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FACTS AND HISTORY

In this malpractice action, plaintiffs allege that infant DAVID FRAYLICH suffered profound brain damage resulting from the failure of the delivering obstetrician, DR. DOR, and the delivering hospital, MAIMONIDES HOSPITAL, to timely recognize, diagnose and treat this infant for a congenital diaphragmatic hernia. This birth defect occurs when the stomach or other abdominal contents are abnormally situated above the diaphragm and up in the chest cavity, rather than down in the abdomen where they belong. Consequently, the lungs do not have room to expand, and the newborn baby is unable to inhale after passing through the birth canal.¹

A few hours prior to the infant plaintiff’s birth, Dr. Dor ordered an ultrasound examination of the fetus in the womb as part of a “fetal biophysical profile.” Dr. Zoppel, an obstetrician on the staff of Maimonides Hospital, performed the study. However, Dr. Zoppel failed to recognize that

¹ Prior to delivery, a fetus “breathes” through its umbilical cord, and does not require the use of its lungs. [R. 13]

this baby's intestines had intruded into his chest cavity, even though the ultrasound examination specifically peered through the chest to examine the fetal heart.²

Thus, when the infant plaintiff's umbilical cord was severed following delivery, he couldn't breathe and immediately began to "go sour" due to lack of oxygen. The baby was ultimately transferred *in extremis* to Columbia Presbyterian Hospital, where the heroic efforts of the staff physicians saved his life.

Plaintiffs allege that the treating obstetricians could and should have diagnosed this infant's diaphragmatic hernia during the pre-natal ultrasound examination; and that if they had made the correct diagnosis before the baby was born, appropriate steps could have been taken to prevent this newborn from suffering severe hypoxic brain damage after birth. [R. 13-14]

During discovery, plaintiffs supplied the customary authorization forms enabling the defense to obtain copies of the infant's medical records. [R. 15, 78] These authorizations contained an express prohibition, in bold and capitalized print, forbidding interviews. [R. 78]

Approximately two years prior to the original trial date, plaintiffs' attorney had a lengthy and productive meeting with Dr. Stolar, the infant's treating physician at Columbia-Presbyterian Hospital. Dr. Stolar agreed that if the case were tried, he would testify both as a treating doctor and also as an expert witness on the plaintiff's direct case. [R. 14-15]

On May 29, 1997, approximately three weeks prior to the trial date and in the context of settlement negotiations, defense counsel matter-of-factly advised plaintiff's counsel, "[T]he doctors

² Through counsel, Maimonides Hospital has agreed to accept vicarious liability for Dr. Zoppel, the same as if he were a hospital employee. [R. 13]

at Columbia-Presbyterian Hospital will not help you at the trial.” Defense counsel candidly admitted that he had met with Dr. Stolar, plaintiffs’ treating physician and trial expert, without the knowledge or consent of plaintiffs or plaintiffs’ counsel. [R. 15-16] Defense counsel arranged and conducted this surreptitious interview notwithstanding the express prohibition inscribed upon plaintiffs’ medical records authorization forms prohibiting such interviews.

Defense counsel’s interview with plaintiffs’ doctor/expert effectively “scared the doctor off.” The defense contends its actions were both ethically and legally permissible.

Plaintiffs subsequently moved in the lower Court for an order directing defense counsel to provide copies of any transcript, notes or other documents regarding the substance of his interview with Dr. Stolar, and further directing defense counsel to refrain and desist from conducting any further interviews of the infant plaintiff’s treating physicians unless specifically authorized by the plaintiffs in a signed and notarized authorization document. Plaintiffs’ motion was denied. [R. 4-8] Plaintiffs appeal from that Order and Decision.

Notably, the defense does not challenge any of the five material facts underlying this application, namely:

1. That Dr. Stolar was, and still is, the infant plaintiff’s pediatrician;
2. That prior to defense counsel’s interview, Dr. Stolar had agreed to come to Court at plaintiff’s request to, in defense counsel’s words, “tell it like it is”;
3. That the forms authorizing the release of the medical records of Dr. Stolar’s treatment of the infant plaintiff contained an express prohibition against interviewing Dr. Stolar;
4. That disregarding the express prohibition, defense counsel met with and interviewed Dr. Stolar without the knowledge or consent of plaintiffs or plaintiffs’ counsel; and

5. That Dr. Stolar now declines to come to Court as an expert for the plaintiff.

These five undisputed facts form the basis of plaintiffs' application, and fully compel the relief requested.

STATUTES AT ISSUE

CPLR 4504(a):

(a) **Confidential information privileged.** Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing or dentistry shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity... [Underlining added; bold printing original.]

CPLR 3101(b):

(b) **Upon objection by a party, privileged matter shall not be obtainable."**

UNIFORM RULES FOR TRIAL COURTS, 22 N.Y.C.R.R. § 208.13:

[I]n all actions in which recovery is sought for personal injuries, disability or death, physical examinations and **the exchange of medical information shall be governed by the provisions hereinafter set forth.** [Emphasis added.]

UNIFORM RULES FOR TRIAL COURTS, 22 N.Y.C.R.R. §208.17:

After any action has been placed on the trial calendar pursuant to this rule, no pretrial examination or other preliminary proceedings may be had....

[T]he court may make an order granting permission to conduct such examinations or proceedings [after a note of issue has been filed] ... only upon motion on notice,

showing in detail, by affidavit, the facts claimed to entitle the moving party to relief under this subdivision. [Emphasis added.]

POINT I

NEW YORK'S PUBLIC POLICY FAVORS CONFIDENTIALITY; COURTS MUST PROTECT THE PHYSICIAN/PATIENT RELATIONSHIP & THE MEDICAL PRIVILEGE BY REGULATING DISCLOSURE OF MEDICAL INFORMATION

Dating back to principles of confidentiality embodied in the Hippocratic Oath, *circa* 1000 B.C., the physician/patient privilege (“medical privilege”) is an essential and long-standing tradition founded on public policy considerations.

Over one hundred and seventy years ago, the New York State Legislature first codified physician/patient confidentiality in a statute:

No person duly authorized to practice physic or surgery, shall be allowed to disclose any information which he may have acquired in attending any patient, in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon.

N.Y. Rev. Statutes of 1828, 406 (Part 3, Chapter 7, Title 3, Article 8, § 73).

In 1836, the Commissioners on the Revision of the Statutes of New York explained the compelling importance of the medical privilege, stating:

The ground on which communications to *counsel* are privileged, is the supposed necessity of a full knowledge of the facts to advise correctly and to prepare for the proper defense or prosecution of a suit. But **surely the necessity of consulting a medical advisor, when life itself may be in jeopardy, is still stronger. And unless such consultations are privileged, men will incidentally be punished by being obliged to suffer the consequences of injuries without relief from the medical art**, and without conviction of any offense.... [Italics original; bold print added.]

3 New York Revised Statutes, Appendix of Revisers' Reports and Notes, 737 (2nd Ed., 1836).

Since then, minor language changes have been made, and the privilege has been expanded (to include dentists and registered and practical nurses). However, the rationale underlying this rule remains unchanged.

Section 836 of the Code of Remedial Justice first allowed for waiver of the medical privilege in 1876, specifically requiring that the patient must be “present or represented by counsel, and ...

L. 1876, Chapters 448-449, § 836. The following year, the Legislature amended this section, providing for express waiver. L. 1877, Chapters 416 and 422. Subsequently, the Legislature adopted the following additional provision:

The waivers herein provided for must be made in open court, on the trial of the action or proceeding, and a paper executed by a party prior to trial providing for such waivers shall be insufficient as a waiver. [Emphasis added.]

L. 1899. Section 836 of the Code of Civil Procedure.

New York’s modern C.P.L.R. 4504 provides a *limited* waiver of the medical privilege when a patient sues his physician or files a lawsuit putting his health in issue. However, the landmark decision of Anker v. Brodnitz clearly restricts the scope of this limited waiver with respect to defendants’ access to plaintiffs’ treating physicians. 98 Misc.2d 148, 413 N.Y.S.2d 582 (Sup. Ct. Queens County 1979), *aff’d*, 73 A.D.2d 589, 422 N.Y.S.2d 887 (Mem) (2 Dept. 1979), *appeal dismissed*, 51 N.Y.2d 743, 411 N.E.2d 783 (Mem), 432 N.Y.S.2d 364 (1980); and *appeal dismissed*, 51 N.Y.2d 703, 411 N.E.2d 795 (Table), 432 N.Y.S.2d 1026 (1980). In Anker, the Appellate Division sustained Justice Seymour Boyers’ original decision expressly and resoundingly condemning *ex parte* interviews, and ratified the protocols regarding confidential communications

set forth in the “Standards of Practice for Doctors and Lawyers” [R. 79] (adopted by both the New York State Bar Association and the Medical Society of the State of New York):

In the prosecution of an action, particularly one involving a claim for personal injury, it is often necessary that the physician be called upon to disclose information acquired in the course of the care and treatment of the patient. When this occurs, the physician should request, and the attorney have the patient-claimant provide, the physician with a properly executed and acknowledged authorization to the physician to make the disclosure.

The attending physician *must not give . . . oral reports* about a patient to attorneys, adjusters, or investigators representing parties whose interests are adverse to those of the patient without *express written authorization from the patient*. [Emphasis added.]

The lower Court in Anker specifically found that by interviewing the plaintiff’s doctor *ex parte*, the defense had indeed violated these standards, and therefore directed the defense to provide plaintiff’s attorney with a transcript of the tape-recorded interview. The disclosure of the transcript was affirmed by the Appellate Division.

Following Anker, plaintiffs’ attorneys have routinely supplied adverse counsel with authorizations for plaintiffs’ medical records on forms containing restrictive language to the effect:

This authorization specifically PROHIBITS the release of any interview, statement, or summary not contained in the patient’s existing medical records. [R. 17]

This language was prominently inscribed on the authorization at issue in this case. [R. 78]

This prohibition against *ex parte* interviews is intended to prevent adverse parties from communicating with the plaintiffs’ physicians in a manner that might negatively impact the patient’s treatment, from “poisoning” doctors against a plaintiff’s case,³ and from eliciting information outside

³ For example, defense counsel may have mentioned to Dr. Stolar (a staff pediatrician at Columbia-Presbyterian Hospital) that he represents Dr. Stolar’s colleague, Dr. Francisca Velcek, a pediatric surgeon on the staff of the

the scope of the patient's charts and/or litigation⁴ that might be unjustly used against the plaintiff.

Accordingly, defense counsel's contention that the commencement of a personal injury action automatically waives "any" or "all" physician/patient privileges and tacitly authorizes secret interviews with plaintiffs' physicians is overly simplistic, excessively broad, and in contravention of

Anker, supra.⁵ Nothing in the mere institution of a lawsuit implies such a "wholesale" or "blanket abandonment" of the statutory medical privilege and privacy rights.

same hospital. Such a comment, even if made quite innocently, would have a devastating impact on Dr. Stolar's allegiances.

⁴ Litigants are often in substantial dispute or disagreement over what injuries, or even what kind of injuries, are at issue in a lawsuit. See, for instance, Watson v. State of New York, 53 A.D.2d 798. Whether a particular physical or mental condition is actually in controversy often requires careful judicial scrutiny, not just a cursory reading of the complaint, Koump, infra; Ideal Publishing Corp. v. Creative Features Incorporated, 59 A.D.2d 862, and special knowledge of the relevant factors in deciding a particular case. Perry v. Fiumano, 61 A.D.2d 512. Thus, one cannot simplistically conclude that all medical information is automatically discoverable.

⁵ Following defense counsel's logic, whenever a patient files a lawsuit, his medical providers are free to reveal and discuss every intimate detail of that patient's physical and mental history with *anyone at all*; nothing limits the blanket waiver to defense counsel. Therefore, anyone capable of persuading a doctor into discussing a plaintiff's medical information is free to do so, even if they have no legitimate interest in the information.

The defendants' position is an unsupported and simplistic expansion of the Court of Koump vs. Smith, 25 N.Y.2d 287, 303 N.Y. Supp.2d 858, 250 N.E.2d 857, which holds that the commencement of a personal injury action waives the physician/patient privilege to the limited extent that the plaintiff must permit discovery of his/her relevant medical records. Notably, Koump does not authorize *ex parte* interviews with a non-party physician; it only requires the supply of authorizations for medical records.⁶ A careful reading of Koump shows that it demands strict adherence with procedural safeguards, and in no way supports the defense's claim of total waiver of confidentiality.

On the contrary, **the Court of Appeals has historically placed a high value on the physician/patient privilege**, “to protect those who are required to consult physicians from disclosure of secrets imparted to them, to protect the relationship of patient and physician, and to prevent physicians from disclosing information which might result in humiliation, embarrassment, or disgrace to patients.” Steinberg vs. New York Life Insurance Co., 263 N.Y. 45, 48-49, 188 N.E. 152, 153. The Court of Appeals further noted that the patient has a right to expect his doctor to follow the Hippocratic Oath's declaration that “whatever in connection with my professional practice or not in connection with it, I may see or hear in the lives of men which ought not to be spoken of, I will not divulge, as reckoning that all such should be kept secret.”

Additional legislation and regulations further demonstrate New York's high regard for the medical privilege. For example, the Rules of the Board of Regents specify that the “reve[lation] of personally identifiable facts, data or information obtained in a professional capacity *without the prior*

⁶ If defense counsel's flawed reasoning was indeed correct, there would be no need for the supply of authorizations at all; a copy of the complaint would suffice.

consent of the patient or client, except as authorized by law,” constitutes unprofessional conduct. 8 N.Y.C.R.R. 29.1(b)(8). Similarly, this State’s Education Law incorporates the foregoing regulation by reference. N.Y. EDUC. LAW §6509.

These statutes, rules, regulations and case law all point to the same conclusion; New York’s public policy ascribes paramount importance to preserving the integrity of the physician/patient relationship and the confidentiality of medical information. The fact that there are several separate rules and regulations to similar effect requires strict construction rather than expansive interpretation. Therefore, Courts must protect these highly-regarded principles by narrowly circumscribing waiver(s) of the statutory medical privilege.

POINT II

***EX PARTE* INTERVIEWS OF PLAINTIFF'S MEDICAL PROVIDERS CONTRADICT THE LEGISLATIVE INTENT, VIOLATE THE UNIFORM RULES, AND ARE UNNECESSARY**

A. EX PARTE INTERVIEWS OF PLAINTIFF'S MEDICAL PROVIDERS CONTRADICT LEGISLATIVE INTENT:

Not one of the numerous, explicitly-authorized forms of discovery set forth in Article 31 of New York's C.P.L.R. endorses *ex parte* communications - much less *ex parte* interviews which undermine the statutory medical privilege. Instead, all of the several statutory discovery devices specifically require advance written notice to all parties. This express mandate for open discovery clearly evidences the Legislature's intent that adversarial proceedings should be conducted in broad daylight, not shrouded in secrecy.

Consider the following procedures authorized for obtaining medical information: Pursuant to C.P.L.R. 3121(a), a defendant is entitled to have a physician of his own choice conduct an "independent" physical examination of the plaintiff. Such examinations require advance written notice to the plaintiff's attorney, who retains the right to accompany the client during the examination.

Pursuant to 22 N.Y.C.R.R. §202.17, a defendant is also entitled to obtain copies of a plaintiff's relevant, written medical records and, where appropriate, x-rays. However, to do so, a defendant must typically serve a written discovery demand for these items, and plaintiff's counsel supplies the defendant with plaintiff's notarized permission authorizing the release of these items.

C.P.L.R. 3121(a) further requires defendants to supply plaintiffs' counsel with duplicates of all hospital records received pursuant to the plaintiff's authorizations.

A defendant may also obtain deposition testimony from plaintiff's medical providers, subject to the general requirement that such depositions may require a showing of adequate special circumstances. (See the Second Department's decision in Dioguardi vs. St. John's Riverside Hospital, 144 A.D.2d 333, 533 N.Y.S.2d 915 (1988).) Again, this procedure requires appropriate notice to all interested parties.

These procedural safeguards uniformly demonstrate the Legislature's concern for preserving the confidentiality of medical records and the integrity of the doctor/patient relationship, and it's intent that disclosures of such statutorily-privileged information should be obtained in a regulated manner, with the involvement of plaintiff's counsel, in order to protect the patient's rights. The Legislature's carefully-structured regimen for procuring only the medical information that is relevant and necessary to the defense of a personal injury action, contains no indication whatsoever that the Legislature approves secret, *ex parte* interviews with a plaintiff's medical providers. On the contrary, the testimonial privilege statute (CPLR 4504(a)), the statute governing release of records (CPLR 3121(a)), and the very detailed Uniform Rules (22 N.Y.C.R.R. §208.13 *et seq.*) conspicuously manifest legislative insistence on open and orderly adversarial procedures.

B. POST-NOTE OF ISSUE INTERVIEWS VIOLATE THE UNIFORM RULES

Defense counsel's post-Note of Issue interview of Dr. Stolar unquestionably constituted "discovery," notwithstanding any characterizations to the contrary.⁷ However, the uncontested filing of plaintiff's Note of Issue had already terminated discovery.⁸ The Uniform Rules for Trial Courts provide that:

After any action has been placed on the trial calendar pursuant to this rule, no pretrial examination or other preliminary proceedings may be had....

[T]he court may make an order granting permission to conduct such examinations or proceedings [after a note of issue has been filed] ... only upon motion on notice, showing in detail, by affidavit, the facts claimed to entitle the moving party to relief under this subdivision.

22 N.Y.C.R.R. § 208.17.

⁷ Discovery is "the ascertainment of that which was previously unknown; the disclosure or coming to light of what was previously hidden; the acquisition of notice or knowledge of given acts or facts." Dictionary.

⁸ Plaintiff was required to check a box on the Note of Issue form certifying that all discovery is complete. Defendants had to promptly object to the filing, if they challenged the assertion that discovery is complete. They did not do so herein, thereby *waiving* the right to further discovery.

Those few courts which have allowed post-Note of Issue interviews have effectively turned this Rule on its head.⁹ By permitting post-Note of Issue discovery, they have improperly opened a new avenue for discovery in clear violation of the Uniform Rules.

⁹ Refer to Point VI at pages 42 for a discussion of the cases permitting post-Note of Issue interviews, and why they should not be followed herein.

Moreover, Section 208.13 of the Uniform Rules explicitly details the protocols for exchanging medical information, requiring, “[I]n all actions in which recovery is sought for personal injuries, disability or death, physical examinations and the exchange of medical information shall be governed by the provisions hereinafter set forth.” [Emphasis added.] 22 N.Y.C.R.R. § 208.13.¹⁰

The subdivisions following this Rule provide detailed regulations for the contents of medical reports (22 N.Y.C.R.R. §208.13, subdivision b.1), the setting up of physical examinations (22 N.Y.C.R.R. §208.13, subdivisions a.-b.), the supply of authorizations (subdivision b.2), the service of examining doctors' reports (22 N.Y.C.R.R. §208.13, subdivision c.) and supplemental reports (22 N.Y.C.R.R. §208.13, subdivision g.), preclusion of evidence of physical conditions not previously exchanged (22 N.Y.C.R.R. §208.13, subdivision h.), and enforcement of the rules (22 N.Y.C.R.R. §208.13, subdivision j.). **There is no provision whatsoever authorizing, or even mentioning, *ex parte* interviews.**

These regulations are, in turn, governed by 22 N.Y.C.R.R. § 208.17, *supra*, which explicitly terminates all discovery once a case has been placed on the trial calendar. Therefore, this Court should disallow post-Note of Issue interviews.

C. EX PARTE INTERVIEWS OF MEDICAL PROVIDERS ARE UNNECESSARY:

The Second Department has emphatically disallowed *ex parte* interviews of medical providers during discovery, stating:

[T]he basis [of our decision is the] sensitive nature of the discovery material upon the ground that **the [*ex parte*] procedure by which discovery was obtained in the**

¹⁰ Note that this Rule employs the directive “shall,” rather than a permissive word such as “may.”

Anker case . . . is not sanctioned by either the C.P.L.R. or the Rules of this Court. The appellants are entitled to obtain any and all medical information that they reasonably require to defend these suits, but they must do so in accordance with approved discovery practice. [Emphasis added.]

Anker, supra.

In Cwick v. City of Rochester, 54 A.D.2d 1078, 388 N.Y.S.2d 753, the Third Department similarly held that there is no authority to privately interview a medical witness. The court stated that there were ample disclosure devices within the C.P.L.R. for defendants to obtain the medical information they sought, so that medical discovery should be limited to that obtainable by rule, statute, or express consent.

Although defendants may argue that *ex parte* interviews with plaintiffs' medical providers might possibly save them time or money, plaintiffs' rights may not be summarily abrogated in the interests of expedience. The author of this Brief argued (and prevailed on) a very similar issue before the Appellate Division, First Department, in 1992, on behalf of some 400 plaintiffs represented by Plaintiffs' Coordinating Committee in the DES litigation. The decision In re N.Y. County DES Litigation, 182 A.D.2d 445, 581 N.Y.S.2d 353 (1992), is very nearly on all fours. Therein, a consortium of drug manufacturers sought private interviews with the plaintiffs' doctors, claiming the sheer volume of DES claims made the usual forms of discovery (EBT's, etc.) unwieldy

and uneconomical.¹¹ On application by the defendants, the lower Court authorized *ex parte* interviews,¹² but *this Court* was unsympathetic and reversed:

The issue here is whether the motion court properly authorized defendants to informally interview doctors who may have prescribed DES to plaintiffs' mothers or plaintiffs even in the absence of plaintiffs' attorneys. The interviews would be conducted only on consent of the doctors and without being recorded. Only if the doctors agreed would plaintiffs' attorneys be present.

The rationale appears to be that this informal procedure would save time and expense in the more than 400 cases in New York County in which claims are asserted growing out of a mother's ingestion of DES during pregnancy.

We find no adequate basis in this record for excluding plaintiffs' attorneys from such interviews.

Likewise, courts across the country have refused to allow *ex parte* interviews on the basis that they are unnecessary. For example, see Wenninger v. Muesing, 240 N.W. 2d 333 (Minn. S. Ct. 1976) whereby the State of Minnesota's highest court directed the defense to utilize existing procedural devices to gather the medical information they desired from the plaintiff's physicians in an honest and open atmosphere.

¹¹ Notably, the DES defendants had a far stronger rationale than the defense herein, as the DES litigation involved a mass tort with hundreds of plaintiffs and thousands of doctors and records.

¹² Defense counsel herein made no claim that he actually *needed* a private interview of Dr. Stolar; he simply *presumed* he was *entitled* to do so. The defense attorneys in the DES litigation were not so arrogant. They filed an appropriate *application for permission* to conduct *ex parte* interviews in open court, and recognizing that they had no such a right absent court permission.

Likewise, see Weaver v. Mann, 90 F.R.D. 443 (D.C., N.D. 1981), which also involved a malpractice claim. In Weaver, the plaintiff successfully sought to prohibit defense counsel from conducting *ex parte* interviews with subsequent treating doctors. The District Court held:

If defendant desires information from plaintiff's attending physicians, **defendants should avail themselves of one or more of the conventional discovery procedures provided for by the Federal Rules of Civil Procedure and refrain from engaging in private conversations with said physicians.**

The Record on Appeal herein contains absolutely **no showing of necessity for *ex parte* interviews**. Indeed, in the Court below, the defense made no pretense of necessity, because they could not. Prohibiting private "informal interviews" does not cut the defense off from the plaintiff's medical information, nor prejudice the defendants in any way. Plaintiffs are automatically required to supply authorizations for all of the relevant treating doctors' medical records. 22 N.Y.C.R.R. §208.13. In the overwhelming majority of instances, that is all the defense requests. In those rare instances where special circumstances warrant more, the defense can always depose the plaintiff's medical providers on notice, in the same, open manner that plaintiffs must employ to obtain information from non-party witnesses with whom defendants enjoy recognized "special relationships" (such as the hospital's relationship with Dr. Zoppel herein.)

Accordingly, an adversary's discovery of patients' medical information should always be done on notice, with all counsel having the right to participate, and not on an exclusionary *ex parte* basis.

POINT III

SECRET INTERVIEWS VIOLATE PUBLIC POLICY

A. IMPROPER PRESSURES TO DISCLOSE

Unauthorized private interviews with plaintiffs' physicians subject doctors to improper pressures to disclose. As the lower court in Anker recognized, "a doctor may wrongfully feel compelled to make improper disclosures to the [defendant's insurance] carrier." Indeed, it is not unheard of for defense representatives to approach a plaintiff's physician with the suggestion: "Doctor, I'm calling you on behalf of the Malpractice Defense Insurance Company. Our records show that you are insured with us, just as is your friend and colleague, Dr. X. Dr. X is being sued by your patient, John Doe. Doctor X is a member of your professional risk pool. A successful defense of Dr. X helps keep malpractice premiums down. Perhaps you would be so kind as to tell us what you know of patient John Doe and of Dr. X's treatment of John Doe, so that we can effectively mount a defense for Dr. X."¹³ The physician is presented with a conflict of interest between his duty to maintain his patient's confidences, and the opposing pressures to keep (his own) malpractice premiums down and come to the aid of a colleague in distress.

¹³ The Illinois Trial Lawyers Association reported that this was a growing practice by defense counsel, especially in malpractice cases. Insurance adjusters and defense attorneys seemed to be utilizing their relationships with treating physicians created by representing the physicians in their own malpractice cases, or created by personal friendships or the mutuality of interest of being insured with the same insurance carrier as a means to induce the physician to breach his Hippocratic Oath. It was reported that defendant doctors, and defense attorneys, and insurance adjusters have played upon the fears of increased insurance premiums and the professional camaraderie of treating physicians to encourage these subsequent doctors to breach their duty of confidentiality.

B. HARM TO THE PHYSICIAN/PATIENT RELATIONSHIP

Another important consideration is the trust between patients and their doctors. That bond of trust is essential to proper medical care. Patients must feel free to reveal their most personal confidences to their doctors in order to secure proper treatment.

In the case at bar, Dr. Stolar was the infant plaintiff's pediatrician. How is the patient's relationship with his doctor supposed to continue, when the patient's family learns that his doctor has secretly met with their legal adversary? How can a patient entrust confidential information to a doctor, when the opposing counsel can secretly engage the doctor and possibly elicit information to use against the patient in Court?

The specter of defense counsel invading the offices of treating physicians, interrupting the on-going health care of the plaintiff, inducing physicians to testify against their own patients, and gathering information outside normal legal processes *without notice to adverse parties* requires this Court to speak out.

C. DAMAGE TO THE QUALITY OF MEDICAL CARE

The *ex parte* method utilized by the defendant in this case interferes with the practice of good medicine. Because secret meetings with adverse counsel injure the doctor-patient relationship, at least some patients in need of continued medical care will either cease going to their doctors, or change practitioners in an effort to preserve their privacy. There is also a likelihood that in many cases, necessary treatment will not be obtained. As patients come to realize that they cannot

depend on a doctor to respect their privacy, some will withhold information which is necessary for correct treatment - or abstain from care altogether.

This problem was recognized resolved squarely in the plaintiff's favor in Petrillo v. Syntex Laboratories, 499 NE 2d 952 (Ill. App. 1 Dist. 1986). The defense argued that by starting the lawsuit, plaintiff waived the physician-patient privilege and "therefore cannot object to defense counsel engaging in *ex parte* conferences with his treating physicians," but the Appellate Court disagreed in a decision so directly on point and so clearly reasoned that it deserves being quoted at length:

"We believe, for the reasons set forth below, that *ex parte* conferences between defense counsel and a plaintiff's treating physician jeopardize the sanctity of the physician-patient relationship and, therefore, are prohibited as against public policy. Our determination that **public policy prohibits such conferences is bolstered evermore by the fact that no appreciative gain (regarding the evidence to be obtained) can be had through such meetings. Accordingly, we join the growing number of courts which have found that public policy strongly favors the confidentiality of the physician-patient relationship and thereby prohibits, because of the threat posed to the sanctity of that relationship, extra-judicial, *ex parte* discussion of a patient's medical confidence.**

"In sum, we believe that the public has the right to faithfully execute their ethical obligations and thereby protect the confidential relationship existing between patients and their physicians. We also believe that ***ex parte* conferences between a patient's treating physician and the patient's legal adversary threaten that confidential relationship in that they involve the discussion of a patient's medical confidences without the patient's consent. That being the case, it is apparent that *ex parte* conferences are contrary to public policy for they place in jeopardy an established and beneficial interest of society, namely, the confidential relationship existing between a patient and his physician.**

"The second indicia of the public policy prohibiting *ex parte* conference between a plaintiff's treating physician and defense counsel rests in the fiduciary relationship that exists between a patient and his treating physician. The fiducial nature of the physician-patient relationship flows not from the physician's ethical duties, but rather as a result of the physician's unique role in society. Like the confidentiality of the physician-patient relationship, we believe that our society has an established and beneficial interest in the fiduciary quality of the physician-patient relationship. Thus, conduct which threatens the fiduciary relationship existing between a patient and his physician runs contrary to the interests of society and should, we believe, be prohibited. It is evident, as set forth below, that *ex parte* conferences between defense counsel and a plaintiff's treating physician threaten the fiduciary nature of the physician-patient relationship. Therefore, *ex parte* conferences should be barred as being against public policy.

Both the patients and their physicians need a shield from pressures exerted by defense attorneys, insurance investigators, personal "friends," business associates, co-insureds, or former attorneys.

D. EXPOSING UNSUSPECTING DOCTORS TO LIABILITY

A cause of action exists against a doctor who breaches his patients' confidences. *Anker, supra*; Dell vs. Roe, 93 Misc.2d 201, 400 N.Y.2d 668; Felis vs. Greenberg, 51 Misc.2d 441, 273 N.Y.2d 288; Clark vs. Geraci, 29 Misc.2d 791, 208 N.Y.2d 564; Horne vs. Patton, 291 Ala. 701, 287 So.2d 824; Schaffer vs. Spicer, 215 N.W.2d 134 [s.d.]; Simonsen vs. Swenson, Neb. 224, 177 N.W. 831. The lower court in *Anker, supra*, noted that a doctor who discloses his patient's confidences without authority exposes himself to civil damages as well as a charge of professional misconduct so that “the better rule” is to protect doctors by prohibiting such interviews. A cause of action also lies against an insurer who wrongfully induces a physician to breach confidences in the course of the insurer's investigation. Hammonds vs. Aetna Casualty & Surety Co., 237 F.Supp. 96, re-argued 243 F.Supp. 793; Panko vs. Cons. Mutual Insurance Co., 423 F.2d 41 [Third Circuit].

It is unrealistic to expect defense counsel to advise a doctor that conferring with the counsel could expose the doctor to liability and professional discipline. Doctors need protection against this danger, too.

As the lower Court found in *Anker*, “the adequacy of formal discovery procedures, the difficulty of determining what medical information is relevant, and the possibility of doctors or insurers becoming the object of lawsuits for unauthorized disclosure, require that there be no private interviews without a patient's express consent.”

POINT III

EX PARTE INTERVIEWS ARE UNETHICAL

While this Court does not sit directly in judgment on questions of medical ethics, we submit that physicians' comportment with the principles of medical ethics is of no less importance to the Court than is lawyers' compliance with the Canons of Ethics and Code of Professional Responsibility. Accordingly, we will analyze the medical ethics of *ex parte* interviews from the perspectives of the requirements of codes of medical ethics, and the physicians's fiduciary relationship, as well as the ethical implications for attorneys who engage in such interviews.

A. THE CODE OF MEDICAL ETHICS PROHIBITS *EX PARTE* INTERVIEWS:

The code of ethics for the medical profession is comprised of three parts:

- (1) The Hippocratic Oath;
- (2) The American Medical Association's Principles of Medical Ethics; and
- (3) The Current Opinions of the Judicial Council of the AMA (1984 ed.).

All three parts emphasize the confidential nature of the physician-patient relationship and inform the public that a patient can properly expect his physician to protect the confidentiality of medical information obtained in the physician-patient relationship.

The Oath of Hippocrates has instructed physicians for thousands of years that their **patients' confidences "should be kept secret."**

The AMA's Principles of Medical Ethics, Principle IV states: "**A physician** shall respect the rights of patients, of colleagues, and of other health professionals, and **shall safeguard patient confidences** within the constraints of the law." [Emphasis added.]

The Opinions of the Judicial Council of the AMA reflect the AMA's position on how a physician should act in particular circumstances. Section 5.05 of the Current Opinions, for example, states:

The information disclosed to a physician during the course of the relationship between physician and patient **is confidential to the greatest possible degree . . . The physician should not reveal confidential communications or information without the express consent of the patient**, unless required [i.e., by compulsory process] to do so by law." (Emphasis added.)

Section 5.06 deals specifically with the relationship between physicians and attorneys, and reiterates the requirement of patient consent:

The patient's history, diagnosis, treatment, and prognosis may be discussed with the patient's lawyer with the consent of the patient or the patient's lawful representative." (Emphasis added.)

Moreover, sections 5.07 and 5.08 state:

History, diagnosis, prognosis, and the like acquired during the physician-patient relationship may be disclosed to an insurance company representative only if the patient or his lawful representative has consented to the disclosure. (The American Medical Association, Current Opinions of the Judicial Council sec. 5.08.) (Emphasis added.)

Both **the protection of confidentiality and the appropriate release of information in records is the rightful expectation of the patient.** A physician should respect the patient's expectations of confidentiality concerning medical records that involve the patient's

care and treatment." (The American Medical Association, Current Opinions of the Judicial Council, §5.07.) [Emphasis added.]

In addition to these confidentiality requirements, the ethics of the medical profession consistently require a patient's **explicit consent** to the release of confidential information. **Prior consent is "the rightful expectation of the patient."** The American Medical Association, Current Opinions of the Judicial Council, §5.07.

Similar ethical rules for New York physicians are promulgated in the "Standards of Practice for Doctors and Lawyers" of both the New York State Bar Association and the Medical Society of the State of New York. The full text of the Standards is reproduced in the Record on Appeal at R. 78. **Both societies require a properly executed and acknowledged written authorization from the patient, before any "oral report" (i.e., interview) may be had.**

Thus, confidentiality and explicit patient consent are inextricably tied together. Medical information is confidential only if a patient's explicit consent is required before any information is disclosed to third parties.

A patient consents to the release of medical information relevant to the lawsuit) *pursuant to the methods of discovery monitored by his attorney and authorized by court rules only.* (*Ex parte* interviews are not authorized by New York's Uniform Rules. See Point II at page 13, *supra*.)

A patient does not consent to his physician discussing that patient's medical confidences with his legal adversary outside monitored discovery methods on notice. Fields v. McNamara, 540 P.2d 327 (Colo. 1975).

Like the Canons of Ethics for attorneys, the ethics of the medical profession are more than just a set of regulations. They also grant the public an affirmative right to rely on its physicians to

faithfully execute those ethical obligations. That being so, a patient has the right to rely on his physician's strict adherence to the requirements of privacy. Petrillo, *supra*.

Courts have repeatedly found that a patient has the right to rely on his physician's comportment with the ethical requirement of protecting confidential information. In Hammonds v. Aetna Casualty & Surety Co. (N.D. Ohio 1965), 243 F. Supp. 793, the court noted "Almost every member of the public is aware of the promise of discretion contained in the Hippocratic Oath, and every patient has a right to rely upon this warranty of silence." 243 F.Supp. 793, 801 [emphasis added.]

Accordingly, when the patient files suit, the physician/patient relationship requires that the patient can rest assured that the physician will provide relevant medical information only as court-authorized methods of discovery require. Miles v. Farrell (N.D. Ill. 1982), 549 F. Supp. 82; Alexander v. Knight (1962), 197 Pa. Super. 79, 177 A.2d 142.) Unmonitored *ex parte* conferences are inconsistent with the patient's rightful expectations. Petrillo, *supra*. The physician may harm the interests of the patient by disclosing facts are unrelated and irrelevant to the mental or physical condition placed at issue in the lawsuit. Consequently, *ex parte* conferences are unethical.

The overwhelming bulk of authority from other states with procedural methods similar to New York's have held that the filing of a lawsuit does not empower the physician to reveal facts and discuss his patient with the defense attorney or the insurance adjuster in a secret meeting. Refer to Point IV, *infra* at page 36, for further discussion.

The Pennsylvania Superior Court has said that not only does a physician have a duty to remain silent without the appropriate authorization to speak, but that a physician has the ethical duty to refuse affirmative assistance to the patient's antagonist in litigation:

We are of the opinion that **members of a profession, especially the medical profession, stand in a confidential or fiduciary capacity as to their patients. They owe their patients more than just medical care for which payment is exacted; there is a duty of total care; that includes and comprehends a duty to aid the patient in litigation, to render reports when necessary and to attend court when needed. That further includes a duty to refuse affirmative assistance to the patient's antagonist in litigation.** The doctor, of course, owes a duty to conscience to speak the truth; he need, however, speak only at the proper time. [The defense investigator's] role in inducing Dr. Murtagh's breach of his confidential relationship to his own patient is to be and is condemned.

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

Ex parte conferences are inherently incompatible with the compelling obligations of confidentiality. At the heart of every confidential relationship, including that between a patient and his physician, is an atmosphere of trust, loyalty, and faith in the discretion of other. A physician cannot engage in an *ex parte* conference with his patient's legal adversary without endangering the trust and faith invested in him. The ethical duties owed by a physician are such that he cannot engage in an *ex parte* conference with defense counsel.

By interviewing the plaintiff's pediatrician in direct violation of the patient's written prohibition, the defense herein has induced a violation of the physician's ethical obligation of confidentiality.

B. THE FIDUCIARY OBLIGATIONS OF A PHYSICIAN PRECLUDE *EX PARTE* INTERVIEWS

It is basic law throughout the United States that there is a fiduciary relationship between a patient and his physician that requires trust and confidence. (See, Taber v. Riordan, 83 Ill. App. 3rd 900, 403 N.E.2d 1349 (1980); Cannell v. Medical & Surgical Clinic, 21 Ill. App. 3rd 383, 315 N.E.2d 278 1974); Hales v. Pittman, 118 Ariz. 305, 576 P.2d 493 (1978); Stafford v. Schultz, 42 Cal. 2d 767, 270 P.2d 1 (1954); Henkin, Inc. v. Berea Bank & Trust Co, 566 S.W.2nd 420 (Ky. App. Ct., 1978); Foshee v. Krum, 332 Mich. 636, 52 N.W.2d 358 (1952); Henricks v. James, 421 So. 2d 1031 (Miss. 1982); State ex rel. Stufflebam v. Applequist, 694 S.W.2nd 882 (Mo. App. Ct., 1985); Demers v. Herety, 85 N.M. 641, 515 P.2d 645 (1973); Estate of Leach v. Shapiro, 13 Ohio App. 3rd 393 (1984). A fiduciary relationship exists where "there is a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence." Neagle v. McMullen, 334 Ill. 168, 175, 165 N.E. 605 (1929).

That fiduciary duty is undiminished by the filing of a lawsuit. The patient gives *limited* consent to the disclosure (through rule-authorized and monitored discovery methods) only of medical records relevant to the condition placed at issue. The physician continues to owe his patient a strict ethical obligation to release his patient's medical information only in accordance with that patient's consent. (See, The American Medical Association, Current Opinions of the Judicial Council, §§ 5.05, 5.06, 5.08.) Because a patient's consent is limited, any other of disclosure by the physician violates the fiduciary duty. Petrillo v. Suntex Laboratories, 1498 Ill. App.3rd 581, 499 N.E.2d 952 (1986).

Courts which recognize the fiduciary relationship between a patient and his physician have consistently acknowledged that an *ex parte* conference is contrary to the fiducial obligations owed

by a physician. In Wenninger v. Muesing (1976), 307 Minn. 405, 240 N.W.2d 333, for example, the court barred defense counsel from engaging in *ex parte* communications with a plaintiff's treating physician, finding that such a rule "helps preserve the complete trust between a doctor and patient which is essential to the successful treatment of the patient's condition." 307 Minn. 405, 411, 240 N.W.2d 333, 337. Likewise, in Hammonds v. Aetna Casualty & Surety Co. (N.D. Ohio 1965), 243 F. Supp. 793, barred *ex parte* conferences noting "the patient necessarily reposes a great deal of trust not only in the skill of the physician but in his discretion as well. The introduction into relationship of this aura of trust, and the expectation of confidentiality which results therefrom, imposes the fiduciary obligations upon the doctor." 243 F. Supp.793, 802.

Thus, the public has an established and beneficial interest in both the fiducial and confidential qualities of the physician-patient relationship. In addition, the public has an interest, in having those qualities safeguarded from conduct which places them in jeopardy. Accordingly, *ex parte* interviews violate medical ethics because *ex parte* conferences damage the fiduciary nature of the physician-patient relationship.

In Humphers v. First Interstate Bank (1984), 68 Or. App. 573, 684 P.2d 581, aff'd. in part, rev'd. in part and remanded, 298 Or. 706, 696 P.2d 527 (1985), the court recognized the patient's right to rely on the physician's faithful execution of his ethical duties, because "there is widespread public knowledge of the ethical standards of the medical profession and widespread belief that confidences made by a patient to a physician may not be disclosed without the permission of the patient. Patients . . . have the right to rely on this common understanding of the ethical requirements which have been placed on the medical profession." 684 P.2d 581, 587.

Analyzing these principles of medical ethics and fiduciary duty, the Appellate Court of Illinois prohibited *ex parte* interviews, concluding:

... [A] patient, in coming to a physician for medical assistance, places a 'special confidence' in his treating physician. The physician, in turn, owes a duty of good faith toward his patient. This duty of good faith includes, in our opinion, an obligation on the physician's behalf to deal honestly with his patient and thereby avoid engaging in conduct that undermines the fiducial nature of the relationship. **An *ex parte* conference between defense counsel and a plaintiff's treating physician is an example of the type of conduct that undermines the fiducial qualities of the physician-patient relationship.** Petrillo, *supra* [emphasis added.]

The fiduciary relationship imposes the implied promise that the physician will refrain from engaging in conduct that is inconsistent with the "good faith" required of a fiduciary. The patient must be able to trust that the physician will act in the best interests of the patient to protect the sanctity of all confidential matter.

C. IT IS UNETHICAL FOR AN ATTORNEY TO INDUCE A PHYSICIAN TO VIOLATE HIS FIDUCIARY DUTY TO A PATIENT

Ethics committees in New York and other states which have a physician-patient-privilege statute like New York, have held that it is unethical for a defense attorney to engage in *ex parte* conferences with a plaintiff's treating physician. See, e.g., Committee on Professional Ethics of the Bar Association of Nassau County (NY), Opinion 82- 2 (January 6, 1982); Committee on Professional and Judicial Ethics of the State Bar Association of Michigan, Informal Opinion CI -- 587 (December 12, 1980); San Diego County Bar Association Legal Ethics and Unlawful Practices Committee, Opinion 1983 -- 9 (1983); Akron Bar Association

Ethics Committee, Opinion 11 (December, 1983); Missouri State Bar Ethics Opinion, #68; State Bar of California Office of Professional Competence, Planning & Development, Formal Opinion #1975-33, opined that "The privilege is sufficiently important to require the highest standard and conduct in order to prevent unwitting violation," so that "_____
that prior notice be given to plaintiff's counsel

Similarly, the Michigan Committee on Professional and Judicial Ethics, CI-587, forbade *ex parte* interviews, holding "It would be improper for and contrary to the old Canons of Ethics and the new Code of Professional Responsibility for an attorney to attempt to contact a treating physician of an opposite party without the consent of that opposite party. . ."

The prestigious Superior Court in California has ruled that an *ex parte* meeting with an adversary's expert that causes the expert to refuse to testify (as happened herein) is **so reprehensible that the attorney who conducts such an interview will be disqualified from the case.** County of Los Angeles v. Superior Ct., 222 Cal. App.3rd 647, 271 Cal. Rptr. 678 (1990); Shadow Traffic Network v. Superior Court, 24 Cal. App.4th 1067, 29 Cal. Rptr.2d 693 (1990).

The New Jersey Supreme Court disallowed *ex parte* interviews on a related ground:

An equally if not more important interest of the plaintiff, although not specifically pressed before us, **is the desire to preserve the physician's loyalty to the plaintiff in the hope that the physician will not voluntarily provide evidence or testimony that will assist the defendant's cause.**

Stempler v. Speidell 100 N.J. 368 [495 A.2d 857, 864, 50 A.L.R.4th 699] 100 N.J. 368 [495 A.2d 857, 864, 50 A.L.R.4th 699] (1985).

Doctors are not experts in the laws governing privacy issues. They reasonably conclude that if a defense lawyer comes to talk with them - notwithstanding the patient's written prohibition - that

it is indeed permissible. That conclusion, however, puts a physician at risk. The defendant's desire to get information from the doctor is in conflict with the doctor's interest in avoiding having a claim made against him. But, as the court noted in Anker, *supra*, "A doctor who discloses his patient's confidences without authority opens himself to a charge of professional misconduct... In addition to charges of professional misconduct, a cause of action exists against a doctor who, without authority, discloses his patient's confidences."¹⁴ New York's Disciplinary Rule 7-104(A)(2) prohibits an attorney from "giv[ing] advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person have a reasonable possibility of being in conflict with the interests of the lawyer's client."

Aware of the potential for over-reaching by defense counsel, the Committee of Professional Ethics of the Bar Association of Nassau County (NY), Opinion #82-2, answered the exact question which is central to this appeal:

May an attorney interview or arrange for another to interview an adverse party's treating physician without the party's express consent?

[I]t is the Committee's opinion that it would be improper to do so, since by doing so, the attorney is improperly inducing the physician to breach his confidential relationship with the patient. . . . Undoubtedly, therefore, the physician who engages in discussion with his patient's adversary without his patient's authorization has breached his confidential relationship to his patient. In some cases, the breach may occur innocently, it having been induced by representations made by an attorney or the

¹⁴ Dell vs. Roe, 93 Misc.2d 201, 400 N.Y.2d 668; Felis vs. Greenberg, 51 Misc.2d 441, 273 N.Y.2d 288; Clark vs. Geraci, 29 Misc.2d 791, 208 N.Y.2d 564; Horne vs. Patton, 291 Ala. 701, 287 So.2d 824; Schaffer vs. Spicer, 215 N.W.2d 134 [s.d.]; Simonsen vs. Swenson, Neb. 224, 177 N.W. 831.

attorney's representative, express or implied that such disclosure is entirely appropriate because of the 'waiver' doctrine. **An express representation by an attorney that the physician is authorized to disclose confidential information without specific authorization from the patient is, of course, improper and is strongly condemned.** Even in the absence of an express representation to that effect, from the fact that an attorney seeks to acquire such information, the physician may infer ... that he has a right to furnish it. **An attorney should not, directly or indirectly, expressly or impliedly, induce a physician who may not be knowledgeable in the law to breach his confidential relationship to his patient.** [Emphasis added.]

Likewise, the "Standards of Practice for Doctors and Lawyers" of the New York State Bar Association and the Medical Society of the State of New York [R. 78] **require a properly executed and acknowledged written authorization from the patient, before any "oral report" (i.e., interview) may be had.**¹⁵

Thus, **legal ethics requires express permission from the plaintiff explicitly authorizing an interview** to prevent a physician from relying on a defense counsel, whose superior knowledge of the law may induce an unknowing doctor to violate his fiduciary obligations.

In the papers below, defense counsel casually shrugged this ethical opinion off [R. 44], citing Zimmerman v. Jamaica Hospital, 143 A.D.2d 86, 531 N.Y.S.2d 337. There, the Second Department held that the defense could subpoena a non-party physician as a fact witness at trial.

However, Zimmerman does not analyze ethical concerns, nor does it support the fallacious leap of logic that the defense can privately interview the plaintiff's doctors.

¹⁵ The Supreme Court in Anker explicitly found that the defense's *ex parte* interview "unquestionably" violated these ethical standards.

In the Court below, defense counsel argued that "Having ... acted entirely within the bounds of the law, there are no ethical violations." We respectfully disagree. Legal ethics require far higher standard than mere avoidance of illegal acts.¹⁶ The Preamble to the Code of Professional Responsibility notes that it is "the obligation of attorneys to maintain the highest ethical standards."

It is improper for an attorney to contact an adversary's expert to induce that expert not to testify. Because we were excluded, we do not know what was said between defense counsel and Dr. Stolar in this instance (other than the selective portions which the defense elected to reveal in the papers below), but it is unchallenged that Dr. Stolar was cooperative with the plaintiff before meeting with defense counsel, and became uncooperative after the meeting.

As such, the *ex parte* interview was unethical of both the attorney and the doctor who engaged in it.

¹⁶ All kinds of conduct may be legal, but still are unethical. An obvious example is an attorney "wearing a wire" to secretly taping conversations. Another is commingling attorneys' and clients' funds.

POINT IV

COURTS AROUND THE COUNTRY HAVE PROHIBITED *EX PARTE* INTERVIEWS

Innumerable courts throughout the nation - including *this* Court¹⁷ - have held that *ex parte* meetings between defense counsel and a malpractice claimant's non-party treating physicians are impermissible. Most of these rulings have been based on one or more of the following three main rationales: (1) the lack of authorization for *ex parte* interviews in state and federal rules of discovery; (2) the importance of protecting the confidentiality of the physician-patient relationship; and (3) the potential for abuse by defense attorneys. See State ex rel. Kitzmiller v. Henning, 437 S.E.2d 452 (W.Va. 1993); Harlan v. Lewis, 982 F.2d 1255 (8th Cir. 1993); Burns v. Michelotti, 604 N.E.2d 1144 (Ill. App. 1992); Testin v. Dreyer Medical Clinic, 605 N.E.2d 1070 (M. App. 1992); Pourchot v. Commonwealth Edison Company, 587 N.E.2d 589 (Ill. App. 1992); Jaap v. District Court of Eighth Judicial Dist., 623 P.2d 1389 (S.C. Mont., 1981); Young v. Makar, 565 N.E.2d 1030 (Ill. App. 1991), *appeal denied*, 575 N.E.2d 925 (Ill. 1991); Requena v. Franciscan Sisters Health Care Corporation, 570 N.E.2d 1214 (Ill. App. 1991); Nastasi v. United Mine Workers of America Union Hospital, 567 N.E.2d 1358 (Ill. App. 1991); Ford v. Chaplin, 812 P.2d 532 (Wash. App. 1991); Torres v. Superior Court, 270 Cal. Rptr. 401 (Cal. App. 1990); Crist v. Moffatt, 389 S.E.2d 41 (N.C. 1990); Duquette v. Superior Court, 778 P.2d 634 (Ariz. App. 1989); Loudon v. Mhyre, 756 P.2d 138 (Wash. 1988); Ritter v. Rush Presbyterian-St. Luke's Medical Center, 532 N.E.2d 327 (Ill. App. 1988); Yates v. El-Deiry, 513 N.E.2d 519 (Ill. App. 1987);

¹⁷ In re New York County DES Litigation, 581 N.Y.S.2d 353 (App. Div., 1st Dept., 1992).

Karsten v. McCray, 509 N.E.2d 1376 (M. App. 1987); Matter of Hellman, No. 85-24EG (Mass' Board of Registration in Medicine June 24, 1987); Schwartz v. Goldstein, 508 N.E.2d 97 (Mass. 1987); Roosevelt Hotel Limited Partnership v. Sweeney, 394 N.W.2d 353 (Iowa 1986); Petrillo v. Syntex Laboratories, 499 N.E.2d 952 (Ill. App. 1986), *cert. denied*, 107 S. Ct. 3232 (1987); Stoller v. Jun, 499 N.Y.S.2d 790 (App. Div. 1986); Alston v. Greater Southeast Community Hospital, 107 F.R.D. 35 (D. D.C. 1985); Fields v. McNamara, 540 P.2d 327 (Colo. 1975); Weaver v. Mann, 90 F.R.D. 443 (D. N.D. 1981); Garner v. Ford Motor Company, 61 F.R.D. 22 (D. Alaska 1983); See also Manion v. N.P.W. Medical Center, 676 F. Supp. 585 (M.D. Pa. 1987) (defense counsel in medical malpractice action may not privately interview non-party treating physician without notice to claimant); Johnson v. District Court of Oklahoma County, 738 P.2d 151 (Okla. 1987) (trial court in medical malpractice case may not order discovery by *ex parte* interview); and Jaap v. District Court, 623 P.2d 1389 (Mont. 1981) (same); and Kirkland v. Middleton, 639 So.2d 1002 (Fla. App. 1994) (statute prohibiting physicians from discussing patient's medical condition with anyone other than patient or his legal representative or other health care providers prohibits all *ex parte* contacts with defense counsel, even where only non-privileged matters, such as scheduling, are discussed).

Some courts have gone so far as holding that *ex parte* interviews are **unconstitutional**.

Recently (November, 1997), the Illinois Supreme Court ruled that a statute allowing *ex parte* interviews violated the right of privacy guaranteed by the State Constitution. Finding medical information "without question" at the core of individual privacy, *ex parte* interviews unreasonably invade patients' privacy and therefore are unconstitutional. Kunkel v. Walton, No. 81176 (Ill. Sup. Ct., Nov. 20, 1997). Several lower state courts had previously prohibited such interviews; see, e.g.,

Ruperd v. Ryan, 683 N.E.2d 166 (Ill. App., 1997); Burns v. Michelotti, 604 N.Y. 1144 (Ill. App., 1992); Testin v. Dreyer Medical Clinic, 605 N.E.2d 1070 (Ill. App., 1992); Pouchot v. Commonwealth Edison Co., 587 N.E.2d 589 (Ill. App., 1992); Young v. Makar, 565 N.E.2d 1030 (Ill. App., 1991), *app. den.* 575 N.E.2d 295 (Ill. 1991); Requena v. Franciscan Sisters Health Care Corp., 570 N.E.2d 1214 (Ill. App., 1991); Nastasi v. Workers of America Union Health Hosp., 567 N.E.2d 1358 (Ill. App., 1991); Ritter, *supra*; Yates, *supra*; Karsten v. McCray, 509 N.E.2d 1376 (Ill. App., 1987).

We respectfully urge this Court to join with its many brethren in prohibiting such interviews.

POINT V

THE RELIEF PLAINTIFFS REQUEST IS FAIR

Defense counsel argued below that our application was unfair. We submit that properly considered, the relief we request is completely just, and equitably balances the parties' access to different medical witnesses.

There are three distinct classes of medical witnesses in every malpractice case:

Class #1 consists of the plaintiff's treating doctors. These are not completely off-limits to the defense. Their medical records are freely obtainable, and the treating doctors can be spoken to by the defense through formal legal devices with procedural safeguards, such as depositions, interrogatories, etc.

Class #2 consists of the defendants, their staff and personnel, (hospital employees, nurses, etc.). Just as the defense can speak to the plaintiff's doctors only through formal legal channels, the plaintiff can speak to the defendants and their personnel, but only through the same formal channels.

Class #3 consists of the entire universe of other, independent physicians who are strangers to the case, unaffiliated with either plaintiff or defendant, comprising the pool of potential expert witnesses, which either side may contact and draw upon freely.

This framework is evenly balanced. Each side has full and unrestricted access to their own clients, and also has access, *with procedural safeguards*, to the other side and the other side's personnel. Both sides have full and unrestricted access to all of the physicians who are strangers to the case.

The defense protests that this is unfair, because only the plaintiff has unlimited freedom to contact his own doctors. That, however, is counterbalanced by three factors: **(1)** most doctors,

including plaintiffs' own treating doctors, are hostile to malpractice claims on principle, and will not do anything to help their patient sue other doctors; and (2) the defense (and the defendant) is generally better connected within the medical community; and (3) the defense has unlimited access to the defendants.

In this case, defendant Maimonides Hospital has unrestricted access to the approximately fifteen nurses and two dozen or so different consultants, interns, residents, laboratory technicians, and house officers who were involved in the plaintiff's care at the crucial times herein. In contradistinction, the plaintiff has no access to any of these people, except by seeking their depositions.¹⁸

Accordingly, we believe that protecting the plaintiff's doctors from unauthorized interviews by the defense "balances the books."

¹⁸ Our universal experience is that hospitals fight against producing any discovery beyond the hospital chart itself, or more than a single witness for deposition.

We need not look beyond this very case for an example. We had to go before this Court three times in 1-1/2 years, just to get a simple statement regarding the absence of the key ultrasound pictures herein. [R. 14] The defense could have supplied an explanation for their absence at any time, but failed or refused to do so despite two court orders. It took a motion to have the hospital held in contempt of court to get belated compliance.

POINT VI

REAL PREJUDICE RESULTED FROM THE *EX PARTE* INTERVIEW

Whether they did so deliberately or not, defense counsel has turned the plaintiff's treating/expert witness physician against his patient. As a consequence, when the case came on for trial on May 29, 1997 before Justice Cohen, plaintiffs were unable to answer "ready", as they otherwise would have been. The result was very real prejudice to the plaintiff: The case had to be marked off the calendar, and the plaintiffs have to hunt for new witnesses who, in all likelihood, cannot be as effective as the patient's treating doctor.

This prejudice should not be allowed. We respectfully urge this Court to rectify the injustice by granting us **exactly the same relief that was urged on the trial court level in the *Anker* decision, and which the trial court (Supreme Court Justice Seymour Boyers) granted, and which was affirmed by the Appellate Division.**

We also urge the Court to establish the principal herein, that unauthorized interviews with the plaintiff's physicians contrary to the plaintiff's explicit written prohibition, may not be had, regardless of whether a Note of Issue has been filed or not. Such conduct should be prohibited and condemned in this case, and in all cases, forevermore.

POINT VII

THE SCANT AUTHORITY ON WHICH THE LOWER COURT RELIED HAS NEVER BEEN ADOPTED IN THIS DEPARTMENT, IS ILLOGICAL, AND SHOULD BE REJECTED.

Because the First Department has never ruled on this issue, the lower Court was required to follow the rulings from other Judicial Departments in a handful of isolated decisions. We recognize those decisions, but with all respect to the courts which rendered them, submit that they were wrongly decided and/or distinguishable.

In those few decisions dealing squarely with *ex parte* interviews,¹⁹ the Courts found that private interviews in pre-trial discovery were prohibited, but ruled that once a case progressed beyond discovery and a Note of Issue is filed, the prohibition evaporates. (The defense also relied on several inapposite cases dealing with interviewing doctors who were *subpoenaed to testify at trial*, and the scope or admissibility of their *trial testimonies*.²⁰ Those cases are so obviously distinguishable on their face, that we need not consider their inapplicability here.)

¹⁹ Tiborsky v. Martorella, 188 A.D.2d 795, 591 N.Y.S.2d 547 (3rd Dept., 1992); Nielsen v. Apisson, 138 Misc.2d 74, 524 N.Y.S.2d 161.

²⁰ People v. Al-Kanani, 33 N.Y.2d 260, 351 N.Y.S.2d 969, 307 N.E.2d 43 (1973); People v. Edney, 39 N.Y.2d 620, 385 NASD 23, 350 N.E.2d 400 (1976); Levande v. Dines, 153 A.D.2d 671, 544 N.Y.S.2d 864 (2nd Dept., 1989); Zimmerman v. Jamaica Hospital, 143 A.D.2d 86, 531 N.Y.S.2d 337 (2nd Dept., 1988);

Liveri v. Whitehead, 122 A.D.2d 838, 505 N.Y.S.2d 708 (2nd Dept., 1986).

The distinction on which those Courts rely - the pre- or post- Note of Issue status of a case - has no basis in logic. None of the authorities on which the defense relied ever overruled Anker, *supra*. Instead, they constructed a rationalization or artifice - through a contrived and irrelevant distinction - to attain a result different than that in Anker.²¹ Why should it matter one bit, for the purposes of physician/patient privilege, whether a case is still in the discovery phase or past that stage? Why does putting a case on the calendar create a higher level of waiver than commencing the lawsuit? That turning point on which these decisions hinge - the filing of a Note of Issue - is wholly irrelevant to the asserted privilege. Exhaustive research has failed to find even *a single case* outside New York which follows the artificial distinction on which the defense relies.

Furthermore, as demonstrated in Point II(A), *supra* at pages 36, such interviews are flatly violative of the Uniform Rules.

Four basic public policy reasons justify the prohibition of private interviews:

- (1) In the absence of the patient's representatives and formal discovery procedures on notice, doctors could be subject to improper pressures or induced to disclose irrelevant information;
- (2) Formal discovery procedures (on notice) have procedural protections such as protective orders, etc., which are unavailable with *ex-parte* interviews;
- (3) *Ex parte* interviews harm the physician/patient relationship and therefore endanger the quality of medical care;
- (4) Physicians are protected against liability for improper disclosures when formal discovery proceedings are followed.

None of these policy arguments are diminished in the slightest by the filing of a Note of Issue.

²¹ Anker forbids *ex parte* interviews uniformly, whether a case is on the calendar or not.

The opposing policy arguments rely on the proposition that no party to litigation has a proprietary right to any witness' evidence, that informal, private interviews reduce the cost of litigation and permit defendants to quickly and gather information. None of these countervailing arguments are affected in the slightest, one way or the other, by the distinction of whether the case is still in discovery or is beyond that phase.

Where a philosophical battle wages between important, opposing policy concerns, it makes no sense for the resolution to turn on the question of what procedural stage a civil case is in, where that stage has nothing to do with any of the underlying important public policy considerations. Private interviews during discovery are contrary to public policy, as the Second Department found in Anker, but there is nothing in any of the decisions which the lower Court had to follow, that explains why the policy underpinnings of Anker are any less apropos after a Note of Issue is filed than before. Indeed, in Anker, the Second Department specifically stated that the reason it prohibited *ex parte* interviews is "the sensitive nature of the material." That material is no less sensitive after a Note of Issue is file than it was before.

The lower Court was constrained by law to follow bad precedents. This Court is not. This Court has the freedom to exercise its own judgment and set its own precedents. We respectfully ask that it break away from those other courts which have permitted *ex parte* interviews, and to condemn the practice.

POINT VIII

THE DEFENSE HAS WAIVED ANY PRIVILEGE ATTACHED TO DEFENSE COUNSEL'S NOTES OF HIS MEETING WITH DR. STOLAR:

In a strange irony, while showing no respect for the physician/patient privilege the legislature bestowed on plaintiffs, our adversary asserts a claim of privilege attaches to his notes of his secret meeting with Dr. Stolar. However, *the defense has waived all such privilege through their conduct herein.*

In Breen v. Leonard Hospital, 443 N.Y.S.2d 705, 82 A.D.2d 1000 (1981), the Appellate Division, Third Department, found that by interviewing the plaintiff's doctor *ex parte*, the defense had waived any privilege attached to the transcripts of that meeting, and required that they be turned over to the plaintiff.

In Anker, *supra*, the Second Department affirmed and required the defense to turn over the transcript of their tape-recorded *ex parte* interview with the plaintiff's physician.

By telling the lower court the substance of his meeting,²² the defense attorney herein waived the confidentiality of the report he dictated for his file. Partially revealing the substance of his conversation, destroyed the privilege completely. Platt v. Bank of N.Y., 41 A.D.2d 648, 340 N.Y.S.2d 739 (2nd Dept.), *app. disp'd.* 33 N.Y.2d 577, 347 N.Y.S.2d 449, 301 N.E. 2d 433

²²

Defense counsel selectively tells us that:

Dr. Stolar, at no time, indicated he was the plaintiffs' expert. . . Dr. Stolar voiced no objection or reluctance to discuss the infant plaintiff's in utero condition, condition at birth, **propriety of the defendants' diagnosis and treatment, liability, causation** or the child's present condition and current treatment..... Dr. Stolar disclosed that he discussed this matter with [plaintiffs' attorney] and told him, in substance, what he told [defense counsel]..... I drew the distinct impression that Dr. Stolar believed there was neither liability nor causation....

(1973). The U.S. Supreme Court has held that an attorney's work product privilege is subject to waiver if the notes, documents, and internal materials themselves are put to use in Court. United States v. Nobles, 422 U.S. 225 (1975). Having used these notes as a sword in this motion, the defense cannot hide them as a shield. LaVerne v. Inc. Village of Laurel Hollow, 18 N.Y.2d 635, 272 N.Y.S.2d 780, 219 N.E.2d 294 (1966), *app. disp'd.* 386 U.S. 682 (1967).

In those rare instances where we have learned that representatives of the defense have interviewed the plaintiffs' physicians without the foreknowledge and consent of the plaintiffs (or, more specifically, despite the express prohibition in the authorization forms), we have been successful in suppressing the results of those interviews. While these are unreported lower Court decisions, they are nonetheless instructive:

In Siebold vs. Snow (Supreme Court, New York County, November 23, 1977, Tierney, J.), the Court directed the defense in a dental malpractice action to turn over to the plaintiff all tape recordings of an unauthorized interview with the plaintiff's subsequent treating dentist.

Similarly, in Wolitzky vs. Cornell (Supreme Court, New York County, February 17, 1983, Gammerman, J.), the Court precluded the defense from calling as a trial witness a physician whom they interviewed in violation of the prohibition in the plaintiff's authorization, and further directed them to remove from their files all records relating to the interview and any and all reports containing information derived from that interview. The Court further directed the defense to notify plaintiff's counsel of any other physicians who were interviewed, and precluded the defense from calling any expert whose opinions were derived from the fruits of such interviews.

Similarly, in Smith vs. Booth Memorial Medical Center (Supreme Court, Queens County, March 16, 1982, Buschmann, J.), the Court directed the defense to turn over to plaintiff's attorneys

a copy of any transcript of any interview held with the plaintiff's physicians, or a sworn affidavit denying the existence of any such interviews.

In Florida, plaintiff's attorney in a malpractice action learned of *ex parte* meetings, and moved (1) for a protective order prohibiting further contacts, and (2) to strike the testimony of the physicians who met with defense counsel. The appellate court ruled that it was error to deny the protective order, and remanded to the trial court to decide whether to bar the testimony entirely, Keel v. Psychiatric Institute of DelRay, No. 95-1273 (Fla. Ct. App., 4th Dist., Feb. 28, 1996). Florida's highest court prohibited *ex parte* discussions unless the physician reasonably expects to be named as a defendant in the lawsuit. Acosta v. Richter, No. 84, 413 (Fla. Sup. Ct., Jan. 18, 1996).

Barring a physician's testimony as a penalty for an unauthorized interview, has also been approved in Pennsylvania, Manion v. N.P.W. Medical Center, 676 F. Supp. 585, (M.D. Pa., 1987), and in Illinois, Pourchot, *supra*; Requena, *supra*; Yates, *supra*; and Karsten, *supra*.

Accordingly, we respectfully urge the Court to prohibit all such *ex parte* interviews.

CONCLUSION

The statutory medical privilege prohibits discovery of medical information in the absence of waiver by the patient. While the commencement of a personal injury claim entails a limited waiver of confidentiality, it does not constitute a blanket waiver of all statutory protection and procedural safeguards. Medical information is particularly sensitive, and therefore, specially deserving of protection and safeguarding. *Ex parte* interviews eliminate all safeguards, engender suspicion, and are subject to myriad abuses. There are adequate other methods to obtain medical information without the need for *ex parte* interviews. If there is to be a meeting between adverse counsel and a patient's doctor, there is neither need nor justification for excluding the patient's attorney

The physician/patient relationship has always been dependent on the expectation of confidentiality. *Ex parte* interviews sow seeds of distrust between patient and doctor directly damage the physician/patient relationship. This causes a direct, adverse impact on quality patient care, in contravention of the stated public policy of New York.

The few decisions in New York which allow such interviews are based on an irrelevant, illogical and contrived distinction between cases which are on the calendar and those which are not. Since this distinction is irrelevant to the purpose of the physician/patient privilege and CPLR 4503, those decisions should not be followed.

Accordingly, the Order Appealed from should be reversed.

Respectfully submitted,

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