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In This Issue

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The Impact of HIPAA on *Ex Parte* Interviews with Plaintiffs' Treating Physicians: Preemption or Red Herring?

By Bruce R. Parker and DS Gray¹

Informal interviews with key witnesses are a valuable component in preparing an effective defense in litigation. This is particularly true with *ex parte* interviews of treating physicians. Approximately 21 states still permit defense counsel in cases where plaintiffs have put their medical and/or emotional health in issue to conduct informal interviews of consenting treating physicians.² Such interviews spare defendants of the cost of formal discovery and provide defense counsel with a more candid assessment of the plaintiffs' medical condition.

It appears that the plaintiffs' bar in jurisdictions that permit *ex parte* interviews have started a campaign of threatening physicians and hospitals with litigation for allegedly violating the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320(d), *et seq.* As a result, some hospitals are beginning to adopt policies prohibiting *ex parte* interviews. This newsletter explores the legal basis for the plaintiffs' new strategy, comments on the ethical implications of the approach, and suggests steps that defense counsel can take to protect their rights to *ex parte* interviews, notwithstanding HIPAA and the accompanying Privacy Regulations promulgated by the United States Department of Health and Human Services ("DHHS"). 45 C.F.R. §§ 160 *et seq.*

HIPAA and the Privacy Regulations literally extend to *any* use or disclosure of the main topic of *ex parte* interviews, "protected health information" ("PHI").³ Due to the breadth of the definition of PHI, topics often covered during *ex parte* interviews arguably fall under HIPAA. If this was the purpose of HIPAA or the Privacy Regulations, Congress and the DHHS used unconventional means to

express this intention. HIPAA, the Privacy Regulations, and the accompanying history of both do not even address *ex parte* interviews. This silence recently led one court to find that HIPAA and the Privacy Regulations do not preempt state law permitting *ex parte* interviews. *In re PPA Litig.*, 2003 WL 22203734 (N.J. Super. Ct. Sept. 23, 2003) (“*PPA Litigation*”). The Superior Court of New Jersey nonetheless banned *ex parte* interviews in that case due to the number of plaintiffs and administrative hurdles present. The unique facets of New Jersey law also may make *PPA Litigation* distinguishable in jurisdictions that allow unfettered *ex parte* interviews and do not require notice for such interviews. Until the courts, Congress, or the DHHS untangle this Gordian knot, defense counsel in jurisdictions that allow *ex parte* interviews should provide notice to plaintiffs’ counsel and shift the burden to plaintiffs to exert their HIPAA rights through a formal motion for a protective order.

VARYING PERSPECTIVES ON EX PARTE INTERVIEWS

The common law provides no confidentiality to communications between physicians and patients. *Felder v. Wyman*, 137 F.R.D. 85, 87 (D. S.C. 1991). Over the last 100 years, however, legislation and court decisions have sanctified the physician-patient relationship in many states. Jurisdictions are now fairly evenly divided on whether counsel may pierce the confidentiality of this relationship with *ex parte* interviews. See *supra* note 2. How a jurisdiction assesses *ex parte* interviews often depends on balancing the plaintiffs’ right to privacy and the defendants’ unqualified right to evidence. *Smith, supra*, at 252.

“[T]here are entirely respectable reasons for conducting discovery by interview *vice* deposition: it is less costly and less likely to entail logistical or scheduling problems; it is conducive to spontaneity and candor in a way depositions can never be; and it is a cost-efficient means” of learning information from

non-essential witnesses without deposing them at all. *Doe v. Eli Lilly & Co.*, 99 F.R.D. 126, 128 (D.D.C. 1983). In the pre-HIPAA litigation environment, if treating physicians voluntarily discussed plaintiffs’ medical treatment with defense counsel and counsel narrowly tailored any conversations to the medical conditions for which the plaintiffs sought recovery, such conversations would not have compromised any privacy rights in many jurisdictions.⁴ The Model Rules of Professional Conduct actually guarantee equal access to witnesses and preclude attorneys from instructing witnesses to refrain from talking with opposing counsel. Model Rule 3.4(f). Nothing requires or even permits opposing counsel to act as gatekeeper during these protected interviews. *Cf. Hickman v. Taylor*, 329 U.S. 495 (1947).

[A] rule disallowing *ex parte* communications with a plaintiff’s treating physicians attempts to ensure the confidentiality of the physician-patient relationship at the expense of the defendant. Allowing a plaintiff to have free access to potentially important facts and/or expert witnesses while requiring the defendant to use more expensive, inconvenient, and burdensome formal discovery methods tilts the litigation playing field in favor of the plaintiff.

Jennings, supra, at 475. Indeed, when the amount in controversy is relatively small, *ex parte* interviews may be the only realistic way of discovering the medical basis for a plaintiff’s underlying claim. *E.g., Felder*, 137 F.R.D. at 89 (in South Carolina district courts, no depositions are permitted in cases involving \$10,000 or less in alleged damages).

Several courts nonetheless prohibit defense counsel from conducting *ex parte* interviews to protect a plaintiff’s privacy.⁵ These courts question whether a treating physician should determine what PHI is relevant to a plaintiff’s claim and whether a physician can

prevent defense counsel from conducting a fishing expedition. *E.g.*, *Roosevelt Hotel Ltd. P'ship v. Sweeney*, 394 N.W.2d 353, 357 (Iowa 1986). These unmonitored communications also are seen as compromising a plaintiff's expectations of confidentiality and chilling a patient's willingness to disclose especially sensitive information. *Petrillo v. Syntax Labs., Inc.*, 499 N.W.2d 952, 957-69 (Ill. App. 1986). Others suspect defense counsel of impermissibly swaying a treating physician's opinion by emphasizing the impact of a plaintiff's verdict on medical malpractice premiums or the availability of coverage to the physician. Bobby Russ, *Can We Talk? The Rest of the Story, or Why Defense Attorneys Should Not Talk to the Plaintiff's Doctors*, 39 Tenn. B.J. 29, 30 (2003) (quoting *Manion v. N.P.W. Med. Ctr.*, 676 F. Supp. 585, 594-95 (M.D. Pa. 1987)).

BACKGROUND ON HIPAA AND THE PRIVACY REGULATIONS

Among the many, diverse subjects addressed by HIPAA is "the protection of the privacy of individuals' health information." Richard L. Antognini, *The Law of Unintended Consequences: HIPAA and Liability Insurers*, 69 Def. Couns. J. 296, 296 (2002). The DHHS ultimately promulgated the Privacy Regulations to expound upon the broad policy initiatives set forth in this section of HIPAA. Jennifer Guthrie, *Time Is Running Out—The Burdens & Challenges of HIPAA Compliance: A Look at Preemption Analysis, the "Minimum Necessary" Standard, and the Notice of Privacy Practices*, 12 Annals Health L. 143, 144 (2003). Becoming effective on April 14, 2001, the Privacy Regulations required most health care providers, health plans, and health care clearinghouses, to restrict the use and disclosure of PHI within two years. 45 C.F.R. § 164.534. (Small health plans have until April 14, 2004 to comply with the Privacy Regulations. *Id.* (b)(2).)

The Privacy Regulations place limitations on how healthcare providers may use or disclose PHI. As discussed *infra*, the Privacy

Regulations do not seek to control the conduct of third parties, such as litigants and their counsel who are not associated with those providing medical care. Therefore, it is simply incorrect for plaintiffs' counsel to argue that defense counsel violate HIPAA by conducting *ex parte* interviews with plaintiffs' treating physicians.

For any purposes besides carrying out treatment, payment, or healthcare operations, a health care provider is generally required to obtain a patient's authorization. 45 C.F.R. § 164.502(a); 45 CFR § 164.506(a)(1). Even then, "covered entities must make reasonable efforts to disclose only the minimum necessary to achieve the purpose for which [PHI] is being used or disclosed." *PPA Litig.*, 2003 WL 22203734, at *4. HIPAA and the Privacy Regulations swept aside state laws to the contrary with express, but limited, preemption clauses. 42 U.S.C. § 1320d-7(a); 45 C.F.R. § 160.203 ("A standard, requirement, or implementation specification adopted under this subchapter that is contrary to a provision of state law pre-empts the provision of state law."); *see also, e.g., United States v. Louisiana Clinic*, No. Civ. A 99-1767, 2002 WL31819130, at *5 (E.D. La. Dec. 12, 2002) (HIPAA preempted Louisiana law due to the conflict between that state's statutorily permitted authorizations for medical records and the Privacy Regulations). As noted by the DHHS:

It is important to understand this regulation as a new federal floor of privacy protections that does not disturb more protective rules or practices. Nor do we intend this regulation to describe a set of "best practices." Rather, this regulation describes a set of basic consumer protections and a series of regulatory permissions for use in disclosure of health information. The protections are a mandatory floor, which other governments and any other covered entity may exceed.

Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82471

(Dec. 28, 2000) (codified at 45 CFR Parts 160 and 164) (amended by 67 Fed. Reg. 53181 (Aug. 14, 2002)).

HIPAA'S RESOUNDING SILENCE ON *EX PARTE* INTERVIEWS

The many pages setting forth HIPAA, the Privacy Regulations, and the history of each have left several gray areas through which practitioners must sort. For many defense counsel, one of the more glaring is *ex parte* interviews. Conspicuously absent from HIPAA and the Privacy Regulations is any reference to or any balancing of the competing policy considerations regarding *ex parte* interviews. *PPA Litig.*, 2003 WL 22203734, at *23. The DHHS even downplayed the impact of the Privacy Regulations on litigation by observing that their provisions are "not intended to disrupt current practice whereby an individual who is a party to a proceeding and has put his or her medical condition at issue will not prevail without consenting to the production of his or her protected information." 65 Fed. Reg. at 82530 (discussing 45 C.F.R. § 164.512). Under such circumstances, state courts are reluctant to find preemption. *Medtronic v. Lohr*, 518 U.S. 470, 484-86 (1986) (scope of preemption dictated by Congressional intent drawn from language of statute and legislative history).

Congress and the DHHS nonetheless recognized that plaintiffs retain their federally created privacy rights and limited defendants' access to their PHI. The Privacy Regulations changed how plaintiffs' medical records may be discovered, notwithstanding the waiver of most state law protection through filing suit. See generally Lori G. Baer & Christiana P. Callahan, *The Impact of HIPAA Privacy Regulations on Discovery of Plaintiffs' Medical Records*, 12 L.J.N's Prod. Liab. L. & Strategy 1 (June 2003). Plaintiffs may authorize the disclosure of medical records and other PHI, so long as the content, scope, and duration of the authorizations are clearly delineated. 45 C.F.R. § 164.508(c).

Alternatively, defense counsel may proceed under the explicitly carved exception for subpoenas, discovery requests, and "other lawful process." 45 CFR § 164.512(e). Absent direct court order or valid authorization, a covered entity only may disclose PHI for judicial and administrative proceedings under three circumstances:

1. The healthcare provider receives "satisfactory assurance" that the persons for whom PHI is sought have been given "notice" of the request. *Id.* § 164.512(e)(1)(ii)(A). In other words, defense counsel must make a good faith attempt to provide written notice to the plaintiffs, that notice must provide sufficient information for the plaintiffs to raise any objection with the court or an administrative tribunal before which the action is pending, and the court or tribunal must resolve the objections, if any, in favor of the requested disclosure, or the time period for the plaintiffs to raise objections expires. *Id.* § 164.512(e)(1)(iii). Yet, "[a]ccording to the HIPAA Privacy Regulations, the covered entities must also comply with the Federal Alcohol and Drug Abuse Regulations, so that in accordance with 42 CFR § 2.61, the covered entity that is subject to these regulations can only release alcohol and drug abuse records in response to a subpoena accompanied by a court order." Baer & Callahan, *supra*.
2. The healthcare provider receives "satisfactory assurance" that the defendant has obtained a "qualified protective order." *Id.* § 164.512(e)(1)(ii)(B). In other words, the covered entity must receive a statement or written documentation to determine whether the parties have agreed to, the court has entered, or the administrative tribunal has entered, a qualified protective order that prohibits the dissemination of PHI for purposes other than the litigation. *Id.* § 164.512(e)(1)(iv)-(v).

3. The covered entity itself may make reasonable efforts to provide “notice” to the persons for whom information is sought or may seek a “qualified protective order.” *Id.* § 164.512(e)(1)(vi). In other words, if defense counsel has not performed the heavy lifting for (1) or (2) above, the health care professional may.

THE COURTS’ FIRST CRACK AT RECONCILING HIPAA AND STATE LAW ON *EX PARTE* INTERVIEWS

The Superior Court of New Jersey recently relied on the silence of HIPAA and the Privacy Regulations to find that state law permitting *ex parte* interviews was not preempted in *PPA Litigation*, *supra*, 2003 WL 22203734. Far before HIPAA and the Privacy Regulations were created, the New Jersey Supreme Court expressly permitted *ex parte* interviews so long as defense counsel

- (1) Provide plaintiff’s counsel with reasonable notice of the time and place of the proposed interview;
- (2) Provide the physician with a description of the anticipated scope of the interview; and
- (3) Communicate with “unmistakable” clarity the fact that the physician’s participation in a physician’s *ex parte* interview is voluntary.

PPA Litig., 2003 WL 22203734, at *2 (citing *Stempler v. Speidell*, 100 N.J. 368, 373-82 (1985)). In *PPA Litigation*, over 300 plaintiffs alleged personal injury damages stemming from their use of PPA, an ingredient in cold medicines, cough suppressants, and appetite suppressants. Although each plaintiff executed

authorizations to release medical records to the defendants, plaintiffs’ counsel nonetheless objected to *ex parte* interviews based on HIPAA. Defense counsel filed for a protective order and argued that HIPAA did not preempt New Jersey law expressly permitting *ex parte* interviews. The court agreed because “the plain fact is that informal discovery is not expressly addressed under HIPAA as either endorsed or prohibited.” *Id.* at *13.

Nowhere in HIPAA does the issue of *ex parte* interviews with treating physicians, as an informal discovery device, come into view. The court is aware of no intent by Congress to displace any specific state court rule, statute or case law (e.g., *Stempler*) on *ex parte* interviews. As for this state’s informal discovery practices, Congressional intent seems not to intrude in New Jersey’s general authority over its judicial and administrative proceedings. HIPAA under 45 CFR § 164.512(e) allows a covered entity to disclose protected health information without written authorization of the patient or an opportunity for the patient to agree or object to the disclosure during judicial proceedings under certain circumstances such as court order, discovery request, or subpoena. Otherwise, the covered entity, or physician for the instant case, must receive satisfactory assurances that the party seeking the protected health information has made reasonable efforts to secure a qualified protective order from the court.

Id. at *11 (footnote omitted). The court ultimately found, however, that the plaintiffs would have to execute new HIPAA-compliant authorizations for their medical records and

exercised its discretion to ban *ex parte* interviews in that case. *Id.*

The *PPA* court's finding that there is no federally imposed floor on *ex parte* interviews hints that any concerns about the impact of HIPAA and the Privacy Regulations on these informal discovery devices may be much ado about nothing. Two factors nonetheless dilute the strength of this finding. First, the New Jersey Superior Court nonetheless banned *ex parte* interviews due to the administrative burdens that would be placed on the parties and the court. The number of claims involved, the fact that each plaintiff had to execute another HIPAA-compliant authorization, and the sensitivity of the medical information led the court to restrict defense counsel to formal discovery procedures:

The holding in *Stempler* reserves judicial discretion with regard to the appropriateness of *ex parte* interviews even under "extreme cases". This court recognizes that mass tort cases with [their] inherent complexity fall within the definition of extreme cases. Therefore under this court's authority and given the magnitude of the potential intricacies of entirely redoing the discovery process to include informal discovery with HIPAA-compliant authorizations, the most practical recourse is to deny the use of *Stempler* interviews. This court sees no necessity for informal discovery so late into the *PPA* litigation. This however, does not implicate that *Stempler* is not available as an informal discovery tool for mass tort cases, but rather given the involvedness of such cases, special hearings early during case management for the design of HIPAA-compliant

authorization forms may become the custom for the conduct of *Stempler* interviews in future mass tort litigation.

Id. at *16 (footnote omitted). Although the court in *Stempler* refused to characterize all mass court cases as "extreme cases" warranting the exercise of its discretion to ban *ex parte* interviews, the discussion in *PPA* Litigation opens the door to other courts similarly using their discretion to ban *ex parte* interviews to avoid HIPAA and the Privacy Regulations altogether.

It is altogether unclear whether *PPA* Litigation would extend to states where defense counsel had previously unfettered access to a plaintiff's treating physicians. New Jersey law sets forth several steps that defense counsel must take before conducting *ex parte* interviews. *Stempler*, 100 N.J. at 373-82. Such prerequisites provide plaintiffs (and their counsel) with sufficient time to raise any objections, advise treating physicians that defense counsel cannot compel them to talk without official court process, and discuss what medical conditions may be discussed during *ex parte* interviews. Indeed, the parallels between the *Stempler* notification procedure and the provisions of HIPAA for depositions, discovery requests, and "other lawful process" are remarkably similar.⁶ Compare *Stempler*, 100 N.J. at 373-82, with 45 C.F.R. § 164.512(e). Even the court in *PPA* Litigation carefully noted that HIPAA and the Privacy Regulations did not prevent *ex parte* interviews under *Stempler*. *PPA* Litig., 2003 WL 22203734, at *11. Virtually unaddressed by the decision in *PPA* Litigation are states that have found no need to impose *Stempler*-like prerequisites on *ex parte* interviews. When a plaintiff's counsel uses HIPAA to scare healthcare providers into refusing a previously protected request for an *ex parte* interview, *PPA* Litigation provides limited firepower in crafting a counter-salvo.

PRACTICE POINTERS

The court in *PPA* Litigation poignantly

observed that “[t]he passage of HIPAA and the enactment of the Privacy Rule mark a dramatic departure from the current state of medical and legal practice. The change is a myopic examination on a lone example of what may be the single most important question raised in the 21st century by Americans, namely balancing the privacy concerns versus technological advancements.” *Id.* at *8. Although profound, the impact of HIPAA and the Privacy Regulations remains unclear.⁷ Once plaintiffs have produced their medical records, *ex parte* interviews in which physicians are questioned about publicly released records hardly seem to invoke legitimate concerns about privacy. At least on the surface, however, HIPAA and the Privacy Regulations put the key to accessing PHI regarding plaintiffs’ medical conditions in the plaintiffs’ hands. Antognini, *supra*, at 300. Under these circumstances it is unlikely that most plaintiffs will consent to *ex parte* interviews. Any attempt to include *ex parte* interviews in the now-standard, HIPAA-compliant authorization for medical records probably will be stricken. Proposals for a jointly stipulated protective order, guarding PHI against non-litigation disclosure, but permitting *ex parte* interviews, likely will succumb to similar resistance. See 45 C.F.R. § 164.512(e)(1)(ii), (iv), (v).

The simple fact that Congress and the DHHS did not address *ex parte* interviews in enacting HIPAA and the Privacy Regulations is compelling evidence that courts retain the discretion to permit these informal discovery devices on a jurisdiction-by-jurisdiction basis. Assessing the true impact of HIPAA, however, cannot be limited to the text and legislative history. The breadth of HIPAA and the substantial repercussions⁸ for HIPAA violations will undoubtedly cause healthcare providers to think twice before agreeing to *ex parte* interviews even if defense counsel has a winning argument that HIPAA does not affect state law.

The “other lawful process” exception provides the most effective option for defense

counsel seeking to conduct informal discovery of treating physicians. In those jurisdictions that permit *ex parte* interviews, they would fall within the definition of “other lawful process” under HIPAA. See, e.g., *supra*, note 3. Once the plaintiffs’ treating physicians have been identified, defense counsel should send a letter to plaintiffs’ counsel expressly advising of their intent to interview each of the identified treating physicians. See 45 C.F.R. § 164.512(e)(1)(ii),(iii). This letter should advise that defense counsel intends to ask about the medical condition for which the plaintiffs seek recovery, that each physician will be advised that the decision to participate in the *ex parte* interview will be voluntary, and that any objection to the interview must be filed in court. This written notification should be sent sufficiently early in the litigation to provide plaintiffs’ counsel with a meaningful opportunity to raise any objections; otherwise, the possibility of a covered entity receiving satisfactory assurance and agreeing to an *ex parte* interview diminishes appreciably. Although plaintiffs’ counsel may respond with a letter raising HIPAA as a defense, the “other lawful process” exception plainly requires plaintiffs to seek relief from the court. *Id.* While plaintiffs’ counsel also may assert that defense counsel would violate HIPAA and the Privacy Regulations by conducting *ex parte* interviews, such a claim ignores the fact that these protections only apply to “covered entities” and their “business associates,” not defense counsel.

After putting plaintiffs’ counsel on notice of an intent to interview treating physicians, defense counsel should anticipate that plaintiffs’ counsel will contact the treating physicians and threaten them with litigation if they agree to meet with defense counsel. At least some plaintiffs’ counsel can be expected to ignore the simple fact that HIPAA and the Privacy Regulations provide an allegedly aggrieved patient with administrative remedies and access to government attorneys to pursue their claims, not a private course of action in court.⁹ Once plaintiffs’ counsel receive notice of an intent to pursue *ex parte* interviews, defense

counsel is free of HIPAA's shackles. The only proper recourse is a protective order. Under these circumstances, plaintiffs' counsel act unethically by telling health care providers that they will violate HIPAA by agreeing to an *ex parte* interview. Under Rule 3.4(f) of the Model Rules of Professional Conduct, an attorney may not encourage witnesses with relevant information from withholding that information to other counsel in the proceeding. Should plaintiffs' counsel persist in impeding access to treating physicians, defense counsel should consider filing complaints with the state disciplinary commission and for sanctions with the court.

CONCLUSION

The threat of significant fines, penalties, and jail time under HIPAA and the Privacy Regulations give plaintiffs' attorneys a powerful weapon to bully healthcare providers into limiting their discussions with defense counsel. *But see* Model Rule 3.4(f). HIPAA and the Privacy Regulations do little to alleviate this fear by extending to all disclosures of PHI without referencing *ex parte* interviews. As at least one court has found, however, that this silence suggests that courts and states remain free to permit unqualified *ex parte* interviews. Before Congress, the DHHS, or the courts make clear whether HIPAA impacts the freedom of treating physicians to agree to *ex parte* interviews, however, prudent defense counsel should act progressively to force plaintiff's counsel to take the offense. Otherwise, both the opportunity for and the likelihood of obtaining a meaningful *ex parte* interview may be lost.

ENDNOTES

1. Mr. Parker is a partner in the products liability group of VENABLE LLP and is a member of the Executive Committee of the IADC. Mr. Gray is an associate in the products liability group of VENABLE LLP.
2. John Jennings, *The Physician-Patient*

Relationship: The Permissibility of Ex Parte Communications between Plaintiff's Treating Physicians and Defense Counsel, 59 Mo. L. Rev. 441, 454 & n.77 (1994); J. Christopher Smith, *Recognizing the Split: The Jurisdictional Treatment of Defense Counsel's Ex Parte Contact with Plaintiff's Treating Physician*, 23 J. Legal Prof. 247, 252-55 (1998-99); *see also* *Butler-Tulio v. Scroggins*, 139 Md. App. 122, 150, 774 A.2d 1209, 1225 ("There is, however, no such prohibition in Maryland against what appellant describes as 'ex parte contacts' between a lawyer and the treating physician of an adverse party who has placed her medical condition in issue."), *cert. denied*, 366 Md. 247, 783 A.2d 221 (2001).

3. PHI includes any information, whether oral or recorded in any form or medium, that: (1) is created or received by a healthcare provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse, and (2) relates to the past, present, or future physical or mental health or condition of an individual; the provision of healthcare to an individual; or the past, present, or future payment for the provision of healthcare to an individual. 45 CFR § 160.103.
4. *E.g.*, *Shots v. CSX Transp.*, 887 F. Supp. 206, 208 (S.D. Ind. 1995) ("Where the plaintiff does not suggest that any other medical condition exists which merits protection from disclosure, the policy considerations which protect the physician-patient relationship can safely be subverted to those policy considerations which expedite the discovery process."); *Alston v. Greater S.E. Community Hosp.* 107 F.R.D. 35, 37 n.2 (D.D.C. 1985) ("[B]y bringing an action ... a plaintiff waives the physician-patient privilege, but only to the extent that attending physicians may be required to testify on pretrial deposition with

respect to the injuries sued upon.”); *Butler-Tulio*, 139 Md. App. at 150, 774 A.2d at 1225.

5. *E.g.*, *Harlan v. Lewis*, 982 F.2d 1255, 1263-65 (8th Cir. 1993) (affirmed sanctions on defense counsel for communicating *ex parte* with plaintiff’s treating physicians); *Garner v. Ford Motor Co.*, 61 F.R.D. 22, 24 (D. Alaska 1973) (“[I]f defendant desires information from plaintiff’s attending physicians concerning the physical condition of plaintiffs, defendant should avail itself of one or more of the conventional discovery devices provided for by the Federal Rules of Civil Procedure.”); *Miles v. Farrell*, 549 F. Supp. 82, 85 (N.D. Ill. 1982) (“As a general rule, a treating physician may not discuss his patient’s medical condition with opposing counsel except pursuant to discovery authorized under the applicable rules of civil procedure.”).

6. Based on these parallels, the Defense Research Institute filed an *amicus* brief in support of the defendants’ motion for a protective order in *PPA Litigation*. The DRI argued that *ex parte* interviews constituted “other lawful process” and that *Stempler* provided as much protection as required by 45 C.F.R. § 164.512(e). The authors wish to thank Diane Sullivan, Michelle Yeary, Michelle Seldin, and Dechert LLP for providing the relevant pleadings from *In re PPA Litigation* and discussing this case with them.

7. *See also, e.g.*, Baer & Callahan, *supra* (“How great an impact the HIPAA Privacy Regulations will have on product liability litigation in general is yet to be seen, but it is clear that these regulations will have an immediate effect on discovery of medical records.”); 2002-2003 *State Bar of Texas Committee Reports*, 66 Tex. B. J. 606, 606 (2003) (discussing proposed rule change to Texas Rules of Procedure in light of HIPAA to permit “*ex parte* contact and disclosure of confidential healthcare information only by written consent of the patient or the patient’s representative or by a court order” and excluding any evidence obtained in violation of the rule except “upon a finding of good cause”).
8. Nancy A. Lawson, et al., *The HIPAA Privacy Rule: An Overview of Compliance Initiatives and Requirements*, 70 Def. Couns. J. 127, 147-49 (2003); *see also* Jonathan Cone, et al., *Health Care Fraud*, 40 Am. Crim. L. Rev. 713, 751-52 (2003).
9. *E.g.*, *O'Donnell v. Blue Cross Blue Shield of Wyo.*, 173 F. Supp. 1176, 1180 (D. Wyo. 2001); *Brock v. Provident American Ins. Co.*, 144 F. Supp. 2d 652, 657 (N.D. Tex. 2001); *Means v. Independent Life & Acc. Ins. Co.*, 963 F. Supp. 1131, 1135 (M.D. Ala. 1997); *Wright v. Combined Ins. Co. of Am.*, 959 F. Supp. 356, 362-63 (N.D. Miss. 1997).