

HIPAA and Ex Parte Interviews—Are We Parting Ways With Ex Parte Interviews?

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I. Introduction

In courts across the nation, a discovery debate is hotly brewing regarding a lawyer's *ex parte* interview with a plaintiff's healthcare provider. Notably, the text of the Health Insurance Portability and Accountability Act's (HIPAA's) Privacy Rule "does not explicitly mention *ex parte* interviews."¹ However, attempts to block or restrict such *ex parte* interviews have been likened to "sending a boxer into the ring wearing a blindfold!"² Are these interviews consistent with the goals of "open and fair discovery" or do such interviews impermissibly constitute "secret meetings"?³

Many litigators are already familiar with HIPAA's litigation provisions, including those regarding a HIPAA authorization, "satisfactory assurance[s]" with discovery requests, and qualified protective orders.⁴ This article examines how many courts have grappled with HIPAA and *informal* discovery: in particular, a lawyer's *ex parte* interview with a plaintiff's healthcare provider.

II. Overview of Judicial Decisions to Date

Under HIPAA's Privacy Rule, "health information" is defined as "any information, whether oral or recorded in any form or medium . . ."⁵ So, even if a physician (or other healthcare provider covered by HIPAA) has properly disclosed *medical*

records in response to a HIPAA authorization or a discovery request, an *interview* between the physician and a lawyer regarding such patient's health information or records arguably is a *separate disclosure*, which should comply with HIPAA's Privacy Rule.

Ex parte interviews are a time-honored method of "informal discovery" which can certainly be efficient and cost-effective for both parties.⁶ As noted by courts, the practice of *ex parte* interviews "created little controversy" before HIPAA.⁷ The issue of *ex parte* interviews under HIPAA now typically arises when: (1) the defendant moves to compel a plaintiff to sign a HIPAA authorization to permit *ex parte* interviews; (2) the plaintiff moves to preclude defense counsel from conducting such interviews; or (3) the defendant moves for formal permission to proceed with such interviews. The issue also arises when counsel seeks sanctions after discovering opposing counsel has already conducted an *ex parte* interview with a treating provider. See *e.g.*, *Crenshaw v. MONY Life Ins. Co.*⁸ (party sought exclusion of witness); *Meek v. Vasconez*⁹ (party sought reversal of jury verdict). See generally *Law v. Zuckerman*¹⁰ (potential HIPAA violation could be remedied if court orders either party can speak with the treating physician before he testifies at trial). Judicial reaction to such interviews has been mixed, as shown below.

1. *Some courts have held a lawyer's ex parte interview with a plaintiff's healthcare provider violates HIPAA's Privacy Rule.* In *EEOC v.*

Boston Market Corp.,¹¹ a defendant sought a court order permitting defense counsel to engage in *ex parte* communications with the plaintiff's treating psychologists. The court held the interviews, although not expressly prohibited by HIPAA, could run afoul of HIPAA's public policy. The court denied defense counsel's motion and ruled the plaintiff's health information could only be released through the methods listed in HIPAA (court order, subpoena or discovery request). In another case, *Moss v. Amira*,¹² an appellate court actually reversed a jury verdict, based on defense counsel's *ex parte* communication with the plaintiff's treating physician, finding the trial court should have barred portions of the physician's deposition based on Illinois law. Notably in *Moss*, a concurring judge wrote that the "protections provided to medical patients in Illinois . . . are now provided to medical patients throughout the United States by [HIPAA] . . ."¹³

In addition to protecting patients' privacy rights, the Tennessee Supreme Court has focused on an additional policy reason for not permitting the use of *ex parte* interviews: the increased contract and tort liability of physicians who disclose confidential information in such interviews. See *Alsip v. Johnson City Med. Ctr.*¹⁴ In particular, the Tennessee Supreme Court noted the defendants' proposed order did not "inform the non-party physician . . . that he may be held

personally liable for disclosures outside the relevance of the present litigation,"¹⁵ and it was an unfair "gamble" to ask a physician "untrained in the law" to determine what information was relevant to the suit.¹⁶ Thus, the *Alsip* court reasoned that allowing *ex parte* communications between plaintiff's non-party treating physicians and defense counsel would result in "increased litigation in the State's already overburdened trial court system . . ."¹⁷

This warning of litigation against physicians was realized in a recent Utah case. In *Sorenson v. Barbuto*,¹⁸ a patient sued his former physician because of the physician's *ex parte* interview with defense counsel. During a previous personal injury suit arising from an automobile accident, the patient's attorney learned of the physician's *ex parte* communication during the deposition of another witness. The patient's counsel then deposed the physician, and successfully moved *in limine* to exclude the physician's testimony at trial. The patient then sued his prior treating physician under tort and contract theories because of the physician's *ex parte* interview with defense counsel. The *Sorenson* court rejected the patient's breach of implied contract claim, but found the physician had a tort-based duty of confidentiality that continued even after the physician-patient relationship was over, holding the physician's *ex parte* interview with defense counsel breached the physician's fiduciary duty of confidentiality.

Significantly, the *Sorenson* court also noted (1) the physician's *ex parte* interview was a disclosure to a "small group of persons" and thus could not constitute an invasion of privacy; (2) the physician's statements during a later deposition in the case were protected by the judicial proceeding privilege; and (3) the physician's participation in the *ex parte* interview and agreement to serve as a paid advocate for defense counsel met the "extreme and outrageous" threshold for an intentional infliction of emotional distress claim.¹⁹

2. *Other courts have held such ex parte interviews can proceed, but only if certain requirements are fulfilled.* See e.g., *Smith v. Rafalin*²⁰ (directing plaintiff to sign HIPAA-compliant authorizations permitting defense counsel to speak privately with plaintiffs' treating physicians; noting equal access issues; declining to order defense counsel to provide written notes of interview to opposing counsel, due to work product privilege, but counsel must provide the physician's records produced at the interview but not previously provided); *Bayne v. Provost*²¹ (defendants objected to plaintiff's limited authorization permitting disclosure of only "records;" court issued HIPAA-compliant qualified protective order, permitting defendants to interview plaintiff's nurse *ex parte*; if nurse declined voluntary interview, subpoena for deposition could be served); *Croskey v. BMW of N. Am, Inc.*²² (denying plaintiff's request for

an order prohibiting defense counsel's *ex parte* interviews; however, defense counsel needs HIPAA-compliant authorization, must notify plaintiff's counsel of intent to conduct the interview, and must notify the treating physician his participation in the interview is not required). See also *Law v. Zuckerman*²³ (finding *ex parte* interviews must be conducted in accordance with HIPAA regulations, and defense counsel's *ex parte* interview with plaintiff's physician without plaintiff's consent was prohibited under HIPAA, even though permitted under state law; noting defense counsel had attempted to act in good faith); *Keshecki v. St. Vincent's Med. Ctr.*²⁴ (concluding HIPAA preempted New York law regarding *ex parte* interviews with treating physicians; setting forth several requirements for defense counsel who wished to interview plaintiff's treating physician, including detailed requirements for separate HIPAA authorization; also requiring defendant to provide plaintiff with written materials from the interview). But see *McCloud v. Bd. of Dirs. of Geary Cmty. Hosp.*²⁵ (granting defendants' request for an order permitting *ex parte* interview, but refusing to require three days' notice to plaintiff's counsel of the interview or presence of plaintiff's counsel during interview; noting the order notifies the physician he or she has a right to decline the interview request and *ex parte* means "on one side only"). Note at least two courts appear to dis-

agree whether a particular type of court order, a qualified protective order, is necessary to permit an *ex parte* interview. See *Hulse v. Suburban Mobile Home Supply Co.*²⁶ (granting defendants' request for court order; noting the proposed order informed physician of right to decline interview request; also noting HIPAA permitted disclosure in response to "a court order," separate and apart from a qualified protective order in response to a subpoena or discovery request). But see *Boukadoum v. Hubanks*,²⁷ ("attorneys may not have *ex parte* contact with doctors, hospitals and other providers without the patient's consent or without a qualified protective order") (emphasis supplied).

3. *Other courts still aren't sure about HIPAA and ex parte interviews, resulting in conflicting decisions—even within the same state.* For example, in *Steele v. Clifton Springs Hospital and Clinic*,²⁸ a court in New York found the initial question was whether a private, *ex parte* interview even constituted a "judicial or administrative proceeding" under HIPAA. While finding this initial question debatable, the court noted a plaintiff could not simply refuse to provide an authorization while at the same time interviewing those same physicians for potential testimony. The *Steele* court therefore granted the defendant's motion to compel the plaintiff to provide HIPAA-compliant authorizations as set forth in the *Keshecki* case. But see

Valli v. Viviani,²⁹ (declining to follow *Keshecki*; finding HIPAA did not preempt New York law, which permitted *ex parte* interviews; directing the plaintiff to provide an authorization and noting it would be wise for trial counsel to observe HIPAA requirements until further legislation is promulgated). See generally *Constantino v. Cooper*³⁰ (reviewing numerous New York courts' conflicting decisions regarding *ex parte* interviews under HIPAA; issuing an order compelling plaintiffs to provide particular authorizations for defense counsel to conduct *ex parte* interviews; also holding a subpoena cannot be served with the authorization).

III. Ex Parte Interviews in Class Action Suits

At least one court has held counsel should proceed in a class action suit via depositions, rather than *ex parte* interviews, in light of the number of cases involved and a fast approaching trial date. See *Smith v. Am. Home Prods. Corp. Wyeth-Ayerst Pharm.*³¹ Significantly, the *Smith* court noted *ex parte* interviews might be available as "an informal discovery tool for mass tort cases,"³² and use of HIPAA-compliant authorization forms could become customary for mass tort litigation in the future. See also *Brigman v. Wyeth, Inc. (In re Diet Drug Litig.)*,³³ where defense counsel sought an order permitting pre-deposition *ex parte* interviews with plaintiffs' treating physicians. The court concluded *ex parte* interviews with patient consent could "co-exist" with HIPAA and applicable state laws. Thus, such

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interviews could proceed with certain requirements, including a signed authorization, but the interview must be recorded and transcribed, with a copy made available to plaintiff's counsel.

In another case, *In re Vioxx Products Liability Litigation (Vioxx I)*,³⁴ the Plaintiffs' Steering Committee for Multidistrict Litigation sought to preclude defendants from participating in *ex parte* interviews with plaintiffs' prescribing physicians. Noting the potential for improper collusion or influence between counsel and those physicians who were potential (but not yet named) defendants, the court held any party wishing to interview a prescribing physician *ex parte* must first give opposing counsel five days notice, in order to permit opposing counsel the opportunity to participate; the interview also could proceed if opposing counsel declined to attend. Upon request, the court modified its initial order, clarifying the restrictions remained in place for defendants' counsel, but applied to plaintiffs' counsel only when plaintiffs sought an *ex parte* interview with a prescribing physician who *has been named as a defendant*. See *In re Vioxx Prods. Liab. Litig. (Vioxx II)*.³⁵ The *Vioxx II* court relied heavily upon the physician-patient privilege and noted that while its modified order might seem one-sided, defense counsel could still depose the physicians or interview them in the presence of plaintiffs' counsel.

IV. What About Waiver?

Some courts have found HIPAA's Privacy Rule preempts state law providing for a waiver upon the filing of suit. For example, in

Belote v. Strange,³⁶ the court concluded HIPAA was more protective than, and thus preempted, Michigan law which had allowed informal waiver in cases where the patient's mental or physical condition was at issue.

However, other courts have reaffirmed the waiver principle (even though HIPAA's litigation provisions do not mention such a waiver). See, e.g., *Holzle v. Healthcare Servs. Group, Inc.*,³⁷ where the court concluded a plaintiff waived the physician-patient privilege and HIPAA rights when she affirmatively asserted a physical or mental condition. See also *In re Diet Drug Litigation*,³⁸ (noting plaintiffs who filed a personal injury suit against a drug manufacturer had placed their medical condition at issue and waived significant privacy rights). See generally *Sorenson v. Barbuto*,³⁹ (in suit by patient against former treating physician, court noted state law provided for no privilege if party relied on physical or mental condition as element of a claim or defense, but this exception was "not without limits"). In sum, courts have issued conflicting rulings regarding whether waiver has occurred regarding a party's health information.

V. What About the Plaintiff Signing an Authorization Form?

In some cases, defense counsel have asked the court to compel a plaintiff to sign an authorization form, which would permit *ex parte* interviews with treating physicians. In these cases, the authorization forms vary from a HIPAA-compliant authorization form to an authorization form set forth in state law. See, e.g.,

Northlake Med. Ctr., LLC v. Queen,⁴⁰ and *Allen v. Wright*.⁴¹ In those cases, the plaintiff submitted a signed authorization form, but the authorization did not comply with the form required by the state's tort reform act, which would authorize defense attorneys to discuss the plaintiff's care and treatment with the plaintiff's treating physicians.

In both cases, the Georgia Court of Appeals held HIPAA preempted the state law and affirmed the trial courts' decisions denying the defendants' motions to dismiss. In particular, in *Northlake Med. Ctr., LLC v. Queen*,⁴² the Georgia Court of Appeals specifically held (1) the state's authorization form conflicted with HIPAA; (2) the authorization did not limit the health information to be disclosed; and (3) the authorization offered "no mechanism by which a plaintiff might object to the disclosure of even completely irrelevant information."⁴³ One judge dissented in *Northlake*, noting the state law "encourages use of the authorization form as a means of conducting informal discovery," "promotes *ex parte* discussions to facilitate timely and cost-efficient resolution of claims," and was consistent with Georgia law regarding waiver.⁴⁴

The Georgia Court of Appeals reached a similar result in *Crisp Regional Hospital, Inc. v. Sanders*,⁴⁵ in which a medical malpractice plaintiff submitted her own signed authorization form, rather than signing the authorization form set forth in the state's tort reform act. The *Sanders* court reiterated that HIPAA preempted the tort reform act's provisions regarding medical authorization forms

and thus affirmed the trial court's grant of a protective order to the plaintiff and denial of defendants' motion to dismiss. Despite the consistency of *Sanders*, *Northlake*, and *Allen*, note that the Georgia Supreme Court recently granted *certiorari* in the *Allen* case to address the HIPAA preemption issue.

Another appellate court recently addressed this issue in Michigan. See *Barnes v. Beattie*.⁴⁶ In that case, the plaintiff signed the defendant's "HIPAA Privacy Authorization" form, which waived the physician-patient privilege and stated it did not require oral communications between defense counsel and a healthcare provider. The plaintiff later revoked "any alleged authorization for you to contact any of Plaintiff's doctors in any respect, other than requesting and receiving Plaintiff's medical/dental charts."⁴⁷ The defendant then moved for summary disposition, arguing the plaintiff's assertion of the physician-patient privilege (and revocation of the authorization) entitled him to dismissal under state law. The trial court dismissed the complaint, but the Michigan Court of Appeals reversed, noting the state law at issue referred to document requests rather than *ex parte* communications. The *Barnes* court held the plaintiff had not actually stopped defense counsel from interviewing the plaintiff's treating physicians *ex parte* for the following reasons: (1) Michigan law did not preclude an *ex parte* interview if the physician chose to cooperate; and (2) a plaintiff need not "authorize" such *ex parte* interviews in order for them to occur.⁴⁸

VI. Options and Strategies for Litigators

In many but certainly not all of the above-discussed decisions regarding *ex parte* interviews, courts have found an attorney's *ex parte* interviews of a party's treating providers could violate state and federal health privacy laws, including HIPAA.⁴⁹ Courts also have found that even if such interviews are not prohibited or preempted by HIPAA, certain "procedural safeguards" should be considered in order to protect the patient's privacy interests.

Additionally, at least one court has prohibited a patient from contacting or otherwise communicating with her treating providers in order to influence their decisions whether to grant or deny the defendant's requests for *ex parte* interviews. *See Harris v. Whittington*⁵⁰ (granting defendant's motion for protective order; rejecting patient's claim that such a restriction would violate her First Amendment rights; rejecting implicit presumption that "informal interviews out of the presence of opposing counsel are inherently wrong [or] . . . that counsel will engage in inappropriate and/or unethical conduct when interviewing fact witnesses . . .").

The current state of the law regarding HIPAA and *ex parte* interviews of treating healthcare providers rapidly continues to evolve. Indeed, in *Brazier v. Crockett Hospital*,⁵¹ a malpractice case, a trial court granted the defendants' motion for permission to conduct *ex parte* interviews. The plaintiff's counsel was later sanctioned for sending letters to the physicians, which disagreed with the order and warned the physicians such *ex*

parte interviews would violate the patient's HIPAA rights and be considered "a serious breach of [the patient's] confidence."⁵² On appeal of *Brazier*, the Tennessee Court of Appeals reversed, noting the Tennessee Supreme Court had issued a new decision *after* oral argument in *Brazier*, and the Supreme Court decision expressly prohibited *ex parte* communications between defense counsel and plaintiff's non-party treating physicians in Tennessee.⁵³ *See also Webb v. N.Y. Methodist Hosp.*⁵⁴ (reversing grant of defendants' motion to compel plaintiff to execute authorizations to permit *ex parte* interviews, due to decision issued same day in another case, *Arons v. Jutkowitz*⁵⁵).

In a good faith effort not to utilize resources unnecessarily on HIPAA preemption or appellate issues, legal counsel could consider establishing—early on in the case—some mutually agreeable parameters for interviews of a plaintiff's and defendant's treating providers. Indeed, at least one court has expressly directed the parties to "meet and confer to work out this remaining [*ex parte*] issue in a way that will minimize discovery costs . . ." and later report back to the judge's chambers if they were unsuccessful.⁵⁶

For example, counsel might agree on one or more of the following options:

- Counsel gives reasonable notice to the patient's counsel of the time and place of a treating provider interview and proceeds with the interview if the patient's counsel declines to attend;

- Court issues an order stating either party may speak with a treating provider before the provider's deposition;
- Counsel proceeds with an *ex parte* interview upon a HIPAA-compliant authorization voluntarily signed by the patient;
- Interviews of treating providers take place if plaintiff's and defense counsel are both present during the interview; and/or
- Counsel proceeds with *depositions* of the treating providers, rather than interviews.

If the parameters agreed upon by counsel in a case are set forth in a HIPAA-compliant authorization or qualified protective order, then treating providers are more likely to meet with counsel in a case, and this cost-effective informal discovery device is preserved (for the benefit of all parties and their counsel).

Endnotes

¹ *Croskey v. BMW of N. Am. Inc.*, No. 02-73747, 2005 WL 4704767, at *4 (E.D. Mich. Nov. 10, 2005). Health Insurance Portability and Accountability Act, *See* 45 C.F.R. pts. 160 and 164.

² *Id.* at *3.

³ *Id.*

⁴ 45 C.F.R. § 164.512(e).

⁵ 45 C.F.R. § 160.103 (emphasis supplied).

⁶ *See, e.g., Stempler v. Speidell*, 495 A.2d 857 (N.J. 1985) (pre-HIPAA case); *see also Barnes v. Beattie*, No. 266468, 2006 WL 2089215 (Mich. Ct. App. July 27, 2006) (post-HIPAA case).

⁷ *Ottinger v. Mausner*, No. 1527/04, 2006 WL 777066, at *1 (N.Y. Super. Ct. Mar. 20, 2006).

⁸ 318 F. Supp. 2d 1015 (S.D. Cal. 2004).

⁹ No. 2005-CA-000397-MR, 2006 WL 1652736 (Ky. Ct. App. June 16, 2006). In *Meek*, the court declined to reverse the jury verdict, finding the physician's testimony only rebutted testimony provided by the plaintiff's expert witness.

¹⁰ 307 F. Supp. 2d 705 (D. Md. 2004).

¹¹ No. CV 03-4227 LDW WDE, 2004 WL 3327264 (E.D.N.Y. Dec. 16, 2004).

¹² 826 N.E.2d 1001 (Ill. App. Ct. 2005).

¹³ *Id.* at 1009 (Quinn, J., concurring) (citations omitted).

¹⁴ 197 S.W.3d 722 (Tenn. 2006).

¹⁵ *Id.* at 729.

¹⁶ *Id.* (referring to *Roosevelt Hotel Ltd. P'ship v. Sweeney*, 394 N.W.2d 353, 357 (Iowa 1986)).

¹⁷ *Id.*

¹⁸ No. 20050501-CA, 2006 WL 2291182 (Utah Ct. App. Aug. 10, 2006).

¹⁹ *Id.* at *4-5.

²⁰ No. 117182/03, 2005 WL 697581 (N.Y. Sup. Ct. Mar. 24, 2005).

²¹ 359 F. Supp. 2d 234 (N.D.N.Y. 2005).

²² No. 02CV73747DT, 2005 WL 1959452 (E.D. Mich. Feb. 16, 2005), *aff'd in part, rev'd in part*, No. 02-73747, 2005 WL 4704767 (E.D. Mich. Nov. 10, 2005) (finding magistrate erroneously exceeded HIPAA by ruling a qualified protective order must include notice to plaintiff's counsel of *ex parte* interviews and plaintiff's consent).

²³ 307 F. Supp. 2d 705 (D. Md. 2004).

²⁴ 785 N.Y.S.2d 300 (Sup. Ct. 2004).

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25 No. 06 1002 MLB, 2006 WL 2375614, at *3 (D. Kan. Aug. 16, 2006) (quoting *Black's Law Dictionary*, 517 (5th ed. 1979)).

26 No. 06-1168-WEB, 2006 WL 2927519 (D. Kan. Oct. 12, 2006).

27 No. 06-737, 2006 WL 3903581, at *4 n.2 (D. Md. Nov. 28, 2006).

28 788 N.Y.S.2d 587, 590 (N.Y. Sup. Ct. 2005).

29 No. 26777-2001, 2005 WL 735872 (N.Y. Sup. Ct. Mar. 31, 2005).

30 No. 17468/03, 2006 WL 1789066 (N.Y. Sup. Ct. May 15, 2006).

31 855 A.2d 608 (N.J. Super. Ct. Law Div. 2003).

32 *Id.* at 627.

33 895 A.2d 493 (N.J. Super. Ct. Law Div. 2005).

34 230 F.R.D. 470 (E.D. La. 2005).

35 230 F.R.D. 473 (E.D. La. 2005).

36 No. 262591, 2005 WL 2758007 (Mich. Ct. App. Oct. 25, 2005).

37 No. 110376, 2005 WL 1252597 (N.Y. Sup. Ct. May 24, 2005).

38 895 A.2d 493; *see also Arons v. Jutkowitz*, 825 N.Y.S.2d 738, 740 (App. Div. 2006) ("a plaintiff who commences a medical malpractice action waives the physician-patient privilege with respect to those physical or mental conditions which he or she affirmatively places in issue in the lawsuit").

39 2006 WL 2291182, at *3; *see also Hulse v. Suburban Mobile Home Supply Co.*, No. 06-1168-WEB, 2006 WL 2927519 (D. Kan. Oct. 12, 2006) (noting state law provided for no privilege if patient's condition was element or factor of claim or defense).

40 634 S.E.2d 486 (Ga. Ct. App. 2006).

41 634 S.E.2d 518 (Ga. Ct. App.),

cert. granted (Oct. 31, 2006).

42 634 S.E.2d 486 (Ga. Ct. App. 2006).

43 *Id.* at 491.

44 *Id.* at 493 (Andrews, J., dissenting).

45 636 S.E.2d 123 (Ga. Ct. App. 2006).

46 2006 WL 2089215.

47 *Id.* at *1.

48 *Id.* at *2.

49 This article does not examine state laws, which also restrict use and disclosure of certain types of health information, such as regarding mental health, alcohol/drug abuse, HIV/AIDS, or privileged communications.

50 No. 06-1179-WEB, 2007 WL 164031, at *3 (D. Kan. Jan. 19, 2007).

51 No. M200402941COAR10CV, 2006 WL 2040408 (Tenn. Ct. App. July 20, 2006).

52 *Id.* at *1.

53 *Id.* at *2 (referring to *Alsip v. Johnson City Med. Ctr.*, 197 S.W.3d 722).

54 825 N.Y.S.2d 645 (App. Div. 2006).

55 825 N.Y.S.2d 738 (App. Div. 2006).

56 *See Santaniello v. Sweet*, No. 3:04CV806, 2007 WL 214605, at *4 (D. Conn. Jan. 25, 2007).

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