STATE OF MICHIGAN

IN THE SUPREME COURT

ANDREA L. HOLMAN, Personal Representative
of the Estate of LINDA CLIPPERT, Deceased,

Plaintiff/Appellant,

v

MARK RASAK, D.O.,

Defendant/Appellee.

Supreme Court No. 137993
COA Docket No.279879
Lower Court Case No. 05-068-493-NH

DEFENDANT/APPELLEE'S RESPONSE TO PLAINTIFF/APPELLANT'S BRIEF ON APPEAL

PROOF OF SERVICE

ORAL ARGUMENT REQUESTED

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STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction pursuant to **MCR 7.301(A)(2).** Jurisdiction was properly invoked. Plaintiff/Appellant timely filed her Application for Leave to Appeal the November 18, 2008 Judgment of the Michigan Court of Appeals. This Court's May 7, 2009 Order granted leave to appeal. **(Appellee's Apx., p. 3b).**

STATEMENT OF QUESTION PRESENTED

I. WHETHER THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 (HIPAA) PERMITS *EX PARTE* INTERVIEWS BY DEFENSE COUNSEL WITH TREATING PHYSICIANS PURSUANT TO A QUALIFIED PROTECTIVE ORDER.

DEFENDANT/APPELLEE SAYS:	**"YES"**
PLAINTIFF/APPELLANT SAYS:	**"NO"**
THE TRIAL COURT SAID:	**"NO"**
THE MICHIGAN COURT OF APPEALS SAID:	**"YES"**

COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

A. Factual Background and Proceedings in the Trial Court.

This is a medical malpractice action in which Plaintiff/Appellant, Andrea Holman alleges that Defendant/Appellee, Mark Rasak, D.O., failed to properly diagnose and treat Plaintiff's Decedent, Linda Clippert's coronary artery disease and pending myocardial infarction. Plaintiff alleges that this resulted in Ms. Clippert's death. Ms. Clippert had an extensive history of medical problems during the years leading up to her death. These problems included: hypertension; elevated cholesterol; myocardial infarction in 1995, requiring angioplasty of her right coronary artery; triple-vessel coronary artery disease, including 80% - 90% occlusion of the right coronary artery in March 2002, requiring catheterization, angioplasty and stenting; diabetes since the early-1990s; Legionnaire's Disease, requiring intubation and a tracheotomy in January 2001; Diabetic neuropathy; deep vein thrombosis; tobacco abuse; and osteoarthritis. **(Appellant's Apx., pp. 23a-25a).** During an admission to Providence Hospital in March 2002, approximately four months before the treatment at issue here, Ms. Clippert received a consultation from a cardiovascular surgeon, Gary Goodman, M.D. In his report, Dr. Goodman stated as follows:

> Cardiac catheterization demonstrates her to have triple vessel coronary artery disease, but the lesion in the left anterior descending artery does not appear critical at this point. ... I think that at her age and with her disease and multiple problems, that she will continue to go on to become progressively more diseased. I would suggest reserving surgical revascularization for such a time when her left anterior descending artery disease becomes critical and a complete revascularization can be performed. **(Id., pp. 26a-27a).**

After Plaintiff filed this medical malpractice action, defense counsel sought to interview Dr. Goodman to investigate possible proximate causation issues raised by his report. **(Id., p. 75a).** Defense counsel had already obtained a release which was compliant with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") from Plaintiff to obtain Dr. Goodman's medical records. **(Id., p. 84a).** However, Plaintiff's counsel took the position that an *ex parte* interview was

not allowed under HIPAA without Plaintiff's counsel's consent, which he refused to give.

Defense counsel moved for a protective order, citing ***Croskey v BMW*, 2005 WL 4704767 (ED Mich 2005) (Appellee's Apx., p. 7b)**, which held that HIPAA does not require that defense counsel notify plaintiff's counsel or obtain plaintiff's counsel's consent before holding *ex parte* meetings with plaintiff's physicians, so long as an appropriate protective order is entered which provides "clear and explicit notice to plaintiff's treating physician both as to the purpose of the interview and to the fact that the interview is not required...." **(Id., p. 14b).** In *Croskey*, U.S. District Court Judge Nancy Edmunds reversed in part a Magistrate Judge's determination that HIPAA did not allow defense counsel to conduct *ex parte* meetings with plaintiff's treating physicians unless plaintiff's counsel was notified and gave his consent. Judge Edmunds' decision stated:

> Defendant argues that the requirement of notice to plaintiff's counsel will have the practical effect of obstructing, or precluding entirely, *ex parte* interviews, and that it is "entitled under principles of fundamental fairness to investigate the health condition of plaintiff without interference of and without disclosing its work product to his counsel." Defendant maintains that plaintiff should not be permitted to use the patient-physician privilege "as both a sword and a shield." ... [T]he requirements [have been described] as being "analogous to sending a boxer into a ring wearing a blindfold!"
>
> These concerns are legitimate. ... [T]hey provide the basis for Michigan law, which would give defendants relatively unfettered access to a plaintiff's physician based on the goal of open and fair discovery. This is exactly what led to the Magistrate's correct conclusion that Michigan law is less stringent than HIPAA, and is therefore preempted. **Preemption does not extinguish the possibility, however, that the policy rationale behind Michigan law might fit neatly within the HIPAA framework**.
>
> The problem with 45 CFR §164.512(e) is that it does not explicitly mention *ex parte* interviews. In fact, the requirements of a "qualified protective order" include "the return to the covered entity or destruction of the protected health information (including all copies made)," which suggests that this section may have been intended only to cover *documentary* evidence. Given this ambiguity, the Magistrate found that additional requirements were necessary to further the goals of HIPAA.

> As to the first additional requirement, notice to plaintiff's counsel, the Magistrate was in error. **Notice to plaintiff's counsel would render superfluous Parts (ii)(A) and (ii)(B) of the disputed statute. The use of the term "or" between them makes clear that these were intended to be alternate provisions, a fact that the Magistrate correctly recognized. Part (ii)(A) deals with notice to the plaintiff, while Part (ii)(B) deals with a qualified protective order from a court. Notice to plaintiff's counsel would defeat the entire purpose of utilizing Part (ii)(B) rather than Part (ii)(A), since under the Magistrate's holding, plaintiff not only must be notified, but must consent to the *ex parte* interview taking place. To allow plaintiff to block the interview would be inconsistent with HIPAA's structure, and would impede defendant's access to evidence. For these reasons, 45 CFR§164.512(e)(1)(ii)(B), as defined by Section 164.512(e)(1)(v), does not require specific notice to plaintiff's counsel before defendant conducts an *ex parte* interview with plaintiff's treating physician. Nor does it require plaintiff to consent to such an interview. (Appellee's Apx., pp. 11b-13b, emphasis supplied, citations omitted).**

In response to Defendant's motion, plaintiff seized upon ***Croskey's*** reference to the fact that 45 CFR § 164.512(e)(1)(v) does not explicitly mention *ex parte* interviews, arguing that the "HIPAA definition of a 'qualified protective order,' by its terms, makes an '*ex parte* physician meeting' order not HIPAA compliant and therefore invalid. No court can fashion an order complying with Part (B) of the governing HIPAA regulation [requiring that protected health information be returned to the covered entity or be destroyed at the end of the litigation] where oral protected health information is disclosed *ex-parte*." **(Appellant's Apx., pp. 66a).** While this argument ostensibly relied upon certain language in the ***Croskey*** opinion, it incorrectly interpreted the opinion. This argument also ignored the outcome of ***Croskey***, i.e. that the *ex parte* interview was permitted, despite plaintiff's objections, and notwithstanding any purported ambiguity in 45 CFR §164.512(e)(1)(v). **(Appellee's Apx., p. 13b).**

The trial court heard oral argument on Defendant's Motion on June 20, 2007. **(Appellant's Apx., p. 71a).** Defense counsel referred the trial court to ***Croskey***, elaborating upon the

fundamental fairness concept discussed therein and asking the court to level the "playing field":

> [A]ll I ask for in this protective order, which I've provided a copy to plaintiff's counsel, is the explicit language in [*Croskey*]. ... [T]he policy behind this, Your Honor, is that otherwise it's an uneven playing field. Plaintiff's counsel has hinted that he's trying to meet with Dr. Goodman. He can then go out and try to meet with Dr. Goodman. I can't talk with Dr. Goodman. So he's [plaintiff's counsel] going to know what this treating physician would say at the time of trial, and perhaps before that at a video deposition, while I have no idea. And he [plaintiff's counsel] says, well, that's too bad. If you want to find out what he has to say, you have to take his deposition. That's not a fair playing field. **(Id., pp. 76a-77a).**

Plaintiff's counsel also argued that HIPAA supersedes the prior Michigan practice of allowing *ex parte* interviews with plaintiffs' treating physicians (see ***Domako v Rowe,* 438 Mich 347; 475 NW2d 30 (1991)**), and that a qualified protective order could not be fashioned here in compliance with HIPAA because HIPAA regulations addressing qualified protective orders do not apply to oral communication. **(Appellant's Apx., p. 83a).** Defense counsel responded by noting that in ***Croskey***, the federal court found that because HIPAA regulations do "not explicitly mention *ex parte* interviews ... the protective order is appropriate. ... That's why she [Judge Edmunds] says that *ex-parte* interviews are appropriate if a qualified protective order is entered." **(Id., p. 86a).**

The trial court issued a written opinion denying Defendant's Motion. **(Appellant's Apx., p. 12a).** In this Opinion and Order, the trial court noted that this issue had apparently not "been directly addressed by Michigan courts" (Id.), except for one unpublished opinion, ***Belote v Strange*, unpublished opinion per curiam of the Court of Appeals, decided October 25, 2005 (No. 262591) (Appellant's Apx., p. 120a)**, which held that HIPAA prevented *ex parte* interviews "absent a court order, written permission from the patient, or assurances that the patient has been informed of the request and given an opportunity to object." However, ***Belote*** was not controlling because defendants in that case did not seek a protective order. **(Appellant's Apx., p. 12a).** In the absence of Michigan authorities on point, the trial court cited ***Croskey***, but found that because

"defense counsel .. is seeking *ex parte* oral discussions with the treating physicians," as opposed to "written health care information," a "qualified protective order that complies with HIPAA (CFR 164.512(e)(1)(v)) cannot be fashioned. This Court believes that HIPAA does not authorize *ex parte* oral interviews because the HIPAA provision relative to a qualified protective order only seems to pertain to documentary evidence." **(Id., p. 13a).**

On July 3, 2007, Defendant filed a Motion for Reconsideration, arguing that the trial court misinterpreted ***Croskey***, which specifically found that *ex parte* oral interviews *are* permissible under HIPAA. **(Appellant's Apx., pp. 6a-7a, 102a).** Although the ***Croskey*** decision noted that HIPAA provisions relative to a qualified protective order "may have been intended only to cover documentary evidence," the court in ***Croskey*** further reasoned that to allow Plaintiff to block the *ex parte* interview "would be inconsistent with HIPAA's structure and would impede Defendant's access to information." **(Appellee's Apx., p. 12b).** Moreover, the Magistrate in ***Croskey*** had incorrectly "found that additional requirements [notice to plaintiff and its consent] were necessary to further the goals of HIPAA." **(Id.).** Defendant argued that the trial court misconstrued the significance of the ***Croskey's*** finding regarding 45 CFR §164.512(e)(1)(v). The reasoning applied by the trial court (that because the HIPAA provisions at issue did not apply to oral interviews, they were not permitted, even with a protective order) was specifically rejected by Judge Edmunds in ***Croskey*****. (Appellee's Apx., p. 10b).** Nonetheless, Defendant's Motion for Reconsideration was denied in an Opinion and Order dated July 25, 2007. **(Appellant's Apx., p. 14a).**

B. <u>Proceedings in the Court Of Appeals</u>.

Defendant filed an Application for Leave to Appeal in the Court of Appeals, which granted leave on September 13, 2007. Lower court proceedings were stayed pending resolution of the appeal. Oral argument was scheduled for November 13, 2008 and the Court of Appeals issued its published opinion on November 18, 2008.

In concluding that Defendants could conduct an *ex parte* interview with the decedent's treating physician if a qualified protective order was in place, the Court of Appeals noted that federal privacy regulations clearly applied to both oral and written information, and further, that HIPAA did not prohibit all *ex parte* communications with an adverse party's treating physician. Nonetheless, HIPAA clearly regulated the methods by which a physician may release information, including "oral" medical records. **(Appellant's Apx., pp. 19a-21a, quoting *Law v Zuckerman*, 307 F Supp 2d 705, 708 (D Md 2004)).**

The Court of Appeals agreed with Plaintiff that HIPAA would supersede Michigan law to the extent that its protections and requirements were more stringent than those provided by state law. However, it disagreed with the trial court's determination that an *ex parte* interview could not be the subject of a qualified protective order under HIPAA.

> But we disagree with the circuit court's determination that a defendant's *ex parte* interview with a treating physician may not be the subject of a qualified protective order under HIPAA. While 45 CFR 164.512(e)(1)(ii) does not specifically address oral communications, neither does it exclude oral or spoken information from the regulations governing disclosure of protected health information. As our Supreme Court observed in *Domako, supra* at 361-362, where rules are not meant to be exhaustive, "the omission of oral interviews does not mean that they are prohibited." In fact, 45 CFR 160.103 specifically provides that HIPAA applies to both oral and written information, and 45 CFR 164.512(e)(2) makes clear that the regulations concerning qualified protective orders "do not supersede other provisions of this section that otherwise permit or restrict uses or disclosures of protected health information." Thus, as the federal district court determined in *Bayne*, *supra* at 241, "if a qualified protective order, consistent with [45 CFR 164.512(e)], was in place then an *ex parte* discussion with the health provider would be appropriate." **(Appellant's Apx., p. 21a).**

The circuit court erred in finding that oral interviews could not be the subject of a qualified protective order under HIPAA. "Quite simply, Defendants may conduct an *ex parte* oral interview with Clippert's physician if a qualified protective order, consistent with 45 CFR 164.512(1)(e), is first put in place." **(Id., citing *Bayne v Provost*, 359 F Supp 2d 234 (ND NY 2005)).** This holding was

consistent with both Michigan and Federal law.

STANDARD OF REVIEW

A decision to grant or deny discovery is reviewed for an abuse of discretion. ***Mercy Mt Clemens Corp v Auto Club Ins Ass'n*, 219 Mich App 46, 50-51; 555 NW2d 871 (1996)**, as is a decision regarding a motion for a protective order. ***PT Today, Inc. v Comm'r of Office of Financial and Ins. Services*, 270 Mich App 110, 151; 715 NW2d 398 (2006)**.

This application also involves questions of statutory interpretation. The interpretation and application of a statute is a question of law which is reviewed *de novo*. ***Roberts v Mecosta Co Gen Hosp,* 466 Mich 57, 63; 642 NW2d 663 (2002) (*"Roberts I"*)**.

Decisions of lower federal courts are not binding on Michigan state courts, ***Abela v GMC*, 469 Mich 603, 606; 677 NW2d 325 (2004)**, but this Court is free to adopt their analysis if it is persuasive and instructive, ***Cowles v Bank West*, 476 Mich 1, 33; 719 NW2d 94 (2006)**.

SUMMARY OF ARGUMENT

Michigan law permits *ex parte* interviews between defense counsel and a plaintiff's treating physician in personal injury actions, after waiver of the statutory physician-patient privilege. **MCL 600.2157. MCL 600.2912f(2)-(3)** also provides that in medical malpractice actions, filing a notice of intent or a complaint waives any claim of privilege created by law. In ***Domako, supra***, this Court held that *ex parte* interviews between defense counsel and plaintiff's treating physicians were, on a voluntary basis, a permissible form of informal discovery.

In 1996, Congress enacted HIPAA, which authorized the Secretary of Health and Human Services to promulgate regulations regarding the use and disclosure of protected health information ("PHI") by covered entities, such as physicians; 45 CFR Parts 160 and 164, collectively known as the "Privacy Rule," forbid covered entities from using or disclosing PHI except as mandated or permitted by its provisions. **45 CFR §164.502(a)**.

Michigan law allowing *ex parte* interviews is "not contrary" to the Privacy Rule, and thus is not preempted by the rule where it is not impossible to comply with both state law and federal regulations. Michigan law permits, but does not require *ex parte* interviews with a plaintiff's treating physician. Federal regulations likewise permit, but do not require, PHI to be used or disclosed by covered entities without authorization or plaintiff's agreement in the course of judicial or administrative proceedings under several alternative provisions, including §164.512(e) (1)(ii)(B), when the party seeking the information provides satisfactory assurances that he or she has made reasonable efforts to secure a qualified protective order. **45 CFR § 164.512(e)(1)(v)**.

The Court of Appeals concluded that Michigan law regarding disclosure of PHI was less stringent than federal regulations, but nonetheless held that *ex parte* interviews were allowable pursuant to the litigation exception of §164.512(e), with the use of a qualified protective order. This conclusion was consistent with both Michigan's strong historical commitment to open and effective discovery, as discussed in *Domako*, and with the Legislature's preference for informal discovery, as reflected in the enactment of tort reform which was intended to reduce the cost of health care and provide an opportunity for early investigation and settlement of claims during the pre-notice period. Courts in other states have held that HIPAA does not preempt state privacy laws allowing *ex parte* interviews with treating physicians, either because HIPAA does not address the subject and therefore state law cannot be contrary to HIPAA, or because both state law and federal regulations permit disclosure of PHI in judicial proceedings and it is therefore not impossible to comply with both state law and federal regulations as long as HIPPA's procedural requirements (i.e. use of a qualified protective order) are complied with.

Other courts have concluded that the Privacy Rule is more stringent that their state laws, but that the practice of allowing *ex parte* interviews can be reconciled with HIPAA through use of a qualified protective order incorporating the procedural requirements of § 164.512(e)(1)(v), as did

the Court of Appeals in this case. Generally, states which allowed *ex parte* interviews with treaters prior to the enactment of HIPAA continue to do so, and states which barred such interviews prior to HIPAA continue to bar such interviews.

This Court has recognized that once the physician-patient privilege is waived "there are no sound legal or policy grounds for restricting access to a witness" such as a treating physician. Domako, supra at 361. HIPAA specifically permits disclosure of PHI in judicial and administrative proceedings and provides a procedural mechanism to ensure that PHI is not used for any purpose other than the litigation for which it was requested and that PHI is returned or destroyed at the end of the proceedings. The Department of Health and Human Services ("HHS") has made clear that federal privacy provisions were "not intended to disrupt current practice whereby an individual who is a party to a proceeding and has put his or her medical condition at issue will not prevail without consenting to the production of his or her protected information." **Standards for Privacy of Individually Identifiable Health Information, 65 Fed Reg 82530 (December 28, 2008), discussing 45 CFR § 164.512.** The policy rationale behind Michigan law permitting *ex parte* interviews - to provide equal access to relevant evidence and effective, cost efficient litigation - thus can be reconciled with HIPAA, which itself allows disclosure of PHI in judicial proceedings where a plaintiff has put her medical condition at issue.

ARGUMENT

MICHIGAN'S LONGSTANDING INFORMAL DISCOVERY RULES PERMITTING *EX PARTE* INTERVIEWS BETWEEN DEFENSE COUNSEL AND PLAINTIFF'S TREATING PHYSICIANS, WHEN PLAINTIFF HAS PUT HER MEDICAL CONDITION AT ISSUE BY FILING A MEDICAL MALPRACTICE ACTION, CAN BE RECONCILED WITH THE PRIVACY RULE OF HIPAA, LIMITING DISCLOSURE OF PRIVATE HEALTH INFORMATION THROUGH USE OF A HIPAA COMPLIANT QUALIFIED PROTECTIVE ORDER.

Michigan law, like that of many other states, permits *ex parte* interviews between defense

counsel and plaintiffs' treating physicians in personal injury actions. The Court of Appeals concluded that although the Privacy Rule of HIPAA altered the legal landscape with respect to disclosure of private health information, Michigan's *ex parte* rule could be reconciled with HIPAA, and HIPAA compliance could be achieved through use of a qualified protective order to protect patient information. This would allow the benefits derived from *ex parte* interviews to continue while acknowledging the heightened requirements regarding disclosure of private health information imposed by HIPAA.

Informal interviews with a treating physician allow defense counsel to assess the physician's knowledge of plaintiff's medical condition and treatment to determine if a formal deposition is necessary. Without such access, counsel must decide whether to depose the physician or to risk cross-examining him without the benefit of discovery if he appears as a witness at trial. This Court has noted that it is "routine practice ... to talk with each witness before trial to learn what the witness knows about the case and what testimony the witness is likely to give" and "[t]here is no justification for requiring costly depositions ... without knowing in advance that the testimony will be useful." ***Domako, supra* at 360-361.**

In contrast, a plaintiff has free access to the facts and expert witnesses while defendant is forced to use more expensive, inconvenient and burdensome formal discovery methods, in the absence of *ex parte* interviews, thus tilting the litigation playing field in plaintiff's favor. These considerations undoubtedly factored into this Court's decision in ***Domako, supra***, permitting such *ex parte* interviews.[1]

A review of Michigan law and the Privacy Rule of HIPAA reveals that the procedural protections for private health information can and do co-exist without conflict with the substantive

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[1] ***Domako's*** ruling is consistent with the ABA Model Rule of Professional Conduct 3.4(a)-(f), which guarantees equal access to witnesses and precludes attorneys from instructing witnesses to refrain from talking with opposing counsel. **(Appellee's Apx., p. 4b).**

provisions of Michigan Law permitting *ex parte* interviews.

A. Michigan Law Regarding *Ex Parte* Interviews.

Under Michigan law, a plaintiff who brings a personal injury action waives the physician-patient privilege. **MCR 600.2157.** A plaintiff who puts his or her medical condition at issue in a lawsuit waives any assertion of privilege when disclosure furthers the goals of discovery. ***Howe v Detroit Free Press, Inc.*, 440 Mich 203, 214; 487 NW2d 374 (1992); *Domako, supra* at 354. MCR 2.314(B)(2)** states that "if a party asserts that the medical information is subject to a privilege and the assertion has the effect of preventing discovery of medical information otherwise discoverable ... the party may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or mental or physical condition." The waiver of the physician-patient privilege is codified at § 2157:

> If the patient brings an action against any defendant to recover for any personal injuries...and the patient produces a physician as a witness on the patient's own behalf who has treated the patient for the injury... the patient shall be considered to have waived the privilege provided in this section as to another physician who has treated the patient for the injuries, disease or condition.

This waiver of privilege is based on the fundamental fairness of permitting defense counsel equal access to investigate the facts put at issue by plaintiff's claims alleging personal injuries. The purpose of the waiver provision is to preclude the suppression of evidence:

> The purpose of providing for waiver is to prevent the suppression of evidence...an attempt to use the privilege to control the timing of the release of information exceeds the purpose of the privilege and begins to erode the purpose of the waiver by repressing evidence. ***Domako, supra* at 354-355 (Internal citations omitted)**.

It would be clearly unfair to permit a plaintiff to have exclusive access to information relevant to his claim while denying defendant the same right. Allowing Plaintiff to have free access to potentially important facts while requiring Defendant to use more expensive, inconvenient and burdensome formal discovery methods such as deposition, provides an advantage to the Plaintiff.

Michigan law permits defense counsel to informally explore the opinions of Plaintiff's treating physicians without wasting resources on formal discovery.

Michigan law is not inconsistent with the requirements of HIPAA, which establish privacy rules defining and limiting the circumstances in which a covered entity may use and disclose protected information. Both Michigan law and HIPAA allow for *ex parte* interviews regarding medical information if a qualified protective order has been obtained. **45 CFR § 164.512(e)(1)(ii)(B).**

B. Michigan's History of Open Discovery and Use of *Ex Parte* Interviews.

This Court has long acknowledged Michigan's "strong historical commitment to far-reaching, open and effective discovery practice. In light of that commitment, this Court has repeatedly emphasized that discovery rules are to be liberally construed in order to further the ends of justice." ***Daniels v Allen Industries, Inc.*, 391 Mich 398, 403; 216 NW2d 762 (1974)**. This commitment to open discovery was embodied in the court rules even prior to the adoption of the Michigan Court Rules in 1985. **See *Id*. at 403, discussing GCR 1963, 310.** This Court had also recognized that the 1985 Michigan Court Rules "were intended to further liberalize Michigan's already open discovery process." ***Domako, supra* at 359** (quoting the lower appellate court's opinion). Even before the adoption of the Michigan Court Rules in 1985 it was established that defense counsel were permitted to conduct *ex parte* interviews with plaintiff's treating physicians following a waiver of the physician patient privilege. ***Id*. at 358** citing ***Gailitis v Bassett*, 5 Mich App 382, 384; 146 NW2d 708 (1966)**. Indeed, ***Domako*** stated that "[i]t would be a regression to conclude that the Michigan Court Rules of 1985 operated to preclude a method of discovery acceptable under the General Court Rules," ***Domako, supra* at 360**, and that *ex parte* interviews were "routine procedures" under the pre-1985 Court Rules. ***Id.* at 360 n.11**.

In ***Domako***, this Court considered whether defense counsel could properly conduct *ex parte*

interviews with plaintiff's treating physicians following waiver of the physician patient privilege. This Court, after an extensive review of the discovery process set forth in the Michigan Court Rules, the history of *ex parte* interviews and the policies supporting open discovery, concluded that such interviews were allowed.

> The scope of discovery is outlined in MCR 2.302(B)(1) which provides: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . ." Since any relevant non privileged information is discoverable, and plaintiffs do not contest the relevance of the information sought from Dr. Abbassian [plaintiff's treating physician], the information could only be shielded from discovery on the basis of privilege. ***Id.*** **at 353.**

_____The physician-patient privilege, codified at § 2157, provides for waiver of the privilege when plaintiff has brought an action for personal injury or malpractice and plaintiff produces any physician as a witness on his own behalf in a malpractice action. The Michigan Court Rules, MCR 2.314(A)(1)(b), likewise provide for a waiver of the physician-patient privilege.[2]

_____***Domako*** further discussed the purposes behind the physician-patient privilege *vis-a-vis* the purpose of providing for waiver:

> The purpose behind the physician-patient privilege is to protect the confidential nature of the physician-patient relationship and to encourage the patient to make a full disclosure of symptoms and conditions. The purpose of providing for waiver is to prevent the suppression of evidence. ("Waiver. . . [is] to prevent the suppression of evidence by one seeking aid of the law and securing compensation for personal injury"). An attempt to use the privilege to control the timing of the release of information exceeds the purpose of the privilege and begins to erode the purpose of waiver

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[2] Pursuant to MCR 2.314(C)(1)(d), a party who does not assert the physician-patient privilege must furnish signed authorizations to the requesting party in the form approved by the State Court Administrator. That form is virtually identical to the HIPAA Authorization form. **Compare Michigan Civil Service Commission Form CS-1786, HIPAA Disclosure Authorization <http://www.michigan.gov/documents/CS-1786_HIPAA_Disclosure _Authorization_92774_7.pdf> (accessed July 20, 2009) with Michigan SCAO Approved Form 315, Authorization for Release of Medical Information <http://courts.michigan.gov/scao/ courtforms/generalcivil/mc315.pdf> (accessed July 20, 2009)**.

> by repressing evidence. Both consequences are anathema to the open discovery policy of our state. The statute and the court rule both allow waiver, thus striking an appropriate balance between encouraging confident disclosure to one's physician and providing full access to relevant evidence should a charge of malpractice follow treatment. ***Domako, supra*** **at 354-355 (Internal citations omitted).**

In summary, the Court concluded that "[t]he privilege attempts to protect confidentiality, and the voluntary disclosure of the information takes away the need for confidentiality." ***Id.*** **at 357.** The Court quoted **8 Wigmore, Evidence, § 2389, p. 855**, with approval for the following rationale:

> The whole reason for the privilege is the patient's supposed unwillingness that the ailment should be disclosed to the world at large; hence the bringing of a suit in which the very declaration, and much more the proof, discloses the ailment to the world at large, is of itself an indication that the supposed repugnancy to disclosure does not exist. ***Domako, supra*** **at 357*.***

After concluding that plaintiff had waived the physician-patient privilege, the Court then addressed whether the defendant was precluded from conducting an *ex parte* interview with plaintiff's treater, acknowledging that even where the privilege has been waived, some other states have limited discovery to formal methods. Noting that even before the adoption of the Michigan Court Rules of 1985 it seemed to be established that defense counsel were permitted to conduct *ex parte* interviews with plaintiff's treating physicians following waiver of the privilege, and the further liberalization of Michigan's discovery process embodied in the new rules, "[i]t would be a regression to conclude that the Michigan Court Rules of 1985 operated to preclude a method of discovery acceptable under the General Court Rules. Furthermore, it is routine practice, sanctioned by the Standard Jury Instructions, to talk with each witness before trial to learn what the witness knows about the case and what testimony the witness is likely to give at trial. SJI 2d 2.06." ***Domako, supra*** **at 359-360.**

Also, this Court found that informal discovery could be useful, efficient and cost effective:

> Restricting parties to formal methods of discovery would not aid in the search for truth, and it would only serve to complicate trial

> preparation. MCR 1.105 expressly states that the court rules are "to be construed to secure the just, speedy, and economical determination of every action . . ." *Ex parte* interviews appear to advance each of these aims. As recognized by other jurisdictions, such informal methods are to be encouraged, for they facilitate early evaluation and settlement of cases, with a resulting decrease in litigation costs, and represent futher the wise application of judicial resources. ... There is no justification for requiring costly depositions, for example, without knowing in advance that the testimony will be useful. The public policy of simplifying litigation and encouraging settlement militates in favor of these interviews, providing there has been a waiver of the physician-patient privilege. [N]o party to litigation 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.... While we recognize that the physician is different from an ordinary witness as a result of the confidential nature of the physician's potential testimony, that confidentiality is adequately preserved by the physician-patient privilege. Once the privilege is waived, there are no sound legal or policy grounds for restricting access to the witness. ***Id.*** **at 360-361 (internal quotations and citations omitted)**.

Finally, ***Domako*** concluded that prohibition of all *ex parte* interviews would be "inconsistent with the purpose of providing equal access to relevant evidence and efficient cost-effective litigation." ***Id.*** **at 361-362**. Their omission from the Court Rules did not mean that they were prohibited, only that such interviews were not mandated and were dependent upon a physician's cooperation. Concerns over improper use of informal discovery could be addressed through use of a protective order to ensure that only relevant information was discussed and confidentiality maintained:

> Furthermore, where there is a legitimate concern over the discovery of irrelevant data, the possibility of undue influence, or the threat of breach of the physician's ethical duty, the party asserting the privilege could always establish the proper parameters for questioning through a protective order. MCR 2.302(C). ***Id.*** **at 362.**

This Court has recognized that *ex parte* interviews facilitate early evaluation and settlement of cases and decrease litigation costs

Two years after ***Domako***, in 1993, the Michigan Legislature enacted **MCL 600.2912f**, which

seems to have endorsed the practice, in medical malpractice cases, of conducting *ex parte* interviews with plaintiffs' treating physicians. Subpart 1 of this provision states that a person who has served a notice of intent, or who has filed "an action alleging medical malpractice," waives the physician-patient privilege "and any other similar privilege created by law," for the "purposes of that claim or action." **MCL 600.2912f(1)**. Subpart 2 states that a person or entity who has been served with a notice of intent, or who has been named as a defendant in a medical malpractice lawsuit, "may communicate with a person specified in section 5838a in order to obtain all information relevant to the subject matter of the claim or action and to prepare the person's or entity's defense to the claim or action." **MCL 600.2912f(2)**. This subpart further authorizes a medical malpractice defendant's "attorney or authorized representative" to engage in such communications. ***Id.*** A "person specified in section 5838a" includes "a person or entity who is or who holds himself or herself out to be a licensed health care professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment...." **MCL 600.5838a(1)**. Finally, § 2912f(3) states that such persons do not violate the physician-patient privilege "or any other similar duty or obligation created by law" when they disclose "information under subsection (2) to a person" defending a medical malpractice action, or to that "person's or entity's attorney or authorized representative...." **MCL 600.2912f(3)**.

Enactment of the statute indicates the Legislature's preference for informal discovery, which is consistent with the Legislature's enactment of tort reform to reduce the cost of health care and provide an opportunity for early investigation and settlement of claims. See ***Neal v Oakwood Hosp Corp*, 226 Mich App 701, 705; 575 NW2d 68 (1997)**, where the Court of Appeals found that "[t]he purpose of the notice requirement is to promote settlement without the need for formal litigation and reduce the cost of medical malpractice litigation while still providing compensation for meritorious medical malpractice claims that might otherwise be precluded from recovery because

of litigation costs," citing Legislative history. See also ***Roberts v Mecosta General Hospital (after remand),* 470 Mich 679, 700 n. 17; 684 NW2d 711 (2004) ("*Roberts II*")** (noting that "settlement is a primary objective of" the pre-suit notice requirement); ***Gulley-Reaves v Baciewicz*, 260 Mich App 478, 480; 679 NW2d 98 (2004)** (holding that a notice of intent must be sufficiently specific so as to afford defendants the opportunity to engage in pre-suit settlement negotiations).

In short, § 2912f allows counsel for medical malpractice defendants (or counsel for a person or entity who has not been sued, but has been served with a notice of intent) to "communicate" with any health care professionals who may have "information relevant" to the "claim or action" or a "defense to the claim or action." **MCL 600.2912f(2)**. Although the term is not defined in the statute, "communicate" is defined by ***The American Heritage Dictionary of the English Language*, 4th Ed. (2000)** as "[t]o convey information about; make known; impart: communicated his views to our office," to "reveal clearly; manifest: Her disapproval communicated itself in her frown," to "have an interchange, as of ideas," or "[t]o express oneself in such a way that one is readily and clearly understood." Thus, the term "communicate" as used in § 2912f(2) encompasses face-to-face, oral interactions. The text of § 2912f does not place any limitations upon when, where, or how such communications may take place, nor does it suggest that a plaintiff or his attorney should be present at, or even notified of, such communications. Moreover, because § 2912f(2) and § 2912f(3) specifically authorize attorneys and health care providers to engage in such interactions during the pre-suit notice period (as well as after a medical malpractice action has been commenced), the Legislature clearly envisioned that such interactions would take place outside the context of **MCR 2.301 et seq.** (i.e., depositions or interrogatories) because those Court Rules only apply "[a]fter commencement of an action...." **MCR 2.302(A)(1); MCR 2.306(A)(1).**

C. Enactment of The Health Insurance Portability and Accountability Act (HIPAA).

The Health Insurance Portability and Accountability Act ("HIPAA") was enacted by Congress

in 1996. In doing so, Congress authorized the HHS Secretary to promulgate regulations to protect the privacy of individually identifiable health information. **42 USC § 1320d-2**. These regulations generally became effective on April 14, 2003 and are collectively referred to as the "Privacy Rule" which sets forth standards and procedures for the collection and disclosure of "protected health information" ("PHI"). PHI includes:

> any information, whether *oral* or recorded in any form or medium, that: (A) is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and (B) relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual. 42 **USC § 1320d(4); 45 CFR § 160.103**. (emphasis supplied.)

Section 164.502 sets forth the general rules for the use and disclosure of PHI and provides that "[a] covered entity may not use or disclose [PHI], except as permitted or required by this subpart or by subpart C of part 160 of the subchapter." **45 CFR § 164.502(a)**. A "health care provider" is a "covered entity" and is thus prohibited from using or disclosing PHI in any form, oral, written or electronic. **42 USC § 1320d-1(a)(3)**. "Use" includes an examination of PHI; "disclosure" includes divulging or providing access to PHI. **45 CFR § 160.103.** There are specific exceptions which allow such disclosure however, and one of these is the Litigation Exception, codified at **45 CFR § 164. 512**. This provision, titled "Uses and disclosures for which consent, and authorization, or opportunity to agree or object is not required," provides for alternate methods which may be used to authorize disclosure of private health information. Plaintiff's argument focuses primarily on the first - § 512(e)(1)(i), which allows for disclosure as expressly authorized by court order. **(Appellant's Brief, pp. 12-17).** Defendant sought to meet with Plaintiff's treating physician pursuant to the third alternative, § 512(e)(1)(ii)(B), which permits disclosure of such information if the physician receives "satisfactory assurances" from the party seeking disclosure that "reasonable efforts" have been made to secure a qualified protective order. The language of the statute does

not require that defendant receive such a qualified protective order, merely that it makes reasonable efforts to secure it. As a practical matter, few if any physicians would be willing to meet with counsel in the absence of such an order given the penalties provided for unauthorized disclosure of medical information.

Defendant sought a qualified protective order pursuant to § 512(e)(1)(ii)(B), which did not require either a court order or plaintiff's consent. That provision required Defendant to provide "satisfactory assurances" (**45 CFR §164.512(e)(1)(iv)**) that reasonable efforts to secure a "qualified protective order" (**45 CFR §164.512(e)(1)(v)**) had been made. A qualified protective order means an order of the court that "prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and requires the return to the covered entity or destruction of the PHI (including all copies made) at the end of the litigation or proceeding." **45 CFR § 164.512(e)(1)(v)**.

The majority of cases which have addressed this issue have concluded that a qualified protective order may be utilized to allow *ex parte* interviews with treaters consistent with HIPAA's specific requirements. This conclusion is consistent with the structure and purpose of HIPAA. HHS has observed that HIPAA's provisions were "not intended to disrupt current practice whereby an individual who is a party to a proceeding and has put his or her medical condition at issue will not prevail without consenting to the production of his or her protected information." **See 65 Fed Reg 82530, discussing 45 CFR § 164.512.**

Plaintiffs may authorize disclosure of protected health information or, alternatively Defendants may proceed under the specified exception for subpoenas, discovery requests and other lawful process provided for under 45 CFR § 164.512(e)(1)(ii)(B) as defense counsel did here.

D. <u>HIPAA and its Impact on State Privacy Laws</u>.

HIPAA was enacted in 1996, principally to increase the portability and continuity of health

insurance. The statute mandates national standards for electronic medical data management. The shift from paper based to electronic records was perceived to threaten the confidentiality of sensitive patient information. However, when first enacted, HIPAA did not specifically regulate the privacy of personal, identifiable health information.[3] HIPAA authorized HHS to promulgate standards governing disclosure of patient health information in the event Congress did not pass privacy legislation within three years of HIPAA's enactment. When the self-imposed deadline passed, HHS proposed and later adopted a privacy pule, 45 CFR, parts 160 and 164, to regulate the use and disclosure of protected health information ("PHI"). PHI includes information in any form, including oral, created or received by covered entities and which is individually identifiable. See **45 CFR § 160.103.** In most instances, compliance with the Rule was required by April 14, 2003. **45 CFR § 164.534.** The Privacy Rule forbids organizations subject to its requirements – that is covered entities – from using or disclosing PHI except as mandated or permitted by its provisions. **45 CFR § 164.502(a)**. A "covered entity" is defined as a "health plan," "health care clearinghouse," or a "health care provider who transmits any health information in electronic form...." **45 CFR § 160.103. See also 42 USC § 1320d(2)-(5)** (defining "health plan," "health care clearinghouse," "health care provider,"and "health information").

1. Mandated and Permitted Disclosures.

Disclosure is mandated by the Privacy Rule in only two instances: when an individual requests his own health information, or when the Secretary of HHS requests a covered entity for access to the information in order to enforce HIPAA. See **45 CFR § 164.502(a)(2)(i) & (ii)**; ***Arons v Jutkowitz,* 9 NY3d 393, 413; 880 NE2d 831 (2007).**[4] In contrast, there are numerous

[3] **White and Hoffman, *The Privacy Standards Under the Health Insurance Portability and Accountability Act: A Practical Guide to Promote Order and Avoid Potential Chaos*, 106 W Va L Rev 709, 719 (2004).**

[4] **See also 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, 1098 (2006).**

circumstances in which the Rule permits the use and disclosure of PHI. "Uses and disclosures qualifying as permissive under the Privacy Rule are just that – for purposes of compliance with HIPAA, the required entity is permitted, but not required, to use the information or make the disclosure. Stated another way, a covered entity, such as a physician, who releases a patient's protected health information in a way permitted by the Privacy Rule does not violate HIPAA; however, neither the statute nor the rule *requires* the physician to release this information." ***Arons, supra* at 413** (internal quotations omitted)(emphasis in original).

Among the categories of permissive use and disclosure is 45 CFR § 164.512, "Uses and Disclosures For Which an Authorization or Opportunity to Agree or Object is Not Required," which includes the litigation exception, **45 CFR §164.512(e)(1)**, at issue here.

2. Use and Disclosure of PHI Pursuant to the Litigation Exception.

The litigation exception allows covered entities to use or disclose PHI without an authorization or oral agreement from the individual when the use or disclosure is made "in the course of any judicial or administrative proceeding...." **45 CFR § 164.512(e)(1)**. This exception permits disclosure of PHI by a covered entity under any one of four alternative rules:

1. HIPAA provides that an authorization is not required in judicial or administrative proceedings and allows disclosure in response to an order of a court or administrative tribunal. **45 CFR §164.512(e)(1)(i)**. Disclosure pursuant to a court order specifies that disclosure must be limited to "only the protected health information expressly authorized by such order." ***Id.***

2. Disclosure is also permitted in "response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of the court or administrative tribunal, if ... the covered entity receives satisfactory assurances ... from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request...." **45 CFR § 164.512(e)(1)(ii)(A)**.

3. Alternatively, disclosure is permitted if the covered entity "receives satisfactory assurance ... from the party seeking the

information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of (e)(1)(v)...." **45 CFR §164.512(e)(1)(ii)(B).** "For the purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that: (A) [p]rohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and (B) [r]equires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding." **45 CFR § 512(e)(1)(v)(A) & (B)**.

4. Finally, HIPAA does not prevent a covered entity from releasing protected information pursuant to a subpoena, discovery request or other lawful process as long as the covered entity itself makes reasonable efforts to notify the individual or to seek a qualified protective order. **45 CFR § 512(e)(1)(vi)**.

Here, defense counsel sought an *ex parte* interview with Plaintiff's decedent's treating physician as authorized by §164.512(e)(1)(ii)(B) through use of a qualified protective order.

3. <u>HIPAA Preemption of State Privacy Laws</u>.

Various commentators have noted that although the HIPAA provisions governing discovery of PHI are lengthy, they are not comprehensive and fail to address the practice of conducting *ex parte* interviews with treating physicians.[5] Indeed, some courts have concluded that there can be

[5] "[N]owhere among HIPAA's express purposes, or even in HIPAA's legislative history, is any reference made to *ex parte* interviews. Rather, the impact on informal discovery tactics in litigation has come without an express congressional intent to that end. Not only is there a conspicuous absence of 'any reference to or balancing of the competing policy considerations regarding *ex parte* interviews,' but the DHHS specifically stated that at least one of its HIPAA privacy regulations was 'not intended to disrupt current practice whereby an individual who is party to a proceeding and has put his or her medical condition at issue will not prevail without consenting to the production of his or her protected information.' It is important to note that this statement says nothing about whether such information has to be provided informally or through formal judicial proceedings, and thus does nothing to clarify what effect HIPAA will have on informal proceedings such as *ex parte* interviews." **Comment, *Don't Ask, Don't Tell: HIPAA's Effect on Informal Discovery in Products Liability and Personal Injury Cases,* 2006 BYU L Rev 1075, 1082-1083 (2006).**

no conflict between state law and the HIPAA Privacy Rule on the subject of *ex parte* interviews of treating physicians because HIPAA does not address the subject. **See *Arons, supra* at 415; *Smith v American Home Products Corp.,* 372 NJ Super 105; 855 A2d 608 (2003).**[6]

HIPAA only preempts "contrary" state laws, unless an exception applies. **45 CFR § 160.203.** Therefore, the initial determination in any preemption analysis is to determine whether state law and HIPAA are "contrary."[7] HIPAA's general preemption rule provides: "a standard, requirement, or implementation specification adopted under the subchapter that is contrary to a provision of state

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[6] The argument that there is no conflict, and therefore no preemption, is also supported by a report issued by the HHS' Office for Civil Rights in 2003, discussed in ***Holmes v Nightingale,* 158 P3rd 1039, 1049 (Okla 2007) (Colbert, J., concurring)**:

> In Oklahoma, the Oklahoma State Medical Association and the Oklahoma Hospital Association made a joint request to the Secretary of the Department of Health and Human Services for an exception to any preemptive effect of HIPAA on section 19(B) [an Oklahoma statute that establishes a waiver of the physician-patient privilege upon the filing of a medical malpractice lawsuit]. The Secretary delegated the decision on such requests to the Office for Civil Rights. On June 24, 2003, the Director of that office issued his response to the request.
>
> The response began by quoting the exemption request which noted that section 19(B) permits defense counsel in a medical malpractice action "to gather medical records and/or conference with willing health care providers without the necessity of a patient authorization, subpoena, or court order." After analyzing section 19(B) and HIPAA, the response concluded that there was no preemption issue because "covered entities can comply with both [section] 19(B) and 45 C.F.R. § 164.512(e)(1)(ii)-(vi). It is neither impossible for a health care provider to comply with both statutes, nor is complying with the Oklahoma statute an obstacle to the accomplishment or execution of the purposes and objectives of HIPAA." Thus, no exemption was required because preemption was not an issue. ***Id.***

[7] One commentator has noted that the single error most frequently made by courts is the failure to determine whether the two laws are contrary. "This first step is critical because when the laws are not contrary, they can generally be reconciled without one law preempting the other, so that the subsequent, more difficult stringency analysis can be avoided." **Cohen, *Reconciling, supra* at 1123.**

law preempts the provision of State law...." ***Id.*** For purposes of HIPAA, "contrary" means:

> Contrary, when used to compare a provision of State law to a standard, requirement, or implementation specification adopted under the subchapter, means:
>
> > 1. A covered entity would find it impossible to comply with both the State and federal requirements [the "impossibility test"] or,
> >
> > 2. The provision of state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of part C of title XI of the Act or section 264 of Pub. L. 104-191, as applicable [the "obstacle test"]. **45 CFR §160.202.**

To be "contrary" within the meaning of the Rule, a covered entity would have to find it impossible to comply with both the state and federal requirements. Under the 'impossibility test", a state law is contrary to the Privacy Rule only if it would be impossible for a covered entity to comply with both the state requirement and the Rule. ***Arons, supra* at 414.**

In ***Arons****,* the New York Court of Appeals concluded:

> [T]here can be no conflict between New York law and HIPAA on the subject of *ex parte* interviews of treating physicians because HIPAA does not address this subject. Accordingly, the Privacy Rule does not prevent this informal discovery from going forward, it merely superimposes procedural prerequisites. As a practical matter, this means that the attorney who wishes to contact an adverse party's treating physician must first obtain a valid HIPAA authorization or a court or administrative order; or must issue a subpoena, discovery request or other lawful process with satisfactory assurances relating to either notification or a qualified protective order. ***Id*****. at 415.**

Arons held that plaintiffs were required to sign HIPAA compliant authorizations allowing *ex parte* meetings and struck additional conditions imposed by the lower courts, finding them to be improper. ***Id.*** **at 416.** In support of its conclusion that state law was not preempted, *Arons* quoted HHS regulations which state that, where "there is a State provision and no comparable or analogous federal provision, or where the converse is the case," there is no possibility of preemption because in the absence of anything to compare "there cannot be ... a 'contrary'

requirement" and so "the stand-alone requirement – be it State or federal – is effective." ***Id.* at 415, quoting 64 Fed Reg 59918, 59995**.

In *Smith, supra*, a New Jersey Court was asked to determine if HIPAA preempted New Jersey law specifically permitting *ex parte* interviews with health care providers. The court concluded that since none of the HIPAA regulations explicitly addressed the issue of *ex parte* interviews, informal discovery in New Jersey was governed by state law. ***Smith, supra* at 134.**

Michigan law is not contrary to HIPAA because it is possible to comply with both Michigan law and the HIPPA Privacy Rule. In Michigan, state law permits disclosure of PHI by a treating physician on a voluntary basis after waiver of the physician-patient privilege, but does not mandate it. See ***Domako, supra* at 362.** HIPAA likewise permits, but does not mandate, the disclosure of PHI in the course of judicial proceedings, without notice or authorization if defense counsel seeks a qualified protective order. **45 CFR § 512 (e)(1)(ii)(B)**. HIPAA does not create a federal physician-patient privilege. ***Northwest Memorial Hospital v Ashcroft,* 362 F3d 923, 926 (7th Cir 2004)** (stating that "[w]e do not think HIPAA is rightly understood as an Act of Congress that creates a privilege."). The two provisions are thus not contrary and can be reconciled through use of a qualified protective order. Parties can comply with both the federal and state requirements because HIPAA allows disclosure of PHI during judicial or administrative proceedings and state law allows similar disclosures pursuant to *ex parte* interviews.

Additionally, HIPAA contains no provisions which expressly mention *ex parte* communication including *ex parte* interviews with treating physicians. See ***Smith, supra* at 134; *Arons, supra* at 415**. There are no provisions of the Privacy Rule analogous to Michigan law pertaining to the physician-patient privilege, waiver of that privilege or *ex parte* interviews with treating physicians, and thus there can be no finding that Michigan law is "contrary" to the provisions of HIPAA.

Moreover, Michigan law is not an obstacle to the purposes and objectives of HIPAA. Again, where a Michigan law permitting *ex parte* interviews is permissive, there is no obstacle to complying with any HIPAA mandate or prohibition and therefore no obstacle to achieving HIPAA's purposes and objectives.

HIPAA only preempts "contrary" provisions of state law, and where both HIPAA and Michigan law permit, but do not mandate, *ex parte* communication with treating physicians there is no preemption. State laws permitting disclosures can generally be reconciled with federal law by adding any procedural protections which HIPAA requires (i.e. use of a qualified protective order, authorization from the individual, or providing notice to the individual).

4. Determining Which Law is More Stringent When State Law is Found to be "Contrary" to HIPAA.

Only when state law is found to be contrary to HIPAA must a court determine whether HIPAA is more stringent than state law and thus preempts state law. In the litigation context, the preemption analysis focuses most often on the "more stringent" rule. A state law is deemed "more stringent" if it meets any one of six criteria. **45 CFR § 160.202.** The state law is generally more stringent than HIPAA when it is more restrictive than HIPAA in allowing disclosures of PHI to a third party or when it allows greater latitude to an individual to access PHI, amend PHI, or receive an accounting of disclosures of PHI.

Here, the Court of Appeals concluded that Michigan law was less stringent than HIPAA, without comparing whether the two were contrary. Because filing a lawsuit for personal injury or malpractice generally waives the statutory physician-patient privilege with respect to a condition, disease or injury at issue, **MCL 600.2157**, and a defense attorney is permitted to meet *ex parte* with plaintiff's treating physician as part of discovery, ***Domako, supra* at 361-362**, the court concluded that HIPAA was more stringent. Filing a lawsuit does not waive the confidentiality of health information pursuant to HIPAA. **(Appellant's Apx., p. 20a).**

The Court of Appeals recognized, however, that PHI could be obtained pursuant to HIPAA during the course of judicial proceedings if certain steps were followed, including use of a qualified protective order under **45 CFR § 164.512(e)(1)(ii)(B)**. Although the court concluded that HIPAA's protections and requirements were more stringent than those of Michigan law, which was thus superceded, it also recognized that the litigation exception allowed *ex parte* interviews if a qualified protective order consistent with HIPPA was in place.

The Court of Appeals did not initially determine if Michigan law and the Privacy Rule were "contrary" before deciding that HIPAA was more stringent. Nonetheless, the court's holding recognized that even if HIPAA were more stringent than Michigan law, it permitted disclosure of Plaintiff's PHI in the course of judicial proceedings with use of a qualified protective order. **(Appellant's Apx., p. 21a)**. The court's conclusion that the litigation exception applied to permit *ex parte* interviews, even if Michigan law was less stringent, was correct. Had the court initially analyzed whether the use of *ex parte* interviews was contrary to the Privacy Rule, the "more stringent" preemption analysis may not have been necessary, but the result would have been the same. Both the Privacy Rule and Michigan law permit disclosure in the course of judicial proceedings and use of a qualified protective order provides the procedural protections required by HIPAA.

E. Many Federal Courts Have Recognized that HIPAA Allows the Release of Oral Information Pursuant to a Qualified Protective Order.

Prior to the Court of Appeal's decision in this case, Michigan appellate courts had not directly addressed the issue of whether a qualified protective order under § 512(e)(1)(v) applied to permit an *ex parte* interview between counsel for a defendant and a plaintiff's treating physician.

Many federal district courts have addressed the specific issue of *ex parte* communication with health care providers and have concluded that if a qualified protective order consistent with § 164.512(e)(1)(v) is in place, that an *ex parte* discussion with a health care provider would be

appropriate. This Court has recognized that although lower federal court decisions are not binding on state courts, their analysis and conclusions may be persuasive. ***Abela, supra* at 606-607.**

Bayne, supra was one of the first published cases to consider whether HIPPA permitted *ex parte* interviews between defense counsel and plaintiff's health care providers. Concluding that such interviews were permitted, the federal court allowed defense counsel to interview one of plaintiff's treating physicians subject to a qualified protective order. The Privacy Rule made no mention of *ex parte* interviews with health care providers either to endorse or prohibit the interviews. However, it was significant to the court that 42 USC §1320d(4) defined health information to include both oral and recorded information. The court reasoned that "the only reasonable method to gain health information that remains oral and not reduced to writing is by an interview." ***Bayne, supra* at 240.**

Ultimately, the court granted defendants a qualified protective order allowing an interview between counsel for defendant and one of plaintiff's health providers conditioned on the incorporation of the directions of the court and the provisions of § 164.512(e)(1)(v)(A) and (B). ***Id.* at 243.** Shielding the health care provider from a proper *ex parte* interview "would be tantamount to denying the Defendants of their right to effective assistance of counsel." ***Id.* at 242.** The federal court also rejected plaintiff's suggestion that a deposition of the witness would resolve the issue: "a deposition is not the same as an *ex parte* interview and this Court does not have the authority to limit, control, or nullify the benefits an interview may have over a deposition, and neither should the Plaintiff." ***Id.* at 242 n. 8**.

The qualified protective order granted by the court in ***Bayne*** prohibited defendants from using or disclosing the information for any purpose other than the litigation, required them to return or destroy the protected information at the end of the litigation, to caption the document as a "Qualified Protective Order and Authorization" and use it exclusively for interview of the specified

provider. Further it noted that the purpose of the disclosure was not at the patient's request but rather to assist defendants in a suit brought by the plaintiff. Finally, defendants were required to advise the provider that participation was voluntary. ***Id.* at 243.**

Bayne looked to the few prior federal precedents available at the time to assist the court in its analysis, specifically ***Law, supra*** and ***Crenshaw v Mony Life Insurance Co.,* 318 F Supp 2d 1015 (SD Cal 2004)**. Plaintiff argues that ***Law*** and ***Crenshaw***, cited by the court in ***Bayne*,** prohibit informal discovery, and thus would not allow *ex parte* interviews. **(Appellant's Brief, p. 16).** ***Bayne*** analyzed both of these cases and concluded it could reasonably be inferred from each of the opinions that "if a qualified protective order, consistent with §164.512(e)(1)(ii)(B), (v)(A) and (B), was in place then an *ex parte* discussion would be appropriate." ***Bayne, supra* at 241.**

Law, supra addressed the question of whether adverse counsel's *ex parte* discussion with a treating physician regarding the scope of the physician's care violated HIPAA. Reasoning that a Maryland statute mandated that patient records were discoverable without authorization or notice to the patient, and therefore concluding that *ex parte* communications with the treater would fall within the HIPAA exception of 45 CFR § 164.103, counsel for defendant had met with one of Plaintiff's treating physicians without authorization or notice. ***Id*. at 712 n.3.**

Law concluded that in the absence of strict compliance with HIPAA, *ex parte* discussions were prohibited and that Maryland law was "less stringent" on the issue of *ex parte* communication and thus preempted by HIPAA. Importantly however, the court concluded that protected health information could be obtained during a judicial proceeding and listed three ways in which it could be accomplished, including pursuant to § 164.512(e)(1)(ii)(B) (through the use of a qualified protective order as sought by Defendant here). ***Law, supra* at 711, 712.** *Ex parte* interview were legitimate as long as defendant's counsel complied with HIPAA. ***Id.* at 712, 713.** First, counsel could obtain a court order allowing the health care provider to disclose the protected health

information expressly authorized by that order. "In the absence of a court order, § 164.512(e)(1)(ii)(A) and (B) provide two additional methods available when used in conjunction with more traditional means of discovery." ***Id.* at 711.**

Here, Defendant proceeded under § 164.512(e)(1)(ii)(B) to obtain a qualified protective order which would permit defense counsel to meet with Plaintiff's treating physician.

In ***Crenshaw, supra*** the court addressed an attorney's *ex parte* communication with a physician, who had on one occasion examined the plaintiff, and found that it fell outside "HIPAA's requirement that confidential medical information be disclosed pursuant to court order, subpoena or discovery request." ***Id.* at 1029.** However, the federal court also acknowledged HIPAA privacy provisions allow for disclosure in judicial proceedings if statutory safeguards are met:

> Under HIPAA, disclosure is permitted, *inter alia*, pursuant to a court order, subpoena, or discovery request when the health care provider "receives satisfactory assurance from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order..." 45 CFR § 164.512(1)(e)(ii)(b) [sic]. The protective order must prohibit "using or disclosing the protected health information for any purpose other than the litigation ..." and "[r]equire [ ] the return to the [physician] or destruction of the protected health information...at the end of the litigation or proceeding." 45 CFR § 164.512(1)(e)(v) [sic]. ***Crenshaw, supra* at 1029.**

In ***Crenshaw***, the protective order entered by the parties protected only confidential information of the defendant, not plaintiff Crenshaw, and therefore did not satisfy the requirements of HIPAA. ***Id.*, citing 45 CFR § 164.512(e)(1)(v)**. The court stated that "[o]nly formal discovery requests appear to satisfy the requirements of **§ 164.512(e)**," without any further citation or authority. HIPAA contains no definition of "discovery" or "discovery request" however (see **42 USC § 1320d; 45 CFR § 160.103; 45 CFR § 164.501**) and does not bar, or even refer to *ex parte* contacts with treating physicians. ***Smith, supra* at 134; Comment, *Don't Ask, Don't Tell, supra* at 1082-1083.**

Relying on ***Law, supra,*** and ***Crenshaw, supra***, the federal court in ***Bayne, supra,***

reasonably inferred that *ex parte* discussions with a health provider would be appropriate if a qualified protective order consistent with § 164.512(e)(1)(v)(A) and (e)(1)(v)(B) was in place. A qualified protective order would be an order of the court that prohibited the parties from using or disclosing the information for any purpose other than the litigation for which it was requested, and which required the return to the covered entity or destruction of the information at the end of the litigation or proceeding.

In turn, ***Croskey*** relied on ***Bayne*** in holding that a qualified protective order was available under HIPAA to allow an *ex parte* meeting between defense counsel and plaintiff's treating physician.

In ***Croskey***, plaintiff sought damages for injuries resulting from an alleged radiator explosion in a motor vehicle manufactured by defendant. During discovery, defendant filed an emergency motion seeking an order permitting defense counsel to meet *ex parte* "with all of [p]laintiff's treating physicians and health care providers." **(*Croskey* Magistrate Opinion, Appellee's Apx., p. 16b)**, which was initially referred to Magistrate Judge Komives, who denied defendant's request, to the extent that defendant sought to conduct the interview without plaintiff's consent. **(Id., p. 22b)**. After discussing the relevant HIPAA provisions and regulations as well as the Michigan authorities governing such discovery, Judge Komives found:

> [I]n order to conduct an *ex parte* interview with plaintiff's treating physician ... [defendant] needs not only to comply with 45 CFR § 164.512(e)(1), but also to give notice to plaintiff's counsel of the desire to conduct an *ex parte* meeting with plaintiff's treating physician and to give notice to the treating physician that such a meeting is not required. These notices ... are required in light of HIPAA's distaste for informal discovery. If plaintiff permits an *ex parte* meeting and if the treating physician is willing to conduct an *ex parte* meeting with defense counsel, plaintiff may be deemed to have waived his rights under HIPAA and the *ex parte* meeting may be conducted. **(Id., p. 32b).**

Defendant objected, arguing that the Magistrate Judge improperly added requirements to

the qualified protective order beyond those set forth in § 512(e)(1). Judge Edmunds agreed and ***reversed*** the Magistrate Judge's ruling, in part, holding that "a qualified protective order requires neither specific notice to Plaintiff's counsel nor Plaintiff's consent before Defendant may interview Plaintiff's treating physician *ex parte*." **(Id., p. 14b)**.

Judge Edmunds found that although the Magistrate Judge correctly determined that HIPAA preempts Michigan law regarding physician-patient privilege, "[p]reemption does not extinguish the possibility, however, that the policy rationale behind Michigan law might fit neatly within the HIPAA framework." **(Id., p. 12b)**. Judge Edmunds then turned to § 512(e), noting that "there are three ways in which Defendant may comply ... [1] obtaining a court order, [2] sending a subpoena or discovery request where plaintiff has been given notice of the request, or [3] sending a subpoena or discovery request where reasonable effort has been made to obtain a qualified protective order." **(Id., p. 9b, quotations omitted)**. Judge Edmunds explained:

> The problem with 45 CFR §164.512(e) is that it does not explicitly mention *ex parte* interviews. In fact, the requirements of a "qualified protective order" include "the return to the covered entity or destruction of the protected health information (including all copies made)," which suggests that this Section may have been intended only to cover *documentary* evidence. Given this ambiguity, the Magistrate found that additional requirements were necessary to further the goals of HIPAA.
>
> As to the first additional requirement, notice to Plaintiff's counsel, the Magistrate was in error. Notice to Plaintiff's counsel would render superfluous Parts (ii)(A) and (ii)(B) of the disputed statute. The use of the term "or" between them makes clear that these were intended to be alternate provisions.... Notice to Plaintiff's counsel would defeat the entire purpose of utilizing Part (ii)(B) rather than Part (ii)(A), since under the Magistrate's holding, Plaintiff not only must be notified, but must consent to the *ex parte* interview taking place. To allow Plaintiff to block the interview would be inconsistent with HIPAA's structure, and would impede Defendant's access to evidence. ... **(Id., p. 12b, emphasis supplied)**.

Further, Part (ii) (B) "does not require that a defendant actually *get* a qualified protective order, but permits the release of information based on the assurance that the defendant has

requested a qualified protective order from [a] court or administrative tribunal." **(Id., p. 11b)**.

More recently, the U.S. District Court for the Eastern District of Kentucky, found that "[n]umerous federal courts have held that a defendant is entitled to conduct *ex parte* interviews with a plaintiff's treating physicians." ***Weiss v Astellas Pharma, U.S.*, 2007 WL 2137782 (ED Ky 2007) (Appellee's Apx., p. 98b)**. "As these courts have recognized, treating physicians are important fact witnesses, and absent a privilege, no party is entitled to restrict an opponent's access to a witness, however partial or important to him.... For all of the foregoing reasons, the Magistrate Judge concludes that defendants' counsel should be permitted to have *ex parte* contact with plaintiff's treating physicians and to conduct *ex parte* interviews with these treating physicians." **(Id., p. 101b, quotation and citations omitted)**. "Private interviews permit investigation and preparation of possible defense theories without revealing potential work product. The presence of plaintiff's counsel during these witness interviews could cause interference and disruption." (Id.). (quotation and citations omitted). The Court in ***Weiss***, made these findings notwithstanding plaintiff's assertion that "allowing defendants' counsel to conduct *ex parte* interviews with plaintiff's treating physicians would unnecessarily risk disclosing plaintiff's protected, confidential medical information ... in violation of ... HIPAA...." **(Id., p. 99b)**.

The holding in ***Weiss*** was based largely upon a finding that plaintiff would not have been able to assert a physician-patient privilege under Kentucky law. **(Id., p. 100b)**. The outcome would be the same here, applying this reasoning, as Plaintiff here is likewise unable to assert physician-patient privilege under Michigan law. See **MCL 600.2157; *Domako, supra*.**

***EEOC v Boston Market Corporation*, 2004 WL 3327264 (ED NY 2007) (Appellant's Apx., p. 137a)** also considered whether *ex parte* communications with treating physicians were allowed under HIPAA and acknowledged that such interviews were not expressly prohibited by HIPAA. Section 164.512(e) specifically allowed for disclosure of health information without patient

consent if reasonable efforts have been made to secure protective order. **(Id., p. 139a)**. Although the court declined to ***order*** plaintiff to permit *ex parte* release of health information, the court accepted defendant's suggestion that a new protective order including HIPAA protections would be acceptable.

Plaintiff asserts that the federal court in ***EEOC v Boston Market*** rejected the concept that *ex parte* interviews could take place consistent with the Privacy Rule. A closer reading of the opinion shows that while the court would not *order* plaintiff to permit *ex parte* release of health information by psychologists, it was amenable to defendant's suggestion that a new HIPAA compliant order be entered allowing such contact.

> . . . Release of health information is to be made only through the use of the methods listed in HIPAA, that is, pursuant to a court order that specifies the substance of the information to be released, or pursuant to a subpoena or discovery request that adheres to the notice and protective order requirements of that statute. **(Appellant's Apx., p. 140a).**

The federal court agreed with defendant's suggestion that a new HIPAA compliant order be entered:

> The court does, however, accept the defendant's suggestion that a new protective order that includes the details required by HIPAA be entered, so that the defendants can proceed with discovery from the psychologist and other health care providers pursuant to the methods set forth in HIPAA. **(Id., p. 141a).**

Similarly, in ***Hulse v The Suburban Mobile Home Supply* Co., 2006 WL 2927519 (D Kan 2006) (Appellee's Apx., p. 53b)** the federal court granted defendant's motion for an order allowing *ex parte* interviews with plaintiff's treating physicians and rejected plaintiff's argument that *ex parte* interviews were prohibited by HIPAA. **(Id., p. 54b)**. "Defendants, by filing the present motion seeking a court order allowing the production of medical information and an *ex parte* contact with the treating physicians has [sic] complied with the HIPAA regulations." **(Id.)**. The court found that even if Defendants had sought an order pursuant to § 512(e)(1)(ii) they would be compliant with

HIPAA. **(Id., p. 55b n.3)**.

Following "well reasoned decisions directly on point from this District", including ***Hulse, supra***, the federal court in ***Sample v Zancanelli Mgmt. Corp.*, 2008 WL 508726 (D Kan 2008) (Appellee's Apx., p. 82b)** found that a qualified protective order could be fashioned, consistent with 45 CFR 164.512(e)(1)(i) which allowed a covered entity to disclose information "in response to an order of the court or administrative tribunal." The court also found that, without an order of the court, the covered entity could also disclose health information in response to a "subpoena, discovery request, or other lawful process" if plaintiff was given notice or if the party seeking information seeks a qualified protective order. **(Id., p. 84b)**. The court stated:

> Information exchanged in an *ex parte* communication with plaintiff's treating physicians and medical care providers is not protected by physician-patient privilege or HIPAA. Further, as previously noted, judges in this district have consistently allowed *ex parte* discussions with the opposing parties' treating physicians and other medical care providers - both before and after HIPAA took effect. **(Id., p. 85b)**.

Likewise, in ***Sforza v City of New York*, 2008 WL 4701313(SD NY 2008) (Appellee's Apx., p. 87b)**, another federal court found that defense counsel was entitled to a qualified protective order allowing *ex parte* interviews of emergency medical technicians (EMT's) who were present when plaintiff was allegedly assaulted by New York Police. The federal court, applying federal law in a 42 USC § 1983 action, found nothing in HIPAA which would bar *ex parte* communication with a healthcare provider when that contact had been authorized by court order, specifically citing § 512(e)(1)(i) and (ii). **(Id., pp. 88b-89b)**. If the EMT's agreed to be interviewed, it could save plaintiffs, defendants, and the EMT's "the costs and burden of more formal discovery." **(Id., p. 90b).**

***Santaniello v Sweet*, 2007 WL 214605 (D CT 2007) (Appellee's Apx., p. 71b**) likewise concluded that HIPAA allows *ex parte* interviews of willing, non-party witnesses. Although HIPAA did not expressly address the disclosure of medical information during *ex parte* interviews, the

federal court found that they were permitted so long as a HIPAA compliant protective order was in place. **(Id.).** The court directed the parties to amend the existing protective order so that medical information obtained during oral interviews was expressly protected. **(Id.).**

Harhara v Norville*, 2007 WL 2713847 (ED Mich 2007) (Appellee's Apx., p. 42b)**, also concluded that *ex parte* interview were permitted. ***Harhara noted that in the Sixth Circuit, it was clearly established under the Federal Rules of Civil Procedure that protective orders could be issued. Defendants asked for an order that plaintiff's medical care providers were required to provide medical records and to discuss information concerning plaintiff's medical care with defense counsel. **(Id., p. 43b)**. The defendants stipulated they would not disclose the confidential medical information "for any purpose other than litigation, and that at the end of the litigation, defense counsel must destroy or return to the provider any documents or other materials obtained from them . . ." The federal court concluded that plaintiff had placed his medical condition at issue in the litigation, and the defendants were entitled to discovery including review of medical records and discussion of plaintiff's medical condition with his treating physicians. (Id.). The court outlined the three ways to obtain protected health information during a judicial proceeding pursuant to HIPAA including not only by court order but also pursuant to §§ 164.512(e)(ii)(A) & (B) when used in conjunction with "more traditional means of discovery." **(Id.).**

Similarly, in ***Shropshire v Laidlaw Transit, Inc.*, No. 06-10682 (ED Mich 2006) (Appellee's Apx., p. 91b)** the court granted defendant's motion for a qualified protective order allowing *ex parte* discussions with treaters.[8]

Recently, in ***Palazzolo v Mann,* No. 09-10043 (ED Mich 2009) (Appellee's Apx., p. 68b)**

[8] Additionally, even before the Court of Appeals' decision in ***Holman,*** several Michigan circuit courts had granted defense counsels' requests for qualified protective orders. **(See, for example, trial court orders from *Aldridge* (Appellee's Apx., p. 5b), *Hakim* (Appellee's Apx., p. 40b), *Stahle* (Appellee's Apx., p. 96b), and *Zamler* (Appellee's Apx., p. 104b).**

the federal court, citing ***Holman, supra*** held that a qualified protective order consistent with HIPAA would allow defense counsel to conduct *ex parte* interviews with plaintiff's treating physicians. Plaintiff had put her medical condition at issue and defendants were thus entitled to discovery of medical information in order to properly defend. "Michigan law is well established, prior to HIPAA, that the filing of a personal injury action generally waived the statutory physician-patient privilege regarding any injury at issue in this case, see MCL § 600.2157, and that a defendant was permitted to meet *ex parte* with a plaintiff's treating physician as part of discovery. **(Id. at 69b, citing *Domako, supra*)**. The court found federal law to be in accord. Although under HIPAA filing a lawsuit would not waive the disclosure of confidential health information, HIPAA established procedures by which confidential health information may be disclosed. **(Appellee's Apx., p. 69b, citing 45 CFR §164.512(e)(1)(i) & (ii)**). The court agreed with ***Holman*** that "[d]efendants may conduct *ex parte* interviews with plaintiff's treating physicians consistent with HIPAA. ... so long as there is a protective order in place consistent with [§164.512(e)]." **(Appellee's Apx., p. 70b)**.

In arguing that HIPAA precludes *ex parte* interviews with a plaintiff's treating physicians - contrary to numerous holdings discuss above - Plaintiffs appear to presume that there is something inherently improper about *ex parte* interviews in general. (See Appellant's Brief, p. 4, 7). Such an argument was rejected in ***Harris v Whittington*, 2007 WL 164031 (D Kan 2007)** (Appellee's Apx., p. 49b); courts cannot not presume that defense "counsel will engage in inappropriate and/or unethical conduct when interviewing fact witnesses" (Id. at 52b), as Plaintiffs suggest.[9]

[9] "HIPAA rules and regulations contemplate the disclosure and use of medical information in a judicial proceeding.... Moreover, implicit in plaintiff's objection is the suggestion that informal interviews out of the presence of opposing counsel are inherently wrong. This argument presumes that counsel will engage in inappropriate and/or unethical conduct when interviewing fact witnesses, a presumption this court rejects. Accordingly, plaintiff's objection is overruled." **(*Harris*, Appellee's Apx., p. 52b, emphasis in original). See also *Arons, supra* at 410.**

F. State Courts Which Allow *Ex Parte* Interviews with Treating Physicians have Reconciled their *Ex Parte* Rule with the Privacy Rule by Concluding that an *Ex Parte* Interview May Satisfy Both HIPAA and State Law with Use of a HIPAA Compliant Authorization.

Even prior to the enactment of HIPAA, there was disagreement among the states over whether *ex parte* interviews between defense counsel and plaintiff's treating physicians were appropriate following waiver of the physician-patient privilege, with some states permitting, and others prohibiting, such interviews. HIPAA does not directly address the use of *ex parte* interviews. Subsequent state court decisions have been decided based largely on existing statutes, court rules or policy considerations. Generally, states which prohibited the use of *ex parte* interviews prior to HIPAA continue to do so. States which allowed *ex parte* interviews, and have considered the issue in light of HIPAA, continue to allow them, usually incorporating a qualified protective order. Their reasoning is that the Privacy Rule does not preempt state law or, in the alternative that their practices regarding *ex parte* interviews can be reconciled with HIPAA through use of a qualified protective order incorporating the procedural protections in §164.512(e).

One of the first states to consider the issue was New Jersey. In ***Smith, supra***, the court considered whether HIPAA preempted New Jersey case law, ***Stempler v Speidell,* 100 NJ 368; 495 A2d 857 (1985)**, which expressly permitted *ex parte* interviews with a health care provider.

The court found that none of the HIPAA regulations directly addressed the issue of *ex parte* interviews with treating physicians. "Nowhere in HIPAA does the issue of *ex parte* interviews with treating physicians come into view; therefore this court finds no express preemption regarding such interviews, leaving them a viable tool for defense counsel." ***Smith, supra* at 134**.

Like Michigan, New Jersey permitted *ex parte* interviews of plaintiff's treating physicians before the enactment of HIPAA. See ***Stempler, supra***. In *Smith*, the narrow issue was whether HIPAA preempted informal discovery techniques. The court found that "[t]he answer is plainly 'no.'" ***Smith, supra* at 126.** Although New Jersey's laws with respect to authorizations for use and

disclosure of medical information were required to comply with HIPAA, ***Id.* at 131-132**, the issue of *ex parte* interviews as an informal discovery device was not discussed in HIPAA, and the New Jersey court was "aware of no intent by Congress to displace any specific state court rule, statute or case law. (e.g., *Stempler*) on *ex parte* interviews." ***Id*. at 128.** Under the specific circumstances and time constraints involved in ***Smith***, where approximately 300 mass tort cases were pending on the court's docket with only 1 ½ months until trial, the court determined that defense counsel should proceed directly to deposing the treating physicians, rather than conducting *ex parte* interviews. ***Id.* at 133-134.**

Similarly, in ***In re Diet Drug Litigation*, 348 NJ Super 546; 895 A2d 493 (2005)** the Superior Court reiterated that *ex parte* interviews could be conducted and, citing ***Stempler*,** held that such personal interviews were "an accepted, informal method of assembling facts and documents in preparation for trial." ***Id.* at 555**, quoting ***Stempler, supra* at 382.** Pursuant to New Jersey law - not HIPAA regulations - defense counsel was required to give Plaintiff reasonable notice and provide the treating physician with a description of the scope of the interview and that it was voluntary. At issue was the fact that plaintiffs and their physicians resided in North Carolina, which did not permit *ex parte* interviews in this type of case, without consent. ***In re Diet, supra* at 561-562, citing *Crist v Moffatt*, 326 NC 326; 389 SE2d 41 (1990)**. As an accommodation to North Carolina law, the New Jersey court determined that *ex parte* interviews would be allowed, but only with the interview recorded and with plaintiffs provided a copy of the transcript. Plaintiffs would be required to consent to the interviews. ***In re Diet, supra* at 565**.

The conditions imposed in both New Jersey cases occurred as a result of state law, not as a HIPAA mandate, as Plaintiff implies. **(Appellant's Brief, p. 17)**.

The Supreme Court of Georgia held that HIPAA preempted Georgia law with respect to *ex parte* communications between defense counsel and plaintiff's prior treating physicians**. *Moreland***

v Austin, 2*84 Ga 730; 670 SE2d 68 (2008).** Under Georgia law, once a plaintiff put his medical condition at issue, defendant could seek plaintiff's protected health information by formal discovery, or informally, by communicating orally with plaintiff's physician. After reviewing federal and state law, the Georgia Supreme Court concluded that HIPAA would preempt Georgia law with respect to *ex parte* communication between defense counsel and plaintiff's treating physicians (Id*. at 733-734**), but did not prohibit such communication. While HIPAA generally prevented a medical provider from disseminating medical information, whether oral or in writing, Georgia law, in contrast facilitated and streamlined the litigation process. ***Id*. at 733.** HIPAA was therefore more stringent and governed *ex parte* communication between defense counsel and health care providers. ***Id.*** HIPAA clearly regulated the methods by which a physician could release a patient's health information, including "oral" medical records. The allowable methods included subpoena, discovery requests or other lawful process with assurances pertaining to notification, or a protective order. ***Id.*** The "Privacy Rule does not prohibit informal discovery, 'it merely superimposes procedural prerequisites.'" ***Id*. at 734, citing *Arons, supra* at 415.** The court in ***Moreland*** further stated:

> Thus, in order for defense counsel to informally interview plaintiff's treating physicians, they must first obtain a valid authorization, or a protective order, or insure that the patient has been given notice and an opportunity to object to the *ex parte* contact, all in compliance with the requirements of HIPAA as set forth in 45 CFR § 164.512(e). ***Moreland, supra* at 734.**

The New York Court of Appeals recently held that New York law was not preempted by HIPAA where the two were not "contrary." ***Arons, supra***. Prior to ***Arons***, New York courts were unable to agree regarding the impact of HIPAA preemption on *ex parte* interviews with plaintiff's treating physicians in personal injury actions. Resolving this issue in ***Arons***, New York's highest court held that *ex parte* interviews with plaintiff's treating physicians were permissible, and held that "the Privacy Rule does not prevent this informal discovery from going forward, it merely superimposes procedural prerequisites. As a practical matter, this means that the attorney who

wishes to contact an adverse party's treating physician must first obtain a valid HIPAA authorization or a court or administrative order, or must issue a subpoena, discovery request or other lawful process with satisfactory assurances relating to either notification or a qualified protective order." ***Arons, supra* at 415**.

In ***Arons*,** the court considered three cases in which the lower courts had considered defendants' motions to compel plaintiff to execute HIPAA authorizations allowing defense counsel to speak with physicians. The court concluded that this was appropriate because plaintiffs had waived a physician-patient privilege regarding medical information when they brought suit and there was therefore no basis for the refusal to furnish the requested HIPAA compliant authorizations. In reaching its conclusion, the court reviewed the role of informal discovery of non-party treating physicians in prior decisions and the impact of HIPAA on such discovery.

No statutes or rules expressly either authorized or forbid *ex parte* discussions with any non-party. There was nothing in New York law which closed off these "avenues of informal discovery, which would "relegate litigants to the costly or more cumbersome formal discovery devices." ***Arons, supra* at 409, quoting *Niesig v Team I,* 76 NY2d 363, 372; 558 NE2d 1030 (1990).** Banning informal contacts between attorneys and treating physicians would invite the "further unwelcome consequence of significantly interfering with the practice of medicine" including requiring long depositions or time consuming responses to interrogatories instead of a short telephone call. ***Arons, supra* at 409.**

Arons also rejected Plaintiff's argument that in a more casual setting without opposing counsel present, the physician might divulge privileged medical information or make inappropriate disclosures. The court rejected that argument, as it had in earlier cases, concluding that it did not provide a basis for relinquishing the "considerable advantages of informal discovery." ***Id*. at 410.**

Next, the court addressed the impact of HIPAA on informal discovery of health care

professionals. ***Arons*** concluded that there could be no conflict between New York law and HIPAA on the subject of *ex parte* interviews of treating physicians because HIPAA did not address the subject. Accordingly, the Privacy Rule did not prevent informal discovery from going forward, it "merely superimpose[d] procedural prerequisites." ***Id.* at 415.** An attorney who sought to contact plaintiff's treating physician must therefore obtain a valid HIPAA authorization, a court or administrative order, or issue a subpoena, discovery request or other lawful process with satisfactory assurances relating to either notification or a qualified protective order. ***Id***. The court rejected any requirement that the defense must provide copies of all written statements and notes obtained from the physician during the interview, of any audio or video recordings or transcripts or memoranda or notes. "Imposition of these conditions was improper." ***Id.* at 416.**

Similarly, the Oklahoma Supreme Court held that permitting oral communication with health care providers, where a person has placed his mental or physical condition at issue by filing a lawsuit, did not contravene HIPAA confidentiality requirements. ***Holmes v Nightingale*, 158 P3d 1039, 1041 (Okla 2007)**. *Holmes* found that HIPAA did not prohibit *ex parte* communication with health care providers through a HIPAA compliant court authorization. ***Id.* at 1044.** "We have determined that 45 CFR §164.512 clearly anticipates the issuance of court orders allowing *ex parte* communications with physicians." ***Id.* at 1046.** ***Holmes*** involved § 164.512(e)(1)(i) rather than (e)(1)(ii), but the court's conclusion is equally applicable to that part. *Ex parte* communication may take place through a HIPAA compliant court authorization which encompasses the privacy requirements enumerated in §164.512(e)(1)(ii-vi). ***Id.* at 1044.**

Recently, the Supreme Court of Texas considered the impact of the Privacy Rule on Texas law and held that there was no preemption. ***In re: Lester Collins, M.D.,* 52 Tex Sup J 813; __ SW3d __(2009) (Appellee's Apx., p. 56b).** Collins, a physician who was a defendant in a malpractice lawsuit, appealed the trial court's order granting plaintiff's motion for protective order

which barred defendants and their attorneys from *ex parte* contact with any of plaintiff's non-party medical providers. Texas law requires a plaintiff to sign an authorization for release of medical information prior to filing a lawsuit. **Tex Civ Prac & Rem Code, §74.052(a)**.

After plaintiffs filed suit they immediately sought, and obtained, a protective order prohibiting *ex parte* communication with health care providers, arguing that defense attorneys might obtain oral information that was not included in written records and that barring *ex parte* contact was the only way to assure irrelevant information was not disclosed. The trial court granted the motion. The Texas Supreme Court noted that the physician-patient privilege did not shield relevant information when a plaintiff sued a physician. A 2003 statute required disclosure of relevant health information, both verbal and written, and also required a plaintiff to authorize disclosure sixty days before suit was filed. See ***Id.*** HIPAA prohibited disclosure of private health information except in specific circumstances, with limited exceptions, and the Privacy Rule preempted any contrary requirement of state law. Texas law was "not contrary" to HIPAA because disclosure was permitted in a number of circumstances including during judicial proceedings, citing **45 CFR §164.512(e)(1)(i), (ii)(A), (ii)(B). (Appellee's Apx., pp. 62b-65b)**. The court rejected plaintiff's claim that, to the extent Texas law authorized *ex parte* communications with non-party treating physicians, it was preempted by HIPAA. **(Id., pp. 65b-66b)**. Although it did not decide whether the statute authorized *ex parte* communications in every situation, the court held that plaintiffs failed to make the showing necessary to obtain a protective order. **(Id., pp. 64b-65b)**. Moreover, the authorizations signed by plaintiffs conformed to HIPAA requirements as well as those of Texas law. It would therefore "not be impossible for a health care provider to comply with both laws." (Id.).

The Colorado Supreme Court reached a similar conclusion in ***Reutter v Weber*, 179 P3d 977 (Colo 2007)**. The Court found that Colorado's pre-HIPAA practice of allowing *ex parte* interviews with a plaintiff's treating physicians, so long as the plaintiff had notice and an opportunity

to object to (although not necessarily attend) the meetings (see ***Samms v District Court*, 908 P.2d 520 (Colo1995)**), is consistent with § 164.512(e)(1). The Court reasoned:

> The notice requirement of *Samms* is consistent with federal regulations promulgated under [HIPAA], and we disagree with the Reutters' argument to the contrary. The HIPAA regulations permit the disclosure of medical information in response to a subpoena, discovery request, or other lawful process so long as the patient first receives sufficient notice in order to have an opportunity to object to the court. See 45 CFR § 164.512(e)(1)(ii)(A). The Reutters received prior notice and an opportunity to object when Defendants filed their motion with the trial court requesting permission to interview the Medical Witnesses. ***Reutter, supra* at 984 n.4**.

These decisions reflect a national trend: in the jurisdictions that allowed defense counsel to meet *ex parte* with plaintiffs' treating physicians prior to HIPAA (see ***Holmes*, supra at 1049 (Colbert, J., concurring)**), HIPAA's impact on that practice has been considered - either in state appellate decisions or in federal decisions applying state law - in eleven of those jurisdictions, and all eleven have found that this type of discovery can be conducted consistent with HIPAA.[10]

Moreover, many of the cases cited by Plaintiff in support of her argument that the Privacy Rule precludes *ex parte* communication are either not supportive of her argument, or the restrictions are based on state law, not the requirements of HIPAA.[11] ***Crenshaw, supra*** and ***Law, supra***, did

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[10] These jurisdictions are California (***Crenshaw, supra***), Colorado (***Reutter, supra***), Georgia (***Moreland, supra***), Kansas (***Sample, supra; Hulse, supra***); Kentucky (***Weiss, supra***); Maryland (***Law, supra***); Michigan (***Holman, supra***); New Jersey (***In re Diet Drug, supra***); New York (***Arons, supra***); Oklahoma (***Holmes, supra***); and Texas (***In re: Lester Collins, M.D., supra***).

[11] Examples of cases that relied exclusively upon state law include ***Sorensen v Barbuto*, 143 P3d 295 (Utah App 2006),** which Plaintiff cites for the proposition that "[m]any state courts ... now bar *ex parte* interviews," implying that this is a function of HIPAA. **(Appellant's Brief, p. 17).** However, the intermediate appellate decision cited by Plaintiff was later affirmed by Utah's Supreme Court in an opinion which made no reference to HIPAA; the outcome turned entirely upon Utah law. ***Sorensen v Barbuto*, 177 P3d 614, 618 (Utah 2008)**. Similarly, Plaintiff cites ***Moss v Amira*, 826 NE2d 1001 (Ill App 2005)**. However, this holding had nothing to do with HIPAA; *ex parte* communications with plaintiffs' treating physicians had been barred under Illinois law, on public policy grounds, for nearly a decade prior to HIPAA. See ***Id.***, discussing ***Petrillo v Syntex Laboratories, Inc*., 499 NE2d 952 (Ill App 1986).** In fact, the majority opinion in ***Moss*** makes no reference to HIPAA. Plaintiff also relies upon ***Givens v Mullikin*, 75 SW3d 383 (Tenn 2002)**. Again, the opinion contains no reference to HIPAA, and a closer look at its reasoning reveals that the decision turned entirely upon the Court's interpretation of Tennessee statutes. ***Givens, supra***

not conclude that oral communications were barred, but rather that HIPAA regulations must be followed prior to any *ex parte* communication. Both opinions listed the various ways in which this could be done, including through use of a qualified protective order pursuant to § 512(e)(1)(ii)(B). ***Law, supra* at 711; *Crenshaw, supra* at 1029**.

The New Jersey cases cited by Plaintiff likewise affirmed the availability of *ex parte* interviews, consistent with the Privacy Rule of HIPAA. The denial of *ex parte* interviews in ***Smith, supra*** was based on the fact that approximately 300 mass tort cases were pending on the court's docket with trial 1 ½ months away.

In ***In re Diet Litigation, supra***, issues of North Carolina law were involved. North Carolina does not permit *ex parte* interviews, which caused the court to impose additional conditions on the oral interviews, which the court nonetheless allowed to take place.

Browne v Horbar*, 792 NYS2d 314 (NY Sup 2004)**, also cited by Plaintiff, is no longer good law in light of ***Arons, supra. Arons held that HIPAA did not preempt New York law and merely imposed procedural requirements on disclosure. *Ex parte* interviews continued to be allowed pursuant to New York law.

In ***EEOC v Boston Market, supra***, the federal court acknowledged that *ex parte* interviews

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at 409 n.13. The fact that this holding turned exclusively upon state law is confirmed by the Tennessee Supreme Court's subsequent opinion in ***Alsip v Johnson City Medical Center,* 197 SW3d 722 (Tenn 2006).** Plaintiffs next cite ***Crist, supra***, a decision which pre-dates HIPAA by more than fifteen (15) years. This decision also turned upon public policy considerations which this Court considered, but found unavailing, in ***Domako, supra* at 358-360.** As the North Carolina Supreme Court noted in ***Crist***, the Court's reasoning was "derived from neither statute nor established common law" but rather, reflected a "court-created" doctrine intended to "preserve the treating physician's fiduciary responsibilities during the litigation process." ***Crist, supra* at 45.** The decision sheds no light upon what effect HIPAA may have upon Michigan's discovery practices. Plaintiff also cites ***Deitch v City of Olympia*, 2007 WL 1813852 (WD Wash 2007) (Appellant's Apx., p. 160a)**, a decision which is of little value here because in ***Deitch***, it was the plaintiffs who were seeking the disclosure of information pertaining to the medical condition of a non-party. **(Id., p. 162a).** The decision therefore does not address the central issues in this case, i.e., a plaintiff's waiver of the physician-patient privilege by putting *their own* medical condition at issue in a lawsuit. Moreover, it does not appear that *ex parte* interviews were sought in ***Deitch***.

were not prohibited by HIPAA and accepted the defendant's suggestion that a new qualified protective order be entered so the defendants could proceed with discovery from psychologists and other health care providers pursuant to the methods set forth in HIPAA. **(Appellant's Apx., pp. 142a-143a)**.

The court in ***In re Vioxx Products Liability Litigation*, 230 FRD 473 (ED La 2005)** did not deny all *ex parte* communication. Rather it denied defendant's request for *ex parte* contacts but allowed plaintiffs to contact physicians who were not named as defendants in the lawsuit. ***Id*. at 477.**

In circumstances where state law permits *ex parte* contacts, courts have found oral communication to be permissible if one of the methods specified in § 512(e)(1) is used.

G. HIPAA Specifically Provides for Disclosure of Protected Health Information, Including Both Oral And Written Information, in the Context of Judicial Proceedings in Response to Discovery Requests.

Defense counsel moved for a qualified protective order pursuant to § 512(e)(1)(ii)(B) to allow decedent's treating physician to disclose protected health information as allowed by the Privacy Rule. This procedure has been repeatedly recognized by state and federal courts as an appropriate method by which to seek oral communication. Indeed as the New York Court of Appeals concluded, "the Privacy Rule does not prevent this informal discovery from going forward, it merely superimposes procedural prerequisites." ***Arons, supra* at 415.** The Supreme Court of Georgia recently adopted this reasoning in ***Moreland, supra***. The Supreme Court of Texas likewise held that HIPAA is not a bar to *ex parte* interviews in Texas. ***In re: Lester Collins, M.D., supra***.

While acknowledging that HIPAA extends privacy protection to both written and oral private health information, Plaintiff continues to assert that HIPAA does not authorize oral interviews with treating physicians because a HIPAA compliant qualified protective order cannot be fashioned, and a qualified protective order applies only to documentary evidence. Plaintiff argues that § 512(e)(1)(v) requires the return or destruction of protected information at the end of the litigation or

proceedings and therefore counsel for Defendant cannot obtain a qualified protective order for an *ex parte* meeting with a treating physician because such information cannot be returned or destroyed. Plaintiff states:

> ...the regulations preconditioned the grant of a qualified protective order on the recipient's ability to "return" or destroy the information at the conclusion of the litigation. *Random House Unabridged Dictionary* defines "return" as "to revert to a former owner; to put, bring, take, give, or send back to the original place." "Destruction" is defined as "the act of destroying." ...These terms clearly reference tangible, documentary information. These terms do not apply to intangible, oral communications. Defense counsel cannot empty his or her brain of the protected health information and return it to the physician or destroy it at the conclusion of the litigation. **(Appellant's Brief, p. 26)**.

Plaintiff's rationale is unpersuasive. The concern of both the statute and regulations is to protect the privacy of an individual's health information. However, even if written documentary information is returned to the treating physician at the end of the litigation, the attorney who has read and reviewed such information still retains knowledge of the contents of those documents and the ability to convey that information to third parties notwithstanding the destruction of the written documents. Even so, the statute permits disclosure pursuant to a qualified protective order which allows the review of such documentary information. Just as with an oral interview, the attorney "cannot empty his or her brain of the protected health information" which he or she has received. See **Conn, *"Open" Discovery in the Age of HIPAA*, 88 Mich B J 21, 24 (February 2009)** (noting that the difference between "documentary information" and *ex parte* interviews is a "distinction without a difference that was recently rejected in *Holman*."). Therefore, there is no distinction to be made on this basis between oral and written medical information. In either case, pertinent medical information is retained by the attorney which cannot be "returned" or "destroyed" at the end of the proceeding. The term "health information" refers to both oral and recorded information that is "created or received by a healthcare provider..." **42 USC § 1320d(4)(A)**. Use of a qualified

protective order provides the same protections to oral information as it does to recorded information.

Section 164.512(e)(1)(v)(A) requires that the party receiving the information use it only in connection with the litigation or proceeding for which it was requested. This protects the privacy of the health information conveyed to counsel, either through verbal communication or through written information. Because written information could be lost or viewed by other parties, subparagraph (B) requires documentary materials to be returned to the healthcare provider or destroyed. Whether obtained through documentary review or oral interview, the information remains with defense counsel. Nonetheless, HIPAA contemplates that medical information will be made available during the discovery phase of litigation.

In ***Domako, supra***, this Court recognized that defense counsel should have equal access to investigate facts put at issue by plaintiff's claims and the unfairness of permitting plaintiffs to have exclusive access to this information from treaters while denying it to defendants. The longstanding Michigan practice of allowing informal discovery through means of *ex parte* interviews pursuant to ***Domako*** is consistent with HIPAA regulations which permit protected health information to be made available during discovery, as long as certain safeguards ensure that the use of such information is limited. A qualified protective order provides the required safeguard. Defense counsel's request for a qualified protective order was thus consistent with both federal and state law.

Michigan law has long recognized the importance of informal discovery methods such as *ex parte* interviews, and has permitted their use, as a matter of both fairness and judicial efficiency. ***Domako, supra* at 361.** Such informal discovery permits counsel for defendant equal access in investigating facts put at issue by plaintiff's claims alleging personal injury. In upholding defense counsel's ability to conduct interviews with witnesses in a product liability action, ***Davis v Dow Corning Corp.*, 209 Mich App 287, 293; 530 NW2d 178 (1995)** stated: "...[the] prohibition of all *ex parte* interviews would be inconsistent with the purpose of providing equal access to relevant

evidence and efficient, cost-effective litigation."

Defendant is unfairly prejudiced if Plaintiff is allowed to meet with treating physicians and Defendant is denied the same access. Plaintiffs are given an advantage when they are permitted access to treaters on an informal basis, but defendants are forced to use more expensive and burdensome formal discovery. Without doubt, HIPAA has altered the landscape with respect to discovery of individually identifiable health care information. It does not forbid all disclosure however, and specifically allows disclosure under certain circumstances. Private health information may be disclosed in the course of judicial proceedings - as in this case where Plaintiff has put decedent's physical condition at issue by filing a lawsuit - if certain requirements are met. In the context of legal proceedings, compliance with HIPAA requires only a protective order from the trial court (1) prohibiting disclosure of health information for any purpose other than the litigation and (2) requiring that copies of the information be destroyed at the conclusion of the proceedings. **45 CFR § 164.512(e)(1)(v).** Therefore, even if HIPAA has added additional safeguards to the use of *ex parte* communications as presently allowed under Michigan law, it does not proscribe such interviews with treating physicians if Defendant complies with HIPAA regulations.

CONCLUSION & RELIEF REQUESTED

Attorneys have always sought to interview non-parties who are potential witnesses as part of their preparation for trial. Although *ex parte* interviews are not specifically mentioned as a discovery tool in the Michigan Court Rules, neither are they forbidden as noted by ***Domako, supra*** and by the Court of Appeals' opinion in this case. To foreclose such discovery would relegate defendants to a more costly and cumbersome use of formal discovery. It may also interfere with the efficient practice of medicine, requiring time consuming depositions instead of potentially brief interviews.

The HIPAA Privacy Rule limiting use and disclosure of PHI is easily reconciled with the Michigan practice of allowing *ex parte* communication with a plaintiff's health care provider.

Michigan practice is not contrary to Federal law. Neither HIPAA nor Michigan law prohibits or mandates the release of PHI during judicial proceedings. Disclosure is permitted pursuant to Michigan law (***Domako, supra;*** **MCL 600.2912(f)**), and it is permitted pursuant to §164.512(e)(1)(ii)(B) without notice to or authorization from plaintiff. The Privacy Rule "strikes a balance that permits important uses of information, while protecting the privacy of people who seek care and healing." **HHS Office for Civil Rights*,Summary of the HIPAA Privacy Rule,* <http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf> (accessed July 31, 2009), at 1**. Disclosure is permitted in a number of circumstances, including in a judicial proceeding if a qualified protective order is sought. **45 CFR § 512(e)(1)(ii)(B) & (e)(1)(v)**. Michigan law allowing *ex parte* interviews is completely compatible with the Privacy Rule as long as HIPAA procedural requirements are complied with, as occurred in this case.

WHEREFORE, Defendant/Appellee MARK RASAK, D.O. respectfully requests this Court to affirm the decision of the Court of Appeals holding that defense counsel is permitted to conduct *ex parte* interviews with a plaintiff's treating physician, if a HIPAA compliant qualified protective order is in place.

Respectfully submitted,

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Dated: August 5, 2009

STATE OF MICHIGAN

IN THE SUPREME COURT

ANDREA L. HOLMAN, Personal Representative
of the Estate of LINDA CLIPPERT, Deceased,

Plaintiff/Appellant,

v

MARK RASAK, D.O.,

Defendant/Appellee.

Supreme Court No. 137993
COA Docket No.279879
Lower Court Case No. 05-068-493-NH

PROOF OF SERVICE

STATE OF MICHIGAN)
)SS.
COUNTY OF OAKLAND)

Julie McCann O'Connor, being first duly sworn, deposes and states that on August 5, 2009, she did serve the following document: Defendant/Appellee's Response to Plaintiff/Appellant's Brief on Appeal, Defendant/Appellee's Appendix and this Proof of Service U. S. Mail, postage prepaid upon:

Joseph L. Konheim, Esq.
Blum, Konheim & Elkin
15815 West Twelve Mile Road
Southfield, MI 48076

_____
JULIE McCANN O'CONNOR

Subscribed and sworn to before me
this 5th day of August, 2009.

_____
Rebecca M. Richardson, Notary Public
Oakland County, Michigan
Acting in Oakland County, Michigan
My commission expires: 8/10/2010