University of Baltimore Law Review

Volume 44
Issue 3 *Summer 2015*

Article 6

2015

Comments: HIPAA Confusion: How the Privacy Rule Authorizes "Informal" Discovery

Myles J. Poster
University of Baltimore School of Law

HIPAA CONFUSION: HOW THE PRIVACY RULE AUTHORIZES "INFORMAL" DISCOVERY

I. INTRODUCTION

The year was 1995, and Jane Smith had a rewarding job as a stock clerk at Dave & Hubbard's Grocery Store. One day while Jane is restocking the dairy shelves, she slips and falls on a puddle of milk she spilled, landing firmly on her back. Unable to move, Jane is immediately taken to the hospital. Struggling to diagnose the ailment, the treating physician, Dr. Dolin suggests immediate surgery, to which Jane agrees. After the surgery, Jane is in just as much pain as she was prior to the surgery, and is subsequently diagnosed with a herniated disk. After being discharged from the hospital, and consulting with her attorney Mr. Jones, Jane decides that she wants to pursue legal action against Dr. Dolin for medical malpractice, and Dave & Hubbard's Grocery Store for negligence.

Jane files a complaint in the United States District Court for the District of Maryland, a contributory negligence state.[1] Dave & Hubbard's Grocery Store retains Mrs. Y as its counsel and she immediately begins sorting through discovery in an effort to develop a winnable defense. Mrs. Y notices that Jane visited Dr. Brown, a chiropractor, several times leading up to the incident and decides to pursue the lead. Complying with a recognized Maryland discovery practice, Mrs. Y places an initial phone call to Dr. Brown. After the initial call, Dr. Brown agrees to meet with Mrs. Y outside the presence of Mr. Jones and Jane. During her ex parte interview with Dr. Brown, Mrs. Y discovers that Jane suffered the herniated disk three years prior to the incident and has not followed Dr. Brown's rehabilitative advice, including his suggestion that she wear a back brace at work. During the trial, Mrs. Y calls Dr. Brown to testify, and ultimately the jury absolves both Dr. Dolin and Dave & Hubbard's Grocery Store of all liability. Fast forward to 2014.

Over the course of the past decade, ex parte communications between defense attorneys and plaintiffs' non-party treating

1. *See, e.g.*, Harrison v. Montgomery Cnty. Bd. of Educ., 295 Md. 442, 451, 456 A.2d 894, 898 (1983) ("[T]he well-established law of [Maryland is] that a plaintiff who fails to observe ordinary care for his own safety is contributorily negligent and is barred from all recovery, regardless of the quantum of a defendant's primary negligence." (citing Schweitzer v. Brewer, 280 Md. 430, 439–40, 374 A.2d 347, 353 (1977))).

physicians have become almost nonexistent, a direct result of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA")[2] and its Privacy Rule.[3] Prior to the promulgation of HIPAA, several jurisdictions[4] allowed defense attorneys to informally communicate ex parte with plaintiffs' non-party treating physicians as though they were ordinary fact witnesses.[5] However, with the passage of HIPAA, and subsequently its Privacy Rule,[6] access to personally identifiable health information underwent an overhaul subjecting such information to more stringent regulations.[7]

Following the full implementation of HIPAA and the Privacy Rule in April 2003,[8] there has been tremendous inconsistency in their application[9] and interpretation.[10] As a result of these conflicting dispositions, defense attorneys in some jurisdictions are barred from using a discovery tool that is liberally allowed elsewhere.[11] Per one court's astute observation, "[t]he recently enacted HIPAA statute has

2. HIPAA was signed into law by President Clinton on August 21, 1996. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 1996 U.S.C.C.A.N. (110 Stat.) 1936 (codified at 42 U.S.C. §§ 1320d-1 to d-9 (2012)).

3. *See* 45 C.F.R. §§ 160, 164 (2014); *see also* 42 U.S.C. §§ 1320d(1)-(9).

4. Jurisdictions previously allowing ex parte communications with treating physicians include: Alaska, Colorado, Delaware, the District of Columbia, Georgia, Idaho, Kansas, Maryland, Michigan, Missouri, New Jersey, Wisconsin, Rhode Island. Scott Aripoli, Comment, *Hungry Hungry HIPAA: Has the Regulation Bitten Off More Than it Can Chew by Prohibiting Ex Parte Communication with Treating Physicians?*, 75 UMKC L. REV. 499, 505–06 (2006).

5. Melissa Phillips Reading & Laura Marshall Strong, *Ex Parte Communications Between Defense Counsel and Treating Physicians*, FOR THE DEF. 30 (Oct. 2011), http://www.og-law.com/files/FTD-1110-ReadingStrong.pdf.

6. *Summary of the HIPAA Privacy Rule*, HHS.GOV, http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/index.html (last visited Apr. 18, 2015).

7. *Compare* Butler-Tulio v. Scroggins, 139 Md. App. 122, 141, 774 A.2d 1209, 1219 (2001) (finding that "when a patient puts his or her medical condition at issue in a [lawsuit] . . . a health care provider must disclose . . . all medical information [under the Maryland Confidentiality of Medical Records Act] . . . regardless of whether the patient consents."), *with* Law v. Zuckerman, 307 F. Supp. 2d 705, 709 (D. Md. 2004) (stating "HIPAA preempts MCMRA and is controlling on the issue of *ex parte* communications").

8. 45 C.F.R. § 164.534(a) (2014).

9. *See* Holzle v. Healthcare Servs. Grp., Inc., 801 N.Y.S.2d 234, *5–7 (N.Y. Sup. Ct. May 24, 2005) (finding "[t]he waiver of any HIPAA rights as implicit in the waiver of the physician-patient privilege," thus permitting *ex parte* communication).

10. Crenshaw v. MONY Life Ins. Co., 318 F. Supp. 2d 1015, 1029 (S.D. Cal. 2004) ("HIPAA does not authorize *ex parte* contacts with healthcare providers.").

11. *See Holzle*, 801 N.Y.S.2d 234, at *20–21; *see also Crenshaw*, 318 F. Supp. 2d at 1015.

[forever] changed the landscape of how [all] litigators can conduct informal discovery in cases involving medical treatment."[12]

This Comment will demonstrate that the Privacy Rule implicitly authorizes the exercise of ex parte communication by defense counsel, while also showing that the informal nature of these interviews no longer remains.[13] Part II will analyze HIPAA and the Privacy Rule, including their origins and purpose.[14] Part III will provide an in-depth analysis of the Privacy Rule's scope, the manner in which physicians may disclose protected health information, and sources of confusion with respect to disclosure.[15] Part IV will discuss the background of ex parte communications, and varying judicial interpretations of the Privacy Rule as applied to ex parte communication.[16] Finally, Part V will suggest a more standardized reading that courts should employ when determining whether ex parte communication is permitted, so that future judicial nonconformity can be prevented.[17]

II. THE ORIGINS OF HIPAA AND ITS PROMULGATION

HIPAA, codified as 42 U.S.C. § 1320d, *et seq.*,[18] was signed into law on August 21, 1996 by President Clinton.[19] Although HIPAA was not primarily enacted by Congress to serve as a federal medical privacy act,[20] its privacy implications have been the most far-reaching and broadly impacting part of the legislation. According to the text of HIPAA, its purpose was to "improve . . . the efficiency and effectiveness of the health care system, by encouraging the development of a health information system through the establishment of standards and requirements for the *electronic transmission* of certain health information."[21] Despite the detailed language of HIPAA, President Clinton, when addressing the nation,

12. *Law*, 307 F. Supp. 2d at 711.
13. *See infra* Parts II, III, and IV.
14. *See infra* Part II.
15. *See infra* Part III.
16. *See infra* Part IV.
17. *See infra* Part V.
18. HIPAA was formerly known as Public Law 104-191. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 1996 U.S.C.C.A.N. (110 Stat.) 1936 (codified at 42 U.S.C. §§ 1320d-1 to d-9 (2012)).
19. *See* President William J. Clinton, Statement on Signing of the Health Insurance Portability and Accountability Act of 1996 (Aug. 21, 1996), http://www.presidency.ucsb.edu/ws/?pid=53211.
20. *See* Health Insurance Portability and Accountability Act § 261, 110 Stat. at 2021.
21. *Id.* (emphasis added).

enunciated a different goal, stating "this Act will ensure the portability of health benefits when [workers change vocation] . . . and will protect workers against discrimination by health plans."[22]

While President Clinton briefly mentioned the issue of patient privacy in his statement regarding HIPAA,[23] the privacy regulations of HIPAA were specifically assigned to Congress and the Secretary of the Department of Health and Human Services (HHS) in Section 264 of the Act.[24] To accomplish the ends of HIPAA, Congress required that HHS develop and promulgate regulations relating to the privacy and protection of health information.[25] Although it was not Congress's sole, or even primary, intention to protect the privacy of certain health information, HHS recognized that HIPAA could not fulfill its goals[26] without such patient privacy protections.[27]

Tasked with the creation of "a set of basic national privacy standards and fair information practices,"[28] HHS examined the existing protections and rights under state law. Ultimately, the drafters found that the existing protections under state law were lacking in two respects: (1) they failed to establish the patients' right to access their own health information, and (2) they failed to impose comprehensive protections with respect to patients' medical records.[29] In reference to a patient's health information,[30] HHS

22. President William J. Clinton, *supra* note 19. Furthermore, President Clinton addressed three key reforms that HIPAA would set into motion. First, it will eliminate the possibility that individuals can be denied coverage because they have a preexisting medical condition. Second it will require insurance companies to sell coverage to small employer groups and to individuals who lose group coverage without regard to their health risk status. Finally, it will require insurers to renew the policies they sell to groups and individuals. *Id.*

23. *Id.*

24. Health Insurance Portability and Accountability Act § 264(c)(1), 110 Stat. at 2033 ("If [Congress failed to enact] legislation governing standards with respect to the privacy of individually identifiable health information . . . [within] 36 months after the date of the enactment of [HIPAA], the Secretary of Health and Human Services shall promulgate final regulations . . . not later than the date that is 42 months after the date of the enactment of [HIPAA].").

25. *See, e.g.*, 42 U.S.C. § 1320d-2 (2012).

26. *See* Health Insurance Portability and Accountability Act § 261, 110 Stat. at 2021.

27. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82, 462, 82, 463–64 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160, 164 (2014)).

28. *Id.* at 82, 464.

29. *Id.* at 82, 463–64.

30. Health information consists of "any information, whether oral or recorded in any form or medium, that is created or received by a healthcare provider . . . and relates to the past, present, or future physical or mental health or condition of the individual . . . ." 42 U.S.C. § 1320d-(4) (2012); *see also* 45 C.F.R. § 160.103.

recognized the growing need for federal regulations regarding the use and disclosure of this information by covered entities.[31] In support of their findings, the drafters reaffirmed that privacy is a fundamental right,[32] and with the advent of the Internet and electronic transmission systems, the likelihood of unwanted disclosure was more significant than ever.[33] Additionally, the drafters acknowledged that a patient's ability to receive quality health care would be generally undermined without sufficient privacy protections,[34] an argument frequently utilized by opponents of ex parte communication.[35] As such, HHS issued a proposed Privacy Rule for the public commenting process on November 3, 1999.[36]

After reviewing thousands of public comments, including criticism that "the [Privacy Rule] too harshly restricted access to information,"[37] HHS issued a final draft of the Privacy Rule in December 2000, with subsequent modifications in August 2002.[38]

During the final public commentary in December 2000, HHS specifically addressed the issue of disclosing a patient's health information during the course of judicial proceedings.[39] Nowhere in the response to public comments did HHS explicitly discuss the permissibility of ex parte communications, however, HHS did provide several examples in which patient health information may be

31. 45 C.F.R. § 160.102(a)(3) (stating that a covered entity includes "[a] healthcare provider who transmits any health information in electronic form . . . ."); *see* 42 U.S.C. § 1320d-(3) (defining a healthcare provider as "a provider of medical or other health services, . . . and any other person furnishing health care services or supplies").

32. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82,464 (stating "[a] right to privacy in personal information has historically found expression in American law").

33. *See id.* at 82, 465–67.

34. *See id.* at 82, 466–67.

35. J. Christopher Smith, *Recognizing The Split: The Jurisdictional Treatment Of Defense Counsel's Ex Parte Contact With Plaintiff's Treating Physician*, 23 J. LEGAL PROF. 247, 251 (1999) (arguing that if patients are afforded greater privacy protections, then they can obtain greater medical treatment).

36. U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE FOR CIVIL RIGHTS, SUMMARY OF THE HIPAA PRIVACY RULE 2 (2003), *available at* http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/index.html.

37. REPORTERS COMM. FOR FREEDOM OF THE PRESS, A REPORTER'S GUIDE TO MEDICAL PRIVACY LAW 3 (2007), *available at* http://rcfp.org/rcfp/orders/docs/MEDPRIV.pdf. According to the drafters, the goal of the Privacy Rule—the part of HIPAA that governs public release of information—can prove so frustrating because it gives patients more control of the dissemination of their medical information. *Id.*

38. *Id.*

39. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82, 529.

disclosed by covered entities to defense attorneys.[40] Although the Privacy Rule's regulations relating to the disclosure of protected health information ("PHI")[41] are comprehensive in scheme, and unambiguously remove the informality commonly associated with ex parte communications, the Rule does not explicitly mention ex parte interviews.[42] In fact, the now codified version of the Privacy Rule, found at 45 C.F.R. sections 160 and 164, provides an explicit exception to disclosure of PHI during judicial proceedings.[43]

III. WHEN MAY A COVERED ENTITY DISCLOSE PATIENT INFORMATION?

In most instances, the Privacy Rule prohibits health care providers from disclosing a patient's PHI without valid authorization.[44] However, despite the Privacy Rule's applicability to both written and oral communications,[45] there are instances in which "[a] covered entity may use or disclose the [PHI] without the written authorization of the [patient], as described in [45 C.F.R.] § 164.508,[46] or the opportunity for the [patient] to agree to or object as described in [45 C.F.R.] section 164.510 . . . ."[47] Notwithstanding the fact that there are exceptions permitting disclosure of PHI, the use or disclosure of

40. *See id.*; *see also infra* Part III.B.

41. PHI information is defined as "individually identifiable health information . . . that is: (i) [t]ransmitted by electronic media; (ii) [m]aintained in electronic media; or (iii) [t]ransmitted or maintained in any other form or medium . . . ." 45 C.F.R. § 160.103 (2014).

42. Croskey v. BMW of N. Am. Inc., No. 02-73747, 2005 WL 4704767, at *4 (E.D. Mich. Nov. 10, 2005).

43. *See* 45 C.F.R. § 164.512(e).

44. *See id.* § 164.508 (defining the uses and disclosures for which a valid authorization is required, and the necessary components of such a authorization); *see also id.* § 164.502(b) ("When using or disclosing [PHI] . . . a covered entity . . . must make reasonable efforts to limit [PHI] to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request."). Furthermore, it should be noted that the minimum necessary requirement is not applicable when "[u]se[] or disclosure[] [is] made pursuant to an authorization under § 164.508." *Id.* § 164.502(b)(2)(iii).

45. Health Insurance Portability and Accountability Act of 1996 § 130, 42 U.S.C. § 1320d-(4) (2012); *see also* 45 C.F.R. § 160.103.

46. "Except as otherwise permitted or required . . . a covered entity may not use or disclose [PHI] without an authorization . . . and such use or disclosure must be consistent with such authorization." 45 C.F.R. § 164.508(a)(1).

47. *Id.* § 164.512. Notwithstanding the fact that "[a] covered entity may use or disclose [PHI] without . . . the opportunity for the individual to agree or object," *id.* § 164.512, under the judicial proceedings subsection it is required that an opportunity be made available "to permit the individual to raise an objection . . . ." *Id.* § 164.512(e)(1)(iii)(B).

this private information must still comply with the limitations enunciated in the Privacy Rule.[48] Of the six possible disclosure exceptions set forth in the Privacy Rule,[49] only one, in conjunction with its relevant cross-referenced section, permits the use or disclosure of PHI in ex parte communications.[50]

A. The "Required By Law" Exception and State Law Preemption

While subsections (a)[51] and (e) of 45 C.F.R. § 164.512 are both relevant to ex parte communication, subsection (a) produces a large portion of the confusion in judicial application. Subsection (a) of 45 C.F.R. § 164.512 establishes an exception whereby a covered entity may use or disclose PHI without first obtaining written patient authorization if the "disclosure is required by law."[52] According to the drafters of the Privacy Rule, a disclosure is "required by law" if "a mandate [exists] that compels a [covered] entity to make a use or disclosure of [PHI] and that is enforceable in a court of law."[53] As such, a disclosure "required by law" includes, but is not limited to, court orders, subpoenas, and statutes.[54] Despite this seeming exception, a health care provider's disclosure of PHI is impermissible without a threshold inquiry under HIPAA's preemption language.[55]

Under its preemption scheme, "[HIPAA] shall supersede any contrary provision of State law."[56] A state law is contrary in the eyes of HIPAA if "[a] covered entity . . . would find it impossible to comply with both the State and Federal requirements;[57] or [t]he provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of [HIPAA]."[58] Although it may not have been the intent of the drafters to make things more difficult for the judiciary, HIPAA provides an exception stating that it will not preempt a State law if the law provides the

48. *Id.* § 164.502(a) (stating that use or disclosure must comply with the Privacy Rule).
49. *Id.* § 164.502(a)(1)(i)–(vi).
50. *See id.* § 164.502(a)(1)(i)–(v).
51. *Id.* § 164.512(a)(1)(v) (referencing when use or disclosure requires the patient to agree or object); *see also id.* § 164.510 (discussing when use or disclosure requires the patient to agree or object).
52. *Id.* § 164.512(a)(1).
53. *Id.* § 164.103.
54. *Id.*
55. *See* Health Insurance Portability and Accountability Act of 1996 § 1320, 42 U.S.C. § 1320d-7(a)(1) (2012).
56. *Id.*
57. 45 C.F.R. § 160.202.
58. *Id.*

patients with "more stringent" protections than those available in the Privacy Rule.[59] As such, one of the most common difficulties plaguing courts interpreting the Privacy Rule is their inability to make the threshold determination as to whether State law and Federal law are contrary.[60]

This initial threshold analysis is crucial because if two laws are not contrary, they generally can be reconciled without one law preempting the other, thereby eliminating the need for a more problematic stringency analysis.[61] Currently, the Privacy Rule's definitions of "contrary" significantly narrow the occasions in which a State law and HIPAA will in fact be contrary.[62] The seminal Maryland case *Law v. Zuckerman*[63] provides a prime example of a court properly recognizing that a State law is contrary to HIPAA, but unnecessarily analyzing the "more stringent" requirement.[64]

In *Law*, the Plaintiff brought a medical malpractice suit against her physician for injuries allegedly sustained during the removal of abnormal cells in surgery.[65] During the course of discovery, defense counsel had ex parte communications with Plaintiff's non-party treating physician.[66] In support of his actions, Defendant's attorney argued that the Maryland Confidentiality of Medical Records Act[67] governed the case, not HIPAA.[68] In rejecting defense counsel's argument, the court erroneously relied upon the "more stringent" exception to the Privacy Rule, interpreting "more stringent" to mean "the [increased] ability of the patient to withhold permission and to effectively block disclosure [of their PHI]."[69] By relying on this

59. *Id.* In order to meet the "more stringent" requirement, the law must "provide[] greater privacy protection for the individual who is the subject of the individually identifiable health information." *Id.*

60. *See* Beverly Cohen, *Reconciling the HIPAA Privacy Rule with State Laws Regulating Ex Parte Interviews of Plaintiffs' Treating Physicians: A Guide to Performing HIPAA Preemption Analysis*, 43 HOUS. L. REV. 1091, 1129–31 (2006).

61. *See* 45 C.F.R. §§ 160.202–.203.

62. *See id.* § 160.202.

63. Law v. Zuckerman, 307 F. Supp. 2d 705 (D. Md. 2004).

64. 45 C.F.R. § 160.202(6); *Law*, 307 F. Supp. 2d at 709–11.

65. *Law*, 307 F. Supp. 2d at 707.

66. *Id.*

67. *Id.* at 709. According to the Maryland Confidentiality of Medical Records Act, "[a] health care provider shall disclose a medical record without the authorization of a person in interest . . . [t]o . . . legal counsel, all information in a medical record relating to a patient or recipient's health, health care or treatment which forms the basis for the issues of a claim . . . ." MD. CODE ANN., HEALTH-GEN. § 4-306(b)(3) (LexisNexis 2009 & Supp. 2014).

68. *Law*, 307 F. Supp. 2d at 709.

69. *Id.* at 711.

exception, the *Law* court failed to apply the "General Rule" that "[HIPAA] shall supersede any contrary provision of State law."[70] Rather than stating "[i]f [a] state law can force disclosure . . . it is not 'more stringent' than . . . HIPAA,"[71] the court more appropriately should have found that "[i]f [a] state law can force disclosure" it is "impossible to comply with both the State and Federal requirements," thus triggering HIPAA preemption.[72] This case of first impression not only misapplied the HIPAA preemption analysis, it created flawed precedent for the Fourth Circuit.[73]

Although HHS affirmed during its final public commenting process that the Privacy Rule was not intended to disrupt existing legal obligations,[74] the aforementioned HIPAA preemption provision does just that.[75] In fact, the Privacy Rule not only disrupts existing legal obligations, it also places an undue burden on the judiciary. While HIPAA may preempt any "required" state law "contrary" to it, it does not necessarily follow that court-permitted ex parte communications are preempted as well.

1. HIPAA and the Physician-Patient Privilege

In addition to the difficulty in determining whether or not a state law is contrary to HIPAA and the Privacy Rule, courts post-HIPAA have also grappled with the application of the physician-patient privilege. Historically, "[f]ederal common law has not . . . recognized a privilege between patients and physicians."[76] Therefore, many states have chosen to codify the privilege.[77] However, it is well settled that when a plaintiff initiates a lawsuit thereby placing PHI at issue, that privilege is waived, "thereby subjecting the [private]

70. Health Insurance Portability and Accountability Act of 1996 § 1320, 42 U.S.C. § 1320d-(7)(a)(1) (2012).
71. *Law*, 307 F. Supp. 2d at 711.
72. *Id.*; 45 C.F.R. § 160.202 (2014).
73. *See* Piehl v. Saheta, No. CCB-13-254, 2013 WL 2470128, at *1–2 (D. Md. June 5, 2013) (viewing "a 'more stringent state law' is any law that gives patients increased control over their own medical records" (citing *Law*, 307 F. Supp. 2d at 709)).
74. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82, 668 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160, 164) ("The [Privacy] [R]ule's approach is simply intended to avoid any obstruction to the health plan or covered health care provider's ability to comply with its existing legal obligations.").
75. *See* 42 U.S.C. § 1320d-7(a).
76. United States v. Bek, 493 F.3d 790, 801 (7th Cir. 2007).
77. *See, e.g.*, N.Y. C.P.L.R. 4504(a) (McKinney 2013); TENN. CODE ANN. § 63-2-101 (2012).

information to discovery."[78] Post-HIPAA, courts have addressed the issue of whether or not the "waiver"[79] principle has remained intact, and they have struggled to analyze its effect on ex parte communication.

In *Thomas v. Ontario Inc.*, the United States District Court for the Eastern District of Michigan found that, unlike Michigan law, which permits ex parte communications following plaintiff's waiver of the physician-patient privilege, HIPAA does not allow for an automatic waiver of the privilege.[80] However, the *Thomas* court did not base its finding on a HIPAA created physician-patient privilege;[81] rather, the court emphasized the goal of HIPAA in ensuring the security and privacy of health information.[82] Additionally, the *Thomas* court found that HIPAA and the Privacy Rule implemented several regulatory exceptions specifically tailored to the disclosure of information during litigation proceedings.[83] While it can be argued that this interpretation of HIPAA and the federal physician-patient privilege is most accurate, one certainty remains: this decision represents a vastly differing view when compared to neighboring jurisdictions.

In the case of *National Abortion Federation v. Ashcroft*,[84] the United States District Court for the Northern District of Illinois quashed a government subpoena for medical records citing HIPAA's recognition of the "importance of the privacy of medical records."[85] In the opinion, Judge Charles Kocoras found that HIPAA, in conjunction with Federal Rule of Evidence 501, compelled the recognition of a federal physician-patient privilege.[86] Furthermore, in rejecting the plaintiff's argument that no physician-patient privilege existed under common law, the *Ashcroft* court found that HIPAA and its privacy regulations governed privilege, not Federal Rule of

78. Conneen v. MBNA Am. Bank, N.A., 182 F. Supp. 2d 370, 381 (D. Del. 2002); Daniel M. Roche, *Don't Ask, Don't Tell, HIPAA'S Effect on Informal Discovery in Products Liability and Personal Injury Cases*, 2006 BYU L. REV. 1075, 1094 (2006).

79. *See* Holamn v. Rasak, 761 N.W.2d 391, 391-92 (Mich. Ct. App. 2008), *aff'd*, 764 N.W.2d 583 (Mich. 2009).

80. Thomas v. 1156729 Ontario Inc., 979 F. Supp. 2d 780, 783 (E.D. Mich. 2013).

81. *Id.* at 782.

82. *Id.*

83. *Id.* at 783; *see also* 45 C.F.R. § 164.512(e) (2014) (outlining federal statutory provisions allowing disclosure of health care information).

84. Nat'l Abortion Fed'n v. Ashcroft, No. 04-C-55, 2004 WL 292079, at *2 (N.D. Ill. Feb. 6, 2004), *aff'd*, 362 F.3d 923 (7th Cir. 2004).

85. *Id.* at *2, *6–7 (quoting United States v. Sutherland, 143 F. Supp. 2d 609, 612 (W.D. Va. 2001)).

86. *Id.* at *4–6.

Evidence 501, because they were produced by an "[a]ct of Congress."[87] Within a matter of months, the United States Court of Appeals for the Seventh Circuit issued an opinion directly contradicting *Ashcroft*.[88]

In writing for a split Seventh Circuit, Judge Richard Posner found that all HIPAA and its privacy regulations "should be understood to do . . . is to create a procedure for obtaining authority to use medical records in litigation . . . [and][w]e do not think HIPAA is rightly understood as an Act of Congress that creates a privilege."[89] These two cases not only plainly show the varying interpretation within the same circuit—albeit the district court and the appellate court—but they also illustrate the growing possibility of forum shopping with respect to HIPAA interpretation.

For example, in *Holzle v. Healthcare Servs. Grp., Inc.*, the New York Supreme Court addressed the growing inconsistency among courts within the jurisdiction with respect to the physician-patient privilege and HIPAA.[90] In its analysis, the *Holzle* court disregarded the holdings of other justices "seem[ing] to infer that the Privacy Rule provides substantive rights for plaintiffs . . . ."[91] Despite its dismissal of previous interpretations and applications of HIPAA and the Privacy Rule to ex parte communication and the physician-patient privilege, the *Holzle* court nevertheless reviewed the case, *assuming arguendo*, that the Privacy Rule did create some form of rights for the plaintiff in litigation.[92] Even under this interpretation, the court found that by bringing a personal injury action wherein the plaintiff affirmatively places their mental or physical condition at issue, "that party *waives* any rights or remedies under HIPAA as to the . . . conditions asserted in the litigation."[93]

In support of its disposition, the *Holzle* court provided a more well-reasoned argument than "HIPAA rights [act] as a sword against defendants but as a shield for plaintiffs [that] would have [an] unfair result."[94] The court reasoned that the waiver of HIPAA rights is as implicit as the waiver of the physician-patient privilege in

87. *Id.* at *5.
88. Nw. Mem'l Hosp. v. Ashcroft, 362 F.3d 923 (7th Cir. 2004).
89. *Id.* at 925–26.
90. Holzle v. Health Servs. Grp., No. 110376, 2005 WL 1252597, at *5 (N.Y. Sup. Ct. May 24, 2005).
91. *Id.* at *6.
92. *Id.*
93. *Id.* (emphasis added).
94. *Id.* at *6.

jurisdictions recognizing such a privilege.[95] More significantly, the court found that the implicit HIPAA waiver approach is "consistent with the principles of separation of powers and statutory construction."[96] Furthermore, the court found that by not forcing unwanted authorizations on plaintiffs, the concern about creating legislation or regulatory schemes without the guidance of the Legislature dissipated.[97]

Conversely, if the plaintiff in *Holzle* had filed their complaint in a different New York venue, *assuming arguendo*, that the procedural requirements were met, a considerably different result would have ensued.[98] In the case of *Keshecki v. St. Vincent's Med. Ctr.*,[99] the New York Supreme Court for Richmond County, recognized that the physician-patient confidentiality privilege had been codified in New York state law for over 175 years.[100] Furthermore, the court also found that plaintiffs generally waive certain privacy rights when they claim an injury because defendants are entitled to discover the nature of their injuries.[101] However, the court ultimately held that the Privacy Rule preempted New York law regarding ex parte communications because the New York law offered less stringent privacy protections.[102] Therefore, the court ruled that "HIPAA protects the privacy of the plaintiff . . . [and] [t]he only adequate remedy to protect that right is to preclude any evidence obtained contrary to [HIPAA] safeguards."[103]

While all of the aforementioned cases still remain "good law," only one interpretation conforms to the legislative intent, the plain meaning. Under the plain meaning canon of statutory construction, courts adhere to the principle that if the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute.[104] With respect to HIPAA and the Privacy Rule, courts need only look to the language of the statute when determining whether a state law is preempted by HIPAA. "The preeminent canon of statutory interpretation requires [the judiciary]

95. *Id.*
96. *Id.*
97. *Id.*
98. *See, e.g.*, Keshecki v. St. Vincent's Med. Ctr., 785 N.Y.S.2d 300, 305 (N.Y. Sup. Ct. 2004) (rejecting the implied waiver theory and holding that HIPPA requires authorization from the patient before private physician interviews are conducted).
99. *Id.*
100. *Id.* at 302.
101. *Id.*
102. *Id.* at 303.
103. *Id.* at 305.
104. Desert Palace, Inc. v. Costa, 539 U.S. 90, 98–99 (2003).

to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'"[105] HIPAA and the Privacy Rule provide the judiciary with a step-by-step guide in determining whether a state law is more stringent than HIPAA or whether state law is contrary, which minimizes the risks of nonconformity that may result from judicial discretion. Additionally, during the public commenting process, the drafters explicitly stated that they did "not intend for the privacy regulation to interfere with . . . state rules of evidence that create privileges."[106] Were it Congress' and HHS' intention to create such a privilege, it is likely that more direct and specific language would have been used, similarly to other statutorily created privileges.[107]

There are several noteworthy arguments as to why a federal physician-patient privilege is needed now, including the fact that physicians possess a greater wealth of patient health information than ever before,[108] advances in technology pose new potential threats to patient privacy,[109] and there is an increasing number of individuals with access to patients' medical information.[110] While all of these concerns are valid, they fail to account for the fact that when HIPAA and the Privacy Rule were being promulgated, the drafters were readily cognizant of these potential dangers, so much so that they extended the privacy requirements well beyond the required minimum.[111] In essence, the proponents of a federally enacted physician-patient privilege are implying that the privacy protections provided by HIPAA are insufficient and fail to achieve their intended end.

---

105. BedRoc, Ltd., LLC v. United States, 541 U.S. 176, 183 (2004) (citing Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992)).

106. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82, 462, 82, 597 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160, 164).

107. *See, e.g.*, 23 U.S.C. § 409 (2006) (stating that certain reports "shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding").

108. Ralph Ruebner & Leslie Ann Reis, *Hippocrates to HIPAA: A Foundation For A Federal Physician-Patient Privilege*, 77 TEMP. L. REV. 505, 520 (2004).

109. *Id.* at 521.

110. *Id.* at 524.

111. *See* Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, Sec. 264(b) (codified at 42 U.S.C. § 1320d). Under the pre-codified version of HIPAA, HHS was required to address only "the rights that [a patient] who is [the] subject of individually identifiable health information should have[,] the procedures that should be established for the exercise of such rights[, and] [t]he use[] and disclosures of such information that should be authorized or required." *Id.*

However, this argument is flawed in that it fails to recognize that HIPAA and the Privacy Rule act as a federally created floor which only permits the disclosure of PHI during judicial proceedings if certain procedural requirements are met.[112] Therefore, if the judiciary appropriately applies the preemption scheme, as explicitly stated in the plain language of HIPAA and the Privacy Rule, the need for a federal physician-patient privilege ceases to exist. Accordingly, in a jurisdiction where an individual waives the statutorily created physician-patient privilege by filing a lawsuit, a judge reading the plain language of HIPAA and the Privacy Rule will see that the state law is "contrary"[113] to, not "more stringent"[114] than HIPAA, thus triggering the federally created privacy protections.[115]

B. The "Judicial Proceedings" Exception to PHI Disclosure

By the time of full compliance in April 2003,[116] more than a dozen states and the District of Columbia expressly permitted ex parte interviews with plaintiffs' non-party treating physicians.[117] Despite the effect that HIPAA and the Privacy Rule had on the dissemination of PHI, nowhere among HIPAA's express provisions, or even HIPAA's legislative history, is any reference made to ex parte communication.[118] However, under the judicial proceedings exception, drafted by HHS and enacted by Congress, ex parte communication with health care providers is implicitly allowed.[119]

---

112. 45 C.F.R. § 164.512(e) (2014); *see also* discussion *infra* Part III.B (describing the requirements necessary for disclosure of PHI during judicial proceedings).

113. 45 C.F.R. § 160.202.

114. *Id.* By analyzing the plain meaning of a State law, a judge should be able to tell whether the law provides greater privacy protections with respect to individuals' identifiable health information, or greater rights to individuals with respect to that information.

115. *See* 42 U.S.C. § 1320d-(7)(a)(1) (2012); *see also* Holamn v. Rasak, 761 N.W.2d 391, 393 (Mich. Ct. App. 2008), *rev'd*, 485 N.W.2d 98 (Mich. 2010), *cert. denied*, 131 S. Ct. 913 (2011) ("Under HIPAA . . . the filing of a lawsuit does not waive the confidentiality of health information . . . ."); 45 C.F.R. § 160.203 (providing the definition of both "contrary" and "more stringent").

116. *See supra* note 8 and accompanying text.

117. Aripoli, *supra* note 4, at 506.

118. Bruce R. Parker & D.S. Gray, *The Impact of HIPAA on* Ex Parte *Interviews with Plaintiffs' Treating Physicians: Preemption or Red Herring?*, DRUG, DEVICE & BIOTECH COMM. NEWSL. (Int'l Assoc. of Def. Counsel, Chicago, Ill.), Dec. 2003, at 3–4, *reprinted in HIPPA* [sic] *and Interviews: Pre-emption or Red Herring?*, 71 DEF. COUNS. J. 208, 211 (2004).

119. 45 C.F.R. § 164.512(e) (stating that "[a] covered entity may disclose protected health information [without authorization] in the course of any judicial or administrative proceeding").

Pursuant to the Privacy Rule's regulations, a health care provider may release PHI without the patient's authorization pursuant to a court order "provided that the covered entity discloses only the [PHI] expressly authorized by such order."[120] Alternatively, PHI may be released pursuant to "a subpoena, discovery request, or other lawful process."[121] Unlike the first provision, the second provision contains a notable caveat: where no formal court order exists, the covered entity must receive from the defendant requesting PHI either "satisfactory assurance[s]" or a "qualified protective order" before disclosing the PHI.[122] The satisfactory assurances requirement represents a clear divergence from pre-HIPAA ex parte communications in that this provision places the opposing party on notice.[123] The covered entity receives satisfactory assurances when the defendants' attorney demonstrates his or her good faith effort to provide written notice to the plaintiff.[124] Additionally, the notice must include "sufficient information about the litigation" so that the patient may object to the disclosure.[125] Finally, the assurance must show that the time for objection to the disclosure has lapsed and that the patient did not file any objections, or that the court resolved all pending objections.[126]

With respect to satisfactory assurances regarding qualified protective orders, the requesting attorney must demonstrate in writing that "the parties . . . agreed to a qualified protective order and . . . presented it to the court,"[127] or "[t]he party seeking the protected health information has *requested* a qualified protective order."[128] The Privacy Rule has established a two prong restriction for a qualified protective order in that it prohibits the parties from using or disclosing the PHI beyond the scope of the pending litigation, and requires the return or destruction of the health information, including copies, at the end of the litigation.[129]

While none of these provisions expressly prohibit or allow ex parte communication some may argue that the judicial exception has a

120. *Id.* § 164.512(e)(1)(i).
121. *Id.* § 164.512(e)(1)(ii).
122. *Id.*
123. *See id.*
124. *See id.* § 164.512(e)(1)(ii)–(iii)(A).
125. *Id.* § 164.512(e)(1)(iii)(B).
126. *Id.* § 164.512(e)(1)(iii)(C)(1)–(2).
127. *Id.* § 164.512(e)(1)(iv)(A).
128. *Id.* § 164.512(e)(1)(iv)(B) (emphasis added).
129. *Id.* § 164.512(e)(1)(v)(A) –(B).

practical effect of ending the practice.[130] However, there is a significant difference between interpreting HIPAA as an outright prohibition of ex parte communication,[131] and interpreting the statute to make the practice more formal.[132] The purpose of this Comment is not to argue that the pre-HIPAA informal discovery practices are alive and well, but rather to address the glaring inconsistencies arising primarily out of the judicial proceedings exception, and suggest how a federal statute intended to increase privacy rights is misapplied in many jurisdictions.

IV. HIPAA'S IMPACT ON EX PARTE COMMUNICATION WITH PHYSICIANS

Ex parte communication with non-party treating physicians is a long-established method of discovery that provides benefits to both plaintiffs and defendants.[133] First, and most importantly, ex parte communication removes barriers that prevent parties from obtaining the candid truth.[134] By allowing ex parte communication, courts open a line of communication that is more conducive to spontaneity and less intimidating than depositions. Secondly, ex parte communication by definition permits only the interviewing party to be present.[135] Therefore, by requiring one party to forgo their presence, this invariably saves valuable time, allowing for better trial preparation.[136] In addition to saving time for both parties in preparation and attendance of depositions, ex parte communications provide a societal benefit; by saving non-party physicians from

130. "*Ex parte* communications between defense counsel and a plaintiff's treating physician for the purpose of gaining a strategic advantage in the defense of a civil lawsuit therefore violate both the letter and the spirit of [HIPAA]." David G. Wirtes, Jr. et al., *An Important Consequence of HIPAA: No More Ex Parte Communications Between Defense Attorneys and Plaintiffs' Treating Physicians*, 27 AM. J. TRIAL ADVOC. 1, 9 (2003).

131. *See* Crenshaw v. MONY Life Ins. Co., 318 F. Supp. 2d 1015, 1029 (S.D. Cal. 2004) ("HIPAA does not authorize ex parte contacts with healthcare providers.").

132. *See* Bayne v. Provost, 359 F. Supp. 2d 234, 243 (N.D.N.Y. 2005) (ordering that the qualified protective order state in bold letters that the information sought is to assist the defendant in defense of a lawsuit brought by plaintiff).

133. Angela T. Burnette & D'Andrea J. Morning, *HIPAA and Ex Parte Interviews—The Beginning of the End?*, 1 J. HEALTH & LIFE SCI. L. 73, 76–77 (2008). "[E]x parte interviews are quicker and more efficient than formal discovery in that they reduce the time needed to prepare for trial." John Jennings, *The Physician-Patient Relationship: The Permissibility of Ex Parte Communications Between Plaintiff's Treating Physicians and Defense Counsel*, 50 MO. L. REV. 441, 458 (1994).

134. J. Christopher Smith, *supra* note 35, at 252.

135. *See* BLACK'S LAW DICTIONARY 316 (9th ed. 2009).

136. *See* Burnette & Morning, *supra* note 133, at 77.

attending time-consuming depositions, they are better able to perform their medical obligations.[137] One judge post-HIPAA has gone as far as to say that requiring a deposition in lieu of ex parte communication "significantly interfer[es] with the practice of medicine."[138] Finally, ex parte communication is efficient and cost effective in that it allows parties to evaluate potential witnesses without unnecessary spending on discovery.[139]

Despite these benefits, prior to HIPAA and the promulgation of the Privacy Rule, numerous policy arguments existed disfavoring ex parte communication. An argument frequently relied upon by plaintiffs in opposition to ex parte communications "is the [risk] of a physician revealing confidential information unrelated to the lawsuit."[140] This was a legitimate concern pre-HIPAA, however, currently it is without merit. Through the promulgation of the Privacy Rule, Congress imposed limitations regarding what information a physician may disclose during ex parte interviews.[141] Under the Privacy Rule's judicial proceedings exception, "only . . . [PHI] expressly authorized [by the court]" may be disclosed during these ex parte communications.[142]

The most predominant argument disfavoring the communications is that "*ex parte* [interviews] yield no greater evidence . . . than that which is already obtainable through the regular methods of discovery."[143] Although more formal methods of discovery are available, this argument fails to recognize that these litigious alternatives subject physicians to unnecessary cross-examination,[144] and are more costly than practices such as ex parte interviews.[145]

While the policy behind ex parte interviews has been highly contested, prior to the promulgation of HIPAA and the Privacy Rule these communications "created little controversy."[146] Since HIPAA's promulgation, the arguments from the plaintiffs and defense counsel have shifted dramatically. Public policy is no longer the crux of the argument; now the plaintiff bar and defense bar are in dispute as to

137. *Id.*
138. Kish v. Graham, 88 N.Y.S.2d 313, 320 (N.Y. App. Div. 2007) (Pine, J., dissenting).
139. Burnette & Morning, *supra* note 133, at 77.
140. Bobby Russ, *Can We Talk? The Rest Of The Story Or Why Defense Attorneys Should Not Talk to the Plaintiff's Doctors*, 39 TENN. B.J., Feb. 2003, at 29.
141. 45 C.F.R. § 164.512(e)(1)(i) (2014).
142. *Id.*
143. Petrillo v. Syntex Labs., Inc., 499 N.E.2d 952, 956 (Ill. App. Ct. 1986).
144. *See* Burnette & Morning, *supra* note 133, at 77.
145. *Id.*
146. Ottinger v. Mausner, No.1527/04, slip op. at *1 (N.Y. Sup. Ct. Mar. 20, 2006).

whether HIPAA's Privacy Rule establishes an outright prohibition against ex parte interviews.[147] The arguments presented by both plaintiffs and defense counsels have resulted in three vastly different categories of court interpretations.

The first of these categories can be classified as judicial interpretations, which holds that ex parte interviews with a plaintiff's non-party physician violate HIPAA's Privacy Rule.[148] The second category of judicial interpretation can be classified as holding ex parte communication may occur, but only if the procedural requirements of the Privacy Rule are met.[149] The final category of interpretations is characterized as dispositions finding that HIPAA does not apply to ex parte discovery, or alternatively, questioning its applicability.[150] These varying interpretations of the same statute, some even within the same jurisdiction,[151] exemplify the need for immediate clarification of HIPAA and the Privacy Rule.

A. HIPAA Prohibits Ex Parte Communication With Physicians

When looking to the source of these inconsistent dispositions, one need only look to 45 C.F.R. §§ 164.512(e)[152] and 160.202.[153] As previously discussed in Part III.A., when a State law is "[c]ontrary"[154] to HIPAA in order for the law to not be preempted, it must be "[m]ore stringent"[155] than the requirements of the Privacy Rule. In many cases, courts are struggling both to distinguish between contrary and more stringent; specifically, these cases are focusing on whether the law "provides greater privacy protection for the [patient] who is the subject of the [PHI]."[156]

147. *See* Law v. Zuckerman, 307 F. Supp. 2d 705 (D. Md. 2004); *see also* Crenshaw v. MONY Life Ins. Co., 318 F. Supp. 2d 1015, 1027–1030 (S.D. Cal. 2004).

148. *See* EEOC v. Bos. Mkt. Corp., No. CV 03-4227, 2004 WL 3327264, at *1–5 (E.D.N.Y. Dec. 16, 2004).

149. *See Law*, 307 F. Supp. 2d at 708; *see also* 45 C.F.R. § 164.512(e) (2014) (elaborating on the procedures for disclosure).

150. *See* Holzle v. Health Servs. Grp., 801 N.Y.S.2d 234 (May 24, 2005).

151. *Compare* Bayne v. Provost, 359 F. Supp. 2d 234, 243 (N.D.N.Y. 2005) (finding that a HIPAA-compliant qualified protective order allowed ex parte communication), *with Holzle*, 801 N.Y.S.2d 234, at *6 (May 24, 2005) (finding that plaintiff waived HIPAA rights when she placed her medical condition at issue).

152. *See* 45 C.F.R. § 164.512(e).

153. *See* 45 C.F.R. § 160.202.

154. *Id.*

155. *Id.*

156. *Id.*

In the case of *Law v. Zuckerman*,[157] the Fourth Circuit addressed HIPAA and ex parte communication as a matter of first impression.[158] Although the mandated provision of the Maryland Confidentiality of Medical Records Act was contrary to HIPAA in that a covered entity could not comply with both State and Federal law, the court interpreted "greater privacy protection"[159] erroneously.[160] This interpretation established precedent not only contrary to the drafter's intentions, but to the judicial disclosure exception as well. In the comments to the Standards for Privacy of Individually Identifiable Health Information, HHS stated:

> The provisions in [section 164.512(e)] are not intended to disrupt current practice whereby an individual who is a party to a proceeding and has put his or her medical condition at issue *will not prevail without consenting* to the production of his or her protected health information. In such cases, we presume that parties will have ample notice and an opportunity to object in the context of the proceeding in which the individual is a party.[161]

Although the court in *Law* ultimately recognized that ex parte communications were permitted so long as HIPAA's disclosure requirements were satisfied,[162] this overly stringent interpretation set the tone for the Fourth Circuit, and established persuasive authority for neighboring state courts.[163]

The Tennessee Court of Appeals addressed the issue of HIPAA and ex parte communication in the case of *Alsip v. Johnson City Med. Ctr.*[164] In *Alsip*, defense counsel sought an order allowing their attorneys to conduct ex parte interviews with the decedent's non-party treating physician.[165] The trial court granted the order; however, the appellate court found that the order was an abuse of

157. Law v. Zuckerman, 307 F. Supp. 2d 705 (D. Md. 2004).
158. *Id.* at 706–07.
159. 45 C.F.R. § 160.202.
160. *See supra* Part III.A.
161. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82, 462, 82, 530 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160, 164) (emphasis added).
162. *Law*, 307 F. Supp. 2d at 708.
163. *See* Alsip v. Johnson City Med. Ctr., No. E2004-00831-COA-R9-CV, 2005 WL 1536192, at *9 (Tenn. Ct. App. Jan. 27, 2005), *aff'd*, 197 S.W.3d 722 (Tenn. 2006).
164. *Id.* at *9–10.
165. *Id.* at *2.

judicial discretion because HIPAA did not permit ex parte communication.[166] Rather than performing the HIPAA balancing test to determine whether state law is contrary, the appellate court relied almost entirely on *Givens v. Mullikin*[167] and the waiver of physician-patient privilege.[168] In dicta, the court reaffirmed *Law v. Zuckerman's* definition of "more stringent,"[169] ultimately concluding that pre-HIPAA, "[ex parte] discussions were once the order of the day, [but] that day has, for better or for worse, come to an end."[170]

Although the *Alsip* decision remains at the far end of the ex parte communication spectrum, the disposition shows a complete disregard for the procedural requirements established in HIPAA's Privacy Rule.[171] Within a matter of years, the United States District Court for the Western District of Tennessee reevaluated ex parte communication, in compliance with the Privacy Rule's procedural requirements, and reached a vastly different conclusion.[172] In a case of first impression within this district, the *Wade v. Vabnick-Wener* court found that "[a]fter the requisite protective order is entered . . . defendant is free to utilize informal discovery, including ex parte interviews, under HIPAA."[173] These contradicting decisions within the same state offer support for the notion that if the judiciary cannot, *sua sponte*, systemically walk through the HIPAA analysis, then a legislatively enacted instrument must be in place to help guide them.[174]

In response to the inconsistent dispositions within its own state, the Tennessee legislature amended the Medical Malpractice statute with what has fittingly been referred to as the "Givens Fix."[175] Under the

166. *Id.* at *9–10.

167. 42 U.S.C. § 1320d-7 (2012); *Alsip*, 2005 WL 1536192, at *10; *see also* Givens v. Mullikin, 75 S.W.3d 383 (Tenn. 2002).

168. *See Givens*, 75 S.W.3d at 405.

169. Law v. Zuckerman, 307 F. Supp. 2d 705, 711 (D. Md. 2004).

170. *Alsip*, 2005 WL 1536192, at *9-10.

171. *See* 42 U.S.C. § 1320d-7 (2012); *see also* 45 C.F.R. § 160.202 (2014).

172. *See* Wade v. Vabnick-Wener, 922 F. Supp. 2d 679 (W.D. Tenn. 2010).

173. *Id.* at 685–86, 691.

174. *See generally* Nancy Efle & Anne Talcott, *Procedural Hurdles: HIPAA and Ex Parte Contact With the Treating Physician*, FOR THE DEF., May 2006, at 60, 61–65 (discussing the varied and at times contradicting results courts have reached regarding HIPPA 's Privacy Rule); *see also* TENN. CODE ANN. § 29-26-121(f) (2012 & Supp. 2014) (providing an example of legislation that provides guidance for HIPPA compliance within a "health care liability action").

175. Jennifer Pearson Taylor & Angela L. Morris, *Legal Matters: The – Givens Fix Ex Parte Communication between Non-Party Physicians and Defense Attorneys*, E. TENN. MED. NEWS, (Aug. 07, 2012), http://www.easttnmedicalnews.com/content/

"Givens Fix" defendants may petition the court upon the filing of a medical malpractice suit, "for a qualified protective order allowing the defendant or defendant and their attorneys the right to obtain [PHI] during interviews, outside the presence of claimant or claimant's counsel . . . ."[176] In essence, the Tennessee legislature adopted part of the Privacy Rule's judicial proceedings exception, incorporating it into the state code. While this legislative action appears to solve the issue of whether ex parte communications are allowed, there are several negative implications of which other states should be aware before following in Tennessee's footsteps.

First and foremost, by incorporating part of the Privacy Rule into the state code, Tennessee has not eliminated the future need to address HIPAA's applicability. The "Givens Fix," while almost verbatim conforming to the judicial proceedings exception, still fails to address what must be done with the PHI following the completion of the lawsuit.[177] This minor omission will likely have complicating results. If a clever plaintiff were to argue that HIPAA provides more stringent privacy protections than the "Givens Fix," which it essentially does,[178] then courts will be right back where they started, almost as if the "Givens Fix" never existed. Additionally, Tennessee courts and other states choosing to incorporate part of the Privacy Rule, could engage in definitional manipulation to completely bar ex parte communication. Neither HIPAA nor the Privacy Rule define "in the course of"[179] or a "judicial or administrative proceeding,"[180] or expressly state whether the term should be given its common, narrow, or broad definition.[181] Therefore, if state legislatures wish to avoid future judicial nonconformity, not only should they codify aspects of the Privacy Rule, they also should define the aforementioned phrases.

While some jurisdictions, such as Tennessee, have taken steps to address inconsistent dispositions, many have remained firm in their opinion that HIPAA prohibits ex parte communication. In the case of *Crenshaw v. MONY Life Ins. Co.*, the United States District Court for the Southern District of California issued a highly inconsistent

---

legal-matters-givens-fix%C2%9D-ex-parte-communication-between-non-party-physicians-and-defense.

176. § 29-26-121(f)(1).

177. *See id.*

178. *See* 45 C.F.R. § 164.512(e) (2014).

179. *Id.*

180. *Id.*

181. State *ex rel.* Proctor v. Messina, 320 S.W.3d 145, 156 (Mo. 2010).

opinion regarding HIPAA and ex parte communication.[182] In *Crenshaw*, the Plaintiff sought to disqualify an expert physician with whom the Defendant's counsel had communicated ex parte.[183] Because California law did not prohibit all ex parte contact, the court found that such practices were in conflict with the letter and spirit of HIPAA.[184] After determining that the communication did not fall within HIPAA's disclosure requirements, the court stated "HIPAA does not authorize ex parte contacts with healthcare providers."[185] To further add to the already glaring inconsistencies in its own opinion, the court found that PHI can be disclosed if the requirements of 45 C.F.R. § 164.512(e) are satisfied.[186] *Crenshaw*, like *Law*, represents the judiciary's growing tendency to liberally construe the Privacy Rule to fit each individual case before it, exemplifying the growing lack of uniformity with respect to HIPAA application.

The aforementioned cases represent the most conservative interpretation of HIPAA's stance on ex parte communications. Although HIPAA undoubtedly formalized the ex parte process, it was not the intention of the drafters to eliminate the practice entirely.[187] In fact, Congress sought to better regulate the practice.[188] These courts' liberal construction of the unambiguous language of HIPAA's Privacy Rule has subsequently established bad precedent for future personal injury cases.

B. HIPAA Permits Ex Parte Communications On A Limited Basis

In regards to jurisdictions taking the middle ground approach, several have held that ex parte interviews can be conducted only if certain requirements are met. In the case of *Smith v. Rafalin*, the Supreme Court of New York directed the Plaintiff to sign HIPAA-compliant authorizations permitting defense counsel to speak privately with Plaintiff's treating physicians.[189] In support of its directive, the court recognized equal access to potential evidence, stating "no party is entitled to restrict an opponent's access to a witness, however partial or important to him . . . ."[190] Although the

182. *See* Crenshaw v. MONY Life Ins. Co., 318 F. Supp. 2d 1015 (S.D. Cal. 2004).
183. *Id.* at 1021.
184. *Id.* at 1028.
185. *Id.* at 1029.
186. *Id.* at 1028–29.
187. *See* 42 U.S.C. § 1320d-7 (2012); *see also* 45 C.F.R. § 164.512(e) (2014).
188. *See* 42 U.S.C. § 1320d-7 (2012); *see also* 45 C.F.R. § 164.512(e) (detailing the regulations for disclosure in proceedings).
189. Smith v. Rafalin, 800 N.Y.S.2d 357 (N.Y. Sup. Ct. Mar. 24, 2005).
190. *Id.*

disposition in *Smith* was initially declined to follow by the court in *Arons v. Jutkowitz*,[191] the Court of Appeals of New York reversed, holding that a plaintiff in a medical malpractice action could be compelled to execute HIPAA-compliant authorizations for ex parte communication.[192] Once again, the court found that "[a] party should not be permitted to affirmatively assert a medical condition in seeking damages . . . while simultaneously relying on [privacy] as a sword to thwart the opposition in its efforts to uncover facts critical to disputing the party's claim."[193]

With respect to jurisdictions interpreting and applying HIPAA and the Privacy Rule, New York has established some of the most inconsistent case law regarding ex parte communication.[194] Within a year of the *EEOC* opinion,[195] the United States District Court for the Northern District of New York issued an opinion addressing the validity of ex parte interviews.[196] In recognizing that "[a]bsent within the four corners" of HIPAA is "any mention of . . . *ex parte interview*[*s*]," the court in *Bayne v. Provost* granted the defendant's request for a qualified protective order to conduct ex parte interviews.[197] However, finding that HIPAA preempted New York law in respect to "more stringent" privacy protections, the *Bayne* court took it upon itself to add to the privacy protections in HIPAA.[198]

In granting the qualified protective order, the *Bayne* court ordered that the defendant include in the protective order "that the purpose of the information is to assist the Defendants in defense of a lawsuit brought by the Plaintiff," and advise the covered entity that this court order "does not compel her to participate."[199] This case represents just one of many judicial interpretations in which the court recognizes that HIPAA preempts state patient privacy laws. However, in its

191. *See* Arons v. Jutkowitz, 825 N.Y.S.2d 738, 742–43 (N.Y. App. Div. 2006), *rev'd*, 880 N.E.2d 831, 838 (N.Y. 2007).

192. *Arons*, 880 N.E.2d at 837–38.

193. *Id.* (quoting Dillenbeck v. Hess, 536 N.E.2d 1126, 1132 (N.Y. 1989)).

194. *See id.; see also* Bayne v. Provost, 359 F. Supp. 2d 234 (N.D.N.Y. 2005); EEOC v. Bos. Mkt. Corp., No. CV 03-4227, 2004 WL 3327264 (E.D.N.Y. Dec. 16, 2004).

195. *Bos. Mkt. Corp.*, 2004 WL 3327264 (holding that "ex parte communications regarding the disclosure of health information, while not expressly prohibited by HIPAA, create . . . too great a risk of running afoul of that statute's strong federal policy in favor of protecting the privacy of patient medical records.").

196. *Bayne*, 359 F. Supp. 2d at 234.

197. *Id.* at 240, 243.

198. *Id.* at 241–42; 45 C.F.R. § 160.202 (2014) (defining "more stringent").

199. *Bayne*, 359 F. Supp. 2d at 243.

application of the Privacy Rule, the court overstretched the express definition of qualified protective order found therein.[200] The Privacy Rule unambiguously defines a qualified protective order as an order of the court "[prohibiting] the parties from using or disclosing the [PHI] for any purpose other than the litigation . . . and requires the return . . . or destruction of the [PHI] at the end of the litigation."[201] Therefore, by acknowledging that HIPAA preempts New York state disclosure laws, the court bound itself to the application of HIPAA's regulations.

C. Dispositions Questioning HIPAA's Validity and Applicability

The final category of dispositions truly emphasizes the lack of uniformity and uncertainty as to the effect of HIPAA on ex parte communications. In the case of *Smith v. American Home Products Corp. Wyeth-Ayerst Pharmaceutical*, plaintiffs filed a products liability suit against the defendant for producing an allegedly harmful pharmaceutical drug.[202] In undertaking a complete HIPAA analysis, the *Smith* court recognized that HIPAA was more stringent than New Jersey law in certain respects, and conversely New Jersey law was more stringent in other respects.[203] After weighing the true policy behind HIPAA, the court found that this policy goal is not diminished through the use of ex parte communication.[204] Similar to other dispositions, the *Smith* court relied on the fact that "informal discovery is not expressly addressed under HIPAA,"[205] therefore, "courts should be governed by state law."[206] In the *Smith* court's view, New Jersey had "established confidentiality protections" that provided adequate privacy to patient's PHI, as required by HIPAA.[207] Specifically, the court referred to the New Jersey Supreme Court case of *Stempler v. Speidell*, which established three privacy requirements when defense counsel conducted ex parte interviews.[208] Although the

200. *Id.* at 241; 45 C.F.R. § 164.512(e)(v)(A)–(B).

201. 45 C.F.R. § 164.512(e)(v)(A)–(B).

202. Smith v. Am. Home Prods. Corp. Wyeth-Ayerst Pharm., 855 A.2d 608, 609 (N.J. Super. Ct. Law Div. 2003).

203. *Id.* at 622–23 (stating that "[o]ne area where state law is more stringent than HIPAA is related to mental health care practice").

204. *Id.* at 623.

205. *Id.*

206. *Id.*

207. *Id.* at 619.

208. *Id.* at 612 (citing Stempler v. Speidell, 495 A.2d 857, 864 (N.J. 1985)). When defense counsel conducts ex parte interviews, counsel must: (1) provide plaintiff's counsel with reasonable notice as to the time and place of the interview, (2) provide the physician with a description of the anticipated scope of the conversation, and (3)

Smith court recognized these privacy requirements, the court also acknowledged that just as in HIPAA, New Jersey statutory law "carries an exception for civil litigation."[209] While the *Smith* court reasoned that changes in "discovery techniques [are] not a role for this court," in deciding whether "HIPAA preempt[ed] informal discovery techniques," the court concluded resoundingly that the "[t]he answer is plainly 'no.'"[210] Notwithstanding this rationale, the *Smith* court ultimately rejected the defendant's request for ex parte communication on the grounds of judicial economy, not privacy constraints.[211]

In addition to reserving ex parte grants to state courts, courts have questioned whether or not ex parte communication even falls under the "judicial proceedings" exception to 45 C.F.R. § 164.512(e).[212] In the case of *State ex rel. Proctor v. Messina*, the Supreme Court of Missouri sitting en banc provided a thorough analysis of HIPAA's "judicial proceedings" exception.[213] Of the greatest concern for the *Proctor* court was the term's varying definition depending of the context of its use.[214] After significant discussion of the multiple contexts in which a "judicial proceeding" can occur, the *Proctor* court ultimately found that "45 C.F.R. 164.512(e), which permits disclosures in the course of judicial proceedings, *does not* apply to a meeting for *ex parte* communications, and consequently, a trial court has no authority to issue a purported HIPAA order . . . ."[215]

The aforementioned cases more than adequately illustrate the confusion HIPAA and the Privacy Rule generate. While HIPAA was promulgated as a device to protect medical information in the face of numerous electronic advancements, increased privacy regulations

---

clearly communicate that the physician's participation is voluntary. *Stempler*, 495 A.2d at 864.

209. *See Smith*, 855 A.2d at 620 (citing N.J. STAT. ANN. § 2A:84A-22.4 (2014)); *see also* 45 C.F.R. § 164.512(e) (2014).

210. *Smith*, 855 A.2d at 621.

211. *See id.* at 625–26. Due to the fact that there were "approximately 300 [phenylpropanolamine tort cases] on [the] court's docket and only one and a half months until trial," the court found that it would be "improvident to cease discovery to hold extensive hearings as to what constitutes 'pertinent' medical information and/or cite all 'more stringent' statutory privacy constraints may apply to ex parte interviews." *Id.* at 625.

212. *See, e.g.*, State *ex rel.* Proctor v. Messina, 320 S.W.3d 145, 155–56 (Mo. 2010) (en banc); *see also* 45 C.F.R. § 164.512(e) (2014) (explaining what a covered entity must disclose throughout proceedings).

213. *Proctor*, 320 S.W.3d at 155–56.

214. *Id.*

215. *Id.* at 157 (emphasis added).

were also an established end. However, the bewildering impact on state discovery practices has been an unintended collateral result. Through the persistence of plaintiffs' attorneys in conjunction with inconsistent judicial interpretations, HIPAA has unnecessarily become a federal symbol of instability and irresolution.

V. A HIPAA INTERPRETATION EVERYONE CAN AGREE UPON?

In the years since the promulgation of the Privacy Rule, few courts, if any, have effectively balanced the plaintiffs' privacy concerns with respect to their PHI and defendants' desire for cost effective discovery.[216] Although ex parte communications do present a risk that physicians may inadvertently disclose information not related to the lawsuit,[217] they also provide a discovery mechanism which is less litigious and intimidating to physicians.[218] The New Jersey Superior Court, in *Smith v. American Home Products Corp. Wyeth-Ayerst Pharmaceutical*, issued a well-reasoned opinion wherein it successfully balanced the plaintiff's competing interest for privacy with the defendant's desire for cost effective discovery.[219] The *Smith* court was able to achieve such a noteworthy conclusion through its determination that "informal discovery is not expressly addressed under HIPAA," thus permitting defense attorneys to conduct ex parte interviews within the privacy requirements afforded by state law.[220] While this is a valid proposal for states that already have established privacy protections, it begs the question: what should states do that do not have these preexisting requirements?

While it is not implausible for state legislatures to amend current statutory law, similar to the action taken by the Tennessee State Legislature,[221] this may not be the most prudent approach. The more practical option is for courts to create these protections through case law similar to the Supreme Court of New Jersey in *Stempler v. Speidell*.[222] In fact, in several jurisdictions where HIPAA and the Privacy Rule are at issue, courts have established these protections without even realizing it. For example, in the case of *Bayne v. Provost*, the United States District Court for the Northern District of

216. *See* Smith v. Am. Home Prods. Corp. Wyeth-Ayerst Pharm, 855 A.2d 608, 617–18 (N.J. Super Ct. Law Div. 2003).
217. Russ, *supra* note 140, at 29.
218. *Id.*
219. *See Smith*, A.2d at 619–27.
220. *See id.* at 623.
221. *See* TENN. CODE ANN. § 29-26-121(f)(1) (2012 & Supp. 2014).
222. Stempler v. Speidell, 495 A.2d 857, 864 (N.J. 1985).

New York granted a qualified protective order on the basis that the defendant notify the physician "that the purpose of the [ex parte interview] is to assist . . . in defense of a lawsuit brought by the Plaintiff," and advise the physician that this court order "does not compel her to participate."[223] These protections are nearly parallel to those relied upon by the *Smith* court.[224] Therefore, this Comment encourages future courts to adopt the logic of the *Smith* court in order to best address and effectuate the privacy and cost concerns of litigants.

VI. CONCLUSION

Prior to HIPAA's 1996 enactment, more than a dozen states explicitly permitted varying degrees of ex parte communication between defense attorneys and plaintiffs' non-party treating physicians.[225] In response to the growing need for greater patient privacy, HHS and Congress promulgated the Privacy Rule in order to better achieve HIPAA's ends.[226] However, the debate over HIPAA has continued nearly two decades after its enactment.[227] Without question, HIPAA and the Privacy Rule altered the ex parte dynamic, as demonstrated in cases such as *Law* and *Crenshaw*.[228] Unlike the pre-HIPAA time in which a defense attorney could speak freely with a plaintiff's physician, the availability of informal discovery is no longer a certainty.

HIPAA's federal floor of privacy protection, combined with its preemption scheme, supersedes any state law that fails to afford patients minimum privacy protections.[229] However, just because HIPAA preempts "less stringent" state discovery laws does not mean that the informal practice of ex parte communication is extinct. Yes, the "informal" nature has been removed from ex parte communications, but the practice is very much alive and well.[230] Promulgated by HHS and Congress, the judicial proceedings

223. Bayne v. Provost, 359 F. Supp. 2d 234, 243 (N.D.N.Y. 2005).
224. *Smith*, 855 A.2d at 612 (citing Stempler v. Speidell, 495 A.2d 857, 859–864) (N.J. 1985)); *see supra* note 210 and accompanying text.
225. *Aripoli*, *supra* note 4, at 505–06.
226. *See supra* Part II.
227. *See supra* notes 8–12 and accompanying text.
237. *See supra* Parts III, IV (citing Law v. Zuckerman, 307 F. Supp. 2d 705 (D. Md. 2004); Crenshaw v. MONY Life Ins. Co., 318 F. Supp. 2d 1015 (S.D. Cal. 2004)).
228. *See supra* Parts III, IV.
229. *See supra* Part III.A.
230. *See supra* Parts IV.B–C, V.

exception to HIPAA and the Privacy Rule explicitly provide a mechanism in which "formal" ex parte communication is permissible.[231] So long as the petitioning attorney satisfies the requirements contained 45 C.F.R. § 164.512(e), there is a likelihood, albeit not guaranteed, that ex parte communication will be ordered by the court.

It is no longer necessary for the HIPAA debate to be stalled at the crossroads of judicial interpretation, patient privacy, and fiduciary concern. Under the plain language interpretation of HIPAA and the Privacy Rule, combined with a balancing of state law, plaintiffs are no longer permitted to utilize the statutes as both a sword and shield to deflect defense counsel's requests for ex parte communication.[232] Under the interpretation set forth in this Comment, both plaintiffs and defendants now stand on equal footing with respect to ex parte communication.

*Myles J. Poster**

* I would like to dedicate this Comment to my family—specifically, my Mother, Father, and Sister—for their unfaltering support throughout the drafting process. Additionally, I would like to thank Professor Dave Jaros for his patience and guidance, as well as his seemingly unlimited supply of constructive criticism. Finally, I would like to thank Andrew Narod, Esq., for his insight and suggestions regarding HIPAA, the Privacy Rule, and ex parte communication.

231. *See supra* Part III.B.

232. *See supra* Part III.A.1.