

I. OVERVIEW OF THE CASE LAW

Defendant WHC has failed to provide this Honorable Court with an accurate and up to date portrait of the state of the law in the United States District Court for D.C. and for the United States District Court for the District of Maryland.

A review of the Points of Authority attached to WHC's Motion cites the following cases:

California 1951
U.S. District Court D.C. 1983
U.S. District Court D.C. 1984
U.S. Court of Appeals D.C. 1986
D.C. Court of Appeals 1992
W.D. Va. 2001

WHC has tried to divert the Court's attention from the current state of the law by citing out of date cases, and failing to tell this Court that this same law firm made the same arguments in *Vongsavang v. Stinson, et. al.*, 6cv00853 (D. MD.) Documents 14 and 18, and that these arguments were rejected by that Court, *Opinion of Magistrate Judge Day*, November 9, 2006, Document 20, attached hereto as Exhibit 1.

In fact, the law of the United States District Court for the District of Maryland is now settled on this issue. Chief Judge Legg recently denied the Defendant's Motion to Permit Ex Parte Communication with Plaintiff's health care providers in *Jeffares v. Kheiri, Memorandum Order of November 19th, 2008*, as follows:

Now pending before the Court is Defendant's Motion for *Ex Parte* Communications with Plaintiff's Treating Health Care Providers (Docket No. 19). The motion is without support in law and defendants have failed to demonstrate good cause for why traditional discovery methods are unworkable.

The issue presented in the instant motion has been addressed conclusively in this district. See *Law v. Zuckerman*, 307 F. Supp. 2d 705, 709 (D. Md. 2004); *Divelbliss v. Appaswamy*, Civ. No. 07-3025, slip op. (D. Md. Oct. 27, 2008)(Memorandum Order denying Motion for *Ex Parte* Communications with Plaintiff's Treating Health Care Providers). For the reasons presented in those cases, this Court DENIES defendant's motion (Docket No. 19).

[Emphasis added.]

Judge Legg's Memorandum Order of November 19th, 2008 is attached as Exhibit 2.

This Court may consider Maryland law where there is no controlling D.C. law on this issue. In *Hickey v. Scott*, 2011 U.S. Dist. Lexis 74057 (D.D.C. July 11, 2011) The Honorable U.S. District Judge Bates stated:

District of Columbia courts have held that when "there are no District cases squarely on point... [and] [i]n the absence of appellate or other authority in this jurisdiction," this court may give Maryland law special attention because the District "was carved out of Maryland and derives its common law from that State." *Walker v. Independence Fed. Sav. & Loan Ass'n*, 555 A.2d 1019, 1022 (D.C.1989).

2011 U.S. Dist. Lexis 74057 at 6 n 3.

The District of Columbia Court of Appeals stated in *Johnson v. Fairfax Village*, 641 A.2d 495, 506 n. 22 (D.C. 1994) that:

We may look to Maryland law on the point because the District of Columbia derives its common law from the state of Maryland. See *Hill v. Maryland Casualty Co.*, 620 A.2d 1336, 1337 n.3 (D.C. 1989); *Walker v. Independence Federal Sav. & Loan Ass'n*, 555 A.2d 1019, 1022 (D.C. 1989).

The District of Columbia Court of Appeals previously held in *Walker v. Independence Federal Sav. & Loan Ass'n*, 555 A.2d 1019, 1022 (D.C. 1989) that when:

there are no District cases squarely on point... [and] [i]n the absence of appellate or other authority in this jurisdiction, this court may give Maryland law special attention because the District “was carved out of Maryland and derives its common law from that State.”

Therefore, we contend that this Honorable Court may follow the settled law of the United States District of Maryland and deny this Defendant’s Motion for *ex parte* communications with Plaintiff’s health care providers.

WHC has also not addressed the relevant law of the United States District Court for the District of Columbia on this issue. Defendant cites federal District of Columbia opinions dated 1983, 1984, and 1986, but these are all prior to the enactment of HIPAA in 1996. HIPAA has been held to preempt the state law upon which these pre-1996 opinions were based.

On February 10th, 2005, the same defendant, Medstar Health, d/b/a the Washington Hospital Center, represented by the same defense counsel as in the present case, filed the same motion, specifically a Motion to permit *Ex Parte* Communication with Plaintiff’s Health Care Providers, in *Aisenbrey v. Medstar Health*, 4cv0089, as Document 18, attached hereto as Exhibit 3. Judge Friedman denied this Motion on June 10, 2005. WHC omitted the fact from their lengthy motion in this case that they have previously briefed this same issue in this Court, and that this motion was previously denied.

Defendant Dr. Margarita Scott, M.D. also filed the same motion, to permit *Ex Parte* Communication with Plaintiff’s Health Care Providers, in *Bagley v. Scott*, 9-cv-0382, Document 6, attached hereto as Exhibit 4. The motion was extensively briefed and Magistrate Judge Deborah Robinson held hearings on this motion on June 1, 2009. After extensive discussion, the Defendant’s Motion was Denied for the reasons set forth in the Transcript filed as Document 24.

The Plaintiff was required to file a Motion to enforce the June 1, 2009 order denying HIPAA *Ex Parte* Contacts, Document 22, and after two additional days of hearings the Plaintiff's Motion to enforce the Court Order denying *ex parte* contacts with Plaintiff's health care providers was granted.

In summary, two judges of the United States District Court for the District of Columbia have considered a Defendant's Motion to permit *Ex Parte* Communication with Plaintiff's Health Care Providers and the Motion was denied by both judges. These rulings are consistent with the settled law of the United States District Court for the District of Maryland.

Additionally, the Plaintiff has fully cooperated with Defendant on discovery. The parties have exchanged medical records. WHC has stated that it needs to obtain information from a number of the Plaintiff's health care providers. The Plaintiffs have executed authorizations allowing both defendants to obtain all of the Plaintiff's medical records. The Plaintiff's decedent required extensive care, approaching \$1 Million dollars in cost, due to the negligence of the Defendants, and quite a few health care providers were involved in trying to address the problems that the Defendants caused. Plaintiff's counsel offered to set up depositions with these health care providers on a cooperative and time efficient basis. Instead of participating in such a program of cooperative discovery, WHC has filed this motion to have secret meetings with Plaintiff's health care providers in which privileged information could be divulged and potentially intimidating interviews with insurance defense counsel will take place. WHC filed this motion without taking a single deposition of a single health care provider. And WHC declined Plaintiff's offer to have informal joint interviews of treating health care providers with WHC counsel. This was exactly the type of privacy invasion that

triggered HIPAA being enacted. So far, additional Defendants Dr. Doris Pablo-Bustos and Dr. Elwin Bustos have not joined in this motion and have not made any request to have secret, *ex parte* communications with Plaintiff's health care providers.

The Plaintiff, by and through Counsel, will now respond to the arguments made by Defendant in detail. However, in summary, the Defendant has advanced no arguments that would make this case significantly different from the cases in which the same motions have been denied in this United States District Court and in the United States District Court for the District of Maryland.

II. BACKGROUND

WHC's Motion asks that this Court issue an order permitting defense counsel to conduct private, unrecorded conversations with Decedent's treating physicians. There would be no effective way for the Plaintiff or for this Court to verify that these conversations would not deviate into discussion of irrelevant matters that are confidential and not discoverable under either Federal or District of Columbia law. There would also be no way for Plaintiff or this Court to verify that these conversations do not improperly influence treating physicians through inadvertently or intentionally coercive suggestions or disclosure of incorrect or distorted information. There is no requirement that the Plaintiff's counsel be present during these conversations.

It is important to note that Plaintiff's counsel are willing to hold informal dual discussions with treating physicians with Defense counsel on an expedited basis and also to hold depositions of treating physicians on an expedited basis.

Plaintiff does not object to conversations with treating health care providers with Plaintiff's counsel present. Defendant's Motion should be denied for these reasons:

1. HIPAA, not *Street v. Hedgepath*, controls the dissemination of protected health information. *Hedgepath* is a case decided in 1992, four years before the passage of HIPAA.

2. Treating physicians have an ethical duty that is placed in jeopardy by *ex parte* communication with individuals adverse to their patients.

3. There has been no showing that full, complete, timely, efficient, and inexpensive discovery cannot be secured by way of agreed upon deposition or dual interviews with all counsel present, as offered by Plaintiff, thereby protecting against the potential abuses of unfettered *ex parte* interviews by defense counsel.

III. ARGUMENT

A. HIPAA Pre-empts District of Columbia Law

Congress enacted the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), in part, to protect the security and privacy of individual identifiable information. *Law v. Zuckerman*, 307 F. Supp. 2d 705, 711 (D. Md. 2004); *see also United States v. Sutherland*, 143 F. Supp.2d 609, 612 (W.D. Va. 2001) (noting that Congress and courts have recognized the importance of protecting confidentiality and that with HIPAA, Congress directed the Secretary of Health and Human Services to establish pertinent regulations). The Health Insurance Portability and Accountability Act of 1996 (hereinafter "HIPAA") requires a court order before *ex parte* contact by defense counsel can be permitted, and it gives this Court the discretion to deny a request for such an order. *See* 42 U.S.C. 1320d, *et seq.* HIPAA embodies a "strong federal policy in favor of protecting the privacy of

patient medical records.” *Law v. Zuckerman*, 307 F. Supp. 2d 705, 711 (D. Md. 2004).

The federal regulations clearly state the requirements of obtaining health information by a party in a judicial proceeding. See 45 C.F.R. 164.512(e). 45 C.F.R. 164.512(e) states in part:

(e) Standard: Disclosures for judicial and administrative proceedings.

(1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

(i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order.

45 C.F.R. 164.512.

Congress has made it clear that health information is protected information and directs the courts to determine the necessity for disclosing such protected information. This includes not only documents, but oral communication about patients as well. HIPAA’s stated purpose of protecting a patient’s right to confidentiality of his or her individual medical information is a compelling federal interest. See *Crenshaw v. Mony Life Ins. Co.*, 318 F. Supp.2d 1015, 1028 (S.D. Cal. 2004). Having defense counsel interview or depose treating physicians with Plaintiff’s counsel present satisfies this purpose while enabling defense counsel to obtain discovery.

Here in Maryland, the Court in *Law v. Zuckerman*, 307 F. Supp. 2d 705, 708 (D. Md. 2004), made it clear that HIPAA prohibits informal discovery of protected health information such as *ex parte* communications, through its admonition that “counsel should now be far more cautious in their contacts with

medical fact witnesses when compared to other fact witnesses to ensure they do not run afoul of HIPAA's regulatory scheme." *Law*, 307 F. Supp. 2d at 711. The court further cautioned that "[w]ise counsel must now treat medical witnesses similar to the high ranking corporate employee of an adverse party." *Id.* The fact that HIPAA so stringently restricts *ex parte* communications with treating physicians is evidence of a clear distaste for such practices.

Finally, it should be pointed out that 45 C.F.R. § 164.512(e) specifically addresses only "formal" methods through which protected health information may be obtained: court order, subpoena, discovery request or other lawful process – all of which clearly involve non-*ex parte* communications. Nowhere in the regulation are *ex parte* communications addressed.

In fact, a recent decision from the Missouri Supreme Court analyzed the HIPAA regulations, and held that a trial court has no authority to issue an order advising a plaintiff's non-party treating physicians that they may or may not participate in informal discovery via *ex parte* communications. *State ex rel. Proctor v. Messina*, 320 S.W. 3d 145 (Mo. 2010). In *Proctor*, the plaintiffs filed a medical malpractice action, and defense counsel sought and obtained a trial court order authorizing informal *ex parte* communications between defense counsel and the plaintiff's treating physicians. The Missouri Supreme Court reversed the order. The court initially noted that "HIPAA's general rule is that *ex parte* communications with a litigant patient's physician are prohibited." 320 S.W. 3d at 152.

The court then focused on the language of 45 C.F.R. § 164.512(e)(1), which authorizes disclosure of protected health information "in the course of any judicial or administrative proceeding." The court stated: "The trial court, however, erred in its application of 45 C.F.R. § 164.512(e)(1) to this case because the plain and ordinary

language of 45 C.F.R. § 164.512(e)(1) does not authorize the disclosure of protected health information during a meeting in which an attorney, without express authorization of the patient, has *ex parte* communications with a physician." 320 S.W. 3d at 155.

The court construed the phrase, "in the course of," "to include matters that occur while a case is pending in a judicial forum." *Id.* at 156. The court noted that neither HIPAA, nor its implementing regulations, define the phrases "in the course of" or "judicial proceeding." The court concluded that a narrow definition is implicit in HIPAA's regulatory requirement that "a covered entity may make disclosures only pursuant to a court order or subpoena, discovery request, or other lawful process." *Id.* In other words, "such disclosure must be under the supervisory authority of the court either through discovery or through other formal court procedures." *Id.* Since an informal meeting between defense counsel and a treating physician is not a judicial proceeding, the court held that a trial court has no authority to issue an order advising the plaintiff's non-party treating physicians that they may or may not participate in informal discovery via *ex parte* communications:

"[T]he meeting at which *ex parte* communications occur is not a judicial proceeding because the trial court has no general oversight of the meeting or any control over it. Thus, 45 C.F.R. § 164.512(e), which permits disclosures in the course of judicial proceedings, does not apply to a meeting for *ex parte* communications, and consequently a trial court has no authority to issue a purported HIPAA order advising the plaintiff's non-party treating physicians that they may or may not participate in informal discovery via *ex parte* communications."

320 S.W. 3d at 157 (footnote omitted).

Finally, the court pointed out that neither the discovery rules, nor HIPAA's provisions, authorize a trial court to issue orders governing methods of informal *ex parte* communications with a plaintiff's non-party treating physicians. *Id.* at 158.

HIPAA does not sanction informal discovery of protected health information, such as *ex parte* communications. As the court in Law recommended, “counsel should now be far more cautious in their contacts with medical fact witnesses when compared to other fact witnesses to ensure that they do not run afoul of HIPAA’s regulatory scheme.” *Law, supra* 307 F. Supp. at 711. The United States District Court for the Southern District of California also determined that defense counsel’s *ex parte* pretrial contacts with a physician who had examined Plaintiff violated HIPAA. See *Crenshaw, supra* 318 F. Supp.2d at 1027.

HIPAA does not specifically allow *ex parte* communications with healthcare providers, but rather outlines limited methods to obtain protected health information *during* a judicial proceeding. 45 C.F.R. § 164.512(e). HIPAA allows for disclosure pursuant to a court order, a subpoena or other discovery requests. 45 C.F.R. § 164.512(e)(1)(ii)(A) and (B). The common thread among each means is that they provide notice to the patient of the request and scope of the inquiry.

B. Continued reliance on *Street v. Hedgepath* is Misplaced

The HIPAA regulations also expressly provide that they preempt any state law unless that state law is more protective of privacy than HIPAA. See 45 C.F.R. § 160.203: “A standard, requirement, or implementation specification adopted under this subchapter that is contrary to a provision of state law preempts the provision of state law.” (See 45 C.F.R. § 160.203(b) for the exception for “more stringent” privacy requirements of state law.) “State law” is expressly defined to include “common law” under 45 C.F.R. § 160.202 (last paragraph).

Thus, HIPAA expressly preempts D.C. and Maryland common law.

To the extent any Maryland case holds to the contrary, including *Butler-Tulio v. Scroggins*, 139 Md. App. 122, 774 A.2d 1209 (2001), cert denied, 366 Md. 247, 783 A.2d 221 (Oct. 12, 2001), cited by the Defendant, this and other such cases are preempted.

Notwithstanding the sea of change brought about by the federal statute, defense counsel in this and other cases have aggressively sought to continue their old, preempted practice of private meetings with a plaintiff's/decedent's treating physicians. Those meetings are not only contrary to the policy behind HIPAA, but also are based on factual premises that are untrue.

In addition, there is no known published District of Columbia case law that has held that a person waives his/her right under HIPAA by putting their medical condition at issue. Defendant contends that in *Street v. Hedgepath*, the District of Columbia Court of Appeals held that when a party puts her medical condition at issue, she waives her statutory right of medical confidentiality under D.C Code §14-307. *Street*, 607 A.2d 1238 (1992). However, the *Street v. Hedgepath* holding waives D.C. law, specifically D.C. Code §14-307, not HIPAA. HIPAA provides greater protection than *Street* and HIPAA preempts District of Columbia law on this issue. The District Court in Maryland held that Maryland's law that allowed *ex parte* communications in situations such as these was found to be preempted by HIPAA. *Law v. Zuckerman*, 307 F. Supp. 2d 705, 710 (D. Md. 2004).

Even in *Street*, the District of Columbia Court of Appeals did not allow unfettered *ex parte* discovery of treating physicians. The Court stated “[n]othing in our holding should be read to preclude the trial court from limiting *ex parte* contacts between defense attorneys and potential witnesses when requested to do so by either party.” *Street*, 607 A.2d at 1247. Following HIPAA, the burden

concerning *ex parte* communication by defense counsel has changed. Instead of patients seeking orders of protection from *ex parte* contact, Defendant must now first request authorization to contact treating physicians.

C. The Importance of Confidentiality as Recognized by HIPAA

A defendant in a malpractice case has every right to obtain all relevant information to defend the case. But this can be done under the existing discovery rules, which provide that any defendant can obtain a plaintiff's complete medical records and can then depose any health care provider with relevant information. Depositions are not just needless, costly impositions but useful devices that protect privileges and preserve testimony in an environment where all cards are on the table and neither party has an unfair advantage. And as pointed out by this Defendant, when a patient places his or her medical condition at issue in a civil action, a health care provider must disclose all medical information that forms the basis of the patient's claim whether or not the patient consents to that disclosure. See MD. CODE ANN. HEALTH-GEN., § 4-302(a) (1982, 2000 Repl. Vol., 2000 Cum. Supp.).

But as both the HIPAA regulations and the case law on doctor/patient privilege recognize, a patient who files a lawsuit for an injury does not thereby sacrifice every shred of privacy and confidentiality in his or her life. To the contrary, only facts relevant to the injury become discoverable in the lawsuit. See *Shady Grove Psychiatric Group v. State*, 128 Md. App. 163, 736 A.2d 1168 (1999) and *Warner v. Lerner*, 115 Md. App. 428, 693 A.2d 394 (1997

To the extent any Maryland case has been or could be read to sanction *ex parte* communications between a treating physician and counsel for a defendant in a medical negligence case, HIPAA has now overruled that case by imposing a strict new regime on disclosures of confidential medical information. The defense in this and other cases implicitly acknowledge the change wrought by HIPAA by the very filing of these motions seeking the Court's advanced approval of their proposed *ex parte* contacts. This was precisely the basis for Magistrate Day's holding in *Law v. Zuckerman*, wherein, at the outset of the opinion dealing with *ex parte* communications between defense counsel and plaintiff's treating physicians, he states: "The Court finds that in the absence of strict compliance with HIPAA such discussions are prohibited."

What is the value of medical confidentiality? "A person who seeks advice and/or treatment from a professional is entitled to trust and rely upon that advice, care or treatment. Otherwise, that person will not have the trust and confidence so necessary for there to be the candor and openness that are likely to lead to adequate treatment or representation. This is just common sense." *Underwood v. Mathews*, 366 Md. 660, 785 A.2d 708 (2001).

Additionally, even well-intentioned, honest treating physicians may be influenced in their opinions by inadvertently misleading, incorrect, or distorted information that arises during an *ex parte* conversation with a defense attorney.

Patients lacking medical degrees do not always recognize what is relevant to their medical condition, and they often bring other concerns to their doctors about issues at home or their job that may have no bearing at all on their medical condition. Thus, any doctor who spends time with his patients is likely to learn much confidential information that is not strictly relevant to a lawsuit. HIPAA says that

such confidential information deserves better protection than in the pre-HIPAA era.

D. The Danger of Unsupervised and Unmonitored Ex Parte Communications

If the Court grants Defendant's Motion, the Plaintiff will not know what information was disclosed by the Decedent's doctors to defense counsel, nor will he know what information defense counsel has told Decedent's physicians. The Plaintiff will also not know how defense counsel has characterized the allegations of the lawsuit and the potential involvement, or lack thereof, of the treating physicians in those allegations. In addition, the Plaintiff will not be privy to what information -- perhaps misleading, distorted, or incorrect -- may be given to Decedent's physicians that could affect their willingness to cooperate, or that could have a subtle or coercive impact on their testimony. Without the presence of counsel for all involved parties, there will be no guarantee that privileged information unrelated to this litigation will not be disclosed. Of great concern is the notion that the sometimes subtle distinction between medical information that should be disclosed and medical information which should remain private will be lost or blurred.

None of this necessarily implies any impropriety by defense counsel or by treating physicians. A defense lawyer may not know he or she has elicited irrelevant and improper privileged information until the damage has already been done. Likewise, a physician unschooled in the law has no way of determining legal relevance and whether or not confidential information should be disclosed. That is why the presence of Plaintiff's counsel is necessary to safeguard against inadvertent violations of a patient's privacy rights.

If *ex parte* interviews are allowed, it would be left to the physician to determine what information is subject to disclosure and what remains privileged. Plaintiff's counsel should be present when defense counsel questions Decedent's treating physicians to guard against inadvertent influences or breaches of patient privacy and rights.

"When a treating physician is interviewed *ex parte* by defense counsel, there are no safeguards against the revelation of matters irrelevant to the lawsuit and personally damaging to the patient" *Horner v. Rowan Companies, Inc.*, 153 F.R.D. 597, 601 (S.D. Tex. 1994). However, "when counsel for the plaintiff is present at a formal deposition, the physician can rely upon that counsel to keep the questioning and his answers relevant to the matters properly at issue in the lawsuit." *Alston v. Greater Southeast Community Hospital*, 107 F.R.D. 35, 37 (D. D.C. 1985).

Ex parte interviews needlessly place the treating physician in an awkward position, having to choose loyalties between fellow doctors in the community and their ethical obligations to their patient. The rights of the patient and the responsibilities of the physicians must supersede any convenience allowing informal discovery by the defense would generate.

Physicians can also be subject to sanctions for violating their ethical duty to maintain the confidences of their patients. D.C. Code § 3-1205.14(a)(16). The American Medical Association has enumerated clear ethical guidelines that require physicians to protect patient confidences:

E-5.05 Confidentiality

The information disclosed to a physician by a patient should be held in confidence. The patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed

services. The patient should be able to make this disclosure with the knowledge that the physician will respect the confidential nature of the communication. The physician should not reveal confidential information without the express consent of the patient, subject to certain exceptions which are ethically justified because of overriding considerations.

When a patient threatens to inflict serious physical harm to another person or to him or herself and there is a reasonable probability that the patient may carry out the threat, the physician should take reasonable precautions for the protection of the intended victim, which may include notification of law enforcement authorities.

When the disclosure of confidential information is required by law or court order, physicians generally should notify the patient. **Physicians should disclose the minimal information required by law, advocate for the protection of confidential information and, if appropriate, seek a change in the law.** (III, IV, VII, VIII) Issued December 1983; Updated June 1994 and June 2007.

(emphasis added).

E-9.07 Medical Testimony

In various legal and administrative proceedings, medical evidence is critical. As citizens and as professionals with specialized knowledge and experience, physicians have an obligation to assist in the administration of justice.

When a legal claim pertains to a patient the physician has treated, the physician must hold the patient's medical interests paramount, including the confidentiality of the patient's health information, unless the physician is authorized or legally compelled to disclose the information.

Physicians who serve as fact witnesses must deliver honest testimony. This requires that they engage in continuous self-examination to ensure that their testimony represents the facts of the case. **When treating physicians are called upon to testify in matters that could adversely impact their patients' medical interests, they should decline to testify unless the patient consents or unless ordered to do so by legally constituted authority.** If, as a result of legal proceedings, the patient and the physician are placed in adversarial positions it may be appropriate for a treating physician to transfer the care of the patient to

another physician.

When physicians choose to provide expert testimony, they should have recent and substantive experience or knowledge in the area in which they testify, and be committed to evaluating cases objectively and to providing an independent opinion. Their testimony should reflect current scientific thought and standards of care that have gained acceptance among peers in the relevant field. If a medical witness knowingly provides testimony based on a theory not widely accepted in the profession, the witness should characterize the theory as such. Also, testimony pertinent to a standard of care must consider standards that prevailed at the time the event under review occurred.

All physicians must accurately represent their qualifications and must testify honestly. Physician testimony must not be influenced by financial compensation; for example, it is unethical for a physician to accept compensation that is contingent upon the outcome of litigation.

Organized medicine, including state and specialty societies, and medical licensing boards can help maintain high standards for medical witnesses by assessing claims of false or misleading testimony and issuing disciplinary sanctions as appropriate. (II, IV, V, VII) Issued December 2004 based on the report "Medical Testimony," adopted June 2004.

(emphasis added).

Allowing the defense to engage in *ex parte* communications with a treating physician invites physicians to violate these duties, inadvertently, willfully or negligently. The obligations and duties of defense counsel are at odds with those of the treating health care providers and allowing *ex parte* communication needlessly highlights the risk of transgressing these conflicting duties.

E. The Information that Defendant Seeks Can Be Obtained Through Formal Discovery

The Rules of Civil Procedure provide defense counsel a means of full and fair discovery of the treaters' care. There is no need to provide defense counsel

access to private interviews with Plaintiff's treating doctors. Why abandon a readily available means of proper and authorized discovery to run the risks of an *ex parte* interview? Discovery should be in accordance with Rule 26 of the Superior Court Rules of Civil Procedure. Under Rule 26, parties may obtain discovery regarding any matter...that is relevant to the claim or defense of any party." (Rule 26 of the Superior Court Rules of Civil Procedure). One of the purposes of subpoenas and notices of deposition is to inform all parties of the discovery that is sought and to provide an opportunity for a party to object to such a request or to attend the proceeding. Neither of those two rights of a party would be available if this Court grants this Motion.

If this Court grants Defendant's Motion, it would remove the checks and balances afforded to a party under the Rules of Civil Procedure. The Rules of Civil Procedure also exist to protect parties from the element of unfair surprise at trial. *Corley v. BP Oil Corp.*, 402 A.2d 1258, 1262 (D.C. 1979) (stating that the primary purpose of the liberalized discovery rules is the prevention of unfair surprise at trial). All of which would be bypassed if the Defendant is allowed to participate in *ex parte* communications with treating physicians.

Defendant will suffer no prejudice if its Motion is denied. The substantive medical records will be provided to the defense as part of the initial disclosures and formal discovery remains open. Plaintiff's counsel offered defense counsel a signed authorization to obtain medical records and other documents from the various health care providers but the offer was not accepted. For all of the above-stated reasons, Plaintiff respectfully requests that Defendant's Motion be denied.

F. Recent Case Law Supports the Denial of this Motion

A search was conducted for recent case law on point. These cases should

be read with particular emphasis on Plaintiff's willingness here to have early interviews and depositions of treating physicians so long as they are attended by all counsel, not just defense counsel. In this court, in *Aisenbrey v. Medstar Health*, U.S.D.C. D.D.C. (Civil Docket 1:04-cv-00089-PLF), the parties fully briefed the Defendant's Motion to Permit *Ex Parte* Communication with Plaintiffs' Health Care Providers, Document 18, filed February 10th, 2005. The motion was opposed by the Plaintiff. Document 19, filed February 17th, 2005. Judge Paul L. Friedman denied the Defendant's motion to permit *Ex Parte* communications with Plaintiff's Health Care Providers by an order of June 10, 2005.

This issue has been extensively litigated in the United States District Court for the District of Maryland with several opinions issued. Chief Judge Legg recently denied the defendant's motion to permit *ex parte* communication with Plaintiff's health care providers as follows:

Now pending before the Court is Defendant's Motion for *Ex Parte* Communications with Plaintiff's Treating Health Care Providers (Docket No. 19). The motion is without support in law and defendants have failed to demonstrate good cause for why traditional discovery methods are unworkable.

The issue presented in the instant motion has been addressed conclusively in this district. See *Law v. Zuckerman*, 307 F. Supp. 2d 705, 709 (D. Md. 2004); *Divebliss v. Appaswamy*, Civ. No. 07-3025, slip op. (D. Md. Oct. 27, 2008)(Memorandum Order denying Motion for *Ex Parte* Communications with Plaintiff's Treating Health Care Providers). For the reasons presented in those cases, this Court DENIES defendant's motion (Docket No. 19).

/s/ Benson Everett Legg, Chief Judge. November 19, 2008.

Jeffares v. Kheiri, Memorandum Order of November 19th, 2008, Attached as Exhibit 2.

The issues presented by Defendant WHC's motion were fully briefed and

considered in major MDL litigation in *In Re Kugel Mesh Hernia Patch Products Liability Litigation*, 1:07md1842, U.S. District Court for the District of Rhode Island. The motion was filed as Docket No. 77 (Dec. 27, 2007), and Opposed by the Plaintiffs as Docket No. 171 (January 14, 2008). The MDL Defendants' motion was referred to Magistrate Judge Lincoln D. Almond for resolution, as is the case here. Order of January 17, 2008.

Judge Lincoln D. Almond issued a Memorandum and Order of January 22nd, 2008, Docket No. 245, denying Defendant's Motion, attached as Exhibit 5. The Defendants appealed on February 5th, 2008, Docket No. 290 to the Court. The appeal was opposed on February 12th, 2008 in Docket No. 354. U.S. District Court Chief Judge Mary M. Lisi denied the appeal on February 25th, 2008, Docket No. 418, attached hereto as Exhibit 6.

Therefore, the weight of authority is against granting the Defendant's motion to allow *ex parte* contacts with treating health care providers.

IV. CONCLUSION

Confidentiality of a person's protected health care information is of the utmost importance. HIPAA has changed the landscape of medical malpractice litigation. It recognizes and enforces a patient's right to protect irrelevant confidential information from disclosure to adversaries in a lawsuit. *Ex parte* contacts are fraught with the danger of violating this right and placing treating physicians in conflict with their duties and responsibilities to their patients. Furthermore, *Street v. Hedgepath* is no longer the end of the inquiry as to the status of the law, as it was decided four years before the enactment of HIPAA and thus has been pre-empted by HIPAA. Plaintiff respectfully requests this Honorable Court deny Defendant's Motion for Protective Order and deny the *Ex Parte*

Communication.

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

Houston Bigelow, Individually and as P.R. of the Estate of Mary Bigelow, Deceased 969 County Home Road Blanch, NC 27212,)	
Plaintiffs,)	Opposition to Motion for
)	Ex Parte Contact with Treating
)	Physicians
v.)	
)	Civil Case No. 10-1471 (RLW)
Washington Hospital Center Corporation, et al.,)	
Defendants.)	Judge Robert L. Wilkins
)	
)	
)	
)	

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