allowing ex parte treating physician interviews, and clients and attorneys are often uncertain about HIPAA’s import because of the lack of official law on point.

HIPAA has injected further uncertainty for courts, attorneys, and clients as to when ex parte interviews will be permitted—further necessitating a standardized approach. More importantly, the statute’s plain language, as recognized by most courts considering the matter, does not support the notion that HIPAA creates an automatic bar to ex parte defense interviews.

4. The policy interests raised by both sides of the bar.

Emerging out of the various statutes and federal and state cases is a hotly-contested discourse about whether ex parte defense interviews are a good idea. We examine the most persuasive arguments raised by both sides of the bar in the hope that

legislatures and courts will balance each in their regulation of interviews.

A. Plaintiffs' position: defense counsel cannot be trusted to behave while in private interviews with treating physicians.

Courts prohibiting ex parte defense interviews cite to a variety of supporting rationales. Likely the most common is that the federal, or a given state's, rules of civil procedure do not expressly permit ex parte defense interviews. These courts observe that the "official" discovery options open to defense counsel are adequate to discover relevant medical information, and that depositions should therefore be the "exclusive" path to substantive communication with a treating physician. The courts expressing this view also often cite to the sanctioning and supervisory powers available to the court in the context of formal discovery, which would be rendered moot in regards to informal ex parte interviews—a loss of control that many courts

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45 King, 798 F. Supp. at 1373.

46 Id.
look at unfavorably.

Judicial decisions barring ex parte defense interviews have also relied on other policies. One major line of cases has held that allowing a defendant unfettered access to treating physicians might discourage patients from discussing their health problems openly, a rationale similar to that underlying the patient privilege itself. Other courts have held that physicians have a fiduciary-type duty that is not waived merely because their patients instituted lawsuits. Similar to this rationale, many courts have interpreted their state patient-privilege statutes as impliedly banning ex parte defense counsel interviews. Some courts have held that the contact would unfairly defeat the

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49Some states have interpreted the privilege to prohibit ex parte interviews by defendant's counsel of plaintiff's treating physicians, as a means to preserve the integrity of the privilege. See Duquette v. Superior Court, 161 Ariz. 269, 778 P.2d 634 (Ariz.App.1989).
public's expectation of confidentiality,\textsuperscript{50} while yielding no significant gain from the contact.\textsuperscript{51}

Other courts have focused on physicians’ lack of legal training, reasoning that in this unsupervised and informal setting doctors are likely to inadvertently disclose prejudicial or privileged information that is outside of the boundaries of the given litigation.\textsuperscript{52}

Some courts have even worried that an unscrupulous defense attorney might, in this unmediated forum, use some nefarious tactic to unfairly coerce a treating physician,\textsuperscript{53} such as invoking the threat of increased malpractice insurance rates.\textsuperscript{54} Still, other courts have not allowed ex parte interviews because it would unfairly expose doctors to either tort liability for breach of the patient's right to privacy, or professional discipline for


\textsuperscript{52}Jaap v. Dist. Court of Eighth Judicial Dist., In & For Cascade County, 191 Mont. 319, 623 P.2d 1389

\textsuperscript{53}See, e.g., Anker v Heller, 98 Misc. 2d 148, 153 (1979) (worried that physicians may be wrongfully pressured into revealing privileged information) (“An unauthorized ex parte interview could disintegrate into a discussion of the impact of the jury's award upon a physician's professional reputation, [or] the rising cost of malpractice insurance premiums.”).

\textsuperscript{54}See, e.g., Manion v. NPW Medical Center of N.E. Pa., Inc., 676 F.Supp. 585 (M.D. Pa. 1987).
unprofessional conduct.  

B. Defendants' position: ex parte defense interviews simply level the playing field

Courts permitting ex parte defense interviews reason that allowing defendant's counsel to contact treating physicians is more equitable to the parties, and more beneficial to the system, than banning the contact. Many of these courts note that once the patient-privilege is waived by the instituting of the lawsuit, treating physicians become merely important fact witnesses with no loyalties (albeit fact witnesses with special expertise). These courts often reason that "no party to litigation has anything resembling a proprietary right to any


56See Morrison v. Brandeis Univ., 125 F.R.D. 14, 19 (D. Mass. 1989) (stating that “the function of interviewing witnesses without the presence of opposing counsel in order to gain information” as one of “important functions which counsel traditionally play in litigation”).


witness' evidence, and no party [is] entitled, absent a privilege, to restrict an opponent's access to a witness by insisting upon some notion of allegiance."\textsuperscript{59} The landmark case heralding this perspective was \textit{Doe v. Eli Lilly & Co}, which stated:

"As a general proposition, however, no party to litigation has anything resembling a proprietary right to any witness' evidence. Absent a privilege, no party is entitled to restrict an opponent's access to a witness, however partial or important to him, by insisting upon some notion of allegiance. Even an expert whose knowledge has been purchased cannot be silenced by the party who is paying him on that ground alone. Unless impeded by privilege, an adversary may inquire, in advance of trial, by any lawful manner, to learn what any witness knows if other appropriate conditions the witness alone may impose are satisfied, e.g., compensation for his time and expertise or payment of reasonable expenses involved."\textsuperscript{60}

Many of these courts also recognize both that a defendant's counsel is no more likely to misuse contact with a treating physician than is a plaintiff's counsel, and that there are many sound policy reasons in support of these interviews.\textsuperscript{61} For but one example, Federal Rule of Procedure 1 states that the rules should be "construed and administered to secure the just, speedy, and inexpensive determination of every action." In

\textsuperscript{60}Id.
\textsuperscript{61}Id.
furtherance of this policy, federal courts commonly encourage parties to utilize informal and alternative means of discovery, including witness interviews.\textsuperscript{62} For these courts, the argument that ex parte physician interviews should be prohibited because they are not expressly permitted by the rules — an argument many courts find persuasive — is counterintuitive, counterproductive, and contrary to the spirit of the rules.\textsuperscript{63} In short, these courts have recognized that "to disallow a viable, efficient, cost effective method of ascertaining the truth because of the mere possibility of abuse, smacks too much of throwing out the baby with the bath water."\textsuperscript{64}

Some commentators have also noted that allowing interviews might encourage open communication and actually increase the likelihood that all relevant information is disclosed. One commentator summed this concept up stating: "[b]y allowing a free exchange of communication between a treating physician and a

\textsuperscript{62}See, \textit{e.g.}, Trans-World Invs. v. Drobny, 554 P.2d 1148, 1152 (Alaska 1976) ("In our opinion . . . 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."); Franks v. Nat'l Dairy Prods. Corp., 41 F.R.D. 231, 237 (W.D. Tex. 1966) (stating that "unless the position of each party is known along with the basis for taking such position, no intelligent evaluation can be made for settlement purposes" via formal discovery).

\textsuperscript{63}See Felder, 139 F.R.D. 290, 291 (stating that the cases banning ex parte defense counsel interviews with treating physicians based on a lack of rules permitting the practice are senseless); Trans-World Invest. v. Drobny, 554 P.2d 1148, 1152 (Alaska 1976).

\textsuperscript{64}Langdon v. Champion, 745 P.2d 1371, 1375 n.8 (Alaska 1987); see also
defense attorney, a court actually opens a line of communication, thus allowing for full and fair disclosure of pertinent facts.\textsuperscript{65}

Courts favoring ex parte defense interviews have also pointed out the inequality of a system in which the plaintiff has unfettered access to important witnesses at any time, while the defendant is allowed a single, monitored, adversarial session of questioning.\textsuperscript{66} One court summed up this view:

Although the rules are silent on informal methods of discovery, prohibition of all ex parte interviews would be inconsistent with the purpose of providing equal access to relevant evidence and efficient, cost-effective litigation. The omission of interviews from \textsuperscript{[ ]} court rules does not mean that they are prohibited, because the rules are not meant to be exhaustive ... Their absence from the court rules does indicate that they are not mandated and that the physician cannot be forced to comply, but there is nothing in the court rules precluding an interview if the physician chooses to cooperate.\textsuperscript{67}

These courts have also held that refusing to allow defendant's counsel private interviews with treating physicians threatens the confidentiality of counsel's work-product because the defense is


\textsuperscript{67}Domako, 438 Mich. at 361-362, 475 N.W.2d 30.
unable to avoid revealing his or her strategy in a deposition, while the plaintiff is under no similar constraint.\textsuperscript{68}

Ex parte communications are also less burdensome on the witnesses themselves. Physicians have challenging schedules, and allowing an attorney to conduct an informal interview makes efficient use of both the physician's and the attorney's time. Allowing contact only through depositions is unfair to treating physicians who often need not have ever been deposed.

The two camps in this national debate are firmly divided with no clear resolution on the horizon. Many courts believe that defense counsel interviews with a plaintiff's treating physician create significant risks that cannot be alleviated through any procedure or protection, and which outweigh any benefit derived from the practice. Other courts find that defense counsel have the right to contact treating physicians, who are in essence merely fact witnesses, and furthermore, that the benefits from this informal discovery technique outweigh any potential harms.\textsuperscript{69}

What this means is that there is no clear national majority to join. Moreover, there are reasonable policy arguments to be made

\textsuperscript{68}Id.

\textsuperscript{69}There is technically also a third camp, which allows ex parte physician contact by defense counsel, but only after certain restrictions or requirements are met, or if the plaintiff approves. See Horner v. Rowan Companies, Inc., 153 F.R.D. 597, 601 (S.D. Tex. 1994) (prohibiting “private ex parte interviews between defense counsel and plaintiff’s treating physician unless, with advance notice thereof, plaintiff specifically and unconditionally authorizes same.”).
both in support of, and against, ex parte defense interviews.

5. Why legislatures and courts need to revisit the regulation of ex parte defense interviews.

There are several compelling reasons courts and legislatures should address the way that ex parte defense counsel interviews are regulated. First, physicians are placed at a severe disadvantage under the current fractured scheme. Physicians are not extensively trained in rules surrounding patient privilege and defense counsel interviews, and they are rarely given any state-specific training. Because each state, and each individual federal and state court, may currently apply different rules—it is virtually impossible for physicians to be trained regarding patient privacy and defense counsel interviews. If courts and legislatures attempt to create a uniform scheme that consistently regulates these interviews physicians, and providers in general, could institute training programs that would ensure physicians are able to properly respond to interview requests.

Second, regulation of interviews does not always appear to balance the important policy interests raised by all of those involved. As explained above, some states simply allow interviews, and some states simply prohibit them. Considering the important interests on both sides of the debate regulations should take a more balanced approach. Unfortunately, many legislatures and courts appear to have either listened to only one side of the
policy debate, or they have based their regulations on existing statutes such as HIPAA or the patient privilege, even where these laws are silent on the practice. Finally, the law regulating these interviews in many jurisdictions is vague creating costs for both plaintiffs and defendants in litigating over whether interviews are permitted. The lack of bright line regulations is particularly challenging for defense counsel who must either forego interviews or risk sanctions.

To illustrate the problems plaguing the current regulatory approach taken by many states, Nevada is used as a case study. The regulation of ex parte defense counsel interviews in Nevada exhibits each of the above issues: doctrines such as the patient privilege are blindly relied on, policy interests have not been expressly balanced, and the vague state of the law leaves physicians and attorneys unsure about whether interviews are permitted.

A. A case study of what is wrong with many current regulatory regimes: the state of Nevada

Nevada's law on ex parte defense interviews is the ultimate illustration of why reform is needed—both because of the lack of relevant, binding case law which leaves all involved unclear
about the rules,\textsuperscript{70} and because the framework does not even attempt to balance the policy interests of the participants.\textsuperscript{71}

Like other states, Nevada affords patients a privilege to prevent the disclosure of confidential medical information shared between doctor and patient.\textsuperscript{72} Nevada law contains a waiver of this privilege which operates similarly to waivers in most states: if an individual voluntarily discloses privileged information to a significant degree, presumably such as the voluntary disclosure which occurs when placing physical or mental condition at issue in personal injury litigation, the information is no longer privileged.\textsuperscript{73} Unlike many other states, however, Nevada law also provides, in addition to this general waiver statute, a statute that creates an automatic exception to the

\textsuperscript{70} There is not a single case in Nevada that provides binding case law either permitting or disapproving of ex parte defense interviews. See Parker v. Upsher-Smith Labs., Inc., 2009 U.S. Disc LEXIS 126565 (D. Nev. Aug. 27, 2009).

\textsuperscript{71} In Nevada, there are several separate privilege statutes, waiver statutes, as well as very relevant amendments to the question of whether ex parte defense counsel interviews with treating physicians are permitted. See NRS 49.215 to 49.245.

\textsuperscript{72} “A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications among the patient, the patient’s doctor or persons who are participating in the diagnosis or treatment under the direction of the doctor, including members of the patient’s family.” NRS. § 49.225 (2007).

\textsuperscript{73} “A person upon whom these rules confer a privilege against disclosure of a confidential matter waives the privilege if the person or the person’s predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter.” NRS § 49.385 (2007).
physician-patient privilege for "written medical or hospital records relevant to an ... element of a claim or defense,"\textsuperscript{74} known as the “privilege-exception” statute.

A relatively recent amendment to the privilege-exception statute raises questions about whether the state legislature meant to target ex parte defense interviews.\textsuperscript{75} Before the amendment, the statute carves out from privilege all "communications" relevant to a claim or defense.\textsuperscript{76} After the amendment, the statute carves out only relevant communications memorialized in "written ... records."\textsuperscript{77} There is nothing in the legislative record evincing the legislature's reasoning behind this change, but the record does contain the testimony of a representative of what was then known as the Nevada Trial

\textsuperscript{74} "There is no privilege ... [a]s to written medical or hospital records relevant to an issue of the condition of the patient in any proceeding in which the condition is an element or a claim or defense." N.R.S. 49.245 (2006). This statute also provides a variety of other exceptions, such as disclosures made in the course of diagnosing or treating an illness. \textit{Id}.

\textsuperscript{75} The single federal district court case to have prohibited ex parte defense counsel contacts in Nevada, discussed extensively infra, uses this amendment as the primary basis for its holding— even though there is no specific statutory language banning ex parte defense counsel contact. Parker, 2009 U.S. Disc LEXIS 126565.

\textsuperscript{76} See the Nevada Senate and House' preamble discussion and summary, in which the original text of the statute is preserved. Assemb.B.809, 1987 Leg., 64th Sess. (Nev. 1987).

\textsuperscript{77} See N.R.S. 49.245.
Lawyers Association—a plaintiff’s bar organization.\(^7^8\) This speaker urged the change in the statute’s language to address the problem of "defendants who take advantage by thinking they can talk about anything with a doctor," and doctors being forced to "unilaterally" waive the patient physician privilege.\(^7^9\) In short, the speaker appears to have urged the change to prevent defense counsel from conducting ex parte defense interviews.\(^8^0\)

This legislative testimony notwithstanding, the statute's intended purpose is unclear. The plain language of the privilege-exception statute, even as amended, does not impose any bar to defense ex parte contact with a plaintiff’s treating doctor, it simply provides an additional means of avoiding the patient-privilege in certain circumstances.\(^8^1\) The Nevada Supreme Court has long adhered to the rule that if a statute’s language "is clear on its face, a court can not go beyond the [language] in

\(^7^8\) The Nevada Trial Lawyers Association is an organization of “independent lawyers who represent consumers and share the common goal of improving the civil justice system.” The association is now called the Nevada Justice Association. See Nevada Justice Association, About us, http://www.nevadajustice.org/NV/index.cfm?event=showPage&pg=mission (last visited on April 25, 2012). The association commonly sends representatives to speak at meetings of the Nevada legislature. Id.

\(^7^9\) Assemb. B. 809, 1987 Leg., 64th Sess. (Nev. 1987).

\(^8^0\) Id.

\(^8^1\) See supra note 58 and accompanying test.
determining legislative intent.” And it is difficult to see how the statute’s language could be ambiguous as to the specific question of whether it bans ex parte defense interviews—considering the statutory language is simple, straightforward, and makes no mention of any such contact. The rationale behind this primary rule of construction is that there can be no better indication of legislative intent than the words the collective legislative body has chosen to include in a statute.

Despite the statute’s relatively clear language and the implications of Nevada’s “plain meaning rule,” the legislature’s amendment of the exception statute’s language cannot escape notice. There is an argument to be made that the amendment was indeed aimed at ex parte defense interviews, after all, why else would the legislature have made the effort to amend the statute

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82 State v. Lucero, 249 P.3d 1226, 1228 (Nev. 2011); see also Beazer Homes Nevada, Inc. v. Eighth Judicial Dist. Court ex rel. County of Clark, 120 Nev. 575, 579-80 (2004) (“If the plain meaning of a statute is clear on its face, then [this court] will not go beyond the language of the statute to determine its meaning.”); Catanio, v. Corello, 120 Nev. 1033 (“We must attribute the plain meaning to a statute that is not ambiguous…only when the statutory language itself” can have two “reasonable meanings…may we look beyond the statute to determine legislative intent.”); Hotel Employees & Rest. Employees Int'l Union, AFL-CIO v. State ex rel. Nevada Gaming Control Bd., 103 Nev. 588, 591, 747 P.2d 878, 879-80 (1987) (“When a statute is clear on its face a court may not go beyond the language of the statute in determining the legislature’s intent.”).

83 See supra note 63 and accompanying text.

84 See supra note 29 and accompanying text.
in the first place.\textsuperscript{85} However, the legislature could have also meant only to ensure that defense counsel were not given unregulated power to conduct informal interviews.\textsuperscript{86} The legislature may have simply been concerned that in wording the original exception statute so broadly to cover any and all “communications,” they had actually usurped the courts’ default supervisory power over these informal interviews.\textsuperscript{87} The legislature could have plausibly meant to ensure that courts would have the power to regulate and supervise informal discovery procedures on a case-by-case basis.\textsuperscript{88} That other states with similar exception statutes have narrower language than Nevada’s pre-amendment statute, and that the current version of Nevada’s exception statute is generally similar to other state’s versions, is also persuasive.\textsuperscript{89}

Furthermore, although legislative history is considered,

\begin{quote}
\textsuperscript{85} See id.
\end{quote}

\begin{quote}
\textsuperscript{86} See supra note 53 and accompanying text. Many courts have argued that, while defense counsel ex parte interviews with treating physicians are not prohibited, they should be carefully regulated. E.g., Horner v. Rowan Companies, Inc., 153 F.R.D. 597, 601 (S.D. Tex. 1994) (prohibiting “private ex parte interviews between defense counsel and plaintiff’s treating physician” unless certain requirements are met).
\end{quote}

\begin{quote}
\textsuperscript{87} It is notable that Nevada’s exception statute pre-amendment, was worded more broadly than comparable statutes in other states. See supra note 32 and accompanying text.
\end{quote}

\begin{quote}
\textsuperscript{88} See sources cited supra note 45.
\end{quote}

\begin{quote}
\textsuperscript{89} This fact leads one to believe that, perhaps, the Nevada legislature was just bringing its exception statute into line with other states. Id.
\end{quote}
Nevada courts also use “reason and public policy” to interpret legislative intent.90 Considering that states have, generally, moved towards permitting more ex parte defense interviews, this rule of statutory interpretation also indicates that Nevada would not interpret the exception statute as outright prohibiting ex parte defense counsel interviews without having unequivocally articulated such a ban.91

If Nevada’s privilege-exception statute is found to be unambiguous, courts will not be permitted to refer to the legislative record to interpret the statute. Even if it there were no “plain meaning rule” in Nevada, a court would have a difficult time determining that the legislature intended to outright ban ex parte defense counsel contact based on a single

90 State v. Lucero, 249 P.3d 1226, 1228 (Nev. 2011) (stating that "legislative history … and reason and public policy" are the two primary rules of construction for ambiguous statutes); Hotel Employees & Rest. Employees Int'l Union, AFL-CIO v. State ex rel. Nevada Gaming Control Bd., 103 Nev. 588, 591, 747 P.2d 878, 880 (1987) (“Pursuant to another rule of statutory construction, an ambiguous statute can be construed in line with what reason and public policy would indicate the legislature intended”); see also Robert E. v. ___, 99 Nev. 445, 448, (looking to legislative history, reason, and public policy to determine legislative intent behind ambiguous statute); Beazer Homes Nevada, Inc. v. Eighth Judicial Dist. Court ex rel. County of Clark, 120 Nev. 575, 580, 97 P.3d 1132, 1135 (2004) (“In construing an ambiguous statute, we must give the statute the interpretation that reason and public policy would indicate the legislature intended.”).

91 At one point, state and federal courts prohibiting defense counsel ex parte interviews with treating physicians were a clear majority, but the majority is not so clear anymore. See supra note 2 and accompanying text. Thus, it can easily be argued that the privilege-exception amendment’s testimony is outdated.
comment made by a member of the plaintiffs’ bar, in light of the absence of statutory language on point.\textsuperscript{92} Thus, if courts want to ban ex parte defense interviews outright, they will most likely have to look beyond the privilege-exception statute.

Finally, it is notable that Nevada’s limited precedent on patient-physician privilege waiver indicates that plaintiffs no longer have exclusive control over defense counsel’s access to treating physicians after the institution of a lawsuit.\textsuperscript{93} Looking to the Supreme Court of Nevada’s earliest, and still only, discussion of what constitutes a waiver of the patient-privilege, plaintiffs do not appear to have any right to narrow their privilege waiver once it has occurred:

\begin{quote}
The patient cannot use this privilege both as a sword and a shield, to waive when it inures to her advantage, and wield when it does not ... no further injury can be inflicted upon the rights and interests which the statute was intended to protect, and there is no further reason for its enforcement ... [once the patient has released this information] the patient can never be restored to the condition which the statute, from motives of public policy, has sought to protect ... The object of the statute having been voluntarily defeated by the party for whose benefit it was enacted, there can be no reason for its continued enforcement in such cases.\textsuperscript{94}
\end{quote}

In the end, the Supreme Court of Nevada has never officially

\textsuperscript{92} See \textit{supra} note 77.

\textsuperscript{93} It should be noted that some courts in other states have argued that plaintiff’s have just this right however. \textit{E.g.}, Horner, 153 F.R.D. at 601.

\textsuperscript{94}State v. Depoister, 21 Nev. 107, 25 P. 1000 (1891).
clarified whether the interaction of the privilege statute, waiver statute, and privilege-exception statute, as amended, leaves room for ex parte defense interviews. However, there are two cases that provide some indication of where the Supreme Court's thinking might roam. Several years ago, a federal district court applying Nevada law reached the issue of ex parte defense interviews in Parker v. Upsher-Smith. The Federal Court, ultimately, invalidated ex parte interviews.

In May of 2011, the Supreme Court of Nevada took on ex parte defense interviews for the first time in Robeck v. Lunas, and appears to have validated the practice. However, the Supreme Court left the decision unpublished so that the case cannot be relied upon as precedent, and the facts of the case are unusual, leaving the Court's reasoning open to interpretation. Consequently, the only yardsticks Nevada judges and lawyers have when deciding whether ex parte interviews are allowed under Nevada law are two apparently opposing cases—neither binding law.

96 Id.
97 Id.
a. The federal district court case: Parker v. Upsher-Smith

In Parker v. Upsher-Smith Labs., Inc., 2009 U.S. Disc LEXIS 126562 (D. Nev. Aug. 27, 2009), the plaintiff sued a drug manufacturer, Upsher-Smith Laboratories ("Upsher- Smith"), alleging that the plaintiff’s husband had died as a result of ingesting Upsher-Smith's anti arrhythm drug, amiodarone.\(^{100}\) Defense counsel sent a letter informing the plaintiff that they intended to interview some of the treating physicians in the case.\(^{101}\) The plaintiff moved to prevent the defense from conducting the interviews, arguing that such contact would violate Nevada's patient-physician privilege.\(^{102}\)

The case was first heard by a magistrate judge who found in favor of Upsher-Smith, deciding that (1) many federal circuits allow ex parte interviews for sound policy reasons, and (2) the plaintiff had waived her patient-privilege when she filed her suit and consequently there was nothing to prevent an ex parte interview.\(^{103}\) The magistrate qualified his ruling by requiring the parties to confer to ensure that information outside the scope of the litigation, which therefore might still be privileged, would

\(^{100}\)Parker, 2009 U.S. Disc LEXIS 126565 at 2.

\(^{101}\)Id. at 3.

\(^{102}\)Id. at 5 (stating that “ex parte interviews could delve into irrelevant personal matters” and would violate the amendments to Nevada’s privilege law).

\(^{103}\)The magistrate permitted defense counsel to interview, ex parte, all six of the plaintiff’s treating physicians in the case. Id.
not be discussed in the interviews. The next day, just as defense counsel was meeting with one of the plaintiff’s attorneys to discuss the interviews, one of the plaintiff’s other attorneys was writing to the treating physicians encouraging them to refuse defense counsel's requests to speak with them. Defense counsel complained of this behavior to the magistrate, and the magistrate sanctioned plaintiffs ‘counsel for the interference.

The plaintiff eventually appealed the decision permitting the ex parte interviews to the federal district court judge who then vacated the magistrate's ruling. In striking down the magistrate's decision, Judge Edward Reed found that the legislative history of the amendment to the privilege-exception

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104 The court “further directed counsel to meet and confer as to the scope of interviews, and if they could not resolve this issue, they were directed to file notices with the court, and a hearing would be scheduled to decide this matter.” Id. at 4.

105 Plaintiffs sent a total of at least twenty letters to various physicians, stating in relevant part: “I represent Iris Parker ... I am writing this letter to ... advise you that even though the court has permitted counsel for Upsher-Smith to speak with you outside our presence, you are free to decide whether or not you wish to meet privately with defense counsel. There is legal authority which provides that neither HIPAA-compliant authorizations nor a court order can force a healthcare professional to communicate with the attorneys. Id. at 6-7. Defense counsel also attempted to argue that the plaintiffs’ counsel’s communications with a newspaper constituted an “indirect” communication with the treating physicians. Id. at 7.

106 Id. at 8-11 (citing to various sanctioning powers including Fed.R.Civ.P. 37(b)(2), 28 U.S.C. § 1927, Local Rule IA 4-1, and sanctions pursuant to the court’s inherent powers).

statute indicated the Nevada legislature had changed the statute's language to specifically bar defendant ex parte contact with treating physicians.\footnote{108}{\textit{Id.} at 12 (accepting plaintiff's position that the amendments to the privilege-exception statute created an affirmative ban on ex parte defense counsel treating physician interviews).} The Court acknowledged that, given that a plaintiff indisputably waives the privilege in situations such as deposition and trial testimony, the act of instituting a lawsuit in Nevada necessarily constitutes a much broader waiver of the privilege than merely the "written records" referenced in the “privilege-exception” statute.\footnote{109}{\textit{Id.} at 10.} But the Court read the amended statute as imposing a complete ban on ex parte defense interviews, even though the statute itself makes no mention of such a prohibition.\footnote{110}{See \textit{supra} note 81 and accompanying text.}

There are several potential arguments against \textit{Parker}'s holding. First, \textit{Parker} reasoned that the legislature intended to create a specific ban on defense counsel contacting treating physicians regardless of whether a privilege is in effect.\footnote{111}{\textit{Id.}} As discussed infra, the plain meaning of the statute’s language does not indicate a ban on ex parte defense counsel contact.\footnote{112}{See generally Mark A. Graber, \textit{Does It Really Matter? Conservative Courts in a Conservative Era}, 75 \textit{FORDHAM L. REV.} 675, 680 (2006) (analyzing the disadvantages and potential constitutional problems with judges applying their own analysis in derogation of that of the legislatures).}
legislature could have been explicit in drafting its amendment if it had wanted to ban ex parte contact specifically, and other states which prohibit such contact have usually done so unambiguously.\textsuperscript{113} Also, the potential abuse of an ex parte interview can be addressed by the type of pre-interview policing advocated by the magistrate in Parker, which is also used in many other jurisdictions that permit defense ex parte interviews.\textsuperscript{114}

Neither the language of the amendment to the exception statute, the scant published legislative history behind it, nor the Parker court's interpretation of legislative intent are dispositive of whether ex parte defense interviews are permitted. However, while there remains no binding precedent, the Supreme Court of Nevada has recently provided some illumination on the ex parte debate, in an unpublished opinion.

b. \textit{Robeck v. Lunas}: The Supreme Court of Nevada's first foray into defense counsel ex parte interviews

In May of 2011, the Supreme Court of Nevada reviewed \textit{Robeck v. Lunas Const. Clean-Up, Inc.}, 53576, 2011 WL 2139941 (Nev. May 27, 2011), which deals squarely with the defense counsel ex parte contact issue, albeit amid unusual facts.\textsuperscript{115} At the outset, it is important to note that this decision is "unpublished," and under

\begin{itemize}
\item \textsuperscript{113}See supra note 27 and accompanying text.
\item \textsuperscript{114}See supra note 77 and accompanying text.
\end{itemize}
Nevada law, that means it cannot be officially used as precedent or cited as legal authority. However, the decision is still a valid order from the Supreme Court which presents the reasoning of the justices, so for purposes of predicting Nevada law on this issue, the decision is highly informative.

In Robeck, the plaintiff was appealing a trial court’s dismissal of his medical malpractice suit. The plaintiff appealed, in part, on the grounds that the defendant’s insurance company had improperly contacted the plaintiff’s treating physicians. The defendant admitted to contacting, ex parte, the plaintiff's treating physician, but only for the purpose of requesting medical documents and to coordinate a deposition. Notably, the plaintiff did not dispute that the defendant’s

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116 See Nevada Supreme Court Rules Rule 123 (stating that “[a]n unpublished order shall not be regarded as precedent and shall not be cited as legal authority”).
117 It is also common practice to cite unpublished opinions as persuasive notice of the Supreme Court’s thinking, although it cannot be used as the basis for rulings.
118 Robeck, 53576, 2011 WL 2139941.
119 In addition to the allegation that defense counsel wrongfully contacted the plaintiff’s treating physicians ex parte, the plaintiff also argued that Robeck’s treating physicians gave false testimony, and that defense counsel made improper statements in his opening and closing arguments. Id.
120 Defense counsel asserted “that it contacted Robeck’s physicians to obtain Robeck’s medical records and coordinate depositions, which Robeck [did] not controvert.” Robeck, 53576, 2011 WL 2139941.
The interview concerned only logistical matters. The only substantive information that changed hands was written documents that the privilege-exception statute specifically permits.

In referring to Nevada's privilege-exception statute, the Court stated that "because Robeck's condition was an element of his claim against [the defendant], [the defendant] did not violate Robeck's medical privacy by contacting his physicians to obtain information regarding Robeck's condition." In broadly stating that defense counsel was permitted to secure "information regarding Robeck's condition" through an ex parte interview, the Supreme Court seemed far less concerned than the Parker court about the possibility of harm which might ensue from a defense lawyer talking with the plaintiffs treating doctor. In short, Robeck's language, although perhaps dictum because no substantive information appears to have been disclosed in the interview, plainly permits ex parte interviews as long as the defendant is "contacting ... physicians to obtain information [about a] condition [that is] an element of [the plaintiffs] claim against the defendant."

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121 Id.
122 Id.
123 Id.
124 The Robeck court made no mention of a distinction between substantive and non-substantive information. Id.
125 Id.
Robeck does not answer the ex parte interview question definitively, as, even if it were published law, the Court, despite its broad language, leaves open the possibility that these interviews could be restricted to the discussion of document production, scheduling, or other logistical matters.126 Nor does Robeck foreclose the possibility that even if permitted, ex parte defense interviews must be preceded by some form of agreement by the parties or court order regarding the permissible scope of the contact.127

6. An attempt at a uniform approach that balances the important policy arguments and brings needed consistency.

Reforms to the standards for treating physician interviews need to address three aspects: first, how to enact new standards as a procedural matter; second, balancing plaintiff and defense counsels’ competing policy interests; and third, creating a more definitive standard so that attorneys know what they can and cannot do in these interviews.

First, there are several potential mechanisms to create new

126 Even though, as noted in note 97, the court does not address the substantive/non-substantive distinction, it can be argued that the holding would be, even if it were persuasive, dictum as to the question of substantive communications. However, the court’s reasoning would seem to apply to all communications.

127 If there was substantive information changing hands, the court may have applied reasoning in line with the magistrate in the Parker case, finding that some agreement as to permissible scope should be reached prior to any interviews.
ex parte interview standards. Legislatures could enact statutes explicitly dealing with the ex parte interview issue, and defining how and when the patient privilege is waived. A model statute is offered at the conclusion of this article which attempts to balance the competing policy perspectives. Legislative solutions offer certainty and are the most binding form of legal standard. However, legislative fixes may be difficult to accomplish—and typically involve lengthy delay due to political challenges.128

Another option for creating new standards would be to adopt local rules or practices on point. Likely, the best approach would involve a model standard that could be adopted into local rules. The benefit of this approach would be to give discretion to local authorities to craft a solution tailored to their locale. The shortcoming of this approach is that judges would have to agree, and judges would be free to vary the terms of the standard, thereby contributing to the lack of uniformity in this area.

Once a mechanism is selected, a solution must balance the policies outlined in Section II supra. Balancing the competing policy perspectives raises two critical needs: first, the need to give defense counsel meaningful ex parte access to treating physicians without incurring the expense and delay of deposition;

and, second, the need to protect the plaintiff’s privileged medical information from inadvertent—or purposeful—disclosure.\textsuperscript{129} Other important concerns include preventing defense counsel from exerting undue influence on treating physicians during the interview process, while ensuring that lawyers have easy access to treating physicians for ministerial matters such as verifying data and scheduling depositions, as well as permitting counsel a fair opportunity to ask substantive questions about the case during the interview.

To address these two fundamental needs, the proposed standard operates to give defense counsel meaningful access to treating physicians, while ensuring that defense counsel take protective measures to ensure that only non-privileged information is released and that the interview is conducted appropriately. This is achieved by creating extensive procedural safeguards defense counsel must comply with in order to carry out the interview.

For additional protection of plaintiff’s privileged information, one provision allows plaintiffs to seek a protective order from the judge specifically delineating what topics the treating physician may discuss—upon the plaintiff making a

\textsuperscript{129} The authors have been unable to find any reliable evidence regarding the extent of purposeful defense counsel abuse of treating physician interviews. Moreover, most commentators and judges do not raise significant concerns over purposeful abuse. Thus, this policy concern is not included in the predicates for reform.
sufficient showing that there is a “significant likelihood” of inadvertent disclosure of privileged information. This provision is envisioned to address situations where plaintiffs have reasonable concerns that sensitive, privileged information is so related to privileged information, the treating physician may have trouble figuring out what information to disclose even after the defense counsel complies with the procedural safeguards.

**Statute:**

(a) Waiver of the patient-physician privilege when asserting claims or defenses.

(1) Subject to subsection (b), a person waives the patient-physician privilege by asserting a claim or defense in which the person’s medical condition is placed at issue.

(2) The scope of the waiver in section (a)(1) is not unlimited but shall extend only to the subject matter relevant to the person’s claims or defenses.

(b) Ex parte interviews of a party’s treating physician by opposing party; protective orders; exceptions.

(1) In general.— In any case in which a party has placed his or her medical condition at issue, the opposing party shall be permitted to contact the party’s treating physician if the opposing party first does each of the following:

a. informs the treating physician of the specific subject matter that is not privileged, such as by waiver, and therefore permissible to discuss;
b. informs the treating physician that any personal medical information, other than that pertaining to the non-privileged subject matter identified in subsection a, should not be discussed;
c. informs the treating physician that the physician may refuse to speak in the non-testimonial setting to the party or his or her counsel for any reason;
d. informs the treating physician of his or her right to be compensated for his or her time;
e. informs the treating physician of his or her right to notify the patient and his or her attorney of the interview in advance;
f. provides notice to counsel of record for the opposing party, or the opposing party if there is no counsel of record, within 24 hours of the interview;
g. informs the treating physician of his or her right to consult with his or her own counsel in connection with the interview; and,
h. memorializes what is discussed in the interview in written or recorded form, and provides it upon request to the physician.

(2) Notwithstanding section (1), a party may seek a protective order from the court which limits the subject matter of an opposing party interview with a treating physician, upon a showing that there is a significant likelihood that the patient’s privileged information may be disclosed.

(3) Notwithstanding section (1) or section (2), a party may contact a treating physician for procedural matters, such as scheduling a deposition, requesting
mailing information, or requesting information pertaining to the physician’s status as a treating physician.

(c) Protection of treating physicians who participate in interviews with defendants.

(1) No treating physician shall be liable for participating in interviews with defendants if the physician acted in good faith.