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Defendants' Right to Conduct Ex Parte Interviews with Treating Physicians in Drug or Medical Device Cases

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Notes

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INTRODUCTION

Litigation involving injuries attributable to drugs[1] or medical devices[2] has increased significantly in recent years.[3] The sharply disputed issue of whether defendant manufacturers have the right to interview privately plaintiffs' treating physicians frequently arises in these cases.[4] Such interviews are in-

1. In this Note, the term *drug* refers to prescription drugs. Federal statutes define prescription drugs as those drugs that pharmacists may dispense only on a physician's prescription, rather than those sold over the counter. 21 U.S.C. § 353(b)(1) (1982).

2. A medical device is defined as any instrument, implant, or other article recognized by the National Formulary or the United States Pharmacopeia and designed to cure disease by affecting a patient's physical structure or bodily function without relying principally on some type of chemical action. 21 U.S.C. § 321(h) (1982); *see* Kessler, Pape & Sundwall, *The Federal Regulation of Medical Devices*, 317 NEW ENG. J. MED. 357 (1987); *see, e.g.*, Phelps v. Sherwood Medical Indus., 836 F.2d 296, 298 (7th Cir. 1987) (discussing heart catheter); Brooks v. Medtronic, Inc., 750 F.2d 1227, 1232 (4th Cir. 1984) (discussing heart pacemaker); Perfetti v. McGhan Medical, 99 N.M. 645, 649, 662 P.2d 646, 650 (Ct. App.) (discussing breast implant), *cert. denied*, 99 N.M. 644, 662 P.2d 645 (1983); Terhune v. A. H. Robins Co., 90 Wash. 2d 9, 15, 577 P.2d 975, 978 (1978) (en banc) (discussing Dalkon shield intrauterine contraceptive device).

3. The number of drug malpractice and product liability cases tripled annually between 1976 and 1982. DRUGS IN LITIGATION vii-viii (2d ed. 1982).

4. *See, e.g.*, Doe v. Eli Lilly & Co., 99 F.R.D. 126, 127 (D.D.C. 1983); Petrillo v. Syntex Laboratories, Inc., 148 Ill. App. 3d 581, 585, 499 N.E.2d 952, 954-55 (1986), *appeal denied*, 113 Ill. 2d 584, 505 N.E.2d 361, *cert. denied*, 483 U.S. 1007 (1987). Various articles have examined ex parte interviews of treating physicians, but not specifically in the drug or medical device context. *See, e.g.*, King & Hall, *Waiver of the Physician-Patient Privilege in South Dakota—May Defense Counsel Conduct Ex Parte Interviews of Plaintiffs' Treating Physicians?*, 33 S.D.L. REV. 260 (1988); Lillehaug, *Ex Parte Interviews with "Two-Hatted" Witnesses*, 21 TORT & INS. L.J. 441 (1986); Tate & Toman, *Ex Parte Physician Conferences: Circumventing the Federal Rules of Civil Procedure*, 4 ADELPHIA L.J. 31 (1986); Webster, *Private Interviews with Plaintiff's Doctor*, FOR THE DEFENSE, Feb. 1988, at 22; Comment, *Discovery and the Doctor: Expansion of Rule 35(b)*, 34 MONT. L. REV. 257 (1973); Annotation, *Discovery:*

formal, ex parte discussions with witnesses about the facts of the case and the witnesses' opinions.[5] Ex parte interviews facilitate discovery of relevant information in a quicker and less expensive manner than more formal modes of discovery.[6] Such interviews also may unearth information unavailable in the heightened adversarial atmosphere created when opposing counsel participates in formal discovery.[7]

Because ex parte interviews perform the valuable role of preparing witnesses and assisting attorneys in evaluating the need for more formal discovery, courts generally do not question their use. An exception arises when the potential witness is a treating physician, because ex parte interviews may endanger information protected by the physician-patient privilege.[8]

The physician, a crucial witness in any personal injury case,[9] becomes an even more vital witness in cases alleging injuries stemming from drug or medical device side effects or failure. These cases differ from other product liability or personal injury cases because the prescribing physician actively participates in the events leading to the lawsuit. The physicians' experience and knowledge of the drugs or devices at issue and their information and opinions about the patients are the crux of such cases. Moreover, defendants often must seek nonprivi-

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Right to Ex Parte Interview with Injured Party's Treating Physician, 50 A.L.R.4th 714 (1986).

5. Courts long have recognized the right to conduct informal discovery, including ex parte interviews with potential witnesses during trial preparation. *See, e.g.*, Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128 (D.D.C. 1983) (holding that Congress did not intend federal procedural rules to eliminate "the use of such venerable, if informal, discovery techniques as the *ex parte* interview of a witness who is willing to speak"). The *Federal Rules of Civil Procedure* protect the results of ex parte interviews as attorney work product. Hickman v. Taylor, 329 U.S. 495, 511 (1947).

6. An ex parte interview of a witness costs less than a deposition and is easier to schedule. State *ex rel.* Stufflebam v. Appelquist, 694 S.W.2d 882, 888 (Mo. Ct. App. 1985).

7. *See, e.g.*, Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128-29 (D.D.C. 1983).

8. *See infra* notes 133-34 and accompanying text.

9. The treating physician is an important witness in any case placing the patient's physical condition at issue. The treating physician possesses the "most relevant information and opinions" about the patient's condition. Orr v. Sievert, 162 Ga. App. 677, 679-80, 292 S.E.2d 548, 550 (1982). The treating physician "is often the expert most capable of refuting a plaintiff's unfounded claims." Webster, *supra* note 4, at 28. Prescribing physicians in drug or medical device cases take on greater importance because they know not only about the patient's physical condition, but also about the drug or medical device, the manufacturer's warning, and other nonprivileged, but critical facts. *See infra* notes 25-29 and accompanying text.

leged information that treating physicians possess to prepare defenses unique to drug and medical device litigation.

Patients have full access to all information the treating physicians possess because their attorneys are free to meet with these physicians without the presence of defense counsel.[10] Courts commonly bar defendant manufacturers from equal access, however, by prohibiting ex parte interviews with the physicians.[11] Defendants therefore must investigate all facts, including discovery of nonprivileged information, in the presence of patients' counsel.

Many courts foster this inequity when attempting to further the physician-patient privilege[12] or theories of patient privacy.[13] Consequently, defendants must rely exclusively on formal methods of discovery, unnecessarily limiting their access to treating physicians.[14] Defendants suffer significant prejudice in trial preparation and may lose entirely the opportunity to present favorable fact or opinion evidence.[15] As a result, courts sacrifice opportunities for case settlement or pretrial dismissal on the merits when material facts remain unknown, or become known only late into trial.[16] Moreover, plaintiffs' unilateral knowledge and control of crucial facts present many opportunities for abuse of the physician-patient privilege.[17] This problem inheres in all personal injury and product liability litigation, but particularly plagues the drug or medical device area because of the unique nature of these lawsuits.[18]

This Note explores defendants' right to conduct ex parte interviews with treating physicians in drug and medical device cases. Part I examines the unique nature of drug and medical device cases and the development of the physician-patient privilege and the patient-litigant waiver. It also discusses the value of ex parte interviews as discovery tools. Part II details the

10. Patients may interview their own physicians freely, but the implications of the physician-patient privilege or notions of confidentiality may impede others' access. *See, e.g.*, Covington v. Sawyer, 9 Ohio App. 3d 40, 45, 458 N.E.2d 465, 471 (1983) ("There is no rule, written or unwritten, prohibiting a party or his attorney from conducting *ex parte* conferences with that party's own witnesses.").

11. *See infra* note 92.

12. Webster, *supra* note 4, at 28.

13. Lillehaug, *supra* note 4, at 445.

14. *See infra* notes 133-53 and accompanying text.

15. *See infra* notes 131-32 and accompanying text.

16. *See infra* notes 85-86 and accompanying text.

17. *See infra* notes 126-30 and accompanying text.

18. *See infra* notes 160-70 and accompanying text.

ways in which ex parte interviews affect the physician-patient privilege and the patient-litigant waiver and the resulting conflict among jurisdictions regarding ex parte interviews of physicians in general. Part III argues that courts generally should allow ex parte interviews of treating physicians because of the patient-litigant waiver. It examines the special circumstances of defendants and treating physicians in drug and medical device cases and illustrates how courts err by ignoring these additional factors when analyzing the propriety of ex parte interviews. The Note argues that these special factors make ex parte interviews especially appropriate in the drug and medical device area and proposes specific guidelines for courts to apply in these cases. The Note concludes that allowing ex parte interviews of physicians will best serve the unique considerations involved in drug and medical device cases without unduly harming the physician-patient relationship.

I. DRUG AND MEDICAL DEVICE CASES: THE USE OF EX PARTE INTERVIEWS AND THE PHYSICIAN-PATIENT PROVILEGE

A. UNIQUE NATURE OF DRUG AND MEDICAL DEVICE CASES

Manufacturers have a general duty to market only reasonably safe products and a duty to warn consumers of the risks involved in product use.[19] The learned intermediary rule modifies this general duty to warn in drug and medical device cases.[20] Under this rule, courts require the manufacturer to warn only the prescribing physician,[21] who acts as a *learned in-*

19. *See, e.g.*, Illinois State Trust Co. v. Walker Mfg. Co., 73 Ill. App. 3d 585, 589, 392 N.E.2d 70, 73 (1979); Eaton, *What the Doctor Ordered*, BRIEF, Summer 1986, at 24, 26 (stating that "it is well settled in the law of product liability that the manufacturer has a duty to warn the ultimate user of known dangers inherent in a product").

20. Many jurisdictions have adopted this doctrine. *See, e.g.*, Beyette v. Ortho Pharmaceutical Corp., 823 F.2d 990, 992 (6th Cir. 1987); Swayze v. McNeil Laboratories, Inc., 807 F.2d 464, 470 (5th Cir. 1987); Brooks v. Medtronic, Inc., 750 F.2d 1227, 1231-32 (4th Cir. 1984); Sterling Drug, Inc. v. Cornish, 370 F.2d 82, 85 (8th Cir. 1966); Goodson v. Searle Laboratories, 471 F. Supp. 546, 548 (D. Conn. 1978); Chambers v. G.D. Searle & Co., 441 F. Supp. 377, 381 (D. Md. 1975), *aff'd*, 567 F.2d 269 (4th Cir. 1977); Terhune v. A.H. Robins Co., 90 Wash. 2d 9, 15, 577 P.2d 975, 979 (1978) (en banc).

21. *See, e.g.*, *Chambers*, 441 F. Supp. at 381; Seley v. G.D. Searle & Co., 67 Ohio St. 2d 192, 198, 423 N.E.2d 831, 836-37 (1981). Courts have carved out two major exceptions to the learned intermediary defense: mass immunization and oral contraceptives. Comment, *Products Liability: The Continued Viability of the Learned Intermediary Rule As It Applies to Product Warnings for Prescription Drugs*, 20 U. RICH. L. REV. 405, 414-19 (1986); *see also* Note, *Oral Con-*

termediary between the manufacturer and the patient.[22] If the manufacturer adequately warns the physician, the manufacturer has discharged its duty, even if the physician subsequently fails to communicate an adequate warning to the patient.[23] Moreover, if the manufacturer inadequately warns the physician, but the treating physician independently receives complete information about the risks of the drug or medical device, the manufacturer will escape liability because no proximate cause exists between its inadequate warning and the injury.[24]

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traceptives: Heading Into an Era of Unpredictability, Unlimited Liability, and Unavailability?, 19 IND. L. REV. 615, 617 (1986).

22. The court first used the term *learned intermediary* in *Sterling Drug*, 370 F.2d at 85.

23. *See* Comment, *supra* note 21, at 406-07.

24. *See, e.g.*, Kirsch v. Picker Int'l, Inc., 753 F.2d 670, 671 (8th Cir. 1985); Goodson v. Searle Laboratories, 471 F. Supp. 546, 548 (D. Conn. 1978); Mulder v. Parke Davis & Co., 288 Minn. 332, 334-36, 181 N.W.2d 882, 885 (1970) (citations omitted); Leibowitz v. Ortho Pharmaceutical Corp., 224 Pa. Super. 418, 430-32, 307 A.2d 449, 457-58 (1973). Courts distinguish between two aspects of causation in drug and medical device cases, medical cause and legal cause. Medical cause, or cause-in-fact, concerns whether the product at issue or some alternative entity or process physically caused the patient's injury. The patient generally meets the burden of proof if the evidence shows that the drug or medical device contributed substantially to the injury. *See, e.g.*, Flom v. Flom, 291 N.W.2d 914, 917 (Minn. 1980). The plaintiff must prove medical cause in any drug or medical device case, regardless of the theories of liability pleaded. *See* Owens v. Bourns, Inc., 766 F.2d 145, 150-51 (4th Cir. 1985) (using standard of reasonable degree of medical certainty, court held that plaintiff did not present sufficient evidence of medical causation between defendant's ventilator and patient's injury). Legal or proximate cause concerns whether the courts will hold the manufacturer liable for the patient's injury as a result of the manufacturer's conduct. Physicians' failure to warn or their direct negligence may break the chain of causation. *See, e.g.*, Chambers v. G.D. Searle & Co., 441 F. Supp. 377, 384 (D. Md. 1975) (holding manufacturer not liable where prescribing physician testified that he would have prescribed drug despite manufacturer's warnings), *aff'd*, 567 F.2d 269 (4th Cir. 1977). Although ex parte interviews facilitate discovery relating to both legal and medical cause, defendants have a particular need to conduct ex parte interviews for the preparation of defenses relating to legal cause. *See In re* Bendectin Litig., 857 F.2d 290, 296 (6th Cir. 1988) (distinguishing between liability and causation in case involving birth defects that drug Bendectin allegedly caused), *cert. denied*, 109 S. Ct. 788 (1989).

Many courts also have modified the manufacturers' liability in drug and medical device cases, refusing to hold manufacturers strictly liable. Important policy considerations unique to these products underpin this exception. *See, e.g.*, Brown v. Superior Court, 44 Cal. 3d 1049, 1062, 751 P.2d 470, 478, 245 Cal. Rptr. 412, 420 (1988) (modifying manufacturers' liability because drugs and medical devices are necessary and valuable products due to their unique purposes: to alleviate pain and suffering and to sustain life). Courts, recognizing that drugs and medical devices are valuable products, encourage their develop-

Because the manufacturer has a duty to warn only the prescribing physician,[25] these physicians act as "two-hatted witnesses"[26] possessing both privileged and nonprivileged information in drug or medical device cases. The physician has privileged information about the patient similar to the information physicians possess in traditional personal injury cases. The prescribing physician also has a wealth of nonprivileged information, including information the manfacturer communicates through package material, advertising, or direct contact by sales representatives.[27] The physicians' opinion of the adequacy of this information is relevant to the manufacturers' duty to warn.[28] The physicians' own training and clinical experience, previous experience with the product, and knowledge of the product through independent sources such as peer discussion or medical literature also represent information both important and nonprivileged.[29]

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ment and marketing by modifying the standard of liability. RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965). By encouraging manufacturers to develop and market drugs and medical devices, courts promote public policy; the imposition of strict liability may drive existing products off the market and may stifle the research and development of new products. Schwartz, *Unavoidably Unsafe Products: Clarifying the Meaning and Policy Behind Comment K*, 42 WASH. & LEE L. REV. 1139, 1141 (1985). Drug and medical device manufacturers receive protection even though courts characterize their products as "unavoidably unsafe;" that is, the products may cause injury even if a company carefully and properly manufactures them. *See* Lindsay v. Ortho Pharmaceutical Corp., 637 F.2d 87, 90 (2d Cir. 1980) (noting that some products are unsafe no matter what precautions companies take during manufacturing process); Wolfgruber v. Upjohn Co., 72 A.D.2d 59, 61, 423 N.Y.S.2d 95, 97 (1979) (discussing concept of "unavoidably unsafe" products), *aff'd*, 52 N.Y.2d 768, 417 N.E.2d 1002, 436 N.Y.S.2d 614 (1980). Courts do not impose strict liability in these cases, reflecting a policy judgment that the availability of drugs and medical devices is so vital to society that manufacturers should not be held strictly liable for the unavoidable injuries the products cause. *See, e.g.*, *Brown*, 44 Cal. 3d at 1063, 751 P.2d at 478-79, 245 Cal. Rptr. at 420 (holding that because of unique purpose of drug and medical devices, "broader public interest in the availability of drugs at an affordable price must be considered in deciding the appropriate standard of liability for injuries resulting from their use").

25. *See supra* notes 19-24 and accompanying text. The concept of the learned intermediary reflects the treating physicians' unique role in drug and medical device cases. *See, e.g.*, Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1276 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974).

26. Commentators have used this term to describe witnesses who may give both fact and expert testimony. Lillehaug, *supra* note 4, at 441. This Note borrows the term to describe prescribing physicians in drug and medical device cases because they possess both privileged and nonprivileged information.

27. Note, *infra* note 31, at 471-74.

28. *See supra* notes 23-24 and accompanying text.

29. *See infra* notes 31-32 and accompanying text.

The prescribing physicians' interest in drug or medical device cases differs from their interest in other personal injury cases, and may be in direct conflict with the patients' interests. In a traditional personal injury case, the physician becomes involved in treating the injury after it has occurred, thus facing no personal liability for the injury.[30] In drug and medical device cases, however, the physician acts as a consumer[31] of the drug or medical device and has a relationship with the manufacturer defendant independent of the physician's relationship with the patient.[32] Consequently, the physician, along with the manufacturer, may bear legal responsibility for injuries to a patient resulting from a breach of the duty to warn.[33] A court also may hold the physician directly liable for injuries to the patient resulting from the negligent prescription of a drug or medical device.[34] Moreover, if the plaintiff sues only the manufacturer, the physician faces the risk of a future lawsuit by the patient, a threat absent in other types of personal injury cases.[35]

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30. *See infra* note 35 (discussing defendant physician's unique role in medical malpractice actions).

31. *See, e.g.*, Carmichael v. Reitz, 17 Cal. App. 3d 958, 989, 95 Cal. Rptr. 381, 401 (1971) (stating that "the prescribing doctor . . . in reality stands in the shoes of the 'ordinary consumer' "); Note, Oksenholt v. Lederle Laboratories: *The Physician as Consumer*, 79 NW. U.L. REV. 460, 462 (1985). Because of the physician's role as a drug consumer, the *Oksenholt* court recognized a physician's independent cause of action for inadequate drug manufacturer warnings. Oksenholt v. Lederle Laboratories, 294 Or. 213, 220, 656 P.2d 293, 297 (1982).

32. Both a customer and an information relationship exist between the manufacturer and the prescribing physician. The manufacturer must update warnings and report adverse product reactions to the physician, a process wholly independent of the patient's relationship. *See, e.g.*, Schenebeck v. Sterling Drug, Inc., 423 F.2d 919, 922 (8th Cir. 1970) (finding that drug manufacturer has duty "to keep abreast of scientific developments touching upon the manufacturer's product and to notify the medical profession of any additional side effects discovered from its use"); Note, *supra* note 31, at 461.

33. *See, e.g.*, Mulder v. Parke Davis & Co., 288 Minn. 332, 340, 181 N.W.2d 882, 887 (1970).

34. *Id.* at 339, 181 N.W.2d at 886.

35. Medical malpractice actions present physicians with no threat of future lawsuits because the patient already has sued the treating or prescribing physician. The physician and patient therefore already have opposing interests. *See* Anderson v. Florence, 288 Minn. 351, 359-60, 181 N.W.2d 873, 878 (1970) (discussing unique role of defendant physician in medical malpractice action as adverse party, eyewitness, and expert witness). The physician and patient interests in drug and medical device litigation are not as clearly defined. In most drug and medical device cases, the patient has not yet sued the prescribing physician, but only the manufacturer. The court in *Doe v. Eli Lilly* recognized that patients' counsel could use control of the medical privilege to threaten treating physicians with liability for unauthorized disclosure of privi-

B. DEVELOPMENT OF THE PHYSICIAN-PATIENT PRIVILEGE AND PATIENTS' WAIVER OF SUCH PRIVILEGE

Because treating physicians frequently are asked to testify or otherwise to participate in drug and medical device cases, the physician-patient privilege usually is implicated in these cases. This privilege protects the confidentiality[36] of patient information that an attending physician[37] acquires while acting in a professional capacity.[38] The privilege covers any information necessary[39] for the physician's examination, diagnosis, or treatment of the patient.[40] Most states[41] have enacted legislation

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leged information, but did not examine the possibility that the patient could use the threat of a future lawsuit concerning the drug or medical device to prevent the treating physician from fully disclosing all relevant information in the current litigation against the drug manufacturer. 99 F.R.D. 126, 128-29 (D.D.C. 1983).

36. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2380(a) (J.T. McNaughton rev. ed. 1961 & Supp. W.A. Reiser ed. 1988). If a patient communicates in the presence of a third party who is unnecessary for medical treatment, the communications are not confidential, and therefore not privileged. *See, e.g.*, State v. LaRoche, 122 N.H. 231, 233, 442 A.2d 602, 603 (1982).

37. The privilege also extends to physicians' professional communications to patients. *See, e.g.*, Sher v. De Haven, 199 F.2d 777, 779-80 (D.C. Cir. 1952), *cert. denied*, 345 U.S. 936 (1953).

38. *See e.g.*, Maine v. Maryland Casualty Co., 172 Wis. 350, 353, 178 N.W. 749, 750-51 (1920) (construing Wisconsin statutory privilege to bar physician from revealing even information beneficial to survivor's lawsuit).

39. Courts have broadly construed *necessary* when determining the extent of the physician-patient privilege. *See, e.g.*, Pride v. Inter-State Business Men's Accident Ass'n, 207 Iowa 167, 174, 216 N.W. 62, 65 (1927) (stating that court "will draw no fine lines as to whether a communication is necessary or unnecessary").

40. Courts will consider examinations conducted for patient treatment privileged, but examinations done at the request of others for fact-finding rather than patient treatment are not privileged. *See, e.g.*, State v. Santeyan, 136 Ariz. 108, 110, 664 P.2d 652, 654 (1983).

41. As of 1985, 40 states and the District of Columbia had passed physician-patient privilege statutes. *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1532 (1985) [hereinafter *Developments*]; *see, e.g.*, D.C. CODE ANN. § 14-307 (Supp. 1988); ILL. REV. STAT. ch. 110, para. 8-802 (Supp. 1988); MINN. STAT. § 595.02(d) (1988); MONT. CODE ANN. § 26-1-805 (1987); N.J. STAT. ANN. § 2A:84A-22.2 (West 1976); N.Y. CIV. PRAC. L. & R. § 4504 (McKinney Supp. 1989). The statutes generally have five requirements for the physician-patient privilege. Kmentt, *Private Medical Records: Are They Public Property?: A Survey of Privacy, Confidentiality and Privilege*, 1987 MED. TRIAL TECH. Q. 274, 277. The person barred from testifying must fit the statutory definition of covered medical personnel. The protected information must flow from a defined medical relationship. The information must come from a communication or an observation. The patient's treatment must require the information. Finally, the information must be confidential. *Id.*

that provides a privilege[42] protecting this information.[43] A minority of states have adopted the privilege in limited circumstances by judicial construction,[44] while others still do not recognize any physician-patient privilege.[45]

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42. The confidentiality of the physician-patient relationship historically has stood as a cornerstone of the physicians' code of ethics. The Hippocratic Oath, dating from the fifth century B.C., states that: "Whatever, in connection with my professional practice or not in connection with it, I see or hear, in the life of men, which ought not to be spoken abroad, I will not divulge, as reckoning that all such should be kept secret." *Reprinted in* B. MALOY, THE SIMPLIFIED MEDICAL DICTIONARY FOR LAWYERS 372 (3d ed. 1960); *see also* Ward, *Pre-Trial Waiver of the Physician/Patient Privilege*, 22 GONZ. L. REV. 59, 62-65 (1986) (stating that physician's duty of confidentiality originates not only from statutory privilege, but also from civil rules, implied contract between physician and patient, and patient's right to privacy). The common law, however, did not recognize a physician-patient testimonial privilege. State v. Staat, 291 Minn. 394, 396-97, 192 N.W.2d 192, 195 (1971). The courts at common law therefore gave no legal protection to communications between physicians and patients. *See, e.g.*, State v. Devanney, 12 Conn. App. 288, 292, 530 A.2d 650, 652-53 (1987) (reasoning that communications between physician and patient have no legal protection because Connecticut has no statutory medical privilege and common law recognizes none, thus courts freely may admit physician's testimony about patient). The physician-patient privilege has been a source of great controversy. *Compare* Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61, 85 (1973) (observing that evidence experts agree that privileges serve no important social purpose) *with* Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 110 (1956) (stating that handicapping legal process is "not too great a price to pay" for certain privileges); *see infra* note 55 and accompanying text.

43. State v. Staat, 291 Minn. 394, 396-97, 192 N.W.2d 192, 195 (1971) (noting that New York was first state to enact such legislation in 1828). "Nineteenth-century legislatures created the privilege primarily as a public health measure to encourage people to seek medical assistance." *Developments*, *supra* note 41, at 1532.

44. Alabama judicially recognized a limited physician-patient privilege absent a statutory privilege in *Horne v. Patton*, 291 Ala. 701, 708-09, 287 So. 2d 824, 829-30 (1973), as did New Jersey in *Hague v. Williams*, 37 N.J. 328, 336, 181 A.2d 345, 349 (1962). New Jersey subsequently adopted the privilege by statute. *See* N.J. STAT. ANN. § 2A:84A-22.2 (West 1976).

45. Through 1985, Alabama, Connecticut, Florida, Kentucky, Maryland, Massachusetts, New Mexico, South Carolina, Tennessee, and West Virginia had not enacted statutes recognizing a physician-patient privilege. *Developments*, *supra* note 41, at 1532 n.9. Federal law also does not provide a physican-patient privilege. *See, e.g.*, United States v. University Hosp., 575 F. Supp. 607, 611 (E.D.N.Y. 1983), *aff'd*, 729 F.2d 144 (2d Cir. 1984); *In re* Grand Jury Subpoena, 460 F. Supp. 150, 151 (W.D. Mo. 1978). In diversity actions, federal courts consider the existence of the physician-patient privilege substantive for *Erie* purposes. State law thus controls whether federal courts recognize the privilege in such cases. *See, e.g.*, Lind v. Canada Dry Corp., 283 F. Supp. 861, 863-65 (D. Minn. 1968). Courts also have held that the physician-patient privilege has "no constitutional underpinnings." State v. Carter, 641 S.W.2d 54, 59 (Mo. 1982) (en banc), *cert. denied*, 461 U.S. 932 (1983).

A variety of policy considerations support the physician-patient privilege. The law recognizes a privilege because the benefits derived from protecting the physician-patient relationship outweigh the costs of confidentiality, including the inhibition of fact-finding during litigation.[46] Other justifications focus on the interests of the individual patient.[47] The physician-patient privilege acknowledges patients' privacy interests in their own medical care.[48] The privilege also shields patients from the potential embarrassment of unauthorized disclosure of personal information.[49] Confidentiality encourages patients to speak frankly with their physicians, thus increasing the likelihood of successful medical treatment.[50] The physicians' professional

46. *See* 8 J. WIGMORE, *supra* note 36, § 2380a, at 830-31 (arguing fallacy of this perception). Courts examine four factors when recognizing a privilege: the party must have communicated in confidence; the confidentiality must be essential to the protected relationship; the community must make a value judgment that the relationship is one that courts should foster; and the injury to the relationship from disclosure must be greater than the benefit gained by the correct disposal of the litigation. *Id.* at 829-32.

47. As support for traditional justifications of the medical privilege eroded, *see infra* note 55, courts and commentators began to defend the privilege as necessary to guard patients' rights to privacy concerning medical information. *Developments*, *supra* note 41, at 1480-83, 1544.

48. *See, e.g.*, Orr v. Sievert, 162 Ga. App. 677, 679, 292 S.E.2d 548, 550 (1982) (finding that without statutory privilege patient still has qualified right to privacy implicit in Hippocratic Oath); Bering v. SHARE, 106 Wash. 2d 212, 227, 721 P.2d 918, 928 (1986) (en banc) (finding that privacy rights extend to relationship with physician), *cert. dismissed*, 479 U.S. 1050 (1987); Note, *Medical Practice and the Right to Privacy*, 43 MINN. L. REV. 943, 952-61 (1959) (examining situations when physician should be permitted to reveal patient's confidences). Courts regularly use a balancing test when resolving conflicts between the patient's right to privacy and the government's attempt to penetrate protected areas. Kmentt, *supra* note 41, at 274. The patient's right to privacy in the medical arena is unclear and undefined. Lora v. Board of Educ., 74 F.R.D. 565, 570 (E.D.N.Y. 1977).

49. State v. Staat, 291 Minn. 394, 397, 192 N.W.2d 192, 195 (1971); *see also* Black, *The Marital and Physician Privileges—A Reprint of a Letter to a Congressman*, 1975 DUKE L.J. 45, 50-52 (suggesting that courts should expand protection of physician-patient relationship in recognition of its extremely private nature).

50. Branch v. Wilkinson, 198 Neb. 649, 658, 256 N.W.2d 307, 313 (1977). *But see* 8 J. WIGMORE, *supra* note 36, § 2380a, at 829-30 (reasoning that absence of privilege will not deter patients from open communications with physicians because patients' desire for proper medical care will outweigh their confidentiality concerns); *Developments*, *supra* note 41, at 1543 & n.92 (noting that commentators have attacked idea that privilege encourages open disclosure because there is "no authoritative empirical evidence to prove or disprove the proposition that the physician-patient privilege . . . actually encourages communication").

ethical duty also justifies the privilege.[51] Some courts place physicians in a fiduciary relationship to patients,[52] obligating physicians to remain silent about professional communications absent some legal justification for disclosure.[53] Other courts reason that the privilege protects physicians from unnecessary involvement in litigation.[54]

The physician-patient privilege, however, is not absolute.[55]

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51. *See supra* note 42; *see also* Note, *To Tell or Not to Tell: Physician's Liability for Disclosure of Confidential Information about a Patient*, 13 CUMB. L. REV. 617, 620-37 (1983) (discussing various statutory, professional, and ethical bases for physicians' fiduciary duty to patients). *But see* Coralluzzo v. Fass, 450 So. 2d 858, 859 (Fla. 1984) (stating that even if physicians violate ethical standards, court will have no jurisdiction to review because state has not codified these standards; medical profession must determine if such violations exist).

52. "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." Petrillo v. Syntex Laboratories, Inc., 148 Ill. App. 3d 581, 593, 499 N.E.2d 952, 960 (1986), *appeal denied*, 113 Ill. 2d 584, 505 N.E.2d 361, *cert. denied*, 483 U.S. 1007 (1987). "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, 608 (1929).

53. *See, e.g.*, Miles v. Farrell, 549 F. Supp. 82, 84 (N.D. Ill. 1982) (noting that physician owes patient fiduciary duty of confidentiality).

54. *See, e.g.*, Wenninger v. Muesing, 307 Minn. 405, 410, 240 N.W.2d 333, 336-37 (1976) (en banc).

55. Danielson v. Superior Court, 157 Ariz. 41, 43, 754 P.2d 1145, 1147 (Ct. App. 1987) (discussing limited nature of physician-patient privilege). Most jurisdictions recognize some form of physician-patient privilege. *See supra* note 41 and accompanying text. The privilege, however, has received much criticism. *See, e.g.*, Lora v. Board of Educ., 74 F.R.D. 565, 574 (E.D.N.Y. 1977) (observing that physician-patient privilege has "been the object of virtually unanimous scholarly criticism"); C. DEWITT, PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT 32 (1958) (noting that critics of medical privilege "have become predominant"). Some critics assert there is no valid basis for the privilege. *See, e.g., id.* at 36-37 (suggesting that in majority of cases, patient uses physician-patient privilege "for the single purpose of winning a lawsuit by excluding relevant and material evidence"); 8 J. WIGMORE, *supra* note 36, § 2380a, at 832 (noting that "[t]here is little to be said in favor of the privilege, and a great deal to be said against it"); Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?*, 52 YALE L.J. 607, 609-14 (1943) (criticizing policies used to justify physician-patient privilege). Evidence experts charge that the privilege incorrectly balances conflicting policies because it does substantial damage to the legal process without much benefit to either the physician or the patient. 8 J. WIGMORE, *supra* note 36, § 2380a, at 829-30 (suggesting physician-patient privilege is unjustified and unnecessary because resulting injury to fact-finding ability of legal process far outweighs any injury done to the physician-patient relationship resulting from compelled disclosure of medical information). However, "no solid empirical data exists to support the estimates of

State legislatures have adopted statutes reflecting interests that override the privilege.[56] Moreover, patients may expressly waive the privilege,[57] and in certain circumstances courts will

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either critics or proponents as to either the costs or the benefits of privileges." *Developments*, *supra* note 41, at 1474; *see also* Chafee, *supra*, at 609-10 (stating that no evidence supports alleged benefits of physician-patient privilege). "Weaknesses in the theoretical foundations of privilege law have prompted charges not only that privileges are irrational and arbitrary, but also that they have been molded principally by improper influences." *Developments*, *supra* note 41, at 1471. Privilege law does not attempt "to encourage communications or to protect privacy" but is merely "special treatment won by the power of those privileged." *Id.* at 1493 (citing E. GREEN & C. NESSON, PROBLEMS, CASES, AND MATERIALS ON EVIDENCE 526 (1983)); *see also* Krattenmaker, *supra* note 42, at 85 (observing that majority of evidence experts attribute testimonial privileges to "competing professional jealousies, resulting in no other societal benefit and great cost to accuracy of fact finding during litigation"). Indeed, some privilege cases focus on the protection of the physician rather than the patient. *See, e.g.*, Wenninger v. Muesing, 307 Minn. 405, 410, 240 N.W.2d 333, 336 (1976) (en banc) (court supervision of depositions with physicians protects "the medical profession against unnecessary harassment or involvement in the discovery procedure") (quoting 2 J. HETLAND & O. ADAMSON, MINNESOTA PRACTICE: RULES OF CIVIL PROCEDURE ANNOTATED 82 (1970)). Courts should construe the privilege strictly because it prevents the admission of relevant evidence. State v. Soney, 177 N.J. Super. 47, 58, 424 A.2d 1182, 1188 (App. Div. 1980), *cert. denied*, 87 N.J. 313, 434 A.2d 67 (1981). The privilege also undermines the administration of justice because it suppresses "what is ordinarily the best source of proof, namely, the physician who examined and treated the patient, upon what is usually a crucial issue, namely, the physical or mental condition of the patient." MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 105, at 226 (E. Cleary 2d ed. 1972) [hereinafter EVIDENCE].

56. Exceptions to the privilege reflect superseding interests of society. Hague v. Williams, 37 N.J. 328, 336, 181 A.2d 345, 349 (1962). Numerous statutory provisions carve exceptions to the privilege, defining situations in which the importance of full disclosure during litigation outweighs the policies behind the privilege. Examples include actions to contest a will, *see, e.g.*, N.J. STAT. ANN. § 2A:84A-22.3 (West 1976), or to commit a patient to a mental institution, *see, e.g.*, TENN. CODE ANN. § 24-1-207(a)(3) (Supp. 1988). Other statutes impose an affirmative duty on physicians, overriding the physician-patient privilege, to report information about certain types of medical treatment, including gunshot or knife wounds, *see, e.g.*, N.Y. PENAL LAW § 265.25 (McKinney 1980), sexually transmitted disease, *see, e.g.*, OKLA. STAT. ANN. tit. 63, § 1-527 (West 1984), or child abuse, *see, e.g.*, CAL. PENAL CODE § 11166 (West 1982 & Supp. 1989). In these situations, societal interests of public health and safety outweigh the benefits of the physician-patient privilege. Note, *supra* note 51, at 627 (noting that courts may find physician's fiduciary duty of confidentiality subservient to higher duty to disclose information due to overriding public interest, for example, when patient has highly contagious disease).

57. The term *waiver* covers those situations in which the medical privilege is set aside "because [the patient] affirmatively places her physical or emotional condition at issue." *Developments*, *supra* note 41, at 1537 n.39. Because the privilege primarily protects patients, most jurisdictions reason that patients, rather than physicians, control the privilege. *See, e.g.*, Wesley Medical Center v. Clark, 234 Kan. 13, 19-20, 669 P.2d 209, 214 (1983) (finding that

imply a waiver.[58] A court may imply a waiver when the balance between the costs and the benefits of the medical privilege tips in favor of disclosure during litigation.[59] Such considerations include facilitating settlement,[60] expediting discovery,[61] and increasing the probability of just litigation results.[62] Courts

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patient, not physician, "may assert the privilege or prevent others from revealing the privileged information"); Maas v. Laursen, 219 Minn. 461, 463, 18 N.W.2d 233, 234 (1945) (same); State *ex rel.* Stufflebam v. Appelquist, 694 S.W.2d 882, 885 (Mo. Ct. App. 1985) (same). Patients therefore may waive the privilege by express consent. Most jurisdictions require that an express waiver be voluntary and clearly intentional. *See, e.g.*, Newell v. Newell, 146 Cal. App. 2d 166, 178, 303 P.2d 839, 847 (1956). A patient's express waiver of the privilege thus is similar to the traditional concept of waiver, used in contract or constitutional law, which courts define as the "intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Patients often give an express waiver when applying for insurance or employment and in other similar situations. *See, e.g.*, Metropolitan Life Ins. Co. v. Brubaker, 78 Kan. 146, 154-55, 96 P. 62, 65-66 (1908) (holding party may waive physician-patient privilege by contract when applying for life insurance policy); Nationwide Mut. Ins. Co. v. Jackson, 10 Ohio App. 2d 137, 140, 226 N.E.2d 760, 762 (1967) (holding application for uninsured motorist coverage may operate as express waiver of physician-patient privilege). *But see* Gilchrist v. Mystic Workers of World, 196 Mich. 247, 251-52, 163 N.W. 10, 11 (1917) (finding patient's express agreement to waive privilege against public policy of Michigan statute).

58. While express waiver allocates control of the privilege between patient and physician, the doctrine of implied waiver allocates control of the privilege between the patient and the judicial system. *See Developments*, *supra* note 41, at 1630 & n.2. Without expressly waiving the medical privilege, a patient may unknowingly and unintentionally act in a manner that subsequently will result in the court implying a waiver. A court may find an implied waiver even though a patient is unaware that a medical privilege exists. *See id.* at 1629 n.1. Courts also may imply a waiver even though a patient has no intention of waiving the privilege. 8 J. WIGMORE, *supra* note 36, § 2327, at 636. Courts should recognize a waiver when fairness dictates setting aside the privilege as a result of the patient's own actions, even if the patient did not specifically act or intend to waive the privilege. *Id.*

59. "Implied waiver operates as the circuit-breaker of privilege law . . . protect[ing] the legal system from abuses . . . ." *Developments*, *supra* note 41, at 1629 (footnote omitted).

60. Implied waiver of the physician-patient privilege protects against the danger of discouraging settlement due to insufficient information. *See Developments*, *supra* note 41, at 1635-36.

61. *See, e.g.*, State *ex rel.* McNutt v. Keet, 432 S.W.2d 597, 601 (Mo. 1968) (en banc).

62. *See, e.g.*, Chester v. Zima, 41 Misc. 2d 676, 677-78, 246 N.Y.S.2d 144, 146 (Erie County Sup. Ct. 1964) (reasoning that purpose of pretrial discovery is to make information available to opposing party in interest of truth and justice; thus plaintiffs bringing lawsuits to recover for personal injuries remove themselves from protection of physician-patient privilege); Dyson v. Hempe, 140 Wis. 2d 792, 804, 413 N.W.2d 379, 384 (Ct. App. 1987) (defining abuse of attorney-client privilege as waiver); *Developments*, *supra* note 41, at 1633-35 (1985) (discussing wisdom of deeming partial disclosure as waiver of privilege for all

commonly set aside the patient's privilege when the privilege does injustice to a defendant during litigation[63] or when a patient's own actions[64] already have impaired the confidentiality of the privileged information.[65]

Most jurisdictions hold that filing a lawsuit placing the patient's physical condition directly at issue operates as an implied waiver of the medical privilege regarding that condition.[66]

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withheld information concerning same subject matter, "because disclosure introduces evidence without providing the opposing party an opportunity to establish its context").

63. Patients' partial or strategic disclosure of privileged information may cause injustice to opposing parties. *Developments*, *supra* note 41, at 1631-33. Partial disclosure results when the privilege holder seeks to reveal only favorable information. "[A] party cannot, by selective invocation of the privilege, disclose documents or give testimony favorable to that party while failing to disclose cognate material unfavorable to that party." Teachers Ins. & Annuity Ass'n v. Shamrock Broadcasting Co., 521 F. Supp. 638, 641 (S.D.N.Y. 1981) (citations omitted); C. DEWITT, *supra* note 55, at 37 (suggesting that "[a] patient may keep the door of the sick-room closed, but he should not be permitted to open it so as to give an imperfect or false view of what took place there, and promptly shut the door the moment the true facts are about to be revealed"); *see also* Weissman v. Wells, 306 Mo. 82, 91, 267 S.W. 400, 403 (1924) (holding patient claiming nervous condition as result of injury may not block testimony of physician who had treated same condition prior to alleged injury). Strategic disclosure occurs when patients release relevant medical evidence at a time most favorable to their lawsuit. *See Developments*, *supra* note 41, at 1632-33. By waiting until trial to disclose relevant medical information, patients gain great tactical advantage because defendants do not have time properly to prepare defense theories. *Id.* at 1647; *see* Chester v. Zima, 41 Misc. 2d 676, 677-78, 246 N.Y.S.2d 144, 146 (Erie County Sup. Ct. 1964). *But see* Boyd v. Wrisley, 228 F. Supp. 9, 11 (W.D. Mich. 1964) (finding patient-litigant waiver is not effective until treating physician actually testifies at trial).

64. Courts may imply a waiver after any voluntary disclosure of privileged information by a patient. For example, courts have held that plaintiffs' pretrial testimony waives the physician-patient privilege. Covington v. Sawyer, 9 Ohio App. 3d 40, 45-46, 458 N.E.2d 465, 471 (1983) (citations omitted).

65. *See* 8 J. WIGMORE, *supra* note 36, § 2389, at 855 (suggesting that patient implies that privilege is no longer important by filing lawsuit publicly exposing physical condition at issue); *see also Developments*, *supra* note 41, at 1630-31 (discussing situations in which courts commonly set privileges aside).

66. *See, e.g.*, Dennie v. University of Pittsburgh School of Medicine, 638 F. Supp. 1005, 1006 (W.D. Pa. 1986) (holding plaintiffs waived all privileges against disclosure of medical records by filing lawsuit); Burlage v. Haudenshield, 42 F.R.D. 397, 398 (N.D. Iowa 1967) (holding physician-patient privilege waived when patient raised damage issue); Trans-World Inv. v. Drobny, 554 P.2d 1148, 1151 (Alaska 1976) (holding that filing personal injury action waives physician-patient privilege); Wenninger v. Muesing, 307 Minn. 405, 407, 240 N.W.2d 333, 335 (1976) (en banc) (stating physician-patient privilege is waived when patient places health at issue); State *ex rel.* McNutt v. Keet, 432 S.W.2d 597, 601-02 (Mo. 1968) (en banc) (holding patient waives physician-patient privilege by bringing physical condition into pleading); Jaap v. District Court, 623 P.2d 1389, 1391 (Mont. 1981) (holding that commencing personal injury action

Courts recognize this patient-litigant exception[67] because filing such a suit impairs the confidentiality of relevant medical information and the subsequent enforcement of the privilege seems inequitable.[68] The patient-litigant waiver promotes discovery of facts relevant to the plaintiff's alleged injury, thereby minimizing the potential for patient abuse of the medical privilege resulting from strategic or partial disclosure.[69] The patient-litigant waiver allows the defendant more complete access to relevant medical information,[70] and better enables courts to make decisions based on the facts of each case.[71]

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waived privilege as to mental or physical condition in controversy); Mattison v. Poulen, 134 Vt. 158, 161, 353 A.2d 327, 330 (1976) (bringing action for damages for injuries suffered waives physician-patient privilege). *But see,* State *ex rel.* Floyd v. Court of Common Pleas, 55 Ohio St. 2d 27, 28, 377 N.E.2d 794, 795 (1978) (per curiam) (determining that party does not waive physician-patient privilege by filing suit for personal injuries resulting from accident). Although most jurisdictions imply a waiver when a patient files a lawsuit placing a physical or mental condition at issue, this consensus is misleading. Courts differ significantly on the scope of this implied waiver. *See infra* notes 88-93 and accompanying text. Patients also may waive the physician-patient privilege by introducing their physical condition as an element of an affirmative defense or as the basis of a counterclaim. *See, e.g.*, Collins v. Bair, 252 N.E.2d 448, 455 (Ind. Ct. App. 1969) (holding that if patients place physical condition at issue by complaint, counterclaim, or affirmative defense, they automatically waive privilege for all matters causally or historically related to condition), *rev'd on other grounds*, 256 Ind. 230, 268 N.E.2d 95 (1971). State statutes also may provide that the filing of a personal injury lawsuit acts as a waiver. *See, e.g.*, DEL. R. EVID. 503(d)(3) (1987); MINN. R. CIV. P. 35.03 (1988); N.J. STAT. ANN. § 2A:84A-22.4 (West 1976). The patient-litigant exception generally does not apply when a third party places the patient's physical condition at issue. *See, e.g.*, Clark v. District Court, 668 P.2d 3, 10-11 (Colo. 1983) (en banc) (stating privilege was not waived because privilege holder did not place his physical or mental condition at issue); Mohammad v. Mohammad, 358 So. 2d 610, 613 (Fla. Dist. Ct. App. 1978) (holding wife did not waive patient-psychiatrist privilege by denying husband's allegations concerning her mental condition), *appeal on other grounds after remand*, 371 So. 2d 1070 (Fla. Dist. Ct. App. 1979).

67. Courts and commentators typically characterize this waiver as "the patient-litigant exception," even though many times it is not a statutory exception, but rather a waiver that courts will imply. *See Developments, supra* note 41, at 1537 (discussing waiver terminology confusion).

68. *See supra* notes 63-65 and accompanying text.

69. *See supra* note 63; 8 J. WIGMORE, *supra* note 36, § 2389; EVIDENCE, *supra* note 55, § 105; C. DEWITT, *supra* note 55, at 36-37.

70. *See, e.g.*, Lazorick v. Brown, 195 N.J. Super. 444, 456-57, 480 A.2d 223, 229-30 (App. Div. 1984) (stating that search for truth and justice mandates that defendants have equal access to potential witnesses, even treating physicians).

71. *See, e.g.*, Hickman v. Taylor, 329 U.S. 495, 501-07 (1947) (asserting that discovery should provide "fullest possible knowledge of the issues and facts before trial"); Hoffman v. Delta Dental Plan, 517 F. Supp. 574, 575 (D. Minn. 1981) (stating that purpose of discovery is to expose all evidence, thus facilitating full and fair trials on merits).

Many courts find that the patient-litigant waiver takes effect immediately after the plaintiff files a lawsuit.[72] This timing facilitates disclosure of relevant medical information during discovery.[73] Early disclosure of information supports the underlying purpose of discovery: preventing surprise at trial and promoting just results by providing all parties with access to material facts.[74] If courts do not imply a waiver at the onset of litigation, the privilege may become a tactical weapon that the plaintiff wields to control the timing and content of the medical information disclosed.[75] Permitting the patient to retain this control abuses the privilege, because it allows the patient to select which information is discoverable and to reveal only favorable information, thus "practically ensur[ing] the unreliability of the disclosed material."[76] Many courts therefore have recognized that defendants have the right to investigate all relevant medical information immediately after the plaintiff has

72. *See, e.g.*, Green v. Bloodsworth, 501 A.2d 1257, 1259 (Del. Super. Ct. 1985); *see also* Collins v. Bair, 252 N.E.2d 448, 455 (Ind. Ct. App. 1969) (finding that if patient places physical condition at issue by complaint, counterclaim, or affirmative defense, privilege automatically is waived for all matters causally or historically related to condition), *rev'd on other grounds*, 256 Ind. 230, 268 N.E.2d 95 (1971). *But see* Barber v. Time, Inc., 348 Mo. 1199, 1208, 159 S.W.2d 291, 295 (1942) (per curiam) (stating that patient's right to privacy includes right to have information given to physician during treatment kept confidential absent patient's express consent); Avery v. Nelson, 455 P.2d 75, 80 (Okla. 1969) (holding that after lawsuit is filed, defendant may not investigate relevant, privileged information absent patient's express consent).

73. *Developments*, *supra* note 41, at 1639 (suggesting that when patient bears burden of proof on issue and must introduce privileged information at trial to meet that burden, then "waiver is clearly warranted at the discovery stage"). Information outside the scope of the implied waiver is protected during the discovery phase of litigation and during trial. *Developments*, *supra* note 41, at 1637-39; *see also* Fedell v. Wierzbieniec, 127 Misc. 2d 124, 126, 485 N.Y.S.2d 460, 462 (Erie County Sup. Ct. 1985) (holding that patient waives privilege by commencing personal injury suit, but only with respect to material issues). A physician disclosing privileged information without a proper waiver may face civil liability for breach of patient confidentiality. *See infra* note 100 and accompanying text.

74. Hoffman v. Delta Dental Plan, 517 F. Supp. 574, 575 (D. Minn. 1981).

75. If the plaintiff inevitably must reveal privileged information to prevail at trial, it is not fair to permit the patient to control the timing and circumstances of the information's release. Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128 (D.D.C. 1983); Note, *Evidence: Waiver of Physician-Patient Privilege*, 51 MINN. L. REV. 575, 577 (1967) (stating that "[i]t is obviously inequitable to allow the plaintiff the tactical advantage resulting from late waiver."). Patients are to use the medical privilege as a shield, not a sword. *See, e.g.*, State *ex rel.* McNutt v. Keet, 432 S.W.2d 597, 601 (Mo. 1968) (en banc).

76. *Developments*, *supra* note 41, at 1632.

exposed privileged information by filing suit.[77]

C. EX PARTE INTERVIEWS

Ex parte interviews are vital discovery tools that counsel generally may use with any witness during discovery.[78] These interviews perform an entirely different role from other, more formal methods of discovery because attorneys conduct them in private, without the potential interference and disruption that opposing counsel's presence may cause.[79] Ex parte interviews protect both witnesses and attorneys by providing an opportunity to prepare properly before formal depositions.[80] A formal

77. *See, e.g.*, Sklagen v. Greater S.E. Community Hosp., 625 F. Supp. 991, 992 (D.D.C. 1984) (stating that "[h]aving waived the medical privilege as to materials favorable to her position it would be manifestly unfair to allow plaintiff to invoke the privilege to shield similar materials which are potentially damaging.").

78. Some jurisdictions hold that prohibiting ex parte interviews with witnesses violates those witnesses' first amendment rights. *See, e.g.*, Vega v. Bloomsburgh, 427 F. Supp. 593, 595 (D. Mass. 1977); Rodriguez v. Percell, 391 F. Supp. 38, 41-43 (S.D.N.Y. 1975). Expert witnesses called in preparation for trial, however, must be formally deposed under Rule 26(b)(4) of the *Federal Rules of Civil Procedure*. The advisory committee notes to the federal procedural rules emphasize that this limit on discovery methods includes only those witnesses acquiring their information for trial preparation. FED. R. CIV. P. 26(b)(4) advisory committee's note, 48 F.R.D. 487, 503 (1969-70). The rule does not apply to witnesses acquiring knowledge as actors in or viewers of the transactions at issue. These witnesses should be treated as ordinary witnesses. *Id.* at 503. Treating physicians in personal injury cases acquire their information as a result of their role in the patient's treatment, independent of any litigation. Thus, access to treating physicians is not limited to formal depositions by the federal procedural rules. *See, e.g.*, Keith v. Van Dorn Plastic Mach. Co., 86 F.R.D. 458, 460 (E..D. Pa. 1980); *cf.* Covington v. Sawyer, 9 Ohio App. 3d 40, 45, 458 N.E.2d 465, 470 (1983) (construing Ohio procedural rules to find no such limits); Frantz v. Golebiewski, 407 So. 2d 283, 284 (Fla. Dist. Ct. App. 1981) (finding defendant's access to treating dentist is not limited to formal deposition by "expert witness-discovery rule" under Florida procedural rules, which are identical to federal rules).

79. "There is an important difference between the nature of informal interviews and more formal procedures such as the taking of a deposition." Vega v. Bloomsburgh, 427 F. Supp. 593, 595 (D. Mass. 1977). Although parties use both methods to uncover facts, formal depositions serve other, entirely different purposes: to "perpetuate testimony, to have it available for use or confrontation at the trial, or to have the witness committed to a specific representation of such facts as he might present." IBM Corp. v. Edelstein, 526 F.2d 37, 41 n.4 (1975) (per curiam). *But see* Wenninger v. Muesing, 307 Minn. 405, 412, 240 N.W.2d 333, 337 (1976) (en banc) (providing defendants with slight tactical advantage is only additional value of ex parte interviews over formal depositions); Karsten v. McCray, 157 Ill. App. 3d 1, 14, 509 N.E.2d 1376, 1384 (Ct. App.) (stating that ex parte interviews provide same information as formal depositions), *appeal denied*, 117 Ill.2d 544, 517 N.E.2d 1086 (1987).

80. Lazorick v. Brown, 195 N.J. Super. 444, 455, 480 A.2d 223, 229 (App.

deposition may more accurately reflect witnesses' statements when they have had the opportunity to clarify their testimony during ex parte interviews before deposition.[81] Attorneys use ex parte interviews to investigate the content and extent of a witness's knowledge to decide if the time and expense of formal depositions are necessary or desirable.[82] For example, if a witness possesses information that undermines the case of the party calling that witness, ex parte interviews provide the only forum in which to discover this information without exposing it prematurely to the opposing party during a formal deposition. Attorneys' work product, including evaluation of theories and evidence,[83] also remains protected because attorneys are able to investigate and prepare privately possible defense theories with witnesses, without revealing to opposing counsel any information entitled to work product protection.[84] Ex parte interviews also reduce litigation costs by facilitating preparation of physicians' affidavits in support of summary judgment motions[85] and by supplying information that may lead to earlier evaluation and settlement of cases.[86] Because of ex parte interviews' immense value, all jurisdictions recognize the right to conduct them absent the physician-patient or other privilege.[87]

Div. 1984). Deposing a physician without prior preparation impedes discovery goals. *Id.* at 455, 480 A.2d at 229.

81. IBM Corp. v. Edelstein, 526 F.2d 37, 41 (1975) (per curiam) (discussing superiority of ex parte interviews over formal depositions for preparation of witnesses, court emphasized that "a potential witness, upon reflection, will often change, modify or expand upon his original statement and that a second or third interview will be productive of greater accuracy").

82. *Id.* at 41 n.4.

83. Attorneys' work product includes files and mental impressions made in preparation for trial. Hickman v. Taylor, 329 U.S. 495, 510-13 (1947). Although courts do not deem this information privileged, it has qualified immunity and may not be discovered absent a substantial showing of necessity by the party seeking such discovery. *Id.* at 511.

84. Information gathered during ex parte interviews may reflect counsel's mental impressions of the case, and courts will protect it as attorney work product. Hickman v. Taylor, 329 U.S. 495, 510 (1947); IBM Corp. v. Edelstein, 526 F.2d 37, 41 (1975) (per curiam).

85. *See, e.g.*, Schramel v. G.D. Searle & Co., No. 86-0198 (E.D. Pa. Nov. 4, 1988) (granting summary judgment to defendant drug manufacturer on basis of physician's affidavit taken during ex parte interview).

86. Trans-World Invs. v. Drobny, 554 P.2d 1148, 1152 (Alaska 1976).

87. *See infra* note 89 and accompanying text. All the cases dealing with ex parte interviews involve some type of privilege, with the vast majority concerning the physician-patient privilege. Lillehaug, *supra* note 4, at 443; *see, e.g.*, Langdon v. Champion, 745 P.2d 1371, 1375 (Alaska 1987) (allowing defendant ex parte interview with plaintiff's treating physician in personal injury case); Petrillo v. Syntex Laboratories, Inc., 148 Ill. App. 3d 581, 593, 499 N.E.2d

II. JUDICIAL DETERMINATION OF THE EFFECT OF IMPLIED WAIVER ON DEFENDANTS' USE OF EX PARTE INTERVIEWS

Defendants' desire to conduct ex parte interviews in drug and medical device cases complicates the question of the proper scope of the patient-litigant waiver, because such cases also implicate the physician-patient privilege.[88] Absent some type of

952, 960-62 (1986) (prohibiting defense counsel's ex parte interview with plaintiff's treating physician in product liability action), *appeal denied*, 113 Ill. 2d 584, 505 N.E.2d 361, *cert. denied*, 483 U.S. 1007 (1987). Only one case, *IBM Corp. v. Edelstein*, does not involve the physician-patient privilege, but instead concerns attorney work-product. 526 F.2d 37, 41 (1975) (per curiam).

88. When determining the scope of the patient-litigant waiver, all courts use a balancing test to weigh the conflicting policies involved. The court in *Stempler v. Speidell* framed the ex parte issue as one whose resolution requires courts to "weigh the interests protected by the patient-physician privilege and the physician's professional obligation of confidentiality against the interests advanced by permitting defense counsel to conduct *ex parte* interviews with . . . physicians regarding those conditions pertinent to the claims asserted in the litigation." 100 N.J. 368, 373-74, 495 A.2d 857, 859 (1985). Ex parte interviews also raise the issue of whether the scope of the patient-litigant waiver is substantive or procedural under the *Erie* doctrine. The existence of the physician-patient privilege is considered substantive, and state law therefore defines it. Lind v. Canada Dry Corp., 283 F. Supp. 861, 863 (D. Minn. 1968). It is unclear, however, whether state privilege laws or the appropriate procedural rules, either state or federal, control the scope of an implied waiver of the privilege. *Compare, e.g.*, Garner v. Ford Motor Co., 61 F.R.D. 22, 23 (D. Alaska 1973) (holding state law determines patient-litigant waiver; once privilege is waived, federal procedural rules dictate extent of waiver) *with, e.g.*, Simon v. G.D. Searle & Co., No. 4-80-160 (D. Minn. May 1, 1986) (stating that type of medical discovery federal courts permit reflects policies determined by state privilege law). Other jurisdictions reason that the ex parte issue raises both procedural and substantive questions regarding the extent of the physician-patient privilege and its waiver. *See, e.g.*, Wenninger v. Muesing, 307 Minn. 405, 407-12, 240 N.W.2d 333, 335-37 (1976) (en banc) (addressing both whether filing personal injury suit waives privilege and which discovery procedures are available to defendant once privilege is waived). Once a court implies a waiver of the medical privilege after a patient files a lawsuit, the court must make another inquiry. The court must ascertain the appropriate procedural rules that it must use to define the methods of informal discovery permissible. *Id.* at 410, 240 N.W.2d at 335-37. This inquiry presents problems because "[p]hysician-patient privilege statutes rarely state what methods of disclosure are to be used." Hayes, *Do Ex Parte Interviews Threaten Patient Privacy? Yes*, BRIEF, Fall 1987, at 6, 12; *see, e.g.*, Coralluzzo v. Fass, 450 So. 2d 858, 859 (Fla. 1984) (finding that no law, rule of procedure, or rule of professional responsibility proscribes ex parte interviews in Florida); Stempler v. Speidell, 100 N.J. 368, 373, 495 A.2d 857, 859 (1985) (stating that in New Jersey "no statute or rule expressly precludes *ex parte* interviews concerning" medical information about condition at issue). Because statutes typically are silent on the ex parte issue, courts must add gloss to procedural rules to make this determination. *But see* MINN. STAT. § 595.02, subd. 5 (1988) (explicitly permitting informal discussions between defendants and treating physicians in medi-

privilege, counsel may conduct ex parte interviews with any witness concerning information relevant to pending litigation.[89] If the court holds that the physician-patient privilege remains intact after a patient files suit, however, defense counsel may not interview the physician.[90] After courts imply a waiver of the privilege, some courts permit defense counsel to conduct ex parte interviews.[91] Other courts, however, still will not permit defendants to conduct ex parte interviews after implying a patient-litigant waiver.[92] Many jurisdictions therefore differ on the issue of whether the patient-litigant waiver permits defendants to conduct ex parte interviews with treating physicians.[93]

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cal malpractice actions; patient's attorney, however, "must have the opportunity to be present at any informal discussion"). Courts add gloss to procedural rules by weighing the conflicting policies involved in much the same manner as that in which they determine whether to imply a waiver of the physician-patient privilege. *See, e.g.*, Anker v. Brodnitz, 98 Misc. 2d 148, 150-54, 413 N.Y.S.2d 582, 583-86 (Queens County Sup. Ct.) (weighing conflicting policies results in court prohibiting ex parte interviews), *aff'd mem.*, 73 A.D.2d 589, 422 N.Y.S.2d 887 (1979). *But see* Green v. Bloodsworth, 501 A.2d 1257, 1258 (Del. Super. Ct. 1985) (asserting that "[t]his Court will not condone the use of the formal discovery rules as a shield against defense counsel's informal access to a witness when these rules were intended to simplify trials by expediting the flow of litigation . . . and to encourage the production of evidence"); Lillehaug, *supra* note 4, at 443 (noting that lack of specific provisions for ex parte interviews in procedural rules suggests "that their drafters did not intend to prohibit a traditional, inexpensive method of discovery").

89. *See, e.g.*, Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128 (D.D.C. 1983) (holding that no party "has anything resembling a proprietary right to any witness's evidence. Absent a privilege no party is entitled to restrict an opponent's access to a witness, however partial or important to him, by insisting upon some notion of allegiance.").

90. *See, e.g.*, Jordan v. Sinai Hosp., 171 Mich. App. 328, 347, 429 N.W.2d 891, 900 (1988) (emphasizing that if court cannot compel patient to waive privilege, court cannot compel treating physician to engage in ex parte interview).

91. *See, e.g.*, State *ex rel.* Stufflebam v. Appelquist, 694 S.W.2d 882, 888 (Mo. Ct. App. 1985) (allowing counsel to conduct private ex parte interview); *see also* Trans-World Invs. v. Drobny, 554 P.2d 1148, 1151 (Alaska 1976) (finding no legal impediments to "informal methods of discovery such as private conferences with the attending physicians").

92. *See, e.g.*, Hammonds v. Aetna Casualty & Sur. Co., 243 F. Supp. 793, 805 (N.D. Ohio 1965) (stating waiver of testimonial privilege does not authorize "private conference between doctor and defense lawyer"); Wenninger v. Muesing, 307 Minn. 405, 410, 240 N.W.2d 333, 336 (1976) (en banc) (declaring private interview invalid); Jaap v. District Court, 623 P.2d 1389, 1391 (Mont. 1981) (concluding that "a private interview of an adversary witness [physician]" is not an acceptable method of discovery under the *Montana Rules of Civil Procedure*).

93. *Compare, e.g.*, Langdon v. Champion, 745 P.2d 1371, 1373-74 & n.4 (Alaska 1987) (recognizing courts may sanction plaintiff's counsel if counsel blocks ex parte interviews, thereby forcing defendant to get court order to interview treating physician) *with, e.g.*, Petrillo v. Syntex Laboratories, Inc., 148

A. EX PARTE INTERVIEWS PROHIBITED ALTHOUGH COURT IMPLIED PATIENT-LITIGANT WAIVER

Some courts hold that although a patient impliedly has waived the physician-patient privilege by filing a lawsuit, the defendant still has no right to conduct ex parte interviews with treating physicians.[94] These courts limit defendants' access to such witnesses to formal methods of discovery.[95] Without patients' express consent to ex parte interviews, defendants may not discuss any information, even nonprivileged matters, with physicians unless formally deposing them.[96]

Courts prohibiting ex parte interviews place greater emphasis on the policies supporting the physician-patient privilege than on those policies favoring defendants' rights. Courts com-

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Ill. App. 3d 581, 610, 499 N.E.2d 952, 971 (1986) (holding defense counsel in contempt for conducting ex parte interview with treating physician), *appeal denied*, 113 Ill. 2d 584, 505 N.E.2d 361, *cert. denied*, 483 U.S. 1007 (1987). The federal district court in Minnesota also illustrates this controversy by splitting on the issue. In *Simon v. G.D. Searle & Co.*, No. 4-80-160 (D. Minn. May 1, 1986), Judge Renner adopted, without opinion, a special master's order denying ex parte interviews in a drug case. The special master followed the Minnesota state rule, defined in *Wenninger v. Muesing*, 307 Minn. 405, 410, 240 N.W.2d 333, 336 (1976) (en banc), reasoning that *Wenninger* reflected the substantive policy of the state. Simon v. G.D. Searle & Co., No. 4-80-160, Special Master Discovery Order at 2 (D. Minn. Feb. 25, 1986). In contrast, Judge Rosenbaum allowed ex parte interviews in a medical malpractice diversity case, viewing the issue as one of federal procedural law rather than state substantive law. Thomsen v. Mayo Foundation, No. 4-84-1239 (D. Minn. Aug. 20, 1986). Judge Doty followed *Thomsen* in *Jenson v. Playtex Family Prod., Inc.*, No. 4-87-908 (D. Minn. Sept. 19, 1988), a toxic shock syndrome case. Judge Magnuson also permitted ex parte interviews in *O'Brien v. Pfizer, Inc.*, No. 3-88-282 (D. Minn. Feb. 21, 1989) (involving prescription drug Feldene).

94. *See, e.g.*, *Petrillo*, 148 Ill. App. 3d at 591, 499 N.E.2d at 959 (stating that by filing suit, patient waives medical privilege, but this waiver does not extend to ex parte interviews with treating physicians); Loudon v. Mhyre, 110 Wash. 2d 675, 677, 756 P.2d 138, 140 (1988) (en banc) (holding ex parte interviews prohibited as matter of public policy). Some Minnesota state courts take the next step, and deny defendants access to treating physicians through formal depositions by finding that defendants have not shown "good cause" as required by *Minnesota Rule of Civil Procedure* 35.04(6). *See, e.g.*, Yanta v. G.D. Searle & Co., No. 447569 (Ramsey County. Dist. Ct. Oct. 26, 1988); Boyd v. G.D. Searle & Co., No. 770271 (Hennepin County Dist. Ct. March 6, 1987); Lightly v. G.D. Searle & Co., No. 765731 (Hennepin County Dist. Ct. Jan. 7, 1987).

95. Wenninger v. Muesing, 307 Minn. 405, 410, 240 N.W.2d 333, 336 (1976) (en banc) (holding formal deposition is exclusive means to discover information about patient's physical condition and permitted only after defendant's showing of good cause).

96. *See, e.g.*, Weaver v. Mann, 90 F.R.D. 443, 445 (D.N.D. 1981) (ordering defendant to refrain from engaging in private conversations with plaintiff's physicians).

monly cite policies including the patients' right to privacy,[97] physicians' ethical[98] or fiduciary duties,[99] physicians' potential liability for unauthorized disclosure of privileged information,[100] and protection of physicians from unnecessary harassment.[101] Some courts have imposed a duty of total loyalty on physicians, including an obligation to testify only on behalf of their patients.[102] These courts value the physician-patient bond

97. *See, e.g.*, Petrillo v. Syntex Laboratories, Inc., 148 Ill. App. 3d 581, 588, 499 N.E.2d 952, 957 (1986), *appeal denied*, 113 Ill. 2d 584, 505 N.E.2d 361, *cert. denied*, 483 U.S. 1007 (1987).

98. *See, e.g.*, Anker v. Brodnitz, 98 Misc. 2d 148, 152, 413 N.Y.S.2d 582, 585 (Queens County Sup. Ct.) (citing possible charges of professional misconduct against physician), *aff'd mem.*, 73 A.D.2d 589, 422 N.Y.S.2d 887 (1979).

99. *See, e.g.*, Miles v. Farrell, 549 F. Supp. 82, 84 (N.D. Ill. 1982) (holding doctor owes fiduciary duty of confidentiality to patient); Piller v. Kovarsky, 194 N.J. Super. 392, 396, 476 A.2d 1279, 1281 (Law Div. 1984) (recognizing that nature of physician-patient relationship "imposes fiduciary obligations on the physician").

100. A court may hold a physician who discloses privileged information without a proper waiver civilly liable for breach of patient confidentiality. *See* Note, *supra* note 51, at 617 (noting courts may hold physicians liable for disclosure using four major theories: breach of physician's duty of confidentiality; violation of statute defining physician conduct; breach of implied contract; or invasion of patient's right to privacy). At least seven states have recognized such a cause of action against a physician. *See, e.g.*, Hammonds v. Aetna Casualty & Sur. Co., 243 F. Supp. 793, 802 (N.D. Ohio 1965); Horne v. Patton, 291 Ala. 701, 708-09, 287 So. 2d 824, 830 (1973); Alberts v. Devine, 395 Mass. 59, 69, 479 N.E.2d 113, 119, *cert. denied*, 474 U.S. 1013 (1985); Simonsen v. Swenson, 104 Neb. 224, 227, 177 N.W. 831, 832 (1920) (per curiam); Hague v. Williams, 37 N.J. 328, 336, 181 A.2d 345, 349 (1962); MacDonald v. Clinger, 84 A.D.2d 482, 486, 446 N.Y.S.2d 801, 804 (1982); Humphers v. First Interstate Bank, 298 Or. 706, 721, 696 P.2d 527, 535 (1985) (en banc). These courts found physicians liable for unauthorized extra-judicial disclosure of privileged information or disclosure during litigation when patients had not voluntarily placed their physical condition at issue. At least three other jurisdictions have rejected such a cause of action against physicians. *See, e.g.*, Logan v. District of Columbia, 447 F. Supp. 1328, 1335 (D.D.C. 1978); Collins v. Howard, 156 F. Supp. 322, 324 (S.D. Ga. 1957); Quarles v. Sutherland, 215 Tenn. 651, 657, 389 S.W.2d 249, 251 (1965). Courts also may recognize a cause of action against a third party who induced an extra-judicial disclosure. *Hammonds*, 243 F. Supp. at 803. These cases, however, have not dealt with physician disclosure after a patient-litigant waiver. Under these circumstances, physicians have witness immunity from tort liability for their disclosure of relevant medical information. *See, e.g.*, Moses v. McWilliams, 379 Pa. Super. Ct. 150, —, 549 A.2d 950, 956 (1988) (en banc) (holding physician's statements made in judicial proceedings immune from civil liability).

101. Wenninger v. Muesing, 307 Minn. 405, 411, 240 N.W.2d 333, 336-37 (1976) (en banc).

102. *See, e.g.*, Alexander v. Knight, 197 Pa. Super. 79, 177 A.2d 142, 146 (1962) (per curiam) (full case not reprinted in state reporter) (declaring physicians owe patients duty of total care and have obligation to refuse to give any affirmative assistance to defendant, and thus should refuse to testify in de-

over other interests or relationships.[103]

B. Ex Parte Interviews Permitted with Patient-Litigant Waiver

Other courts hold that once patients have placed their physical condition at issue, they forfeit control over the disclosure of relevant medical information. Defendants therefore are free to conduct ex parte interviews with treating physicians without the patients' express consent.[104] Courts and attorneys may treat the doctor like any other witness,[105] and any infor-

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fendant's favor); *see also* Hammonds v. Aetna Casualty & Sur. Co., 243 F. Supp. 793, 799 (N.D. Ohio 1965) (declaring physician owes patient duty of undivided loyalty which requires physician to offer medical testimony on patient's behalf). These courts have prohibited ex parte interviews, valuing the physician-patient privilege above the fact-finding function of the legal system. These courts, however, overemphasize physicians' fiduciary duty at the expense of their legal duty. Section 5.05 of the Current Opinions of the Judicial Council of the AMA, *reprinted in* Petrillo v. Syntex Laboratories, Inc., 148 Ill. App. 3d 581, 589, 499 N.E.2d 952, 958 (1986), *appeal denied*, 113 Ill. 2d 584, 505 N.E.2d 361, *cert. denied*, 483 U.S. 1007 (1987), recognizes that "[t]he physician should not reveal confidential communications or information without the express consent of the patient, *unless required to do so by law.*" (emphasis added). The medical profession recognizes that physicians' ethical duty may give way to the legal duty to tell the truth; courts should do no less. *See also* Lillehaug, *supra* note 4, at 447 (arguing that nothing is wrong with physician testifying if it enhances search for truth).

103. *See, e.g.*, Hammonds v. Aetna Casualty & Sur. Co., 243 F. Supp. 793, 800 (N.D. Ohio 1965) (stating that doctor's disclosure of patient's physical condition to patient's adversary violates public policy); Alexander v. Knight, 197 Pa. Super. 79, 177 A.2d 142, 146 (1962) (per curiam) (full case not reprinted in state reporter) (stating doctor's breach of confidential relationship should be "condemned"); Tate & Toman, *supra* note 4, at 57 (suggesting that "proper medical treatment can only be provided if the patient is assured that what the physician learns in confidence will not be revealed").

104. *See, e.g.*, Langdon v. Champion, 745 P.2d 1371, 1375 (Alaska 1987) (stating that "plaintiffs cannot prevent" physicians from participating in ex parte interviews); Orr v. Sievert, 162 Ga. App. 677, 678-79, 292 S.E.2d 548, 550 (1982) (noting patient waives right to control physician when complaint is filed); Stempler v. Speidell, 100 N.J. 368, 382, 495 A.2d 857, 864 (1985) (declaring plaintiff's counsel can be compelled to authorize such interviews). Other courts require the patient to sign an authorization for ex parte interviews to protect the treating physician. *See, e.g.*, Doe v. Eli Lilly & Co., 99 F.R.D. 126, 129 (D.D.C. 1983).

105. Green v. Bloodsworth, 501 A.2d 1257, 1259 (Del. Super. Ct. 1985) (declaring that once physician-patient privilege is waived, "the physician becomes available for interview just like any other witness"); *see also* Orr v. Sievert, 162 Ga. App. 677, 679-80, 292 S.E.2d 548, 550 (1982) (stating "once a patient places his care and treatment at issue in a civil proceedings, [sic] there no longer remains any restraint upon a doctor in the release of medical information concerning the patient within the parameters of the complaint. To hold otherwise would allow a patient to restrain a doctor who possesses the most relevant in-

mation relevant[106] to the plaintiff's physical condition is discoverable through ex parte interviews as well as through formal methods of discovery.[107] Courts taking this view reason that, after voluntarily placing their physical condition at issue, patients would abuse the medical privilege by retaining control of the timing or circumstances of the disclosure of relevant medical information.[108] If courts refused to imply a waiver of the physician-patient privilege, patients would retain the power to prohibit ex parte interviews by refusing to waive the privilege, forcing defendants to meet with treating physicians only during formal depositions in the presence of the patients' counsel.[109]

Courts allowing ex parte interviews of treating physicians conclude that concerns about fairness and full disclosure during litigation outweigh the policies favoring the physician-patient privilege.[110] These courts often limit the scope of inquiry and

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formation and opinions from responding to inquiries as to such information . . . without a written authorization, court order or subpoena."); Hague v. Williams, 37 N.J. 328, 335, 181 A.2d 345, 348 (1962) (declaring that "[s]ociety has a right to testimony and . . . all privileges of exemption from this duty are exceptional"); Monahan, *Do Ex Parte Interviews Threaten Patient Privacy? No*, BRIEF, Fall 1987 at 6, 10 (suggesting that "[p]hysicians, as are any other witnesses, should be expected to testify truthfully to facts within their personal knowledge without regard for whether that testimony helps or hurts a particular party").

106. Courts consider information relevant if it relates causally to the physical condition at issue. Britt v. Superior Court, 20 Cal. 3d 844, 864, 574 P.2d 766, 779, 143 Cal. Rptr. 695, 708 (1978) (en banc); *see also* Stempler v. Speidell, 100 N.J. 368, 381, 495 A.2d 857, 864 (1985) (emphasizing that confidential information not relevant to litigation is "still protected by the physician-patient privilege and the physician's professional obligation to preserve confidentiality").

107. Trans-World Invs. v. Drobny, 554 P.2d 1148, 1151 (Alaska 1976) (allowing ex parte interviews because filing personal injury lawsuit waives physician-patient privilege for all relevant information about health or medical history that plaintiff has put in issue).

108. Doe v. Eli Lilly & Co., 99 F.R.D. 126, 129 (D.D.C. 1983) (calling such tactics abuse of privilege); *see also* Sterchi & Sheppard, *Defendant's Right to Secure Medical Information and Records Concerning Plaintiff*, 53 UMKC L. REV. 46, 51 (1984) (arguing patient waives medical privilege by filing suit; this waiver includes ex parte interviews with treating physicians and courts should force patients to give written authorizations for such interviews so physicians will not fear retribution).

109. *See, e.g.*, Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128-29 (D.D.C. 1983) (noting that if patients retain control of physician-patient privilege after placing their physical condition at issue, patients may monitor defendants' case preparation by insisting on their counsels' presence at formal depositions with treating physicians).

110. *Id.* at 128-29; *see also* Lazorick v. Brown, 195 N.J. Super. 444, 456, 480 A.2d 223, 230 (App. Div. 1984) (declaring search for truth and justice mandates that defendants should have equal access to potential witnesses, even treating physicians).

issue protective orders when necessary to prohibit exploration of irrelevant details of treatment.[111] Courts also may sanction defendants or their attorneys for abuse of ex parte interviews.[112]

Attempts to give legal protection to communications between patients and physicians therefore raise many collateral issues.[113] Most jurisdictions recognize the physician-patient privilege[114] and imply a waiver of the privilege when a patient files suit.[115] Jurisdictions widely disagree, however, on whether this implied waiver extends to ex parte interviews of physicians. Some courts hold that the waiver operates to remove the patients' control over the treating physicians' testimony, thereby providing defendants with the freedom to conduct ex parte interviews. Other courts hold that even with an implied patient-litigant waiver, defendants may use only formal discovery methods and may not conduct ex parte interviews without patients' express consent.

III. A SUGGESTED APPROACH: COURTS SHOULD PERMIT DEFENDANTS TO CONDUCT EX PARTE INTERVIEWS WITH TREATING PHYSICIANS

A. COURTS SHOULD PERMIT DEFENDANTS TO CONDUCT EX PARTE INTERVIEWS WITH TREATING PHYSICIANS IN ALL PERSONAL INJURY CASES

Jurisdictions reach conflicting outcomes when determining whether the patient-litigant waiver extends to ex parte interviews.[116] Courts refusing to allow ex parte interviews fail to

111. *See, e.g.*, Stempler v. Speidell, 100 N.J. 368, 383, 495 A.2d 857, 864-65 (1985) (advising issuance of protective order if proposed ex parte interview "threatens to cause such substantial prejudice to plaintiff"); Chester v. Zima, 41 Misc. 2d 676, 677, 246 N.Y.S.2d 144, 146 (Erie County Sup. Ct. 1964) (noting court can issue protective orders to prevent unreasonable annoyance, expense, disadvantage, prejudice, or embarrassment).

112. *See, e.g.*, Doe v. Eli Lilly & Co., 99 F.R.D. 126, 129 (D.D.C. 1983) (noting that such information must be relevant to subject matter of proceedings).

113. Application of the physician-patient privilege has "fostered problems collateral to those it sought to cure. Serious problems in certain types of litigation, particularly those matters where the physical condition of the patient constitutes an issue of prime importance to the fact finder, have led many commentators to question its value." Trans-World Invs. v. Drobny, 554 P.2d 1148, 1150 (Alaska 1976).

114. *See supra* note 41 and accompanying text.

115. *See supra* notes 66-71 and accompanying text.

116. *See, e.g.*, Doe v. Eli Lilly & Co., 99 F.R.D. 126, 129 (D.D.C. 1983) (hold-

balance reasonably the interests involved and do not give adequate consideration to other protective measures available. Courts must carefully weigh the conflicting policies protecting patients' or defendants' rights to ensure that they do not unjustly deprive defendants of such a critical discovery tool.[117]

Ex parte interviews with any witness encourage candor and spontaneity[118] and are an important and effective method of obtaining critical information.[119] Ex parte interviews with physicians have increased significance because the presence of patients' counsel during a formal deposition may inhibit a physician's testimony.[120] Such interviews facilitate full disclosure during discovery by providing defendants with private, equal access to treating physicians without the presence of patients' counsel.[121] Such informal full disclosure gives defendants an opportunity properly to prepare defenses and theories of liability without exposing information prematurely.[122] Although

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ing that courts should permit ex parte interviews with treating physicians); Langdon v. Champion, 745 P.2d 1371, 1375 (Alaska 1987) (same); Trans-World Invs. v. Drobny, 554 P.2d 1148, 1152 (Alaska 1976) (same); State *ex rel.* Stufflebam v. Appelquist, 694 S.W.2d 882, 888 (Mo. Ct. App. 1985) (same); Stempler v. Speidell, 100 N.J. 368, 382, 495 A.2d 857, 864 (1985) (same); Lazorick v. Brown, 195 N. J. Super. 444, 456, 480 A.2d 223, 229 (App. Div. 1984) (same); Moses v. McWilliams, 379 Pa. Super. Ct. 150, —, 549 A.2d 950, 954 (1988) (en banc) (same). *But see, e.g.*, Hammonds v. Aetna Casualty & Sur. Co., 243 F. Supp. 793, 805 (N.D. Ohio 1965) (declaring courts should prohibit ex parte interviews with treating physicians); Jordan v. Sinai Hosp., 171 Mich. App. 328, 347, 429 N.W.2d 891, 900 (1988) (same); Wenninger v. Muesing, 307 Minn. 405, 410, 240 N.W.2d 333, 336 (1976) (en banc) (same); Jaap v. District Court, 623 P.2d 1389, 1391 (Mont. 1981) (same); Loudon v. Mhyre, 110 Wash. 2d 675, 677, 756 P.2d 138, 140 (1988) (en banc) (same); State *ex rel.* Klieger v. Alby, 125 Wis. 2d 468, 473-74, 373 N.W.2d 57, 60 (Ct. App. 1985) (same).

117. "[T]here are compelling reasons to permit *ex parte* interviews with all fact witnesses, including physicians." Lillehaug, *supra* note 4, at 444.

118. Moses v. McWilliams, 379 Pa. Super. Ct. 150, —, 549 A.2d 950, 959 (1988) (en banc).

119. "[I]t may be impractical and inefficient to produce all treating doctors for depositions without knowing in advance whether their testimony will be useful or helpful in resolving disputed issues." Lazorick v. Brown, 195 N.J. Super. 444, 455, 480 A.2d 223, 229 (App. Div. 1984) (summarizing various reasons to allow informal discovery); Webster, *supra* note 4, at 25.

120. If patients retain control of the medical privilege after filing a lawsuit, this control may intimidate the treating physician by acting as an "inchoate threat." Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128 (D.D.C. 1983); *see* Webster, *supra* note 4, at 28 (establishing agreement with treating physician to provide testimony adverse to patient is "virtually impossible" with patient's counsel present).

121. Langdon v. Champion, 745 P.2d 1371, 1373 (Alaska 1987).

122. If the adversary is present, defense counsel is "well-advised to limit his examination in order to avoid educating the patient's attorney about the

courts prohibiting ex parte interviews usually recognize an implied patient-litigant waiver, they minimize the waiver's significance[123] by emphasizing the importance of the physician-patient privilege[124] over the need for fairness in the fact-finding process.[125]

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strength of the patient's case and to avoid exposing the theories of the defense prematurely." Monahan, *supra* note 105, at 10.

123. Courts minimize the scope of the implied waiver using a variety of methods. *See, e.g.*, Hammonds v. Aetna Casualty & Sur. Co., 243 F. Supp. 793, 805 (N.D. Ohio 1965) (finding patient-litigant waiver "does not authorize a private conference between a doctor and defense lawyer"); Jaap v. District Court, 623 P.2d 1389, 1391 (Mont. 1981) (holding patient waived any physician-patient privilege by filing action placing medical condition at issue, but court did not have authority to allow ex parte interviews because state procedural rules were silent about ex parte interviews as method of discovery); State *ex rel.* Klieger v. Alby, 125 Wis. 2d 468, 474-75, 373 N.W.2d 57, 60-61 (Ct. App. 1985) (minimizing scope of implied waiver by excluding ex parte interviews, absent patient's express consent). *But see* Jordan v. Sinai Hosp., 171 Mich. App. 328, 347, 429 N.W.2d 891, 900 (1988) (finding that in Michigan, physician-patient privilege is "not automatically waived upon the patient's filing of a lawsuit").

124. None of the cases address the "virtually unanimous scholarly criticism" of the physician-patient privilege. Lora v. Board of Educ., 74 F.R.D. 565, 574 (E.D.N.Y. 1977); *see supra* note 55. Yet many commentators reason that the policies behind the physician-patient privilege are tenuous at best. *See, e.g.*, 8 J. WIGMORE, *supra* note 36, § 2380a, at 829 (explaining that physician-patient privilege is unjustified and unnecessary because resulting injury to fact-finding ability of legal process far outweighs any resulting injury done to physician-patient relationship due to compelled disclosure of medical information); Chafee, *supra* note 55, at 609 (stating that "the reasons usually advanced for extending the privilege of silence to the medical profession are not wholly satisfactory"). The privilege is even more suspect in situations in which the patient voluntarily has taken action that waives the privilege in most jurisdictions. *See supra* notes 66-71 and accompanying text. Patients already have jeopardized the privacy and confidentiality of their physicial condition by filing suit. Courts recognize the injustice of permitting patients to use the privilege strategically to prove liability regarding a disputed condition after jeopardizing confidentiality by filing lawsuits. *See, e.g.*, City & County of San Francisco v. Superior Court, 37 Cal. 2d 227, 232, 231 P.2d 26, 28 (1951) (noting that patient-litigant waiver prevents "one who has placed in issue his physical condition from invoking the privilege on the ground that disclosure of his condition would cause him humiliation. He cannot have his cake and eat it too."). By retaining control of the medical privilege, patients also may insist on formal depositions as the only type of meeting permitted between defendants and treating physicians. *See, e.g.*, Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128-29 (D.D.C. 1983) (observing that "[p]arty so wielding the privilege [may] monitor his adversary's progress in preparing his case by his presence on each occasion [when] such information is revealed"). Patients' counsel therefore may observe defendants' trial preparation while they conduct their own preparation "under no such scrutiny." *Id.* at 129. This one-sided monitoring of defendants' trial preparation abuses the medical privilege because such use bears "no relation to the purposes" for which the privilege exists. *Id.* at 129.

125. *See supra* note 46 and accompanying text. Courts attempt to minimize this problem by equating the information obtained from ex parte interviews

By limiting the scope of implied waiver, courts ignore the doctrine's purpose: to prevent patient abuse of the medical privilege.[126] The medical privilege is a powerful weapon, suppressing valuable evidence during litigation[127] without any remedy other than the doctrine of implied waiver.[128] Courts prohibiting ex parte interviews potentially expose the medical privilege to abuse by the patient, yet none have considered this danger,[129] nor have they attempted to remedy it.[130] For example, a patient's attorney is free to use favorable treating physicians as witnesses, although effectively eliminating unfavorable treating physicians by not calling them as witnesses.[131] If plaintiffs' counsel does not call a particular doctor as a witness, defendants, unaware of the doctor's role in the treatment, will be unable to use that doctor as a witness. Even if the defendant is aware of the physician's role, defense attorneys still may be reluctant to call such a witness because they will be unable prop-

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with that obtained from formal depositions. *See, e.g.*, Petrillo v. Syntex Laboratories, Inc., 148 Ill. App. 3d 581, 597, 499 N.E.2d 952, 963 (1986), *appeal denied*, 113 Ill. 2d 584, 505 N.E.2d 361, *cert. denied*, 483 U.S. 1007 (1987) (stating that "the opinion of the treating physician which is disclosed in a deposition is obviously the same opinion as that which defense counsel would obtain in an *ex parte* conference"). *But see* Monahan, *supra* note 105, at 10 (suggesting that if plaintiffs' counsel is present at interview, defense must limit examination to avoid giving up defense strategy); Webster, *supra* note 4, at 28 (asserting that "[p]reparation of the witness for effective trial testimony in the presence of the plaintiff's counsel is virtually impossible").

126. *See supra* notes 59, 63 and accompanying text.

127. *See, e.g.*, Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 39, 125 S.E.2d 326, 331-32 (1962) (noting that physician-patient privilege hid fact that defendant-patient "was suffering from a complication of serious chronic diseases").

128. *See supra* notes 59-60, 63 and accompanying text.

129. The purpose of the medical privilege is to shield the patient from harm, rather than to give the patient a weapon to use in subsequent litigation. *See, e.g.*, State *ex rel.* McNutt v. Keet, 432 S.W.2d 597, 601 (Mo. 1968) (en banc) (prohibiting defendant's use of privilege as "a shield and a dagger at one and the same time.") (citations omitted in original). Courts have emasculated the doctrine of implied waiver, the legal system's only protection from patient abuse of the medical privilege. *See supra* notes 58-59. Courts imply a formal "waiver" of privilege, but in practical terms, the patient remains free to abuse the privilege and intimidate the physician with no recourse for the defendants. *See, e.g.*, Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128-29 (D.D.C. 1983) (retaining control of medical privilege and using control to prohibit ex parte interviews allows patients to abuse privilege because such use bears "no relation to the purposes" for which privilege exists).

130. Some courts hold that formal depositions provide sufficient protection for defendants' interests, but this reasoning ignores the importance of ex parte interviews with treating physicians. *See supra* notes 78-87 and accompanying text.

131. Webster, *supra* note 4, at 28.

erly to prepare the doctor's testimony without opposing counsel's interference.[132]

Courts prohibiting ex parte interviews focus on defendants' potential abuse of the privilege. Communications during ex parte interviews may jeopardize the physician-patient relationship by damaging the patient's trust[133] if the physician exposes information that remains privileged after the patient files a lawsuit.[134] This reasoning fails to recognize the protections available to patients in the event such an abuse occurs. If an overriding threat to the physician-patient privilege exists, the patient may seek protective orders to limit, or in extreme cases,

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132. *Id.* at 28; Monahan, *supra* note 105, at 10 (emphasizing that presence or absence of patient's attorney likely will influence communications between treating physician and defense counsel).

133. *See, e.g.*, Wenninger v. Muesing, 307 Minn. 405, 411, 240 N.W.2d 333, 337 (1976) (en banc) (observing that ex parte interviews may destroy patients' trust by allowing secret meetings between defense counsel and physicians); Loudon v. Mhyre, 113 Wash. 2d 675, 679, 756 P.2d 138, 141 (1988) (en banc) (explaining that "mere threat" of ex parte interviews "may have a chilling effect on the physician-patient relationship").

134. *See, e.g., Wenninger*, 307 Minn. at 410, 240 N.W.2d at 336-37 (finding that despite patient-litigant waiver, courts must prohibit ex parte interviews because defense counsel, without supervision, might abuse physician-patient privilege by asking treating physicians about irrelevant matters). Another, often unspoken, concern is that an ex parte interview will provide defense counsel with an opportunity to influence a treating physician's testimony. The court in *Stempler v. Speidell* recognized that the patient has a dual interest in preventing ex parte interviews:

> The interest advanced as primary is the desire to protect from disclosure by the physician confidential information not relevant to the litigation and therefore still protected by the patient-physician privilege and the physician's professional obligation to preserve confidentiality. An equally if not more important interest of the plaintiff . . . 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, 381, 495 A.2d 857, 864 (1985).

Yet the potential to influence trial testmony is "inherent in every contact" between defense counsel and treating physicians. Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128 (D.D.C. 1983). Because this potential exists during any such contact, prohibiting ex parte interviews creates damage much greater than the resulting benefit. *See, e.g.*, Lazorick v. Brown, 195 N.J. Super. 444, 456, 480 A.2d 223, 229 (App. Div. 1984) (reasoning that "[t]o speculate about sinister motives of attorneys and treating doctors and to establish additional limitations on the right to seek out evidence as a matter of policy would do mischief to the adversary system"). Moreover, the danger of patients' counsel influencing physicians' testimony is greater than the danger defendants' lawyers pose. Webster, *supra* note 4, at 25 (stating that "since plaintiff's counsel is usually the first to contact the treating physician, his opportunity to influence trial testimony is much greater than is defense counsel's, whose meetings with the doctor will occur much later").

to prohibit ex parte interviews.[135] Courts also may punish defendants or their attorneys to deter potential abuse.[136] Moreover, the risk to the physician-patient relationship exists in any contact between defendants and physicians, whether that contact occurs during an ex parte interview, a formal deposition, or trial.[137] Courts recognizing an implied waiver open the door to potential harm to the physician-patient relationship, yet reason that fairness to defendants justifies this risk.[138]

Courts prohibiting ex parte interviews also emphasize protection of physicians' interests. Courts may view ex parte interviews as unnecessary intrusions on physicians,[139] ignoring the possibility that physicians may want to state their views to defendants privately, to act as expert witnesses for defendants,[140] or to prepare properly before giving a formal deposition.[141]

Courts also use physicians' potential tort liability for unauthorized disclosure to justify prohibiting ex parte interviews.[142] The presence of plaintiff's counsel at a formal deposition may protect physicians from improperly disclosing privileged infor-

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135. *See, e.g., Stempler*, 100 N.J. at 383, 495 A.2d at 864-65 (emphasizing that patients may seek protective orders if proposed ex parte interview warranted court supervision); Moses v. McWilliams, 379 Pa. Super. Ct. 150, —, 549 A.2d 950, 959-60 (1988) (en banc) (demonstrating that court may limit ex parte interview by issuing protective order).

136. *See, e.g.*, Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128 (D.D.C. 1983) (asserting that there are "sanctions enough" for any adversary who improperly attempts to influence a witness).

137. *Id.* at 128. Physicians may possess information contrary to a patient's claim, but this information may come to light during a formal deposition or during an ex parte interview. Lillehaug, *supra* note 4, at 445.

138. During formal depositions or trial testimony, the physician still may give evidence that damages the patient's lawsuit, thus resulting in the patient's loss of trust. *See supra* note 137; *cf.* Stempler v. Speidell, 100 N.J. 368, 381, 495 A.2d 857, 864 (1985) (emphasizing that patients seek to retain physicians' loyalty hoping that physicians thus will be reluctant to help patients' adversaries during litigation). Informal interviews between patients' attorneys and treating physicians after defendants have conducted such ex parte interviews may allay patients' concerns about secret disclosure. Webster, *supra* note 4, at 25.

139. *See, e.g., Wenninger*, 307 Minn. at 409, 240 N.W.2d at 336 (suggesting that court supervision of physicians' depositions protects "the medical profession against unnecessary harassment or involvement in the discovery procedure") (citation omitted).

140. "An important practical effect of a rule prohibiting *ex parte* conferences is that it prevents a defendant from utilizing a treating physician as an expert witness." Webster, *supra* note 4, at 28.

141. *See supra* notes 80-81 and accompanying text.

142. *See, e.g., Wenninger*, 307 Minn. at 412, 240 N.W.2d at 337 (explaining that "[e]xcept for the loss of a possible tactical advantage to defense counsel, no other reason has been suggested or occurs to us which would justify exposing doctors to the hazard of potential tort liability").

mation, thus preventing tort liability for breach of the patient's right to privacy or professional discipline for unprofessional conduct.[143] This reasoning, however, fails to recognize that state legislatures adopted the privilege primarily to protect patients, rather than their physicians.[144] These courts also fail to recognize that physician participation in ex parte interviews always is voluntary.[145] If the physician or defendant abuses the privilege, the patient has additional causes of action against the physician for breach of the privilege[146] and against the defendant for inducing the breach.[147]

Thus, the concerns of courts prohibiting ex parte interviews fail to outweigh the interviews' value. Many of the concerns that support the physician-patient privilege[148] lapse when a patient files a lawsuit.[149] As a policy matter, patients may not claim that divulging medical information will humiliate them after they voluntarily have exposed that information to disclosure by filing suit.[150] Patients' expectations of privacy, particularly with respect to the condition at issue, also decrease because of the public nature of the litigation process.[151] Because courts may compel physicians to testify at trial, ex parte interviews merely allow defendants to obtain relevant medical

143. *Id.* at 411, 240 N.W.2d at 337.

144. *See supra* notes 47-50 and accompanying text.

145. State *ex rel.* Stufflebam v. Appelquist, 694 S.W.2d 882, 888 (Mo. Ct. App. 1985) (asserting that court "has no authority to compel" physician to grant ex parte interview). Ex parte interviews will not, however, jeopardize the physician's ethical duty, because the physicans' code of ethics permits disclosure when "required to do so by law." Section 5.05 of the Current Opinions of the Judicial Council of the AMA, *reprinted in* Petrillo v. Syntex Laboratories, Inc., 148 Ill. App. 3d 581, 589, 499 N.E.2d 952, 958 (1986), *appeal denied*, 113 Ill. 2d 584, 505 N.E.2d 361, *cert. denied*, 483 U.S. 1007 (1987). Physicians will not breach their fiduciary duty of confidentiality because they have witness immunity for the disclosure of any medical information that is relevant to patients' lawsuits. Moses v. McWilliams, 379 Pa. Super. Ct. 150, —, 549 A.2d 950, 956-57 (1988) (en banc).

146. *See supra* note 100.

147. *See, e.g.*, Hammonds v. Aetna Casualty & Sur. Co., 243 F. Supp. 793, 803 (N.D. Ohio 1965) (reasoning that "when one induces a doctor to divulge confidential information in violation of that doctor's legal responsibility to his patient, the third party may also be held liable in damages to the patient").

148. *See supra* notes 46-54 and accompanying text.

149. *See supra* notes 66-77 and accompanying text.

150. City and County of San Francisco v. Superior Court, 37 Cal. 2d 227, 232, 231 P.2d 26, 28 (1951) (en banc).

151. Placing a specific physical condition at issue reduces a patient's privacy expectation regarding any privileged information related to that condition. Moses v. McWilliams, 379 Pa. Super. Ct. 150, —, 549 A.2d 950, 954-55 (1988) (en banc).

information earlier in litigation and prevent plaintiffs from abusing the physician-patient privilege.[152] Ex parte interviews do not unduly threaten the patient's medical treatment because the physician remains legally and ethically bound to give the patient proper medical care and to protect any information not relevant to the patient's lawsuit.[153]

Allowing ex parte interviews supports the policy underlying the doctrine of implied waiver: prevention of patient abuse of the physician-patient privilege through use of the privilege as an adversarial tactic.[154] Ex parte interviews help minimize such abuse by offering defendants equal access during the critical pretrial stage to relevant information that treating physicians possess.[155] This access lessens the dangers of strategic or partial disclosure by the patient, preventing patients from using the privilege as a sword rather than a shield.[156] Patients will be unable to disclose only favorable information while concealing unfavorable information by invoking the physician-patient privilege.[157] If a patient places a physical condition at issue, the defendant should have meaningful access to all information necessary to defend against the plaintiff's allegations. Ex parte interviews therefore would increase the probability of full disclosure during the discovery and litigation process.[158]

B. Arguments For Permitting Ex Parte Interviews in Drug and Medical Device Cases Are Even More Compelling

Courts generally have analyzed the issues of the physician-patient privilege, waiver, and ex parte interviews in drug and medical device cases in the same manner as in other cases in-

152. *See supra* note 63 and accompanying text.

153. *See supra* notes 42, 106 and accompanying text.

154. *See supra* note 63; *see also* Sklagen v. Greater S.E. Community Hosp., 625 F. Supp. 991, 992 (D.D.C. 1984) (stating that "[h]aving waived the medical privilege as to materials favorable to her position it would be manifestly unfair to allow plaintiff to invoke the privilege to shield similar materials which are potentially damaging").

155. Chester v. Zima, 41 Misc. 2d 676, 677, 246 N.Y.S.2d 144, 146 (Erie County Sup. Ct. 1964) (ordering patient to release medical records during discovery because material information "normally in the sole possession or under the control of one party" should be available during discovery to facilitate true evaluation of case and to eliminate surprise in litigation).

156. *See supra* note 63 and accompanying text.

157. Webster, *supra* note 4, at 28.

158. Full discovery and disclosure facilitate just results in litigation, thereby increasing the legitimacy of the legal process. *See* Hickman v. Taylor, 329 U.S. 495, 507 (1947).

volving a treating physician as a potential witness.[159] Considerations unique to drug and medical device cases, however, offer additional support for allowing ex parte interviews. Resolution of the ex parte issue is critical in these cases, requiring analysis beyond the foregoing argument concerning ex parte interviews generally. Although physicians and defendants face unique circumstances in drug and medical device cases, courts have ignored all special considerations when making this analysis, and have focused only on general considerations.

In drug and medical device cases, the physician's knowledge concerning the causes, nature, extent, and treatment of the plaintiff's injury also is relevant,[160] yet pales in comparison to the significance of the physician's product knowledge.[161] In addition to requiring evidence regarding injury and causation, the defendant also needs to discover and understand the physician's product knowledge and opinions in connection with the warning and proximate cause issues.[162]

The patient's interests do not change when analyzing the ex parte issue in drug and medical device cases.[163] The special needs of defendants, however, add substantial weight when balancing the ex parte issue in drug and medical device cases. The defendants' ability to investigate physicians' independent

159. Courts adopt the same reasoning to evaluate the propriety of ex parte interviews of physicians in drug and medical device cases as used in other personal injury cases. For example, the court in a drug liability case, *Schramel v. G.D. Searle & Co.*, No. 86-0198 (E.D. Pa. Nov. 4, 1988), granted summary judgment based on a physican's affadavit resulting from an ex parte interview after the court permitted ex parte interviews in *Moses v. McWilliams*, 379 Pa. Super. Ct. 150, —, 549 A.2d 950, 958-59 (1988) (en banc), a case involving medical malpractice. Jurisdictions limiting defendants to formal methods of discovery in other personal injury cases also follow the same analysis in drug and medical device cases. The courts in *Karsten v. McCray*, 157 Ill. App. 3d 1, 13-15, 509 N.E.2d 1376, 1383-84 (1987), and *Yates v. El-Deiry*, 160 Ill. App. 3d 198, 201-02, 513 N.E.2d 519, 521-22 (1987), both medical malpractice cases, permitted ex parte interviews following the same reasoning used in *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581, 499 N.E.2d 952 (1986), *appeal denied*, 113 Ill. 2d 584, 505 N.E.2d 361, *cert. denied* 483 U.S. 1007 (1987), a drug liability case.

160. *See supra* notes 9, 25-29 and accompanying text. The medical cause issue often is more complicated in drug or medical device cases, where the possibility of alternate causes may be a matter of inference from circumstantial evidence, from medical records, or from the physician's interpretation of objective or subjective tests and findings. The treating physician's input in this area also is critical. *See supra* note 24.

161. *See supra* notes 25-29.

162. *See supra* notes 20-24 and accompanying text.

163. *See supra* notes 133-34

knowledge[164] about the product and the adequacy of the product's warning is a prerequisite to preparation of the learned intermediary and proximate cause defenses.[165]

Permitting ex parte interviews also accommodates the special role of physicians as "two-hatted" witnesses in drug and medical device cases. In addition to possessing privileged information about the patient, physicians also wear the hats of fact and opinion witnesses regarding the product at issue.[166] The physicians' general information about the product is *not* privileged because the medical privilege protects only communications between the patient and the physician,[167] and these facts are independent of any protected communications. Forbidding ex parte interviews unnecessarily cloaks this nonprivileged information with the mantle of the physician-patient privilege. Because no privilege is available, prohibiting ex parte interviews robs defendants of their right to prepare this unprivileged testimony privately without the presence of patients' counsel.[168]

Society places great value on drugs and medical devices; as a result, manufacturers may market them despite their charac-

164. *See supra* notes 27-29 and accompanying text.

165. *See supra* notes 19-35 and accompanying text.

166. *See supra* notes 26-29 and accompanying text. Defendants are less likely to abuse treating physicians during ex parte interviews in drug or medical device cases because of the underlying relationship between defendants and treating physicians. Manufacturers have a continuing relationship with prescribing physicians and cannot afford to harrass or abuse their customers. *See supra* notes 31-32 and accompanying text. Defendants' additional incentive to protect prescribing physicians is not present in other types of personal injury cases and also supports ex parte interviews in the drug and medical device context.

167. *See supra* notes 36-40 and accompanying text.

168. Forced presence of patients' counsel during this preparation may violate defense counsels' protection for work product. *See, e.g.*, Weaver v. Mann, 90 F.R.D. 443, 444 (D.N.D. 1981) (stating that *Federal Rule of Civil Procedure* 26(b)(3) protects defendant's written records about conversations with plaintiff's treating physician in anticipation of litigation as attorney work product). The work product doctrine also protects defendants' selection of documents to be used during litigation. *See, e.g.*, Sporck v. Peil, 759 F.2d 312, 316 (3d Cir. 1985) (emphasizing that "the selection and compilation of documents by counsel" must be given "an almost absolute protection from discovery"); James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 144 (D. Del. 1982) (holding that for cases involving extensive document discovery, such as drug and medical device cases, the process of document selection "is often more critical than pure legal research"). *But see* Comment, *Suppose You Want to Depose Opposing Counsel:* Shelton v. American Motors Corp., 73 MINN. L. REV. 1116, 1135-41 (1989) (arguing that protecting document selection as attorney work product ignores case law and *Federal Rules of Civil Procedure*).

terization as "unavoidably unsafe products."[169] If courts give plaintiffs an unfair tactical advantage, the courts will more likely find the manufacturers liable. Eventually, such liability could result in manufacturers taking helpful drugs and medical devices off the market because of the high penalties imposed.[170] Ex parte interviews minimize patients' tactical advantage in these cases and allow manufacturers equal access to crucial information, thereby advancing the policies underlying the special status accorded drug and medical device manufacturers.

C. GUIDELINES FOR ALLOWING EX PARTE INTERVIEWS

Courts should allow ex parte interviews with treating physicians when a patient has filed a lawsuit placing a physical condition directly at issue in a drug or medical device case.[171] Courts should recognize an implied waiver that sets aside the physician-patient privilege immediately after the plaintiff has filed a lawsuit.[172] The waiver should apply to all information relevant to the condition at issue.[173] This immediate waiver protects the defendant from patient abuse of the medical privilege.[174] It also permits the defendant properly to prepare the defenses unique to drug and medical device cases.[175]

To protect patients' interests, courts may conduct preliminary hearings to determine the proper scope of defendants' discovery. Courts may issue protective orders either limiting the scope of an ex parte interview[176] or forbidding a specific interview on the patient's showing of good cause.[177] In addition,

169. *See, e.g.*, Lindsay v. Ortho Pharmaceutical Corp., 637 F.2d 87, 90 (2d Cir. 1980); Wolfgruber v. Upjohn Co., 72 A.D.2d 59, 61, 423 N.Y.S.2d 95, 97 (1979), *aff'd*, 52 N.Y.2d 768, 417 N.E.2d 1002, 436 N.Y.S.2d 614 (1980).

170. Brown v. Superior Court, 44 Cal. 3d 1049, 1064, 751 P.2d 470, 479, 245 Cal. Rptr. 412, 421 (1988) (discussing "possibility that the cost of insurance and of defending against lawsuits will diminish the availability and increase the price of pharmaceuticals is far from theoretical" and listing products that manufacturers either have increased in price or withdrawn from market because of fear of liability for large judgments); *cf.* Schwartz, *supra* note 24, at 1141 (suggesting that imposition of strict liability on drug and medical device manufacturers may drive existing products off market and stifle research and development of new products).

171. *See supra* notes 120-22 and accompanying text.

172. *See supra* notes 72-77 and accompanying text.

173. *See supra* notes 72-73 and accompanying text.

174. *See supra* notes 75-77 and accompanying text.

175. *See supra* notes 19-35 and accompanying text.

176. Moses v. McWilliams, 379 Pa. Super. Ct. 150, —, 549 A.2d 950, 959 (1988) (en banc).

177. *See supra* note 135 and accompanying text.

courts may impose sanctions on defendants abusing the medical privilege through improper influence or attempts to obtain privileged, irrelevant information.[178]

The physician's participation in the ex parte interview should be voluntary.[179] In addition, the physician's counsel may be present during the ex parte interview to protect the physician's legal interests. If the physician refuses to participate, such refusal will limit the defendant's access to formal methods of discovery.[180]

The court should order the defendant to inform the physician of the scope of the interview in advance and to provide the physician with a copy of the court order.[181] This procedure will protect both the physician's and patient's interests in proper disclosure. During the interview, the physician may disclose all patient information relevant to the plaintiff's claim. The physician also is free to disclose all nonprivileged information, including all facts relevant to the learned intermediary and proximate cause defenses, any independent product knowledge, and the physician's general experience and opinions about the drug or medical device at issue.

CONCLUSION

Courts have ignored the unique implications of drug and medical device cases when determining whether defendants have the right to conduct ex parte interviews of treating physicians. Defendants in these cases have a particular need to interview prescribing physicians because of their wealth of relevant, nonprivileged information that is critical to the proper preparation of the unique defenses available in such cases. Ex parte interviews are vital discovery tools serving purposes far different from formal methods of discovery. Courts frequently

178. *See supra* note 136 and accompanying text.

179. *See* Stempler v. Speidell, 100 N.J. 368, 382, 495 A.2d 857, 864 (1985) (stating that "physician . . . need not cooperate if he believes that would compromise his professional responsibilities").

180. *See id.* (reasoning that if physicians refuse to grant ex parte interviews, defendants are left with only formal methods of discovery).

181. *See* O'Brien v. Pfizer, Inc., No. 3-88-282 (D. Minn. Feb. 21, 1989). In a case involving the prescription drug Feldene, Judge Magnuson affirmed a magistrate's order requiring the plaintiff to execute medical authorizations permitting ex parte interviews. *Id.* He also ordered the defendant to give a copy of the magistrate's order to the physician interviewed. *Id.*; *see also* Doe v. Eli Lilly & Co., 99 F.R.D. 126, 129 (D.D.C. 1983) (ordering patient to execute medical authorizations permitting ex parte interviews); Lazorick v. Brown, 195 N.J. Super. 444, 456, 480 A.2d 223, 230 (App. Div. 1984) (same).

have denied defendants the right to conduct ex parte interviews with treating physicians, however, because courts have overemphasized policies behind the physician-patient privilege while discounting policies supporting full and fair access to relevant information during litigation. Courts prohibiting ex parte interviews not only provide patients with a significant litigation advantage, but also inadvertently may promote patients' abuse of the medical privilege. Prohibiting ex parte interviews forces defendants either to depose treating physicians formally, or to forgo the physicians' information.

Because ex parte interviews are vital tools of discovery, courts should allow defendants to conduct such interviews. Ex parte interviews are the most flexible, balanced solution to the inevitable conflict between the physician-patient privilege and the need for the discovery of all relevant information in these cases. Permitting ex parte interviews serves the policy of full disclosure by allowing defendants equal access to all witnesses. Allowing ex parte inteviews gives courts the flexibility to balance the conflicting interests involved, so that physicians, defendants, and the courts do not suffer from unnecessary and inappropriate application of the physician-patient privilege.

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