RECOGNIZING THE SPLIT: THE JURISDICTIONAL TREATMENT OF
DEFENSE COUNSEL’S EX PARTE
CONTACT WITH PLAINTIFF’S TREATING PHYSICIAN

I. INTRODUCTION

In medical malpractice actions, defense counsel is often tempted to contact, ex parte, the plaintiff’s treating physician. Ex parte communications are extra-judicial disclosures by a person to an opposing party in a lawsuit. These contacts occur when one party meets with the person informally without opposing counsel being present. That temptation can lead to disciplinary proceedings against the attorney or attorneys pursuant to the American Bar Association’s Model Rules of Professional Conduct. Moreover, depending upon the jurisdiction in which the action lies, the ex parte communication could result in evidence being inadmissible or punitive damages being assessed. In 1995, the Supreme Court of Wisconsin decided this issue in Steinberg v. Jensen, a case which requires a closer look at the rule pertaining to ex parte communications with plaintiff’s treating physician in other jurisdictions.

II. THE RELEVANT TERMINOLOGY

The “physician-patient privilege,” while not recognized at common law, protects the confidentiality of physician-patient communications. As discussed below, this privilege encompasses diverse public policy justifications. The physician-patient privilege is usually found in two contexts. First, an ethical obligation creates the physician-patient privilege, as found in the Hippocratic Oath, which provides in part, “[w]hatever, in

5. See Woodard, supra note 4, at 237-38.
connection with my professional practice or not in connection with it, I see or hear, in the life of men, which ought not to be spoken abroad, I will not divulge, as reckoning that all such should be kept secret." 6

Second, in most states, the privilege is created by statute. 7 However, these statutes are usually limited to a testimonial privilege which can be waived, either expressly or impliedly, only by the patient. 8 Jurisdictional analysis reveals that this statutory privilege is not always clear-cut because some states provide exceptions and apply waiver accordingly. 9

III. THE WISCONSIN DECISION

In Steinberg v. Jensen, 10 the Wisconsin Supreme Court addressed the question of "what extent, if any, may defense counsel in either a medical malpractice or personal injury action communicate ex parte with the plaintiff's treating physicians?" 11 The court held "that defense counsel may communicate ex parte with a plaintiff's treating physicians so long as the communication does not involve the disclosure of any confidential information." 12 The court did not sanction, but allowed, the ex parte communication where the defense counsel held a three-way telephone conversation with the defendant-physician and with one of the plaintiff's other treating physicians who was not a party to the action. 13 In the conversation, defense counsel confirmed scheduling of a deposition and told the physician about what he would be testifying. 14 This was done after defense counsel warned the plaintiff's physician that privileged information could not be discussed. 15 The court noted that the "discussion focused on scheduling and procedural matters and did not present a risk of discovering any confidential information."

Like many other courts, the Wisconsin Supreme Court considered

7. See Woodard, supra note 4, at 236-37.
8. See Woodard, supra note 4, at 237-39.
10. 534 N.W.2d 361 (Wis. 1995).
11. Id. at 363.
12. Id.
13. Id. at 374.
14. Id. at 366.
15. Steinberg, 534 N.W.2d at 366.
16. Id. at 374.
the physician-patient privilege and the underlying public policy.\textsuperscript{17} In Wisconsin, like many other states, the physician-patient privilege is purely statutory, and it allows a patient “to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient’s physical, mental or emotional condition.”\textsuperscript{18} Thus, “the patient is deemed to own the privilege,” and the patient is the only person who may waive the privilege.\textsuperscript{19} Some jurisdictions create exceptions to the rule that the patient is the only person who may waive the privilege, and the Wisconsin court noted the exceptions.\textsuperscript{20} The Wisconsin statute, listing the exceptions, provided that

[D]efendants in personal injury actions and in malpractice actions commonly invoke the exception . . . that “[t]here is no privilege . . . as to communications [that are] relevant to or within the scope of discovery . . . of the physical, mental, or emotional conditions of a patient” in any proceeding in which the condition is “an element of the patient’s claim or defense.”\textsuperscript{21}

The court noted that the public policy behind this privilege is to “encourage patients to freely and candidly discuss medical concerns with their physicians by ensuring that those concerns will not unnecessarily be disclosed to a third person.”\textsuperscript{22} However, as the court found, “[t]he physician-patient privilege is a testimonial rule of evidence, not a substantive rule of law regulating the conduct of physicians.”\textsuperscript{23}

Implicit in finding that the physician-patient privilege “is limited to judicial proceedings”\textsuperscript{24} is the issue of whether or not lawyers and physicians may freely discuss a plaintiff’s medical treatment outside of the judicial proceeding. While physicians have an ethical duty of patient confidentiality, the court noted that the privilege is waived as to certain

\textsuperscript{17} Id. at 368.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Steinberg, 534 N.W.2d at 368.
\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{23} Id. at 370. This was an important finding because often jurisdictions rely on the fact that the physician-patient privilege is an evidentiary rule of law in order to allow ex parte communications. By allowing ex parte communications under this rationale, the courts seem to also hold that the privilege is only waiveable in trial proceedings and that waiver is not applicable to extra-judicial proceedings.
\textsuperscript{24} Id.
information once a lawsuit is filed.\textsuperscript{25} That information, however, does not encompass confidential information under Wisconsin law.\textsuperscript{26}

Under Wisconsin law, confusion arises as to what may be discussed in an ex parte conversation. Wisconsin seems to be one of few jurisdictions that tries to limit what is discussable in ex parte contacts. The \textit{Steinberg} court held

\begin{quote}
[A]s a matter of public policy that when a defense attorney is involved in an ex parte conversation about the plaintiff with one or more of the plaintiff's treating physicians, the attorney should (1) inform the physician at the beginning of the conversation that he or she has the right to decline to speak with defense counsel, (2) warn that the conversation must be limited to matters that are not confidential, (3) instruct the physician not to disclose or discuss anything that he or she believes might possibly be confidential, and (4) take all steps reasonably practicable to ensure that the conversation does not stray into a discussion of confidential information.\textsuperscript{27}
\end{quote}

The \textit{Steinberg} court stated that in order to question a physician about confidential information, the questioning must be done "either in the presence of opposing counsel or through a writing, an exact duplicate of which must be sent concurrently to opposing counsel."\textsuperscript{28} Thus, the \textit{Steinberg} court did not expressly prohibit ex parte communications. Rather, it limited such contacts in a possibly confusing way for defense counsel. Under the \textit{Steinberg} opinion, the court would definitely allow ex parte communications for scheduling and procedural matters. However, it is not apparent what other information can be discussed. It seems that the court would allow ex parte communications concerning the physical, mental, or emotional condition of the plaintiff since the physician-patient privilege has been waived as to this matter.\textsuperscript{29} This holding stands for the proposition that ex parte communications are possible only to the extent that defense counsel cannot "elicit previously unknown information from the physician."\textsuperscript{30}

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\textsuperscript{25} \textit{Steinberg}, 534 N.W.2d at 370.  \\
\textsuperscript{26} \textit{id.} at 371.  \\
\textsuperscript{27} \textit{id.}  \\
\textsuperscript{28} \textit{id.} at 371-72.  \\
\textsuperscript{29} \textit{id.} at 371.  \\
\textsuperscript{30} \textit{Steinberg}, 534 N.W.2d at 370.
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IV. PUBLIC POLICY

It is generally accepted that express waiver of the physician-patient privilege by the plaintiff will allow ex parte communications. However, in circumstances where there has been no express waiver, the defense counsel is faced with the confusion of what may be asked under a Steinberg-type rule or other applicable state law. Such state law rules are often guided by public policy concerns for allowing or prohibiting ex parte communications.

A. Favoring Prohibition of Ex Parte Communications

As discussed briefly in Steinberg, there are policy arguments favoring the prohibition of ex parte communications. Courts often find one policy reason to be that the privilege leads to full and open disclosure, resulting in the best medical treatment. A second justification is that the public expects that such information will be kept confidential by refraining from disclosure. A third reason centers on the physician's lack of legal training. In this regard, allowing ex parte contacts by defense counsel with the plaintiff's treating physician or physicians might lead to inadvertent disclosure simply because the physician feels compelled to answer or because the physician does not know what is discoverable. A final justification is that "discovery procedures are sufficiently broad to allow the defense to acquire all the information they need from a plaintiff's treating physicians . . . ."

31. Jennings, supra note 1, at 459-60.
32. See 534 N.W.2d at 368-73.
35. See, e.g., King v. Ahrens, 798 F. Supp. 1371, 1373 (W.D. Ark. 1992). While this may be true for young physicians who have not been properly acquainted with the process, it is likely that physicians are trained to deal with plaintiffs' attorneys by in-house counsel or committees. This training would shield physicians, as well as hospitals, from limitless liability.
36. Jennings, supra note 1, at 458. As will become evident later, most of the courts across the nation which prohibit ex parte communications cite this as a justification.
B. Disfavoring Prohibition of Ex Parte Communications

Likewise, there are policy justifications for allowing ex parte communications and disfavoring the prohibition of ex parte communications. These do not focus on the physician’s ethical duty. Rather, these reasons are cost-centered and factor in fairness. One justification cited frequently by courts is that “ex parte interviews are quicker and more efficient than formal discovery in that they reduce the time needed to prepare for trial.”37 A second policy consideration is that it is unfair for one party to have access to the confidential information while prohibiting access to it for another party, thereby restricting “another party’s access to that evidence.”38 Defense counsel should be able to gain confidential information in order to defend its client with all the information known to the parties. Another justification is that by filing a lawsuit, a patient-plaintiff waives the privilege as to certain information.39 A final justification answers one of the justifications for prohibition: allowing ex parte communications does not mandate that physicians must talk to defense counsel.40 The treating physician would still be able to decide what he or she wants to discuss within the parameters of his or her ethical duty.41

These justifications have been used in weighing whether or not ex parte communications between defense counsel and plaintiff’s treating physician should be allowed. Jurisdictions are split as to how to treat this area of the law.

V. JURISDICTIONAL INTERPRETATIONS

The jurisdictional split in treatment of ex parte communications is not straightforward. Whether the jurisdiction prohibits or allows ex parte communications is often a qualified answer.

The jurisdictions seem to be equally split in their treatment of ex parte communications. After setting out those jurisdictions prohibiting ex parte communications, the rationale for the decisions will be briefly discussed. The jurisdictions prohibiting ex parte communications include

37. Jennings, supra note 1, at 458.
39. See Petrillo, 499 N.E.2d at 959.
40. Jennings, supra note 1, at 459. See also, e.g., Steinberg, 534 N.W.2d at 371.
41. Jennings, supra note 1, at 459. See also, e.g., Steinberg, 534 N.W.2d at 371.
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Alabama, 42 Arizona, 43 Florida, 44 Illinois, 45 Indiana, 46 Iowa, 47 Minnesota, 48 Mississippi, 49 Montana, 50 New Hampshire, 51 New Mexico, 52 New York, 53 North Carolina, 54 North Dakota, 55 South Dakota, 56 Texas, 57 Washington, 58 West Virginia, 59 and Wyoming. 60 Public policy considerations factor into these prohibitions, but some of the jurisdictions recognize other justifications for disallowing ex parte communications between defense counsel and a plaintiff’s physician.

The most cited reason for prohibiting ex parte communications is that formal discovery methods may be used to obtain the same information that an ex parte communication would allow. 61 Using this justification, the courts will not allow a fishing exhibition because of the public policy reasons that have been discussed. More importantly, it is often

42. See Horne v. Patton, 287 So. 2d 824 (Ala. 1974).
47. See Roosevelt Hotel Limited Partnership v. Sweeney, 394 N.W.2d 353 (Iowa 1986).
52. See Church’s Fried Chicken No. 1040 v. Hanson, 845 P.2d 824 (N.M. Ct. App. 1993).
61. See, e.g., Petrillo, 499 N.E.2d at 965-66. Where courts justify prohibition on the grounds that formal discovery methods may be used, defense counsel often argues that ex parte communications are “settlement causing.” Id.
cited that the rules of civil procedure do not allow for such ex parte communications; simply put, the courts adhere strictly to the state’s rules of civil procedure.\textsuperscript{62} Jurisdictions citing a discovery justification include Illinois,\textsuperscript{63} Indiana,\textsuperscript{64} Montana,\textsuperscript{65} New Hampshire,\textsuperscript{66} New York,\textsuperscript{67} North Dakota,\textsuperscript{68} and West Virginia.\textsuperscript{69}

Alabama and Florida courts have looked to the absence or presence of a statutory provision. In Alabama, there is no statute creating the physician-patient testimonial privilege.\textsuperscript{70} However, Alabama recognizes that there is a “qualified duty on the part of a doctor not to reveal confidences obtained through the doctor-patient relationship.”\textsuperscript{71} Florida, on the other hand, statutorily “prohibits communications between a doctor and a third party regarding the medical condition of the doctor’s patient unless compelled by a subpoena for deposition, evidentiary hearing, or at trial.”\textsuperscript{72}

The jurisdictions which permit ex parte communications do so for many of the same reasons associated with prohibiting ex parte communications. Some jurisdictions allow ex parte communications based upon the rationale that statutorily the plaintiff-patient waives the physician-patient privilege by filing a lawsuit which puts his or her medical, emotional, or physical condition at issue.\textsuperscript{73} Other jurisdictions allow ex parte communications based upon the rationale that the statutory physician-patient privilege is only testimonial.\textsuperscript{74} Still other jurisdictions point to the absence of such a statute barring ex parte communications.\textsuperscript{75} Finally, some jurisdictions consider the rules of discovery which allow ex parte

\textsuperscript{62} See, e.g., \textit{Jaap}, 623 P.2d at 1391.
\textsuperscript{63} See \textit{Petrillo}, 499 N.E.2d at 952.
\textsuperscript{64} See \textit{Cua}, 636 N.E.2d at 1248.
\textsuperscript{65} See \textit{Jaap}, 623 P.2d at 1389.
\textsuperscript{66} See \textit{Nelson}, 534 A.2d at 720.
\textsuperscript{67} See \textit{Stoller}, 499 N.Y.S.2d at 790.
\textsuperscript{68} See \textit{Weaver}, 90 F.R.D. at 443.
\textsuperscript{69} See \textit{Kitzmiller}, 437 S.E.2d at 452.
\textsuperscript{70} \textit{Horne}, 287 So. 2d at 827.
\textsuperscript{71} Id.
\textsuperscript{72} \textit{Phillips}, 618 So. 2d at 314 (citing FLA. STAT. ch. 455.241(2) (1991)).
\textsuperscript{74} See, e.g., \textit{Brandt v. Pelican}, 856 S.W.2d 658, 662 (Mo. 1993).
\textsuperscript{75} Compare \textit{Quarles v. Sutherland}, 389 S.W.2d 249, 251 (Tenn. 1965) (finding that there was no statutory physician-patient privilege), \textit{with Roberts v. Estep}, 845 S.W.2d 544, 547 (Ky. 1993) (finding that there was no statute barring ex parte communications).
communications with witnesses. Jurisdictions allowing ex parte communications include Alaska, Arkansas, California, Colorado, Delaware, the District of Columbia, Georgia, Idaho, Kansas, Kentucky, Michigan, Missouri, New Jersey, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, and Wisconsin.

VI. CONCLUSION

The rules concerning ex parte communications between defense counsel and plaintiff’s treating physician are necessary in our nation in order to provide for a fair and impartial judicial system. In some jurisdictions, the rules are straightforward and need no further explanation by the courts. Each defense attorney, accordingly, should learn the standard practice procedures in the jurisdiction in which he or she practices.

Courts should be more exacting in their interpretation of the issue of ex parte communications because otherwise confusion could result in the defense attorney’s mind as to what communications are permissible. The

86. See Roberts v. Estep, 845 S.W.2d 544 (Ky. 1993).
88. See Brandt v. Pelican, 856 S.W.2d 658 (Mo. 1993).
95. See Quarles v. Sutherland, 389 S.W.2d 249 (Tenn. 1965).
96. See Steinberg v. Jensen, 534 N.W.2d 361 (Wis. 1995).
policies for allowing ex parte communications likely are those which would make the judicial system more efficient. These public policies should be given great weight, while not overstepping the boundaries of the physician-patient privilege. The physician-patient privilege complicates the issue as the courts seem to accept the policy that allowing ex parte communications would lead to less disclosure in a medical examination. While the justification for preserving the physician-patient privilege is valid, it is necessary for the courts to take note that the plaintiff has made his or her injury the issue in a lawsuit. Therefore, the defendant should be allowed to obtain full discovery within reasonable limits.

Defense attorneys have viable methods of discovery which are sufficient to defend against a lawsuit. However, defense attorneys should not suffer at the hands of plaintiff attorneys by being restricted access to all pertinent information. The treating physician is an instrumental person involved in the litigation. The physician's knowledge of the plaintiff's injuries are relevant to the litigation. Therefore, courts should fashion rules which permit access to the physician's information. These rules could be limited to standard types of questions or to the discovery of documents. Defense attorneys should be able to get much information from medical records, as often the physician's thoughts are noted in detail. A standard questionnaire for all cases would create a means by which all attorneys could create a cooperative relationship, thereby making the judicial system more efficient.

The majority of jurisdictions allow ex parte communications based upon the plaintiff-patient waiver of the physician-patient privilege. Perhaps the underlying rationale for allowing ex parte communication is that "to disallow a viable, efficient, cost effective method of ascertaining the truth because of the mere possibility of abuse, smacks too much of throwing out the baby with the bath water." Those jurisdictions prohibiting such communications do so with ethical considerations in mind. Thus, it would seem that there could be a proper balance of the two and create a much fairer approach.

J. Christopher Smith