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Shielding the Plaintiff and Physician: The Prohibition of Ex Parte Contacts with a Plaintiff's Treating Physician

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SHIELDING THE PLAINTIFF AND PHYSICIAN: THE PROHIBITION OF EX PARTE CONTACTS WITH A PLAINTIFF’S TREATING PHYSICIAN

INTRODUCTION

[W]hatever, in connection with my professional practice, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken abroad, I will not divulge as reckoning that all such should be kept secret . . . .

This oath "has come down through history as a living statement of ideals to be cherished by the physician." Physicians thus are sworn to respect the private facts they discover about their patients. Appropriately, the law also respects the realm of privacy which surrounds the physician and his patient. The protection of this privacy right is statutory in many jurisdictions, including North Carolina. However, the privilege may be waived, either expressly or impliedly. Does the fact that the privilege may be

1. Oath of Hippocrates.
4. See N.C. GEN. STAT. § 8-53 (1989). The statute provides:
   No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon, and no such information shall be considered public records under G.S. 132-1. Confidential information obtained in medical records shall be furnished only on the authorization of the patient, or if deceased, the executor, administrator, or, in the case of unadministered estates, the next of kin. Any resident or presiding judge in the district, either at the trial or prior thereto, or the Industrial Commission pursuant to law may, subject to G.S. 8-53.6, compel disclosure if in his opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge.
5. Capps v. Lynch, 253 N.C. 18, 22, 116 S.E.2d 137, 141 (1960). The right may be waived expressly by contract. Id.
6. Id. at 22, 116 S.E.2d at 141.
waived entitle defense counsel to conduct ex parte interviews with a plaintiff’s treating physician? “[S] tatutes governing waiver of the physician-patient privilege do not specifically allow or prohibit ex parte interviews.” 7 Some jurisdictions allow ex parte interviews, basing their decisions on such factors as facilitation of early settlement and a reduction in litigation costs. 8 The jurisdictions which do not permit ex parte interviews rely on the availability of formal discovery devices 9 and potential for abuse by defense counsel as the basis of their decisions. 10 North Carolina decided not to permit ex parte interviews with plaintiff’s treating physicians in Crist v. Moffatt. 11

As a result of Crist, defense counsel in North Carolina are confined to traditional forms of discovery where a plaintiff’s treating physician is concerned. 12 This decision properly extends protection to the physician and patient in personal injury litigation during pretrial by assuring the patient that his attorney will be present to advise the physician how much information he is legally permitted to disclose. 13

This Note will first explore the physician-patient privilege and the underlying policies which are often implicated in cases confronting challenges to ex parte interviews. Next, this Note will examine the reasoning from the jurisdictions which permit and those which prohibit ex parte interviews. Finally, this Note will analyze the North Carolina Supreme Court’s decision to prohibit ex parte interviews.

THE CASE

Hazel Marie Crist filed a medical malpractice action on De-

“The privilege is waived by implication where the patient calls the physician as a witness and examines him as to the patient’s physical condition, where the patient fails to object when the opposing party causes the physician to testify, or where the patient testifies to the communication between himself and physician.”

Id. at 23, 116 S.E.2d at 141.

7. Annotation, supra note 3, at 717.
12. Id. at 336, 389 S.E.2d at 47.
13. Id. (citing Roosevelt Hotel Ltd. Partnership v. Sweeney, 394 N.W.2d 353, 357 (Iowa 1986)).
Physician-Patient Privilege

November 4, 1986, alleging that the defendant, Dr. Robert C. Moffatt performed surgery and rendered post operative care negligently. After filing an answer, the defendant served the plaintiff with interrogatories and requests for production of medical bills incurred as a result of defendant’s alleged negligence. The plaintiff produced records of her treatment by Dr. James W. Tyson and Dr. F. Alan Thompson, and identified them as physicians who would testify as to the facts and circumstances of their treatment of the plaintiff prior to surgery.

The defendant’s attorney deposed the plaintiff and asked her questions about the treatment rendered by nonparty treating physicians, including Drs. Thompson and Tyson. Some time later, the defendant’s attorney met privately with both Drs. Thompson and Tyson. The defendant’s attorney admitted that he told both doctors that the plaintiff had waived the physician-patient privilege. Thereafter, the plaintiff filed a motion to compel disclosure of the defendant’s attorney’s private conversations with the plaintiff’s nonparty treating physicians. The plaintiff also requested that the court prohibit the use at trial of any information obtained during the private interviews and that the court prohibit any further ex parte contacts. The trial court found that the plaintiff had not waived her privilege prior to the date of the ex parte contacts. The court also found that no resident or presiding judge had entered an order compelling disclosure pursuant to N.C. Gen. Stat. §8-53, nor had a resident or presiding judge entered an order finding that the plaintiff had waived the physician-patient privilege by providing copies of her medical records, by testifying concerning her medical treatment at her deposition, or by identifying the doctors as witnesses or by not objecting to the deposition of any nonparty witness. The court concluded upon these facts that the defendant’s attorney acted improperly by discussing plaintiff’s medical care and treatment with her nonparty treating physicians.

14. Crist, 326 N.C. at 328, 389 S.E.2d at 42.
15. Id.
16. Id. at 328, 389 S.E.2d at 42-43.
17. Id. at 328, 389 S.E.2d at 43.
18. Id.
19. Id. at 329, 389 S.E.2d at 43.
20. Id.
21. Id.
22. Id.
23. Id.
without first receiving the plaintiff's consent. The court issued an order compelling the defendant's attorney to disclose the substance of all the private conversations. The court also ordered the defendant to refrain from further ex parte contacts with the non-party treating physicians without the plaintiff's knowledge and consent or without a court order.

BACKGROUND

A. The Physician-Patient Privilege

The physician-patient privilege is an underlying concern in most cases that address the propriety of ex parte interviews. In determining whether or not to permit ex parte interviews, courts are concerned with the potential wrongful disclosure of information which is generally protected by the physician-patient privilege. Questions arise over whether the privilege has been waived and whether a waiver in itself is so broad that it justifies permitting defense counsel to conduct ex parte interviews. Because the privilege is usually implicated in these cases, it warrants discussion.

At common law there was no privilege protecting the confidentiality of physician-patient communications. Some states have adopted the privilege in limited circumstances by judicial construction, but most states have enacted legislation which protects physician-patient communications. North Carolina enacted legisla-

24. Id.
25. Id.
26. Id. at 330, 389 S.E.2d at 43.
29. As of 1985, 40 states and the District of Columbia had passed physician-patient privileges. Developments in the Law - Privileged Communications, 98 HARV. L. REV. 1450, 1532 (1985). The statutes generally have five requirements for the physician-patient privilege. Kmentt, Private Medical Records: Are They Public Property?: A Survey of Privacy Confidentiality and Privilege, 1987 MED. TRIAL TECH. Q. 274, 277. The person barred from testifying must fit the statutory definition of covered medical personnel. The protected information must flow from a defined medical relationship. The information must come from a communication or an observation. The patient's treatment must require the information. Finally, the information must be confidential. Id.
tion protecting the confidentiality of this relationship in 1885. 30 “Section 8-53 of the North Carolina General Statutes creates a testimonial privilege; that is, it grants a patient the right to prevent his or her physician from testifying to the confidential information received from the patient during treatment.” 31 In North Carolina, the privilege is not confined only to information orally communicated by the patient. 32 It also applies “to knowledge obtained by the physician or surgeon through his own observation or examination while attending the patient in a professional capacity, and which was necessary to enable him to prescribe.” 33 However, some states do have statutes which limit the privilege to oral communications. 34 Federal law does not recognize a physician-patient privilege at all. 35

A variety of policy reasons exist for protecting the physician-patient privilege. The privilege induces patients to make full disclosure so that proper treatment may be given. 36 It also prevents

30. Id. “G.S. 8-53 as interpreted by our Supreme Court has the effect of amending this common law rule.” State v. Bryant, 5 N.C. App. 21, 25, 167 S.E.2d 841, 845 (1969).
33. Id.
34. Simms v. Charlotte Liberty Mutual Ins. Co., 257 N.C. 32, 37, 125 S.E.2d 326, 330 (1962). Ohio is a state which limits the privilege to communications by the patient, but the court holds that a “communication may be not only by word of mouth, but also by exhibiting the body or any part thereof to the physician for his opinion, examination or diagnosis.” Meier v. Peirano, 76 Ohio App. 9, —, 76 Ohio App. 9, —, 62 N.E.2d 920, 922 (1945)(quoting Ausdenmoore v. Holzback, 89 Ohio St. 381, 106 N.E. 41 (1914)).
35. Federal courts rely on the individual state's common law. Rule 501 of the Federal Rules of Evidence states:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil action and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

36. But see 8 J. Wigmore, Evidence § 2380a (McNaughton rev. 1961) (absence of the privilege will not deter people from seeking medical aid or from con-
public disclosure of socially stigmatizing diseases, and in some instances, protects patients from self-incrimination. "The law recognizes a privilege because the benefits derived from protecting the physician-patient relationship outweigh the costs of confidentiality, including the inhibition of fact-finding during litigation." 37

The privilege belongs solely to the patient; a physician or surgeon may not refuse to testify. 38 However, the privilege is not absolute. 39 Under the North Carolina statute, a physician may be compelled to testify if the presiding judge finds that disclosure is necessary to a "proper administration of justice." 40 In such a case the judge must enter upon the record his finding that the testimony is necessary to the proper administration of justice. 41

The privilege may be waived expressly 42 or by implication. 43

resulting physicians freely).

37. Simms, 257 N.C. at 36, 125 S.E.2d at 329.
38. Note, supra note 28, at 1460. See also 8 J. WIGMORE, EVIDENCE § 2380a (McNaughton rev. 1961), testing the physician-patient privilege against the fundamental canons which must be satisfied by every privilege for communications. Does the communication originate in a confidence? Is the inviolability of that confidence vital to the due attainment of the purposes of the relation of physician and patient? Is the relation, through disclosure, greater than the expected benefit to justice? A negative answer to any one of these questions would leave the privilege without support. Id.

40. Simms, 257 N.C. at 38, 125 S.E.2d at 331.
41. Id.
42. N.C. GEN. STAT. § 8-53 reads in pertinent part: "Any resident or presiding judge . . . may . . . compel disclosure if in his opinion disclosure is necessary to a proper administration of justice." The 1953 version of the North Carolina statute has been mentioned favorably for requiring disclosure where necessary. See 8 J. WIGMORE, EVIDENCE § 2380a (McNaughton rev. 1961). The 1937-38 ABA Committee on the Improvement of the Law of Evidence commented that the North Carolina statute allowed a "wholesome flexibility" with its "needed but rare interpretation." Id.

43. Simms, 257 N.C. at 38, 125 S.E.2d at 331. But see, State v. Bryant, 5 N.C. App. 21, 28-29, 167 S.E.2d 841, 847 (1969), where the trial judge did not enter a finding upon the record but the court of appeals held that the act of ruling was itself a finding of necessity.

44. Capps v. Lynch, 253 N.C. 18, 22, 116 S.E.2d 137, 141 (1960). See Note, supra note 28, at 1462. "Most jurisdictions require that the waiver be voluntary and clearly intentional." Id. It is "similar to the traditional concept of waiver used in contract or constitutional law, which courts define as the 'intentional relinquishment or abandonment of a known right or privilege.'" Id. (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1968)).

45. Capps, 253 N.C. at 23, 116 S.E.2d at 141. See also 1 BRANDIS ON NORTH
The patient may waive the privilege by implication by voluntarily discussing the nature of his injuries or testifying to what the physician did or said while in attendance.\(^6\) The privilege is impliedly waived when the patient discusses these matters because the patient breaks the fiduciary relationship with the physician by revealing the communications.\(^7\) By breaking the fiduciary relationship, the patient demonstrates that the confidences no longer need to be protected.\(^8\) However, mere general statements about the patient's physical condition does not waive the privilege.\(^9\) When there is a waiver, it applies not only to communications with the physician, but also to the physician's opinions.\(^50\) The basic reason that courts will imply a waiver is the inherent unfairness to a defendant that would result without an implied waiver. The unfairness would arise when the plaintiff used information gained from his treating physician and then tried to hide information which might help the defendant's case.\(^51\)

B. Ex Parte Interviews

Ex parte interviews are generally available for use with non-expert witnesses prior to formal depositions.\(^52\) The ex parte interviews are neither expressly permitted nor prohibited under a state's rules of civil procedure.\(^53\) However, the confidential rela-
tionship which exists between physician and patient distinguishes the physician from the ordinary witness. Deciding whether or not to allow ex parte interviews requires a court to weigh the competing interests of the physician-patient privilege against the interests advanced by permitting defense counsel to conduct ex parte interviews. As a result, considerable debate exists over the propriety of ex parte interviews with a plaintiff's treating physicians.

1. Views Supporting Ex Parte Interviews

a. Waiver

Some courts focus on the waiver of the physician-patient privilege as the basis for allowing ex parte interviews. Those courts reason that "if no privilege exists or it has been waived, no party is entitled to restrict an opponent's access to a witness." The courts adopting this reasoning emphasize that no party has a proprietary interest in any witness' evidence. "Absent a privilege no party is entitled to restrict an opponent's access to a witness, however partial or important to him, by insisting upon some notion of allegiance." Following this line of reasoning, if defense counsel is not impeded by a privilege, he may, before trial, ask any witness what he knows.

b. Efficiency

 Courts also allow ex parte interviews because they save time and money and facilitate early settlement. An interview of a wit-
ness is less costly than a deposition and is easier to schedule.\textsuperscript{60} An interview is also a "cost efficient means of eliminating non-essential witnesses . . . completely."\textsuperscript{61}

c. \textit{Permissible Under the States' Rules of Civil Procedure}

Moreover, none of the various rules of civil procedure or any other statutes forbid ex parte interviews.\textsuperscript{62} "The ex parte interview is an effective discovery procedure which operates outside of and is not precluded by federal discovery rules."\textsuperscript{63} Relying on this reasoning, some courts conclude that ex parte interviews are permissible since they are not expressly forbidden. Under this analysis, the competing interests of all parties are presumably protected.\textsuperscript{64} First, since it is unrealistic to assume the plaintiff's physician will agree to an interview without plaintiff's consent, the defendant's interest is protected by a rule which permits the trial court to compel a plaintiff to execute an authorization.\textsuperscript{65} Second, a plaintiff's interest is protected by conditions which require the defendant to provide plaintiff's counsel with reasonable notice of the time and place of the interview.\textsuperscript{66} Finally, the physician's interests will be protected if he is informed that he need not cooperate if he believes the interview would compromise his responsibilities.\textsuperscript{67} An overriding of discovery that reduce the cost and time of trial preparation." \textit{Stempler}, 100 N.J. at 382, 495 A.2d at 864.

\textsuperscript{60} Missouri \textit{ex rel.} Stuffiebam v. Appelquist, 694 S.W.2d 882, 888 (Mo. App. 1985) (disapproved by Missouri \textit{ex rel.} Woytus v. Ryan, 776 S.W.2d 389 (Mo. 1989)).

\textsuperscript{61} \textit{Id.} (citing \textit{Doe}, 99 F.R.D. at 128).

\textsuperscript{62} \textit{Stempler}, 100 N.J. at 380, 495 A.2d at 863.

\textsuperscript{63} \textit{Sklagen v. Greater S.E. Community Hosp.}, 625 F. Supp. 991, 992 (D.D.C. 1984). In this case the defendant sought an order requiring plaintiff to execute an authorization allowing the treating physician to be interviewed. The court held that the federal rules simply were not implicated by the defendant's request because the authorization requested did not require or order disclosure from the physician; it merely permitted such disclosure. \textit{Id.}

\textsuperscript{64} \textit{Stempler}, 100 N.J. at 381, 495 A.2d at 863. The defendant's interest is the right to interview the physician without being confined to the expense and inconvenience of formal discovery, the plaintiff's interest is to prevent disclosure of confidential information which is still subject to the privilege, the physician's interest is prevention of inadvertent disclosure of still privileged information and protection from the ethical and legal penalties for such disclosure. \textit{Id.} at 381-82, 495 A.2d at 863-64.

\textsuperscript{65} \textit{Id.} at 382, 495 A.2d at 864.

\textsuperscript{66} \textit{Id.}

\textsuperscript{67} \textit{Id.}
theme in the cases which follow this reasoning is the concern that the plaintiff will use his privilege not as a shield, but as a sword\textsuperscript{68} or trial tactic by controlling the timing and circumstances of the release of information.\textsuperscript{69} The rationale of these cases can be boiled down to one idea. Although a state's rules of civil procedure provide "certain specific formal methods of acquiring evidence from recalcitrant sources by compulsion, they have never been thought to preclude the use of such venerable, if informal, discovery techniques as the ex parte interview of a witness who is willing to speak."\textsuperscript{70}

d. Discovery of Work Product

Another concern that occasionally surfaces is the threat that the defense attorney's work product will be invaded. This is because the party holding the physician-patient privilege will be able to monitor progress in the defendant's case by being present at interviews.\textsuperscript{71}

2. Views Prohibiting Ex Parte Interviews

a. Protection of Confidential Relationship

Courts prohibiting ex parte interviews rely heavily upon the special nature of the physician-patient relationship. Public policy strongly favors protection of the confidential and fiduciary relationship existing between a physician and his patient.\textsuperscript{72} The prohibition against ex parte interviews is not statutory nor is it found at common law; rather it is an "emerging court-created effort to preserve the treating physician's fiduciary responsibilities during the

\textsuperscript{68} J. Wigmore, Evidence §2380a (McNaughton rev. 1961) ("It is certain that the practical employment of the privilege has come to mean little but the suppression of useful truth." Id.).

\textsuperscript{69} Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128 (D. D.C. 1983). Another perceived threat in not compelling plaintiff to give authorization to the physician to speak is the intimidation of the witness by forcing him to discuss matters at his own risk after he voluntarily agrees to an interview, which is improper influence in itself. Id. at 128.


\textsuperscript{71} Doe, 99 F.R.D. at 128-29.

litigation process." Thus, courts prohibiting ex parte interviews look beyond what may technically be permissible because of silence of the statutes and the common law. Instead they focus on the policy behind the physician-patient privilege and decide that policy rather than efficiency should prevail.

i. The Physician's Code of Ethics

For several hundred years physicians have acknowledged their obligation to keep a patient's confidences in trust. The American Medical Association's (AMA) principle IV states that "a physician shall respect the rights of patients . . . and shall safeguard patient confidences within the constraints of the law." The Current Opinions of the Judicial Council of the AMA impose an additional instruction to the physician to maintain patient confidences. Section 5.06 of the Current Opinions deals directly with the attorney-physician relationship. It states that "the patient's history, diagnosis, treatment, and prognosis may be discussed with the patient's lawyer with the consent of the patient . . . ." Courts have repeatedly found that a patient has a right to rely on a physician's ethical obligation to protect the confidential relationship.

Thus, confidentiality and patient consent are inextricably tied together; the relationship between a patient and his physician remains confidential only as long as a patient can rest assured that he must give his consent before any of the information disclosed.

74. PetriUo, 148 Ill. App. 3d at 609-10, 499 N.E.2d at 971. The PetriUo court found the reasoning of courts allowing ex parte interviews to be flawed because they attempt to deal with a question of great societal importance by merely looking to a set of codified rules and procedures for the answer. Id.
75. PetriUo, 148 Ill. App. 3d at 589, 499 N.E.2d at 958 (referring to the Hippocratic Oath).
77. Section 5.05 states: "The information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree . . . The physician should not reveal confidential communications or information without the express consent of the patient, unless required to do so by law."
during the physician-patient relationship is released to third parties. 80

For this reason ex parte interviews undermine physician-patient confidentiality. 81

ii. The Fiduciary Relationship Between Physicians and Patients

The fiduciary relationship between the patient and his physician is another policy consideration which warns against ex parte interviews. 82 Because of the fiduciary relationship, the patient should have the right to expect that his physician will provide the sought after information pursuant only to formal discovery rules. 83 The duty of care owed to the patient includes a duty to aid the patient in litigation, and further includes a duty to refuse affirmative assistance to the patient’s antagonist. 84 If the treating physician agrees to discuss the patient’s case ex parte, the potential for breach of the patient’s confidence would have a chilling effect upon the physician-patient relationship. 85 The patient’s counsel should be present in order to allay the patient’s fears that his physician may be disclosing personal confidences. 86

Furthermore, in the absence of the patient’s attorney, the physician may inadvertently disclose information which may result in potential liability for the physician. 87 Although the physician may

81. Petrillo, 148 Ill. App. 3d at 590, 499 N.E.2d at 959. Petrillo also holds that the implied waiver by filing a suit waives the privilege only to matters in issue and is limited only to formal discovery. Since the consent is limited, any other disclosure by the physician would not have the consent of the patient and therefore would be unethical. Id.
82. Duquette v. Superior Court, 161 Ariz. App. 269, 275, 778 P.2d 634, 640 (1989). The court states that “ex parte communications between defense attorneys and plaintiff's treating physicians would be destructive of both the confidential and fiduciary natures of the physician-patient relationship which have been recognized by statutory and case law.” Id. at 275, 778 P.2d at 640.
83. Petrillo, 148 Ill. App. 3d at 594-95, 499 N.E.2d at 961.
legally refuse an interview, often the physician does not have sufficient understanding of discovery rules to know that he may refuse.\textsuperscript{88} Therefore, if the court allows ex parte interviews, the physician is at greater risk of liability because he may feel compelled to meet with defense counsel.\textsuperscript{89} A rule against ex parte interviews would reduce the chance of the physician breaching his fiduciary duty to the patient. Such a rule would also prevent unnecessary lawsuits against physicians for wrongful disclosure.\textsuperscript{90}

\textit{b. Preservation of Defendant’s Rights}

A prohibition against ex parte interviews is separate and distinct from the physician-patient privilege.\textsuperscript{91} The privilege determines what is discoverable, while the prohibition only determines how it may be discovered.\textsuperscript{92} Therefore, the defendant is not denied any information. Along these lines, one court stated:

\begin{quote}
[W]e are not prohibiting a treating physician from expression of his opinions in a deposition or from testifying in a court of law. Nor does our decision infer that a plaintiff has a right to stop his treating physician from so testifying . . . . [W]e are merely imposing a prohibition on a single type of unauthorized practice.\textsuperscript{93}
\end{quote}

Moreover, a defense attorney can obtain exactly the same amount of information through formal discovery as he can through ex parte contacts.\textsuperscript{94} When the same information can be obtained through either formal or informal methods, formal discovery must


\begin{itemize}
\item 89. \textit{Id.} After the doctor agrees to an interview, that interview may disintegrate into a discussion of the impact of a jury’s award. \textit{Id.}
\item 92. \textit{Id.}
\item 94. \textit{Id.} at 596, 499 N.E.2d at 962.
\end{itemize}
be used if "it is necessary to protect a privileged communication, such as between a physician and a patient."  

\[\text{\textit{c. Extent of Waiver Unknown}}\]

Once the physician-patient privilege has been waived, ex parte interviews still should not be permitted because of the difficulty in determining to what extent the privilege is waived. If the scope of the waiver is left up to the determination of the defense attorney and physician, both will be put in an "untenable position." Even if no improper pressures are exerted over the plaintiff's treating physician, determining the scope of the waiver is still quite difficult. Placing the burden of determining relevancy on an attorney who does not know the nature of the confidential disclosure to be elicited is risky. Asking the physician who is untrained in the law to assume this burden is an even greater risk. Determining whether a physical or mental condition is in controversy often requires careful judicial scrutiny and not a mere cursory reading of the complaint. If disclosure is restricted to formal discovery or express consent, the patient's attorney may object to improper disclosure and the court will be able to regulate disclosure, thereby preventing unlawful or unethical disclosure.

\[\text{\textbf{Analysis}}\]

The question of whether the North Carolina courts would allow ex parte interviews with treating physicians came before the supreme court in Crist v. Moffatt. The trial court found that the

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99: Id. at 357.

100. Anker, 98 Misc. 2d at 152, 413 N.Y.S.2d at 585.

101. Id. at 152, 413 N.Y.S.2d at 586.

defense attorney acted improperly by conducting the interviews and the court of appeals dismissed the defendant's appeal. The supreme court decided the matter was important enough to vacate the decision of the court of appeals and consider the case on the merits.

In Crist, the defendant's first assignment of error was the trial court's failure to find a waiver of the physician-patient privilege when the plaintiff provided copies of her medical records to opposing counsel, testified at her deposition concerning her treatment by other doctors, and identified Drs. Thompson and Tyson as witnesses. The court recognized that a plaintiff may waive the privilege at the time of trial. However, the defendant tried to convince the court that an implied waiver could take place before trial as well. The defendant contended that no meaningful distinction exists between disclosures occurring before trial and disclosures made during trial. However, this contention was flawed. For there to be an implied waiver, the plaintiff must voluntarily go into the details of his or her injuries. Arguably, a plaintiff's testimony prior to trial is not voluntary since it is compelled by the rules of discovery, thereby precluding the possibility of implied waiver based on voluntariness. The court did not, however, decide on the waiver issue. The court merely assumed without deciding that the plaintiff impliedly waived the privilege.

In deciding the question of the permissibility of ex parte inter-

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103. Id. at 329, 389 S.E.2d at 43.
104. Crist v. Moffatt, 92 N.C. App. 520, 374 S.E.2d 487 (1988). The court determined that the trial court's order did not deprive the defendant of any right. Id. at 523, 374 S.E.2d at 488.
105. Crist, 326 N.C. at 330, 389 S.E.2d at 44.
106. Id. at 330-31, 389 S.E.2d at 44.
107. Id. The court cited from Cates v. Wilson, 321 N.C. 1, 361 S.E.2d 734 (1987) and Capps v. Lynch, 253 N.C. 18, 116 S.E.2d 137 (1960) for the ad hoc test used by those courts to establish an implied waiver by a plaintiff's activity at trial. See supra note 5.
108. Crist, 326 N.C. at 331, 389 S.E.2d at 44.
109. Id.
111. State ex rel. Grimm v. Ashmanskas, 298 Or. 206, 213 n. 3, 690 P.2d 1063, 1067 n. 3 (1984) (en banc). "We do not believe the legislature intended waiver to occur when a plaintiff in a personal injury or malpractice case is required by the opponent to submit to a pretrial discovery deposition, because in that situation the holder of the privilege is not voluntarily offering his or her confidential communications or personal condition to the public." Id.
112. Crist, 326 N.C. at 331, 389 S.E.2d at 44.
views, the court first acknowledged that in the majority of jurisdic-
tions defense counsel is limited to formal discovery. The majority
includes states in which the physician-patient privilege is either
statutorily waived upon filing a lawsuit, or deemed by judicial
decision to be waived upon the filing of a lawsuit. However, the
court here based its decision on grounds separate from the statu-
tory privilege, focusing instead on public policy.

The primary policy reason underlying the court's decision in-
volved the unique and confidential nature of the physician-patient
relationship. The uniqueness of the relationship arises partly
from the physician's ethical guidelines. Although not mentioned
in the opinion, another factor behind this policy is the fiduciary
nature of the physician-patient relationship. North Carolina
courts have been quick to protect this relationship. Therefore,
the decision not to allow ex parte interviews follows logically from
other North Carolina decisions protecting the physician-patient
privilege. Furthermore, the public has a right to rely upon the ex-
pectation that physicians will not reveal their confidences. A de-
cision by the court to permit defense counsel to conduct ex parte
interviews would have undermined this expectation because pa-

114. Anker v. Brodnitz, 98 Misc. 2d 148, 413 N.Y.S.2d 582 (1979), aff'd, 73
App. Div. 2d 589, 422 N.Y.S.2d 887 (2d Dept. 1979), app. dism'd, 51 N.Y.2d 743,
banc) (holding that ex parte interviews are prohibited as a matter of public policy).
“An act can be against public policy even though it is not specifically prohib-
ited by a state's statutes or constitution.... Public policy has been defined as
that principle of law which holds that no subject can lawfully do that which has a
tendency to be injurious to the public or against the public good.” Pettrillo, 148 Ill.
App. 3d at 587, 499 N.E.2d at 956-57.
supra notes 71-73 and accompanying text.
117. Crist, 326 N.C. at 333, 389 S.E.2d at 46. The ethical guideline comes
from the time-honored Oath of Hippocrates, the American Medical Association's
Principles of Medical Ethics and The Current Opinions of the Judicial Council of
the American Medical Association. Id.
118. The fiduciary nature of a patient and physician is well settled in North
119. Watts v. Cumberland County, 75 N.C. App. 1, 330 S.E.2d 242 (1985),
aff'd in part, rev'd in part, 317 N.C. 110, 343 S.E.2d 879 (1986), rev'd on other
120. Hammonds v. Aetna Casualty and Surety Co., 243 F. Supp. 793, 891
(N.D. Ohio 1965).
tients would then have legitimate concerns about what information was being disclosed during the interviews. The physician might unwittingly disclose facts which were still protected by the privilege.

North Carolina demonstrated its dedication to the physician-patient relationship by enacting legislation making communications between physicians and patients privileged. Although the Crist court determined that the privilege was not at issue here, the court acknowledged that the policy behind the statute was determinative of the case. A physician may be compelled to testify, but only after a judge determines it is "necessary to a proper administration of justice." By requiring a judge to determine the necessity of disclosure, the legislature demonstrated its policy of protecting patient confidences. The Crist decision is in accord with this policy. In creating a physician-patient privilege, legislatures are concerned with balancing society's interest in the confidential relationship between a patient and his physician with society's interest in ascertaining the truth in civil lawsuits. Ex parte interviews would in no way foster either of those interests. Society's interest in the truth can be satisfied without ex parte interviews since a defendant can obtain the same information through formal discovery. By prohibiting ex parte interviews, society's interest in preserving the confidence of the physician-patient relationship will be satisfied by the knowledge that anyone who seeks redress in court will not have to consent to a complete breakdown of trust between the plaintiff and his physician. The North Carolina legislature obviously holds the physician-patient privilege in high regard, therefore, surely it did not intend to provide defense attorneys a way to circumvent the statutory privilege simply by speaking to treating physicians off the record. Based on the policy

125. Id. at 604, 499 N.E.2d at 967.
126. Id.
127. Id.
behind the physician-patient privilege, Crist was properly decided.

While the argument can be made that once the plaintiff waives the privilege the door is open to any contacts which the defendant's attorney may want to pursue, this reasoning is faulty. The patient consents only to discovery of confidential information through authorized, statutory means of discovery. By prohibiting ex parte contacts, the court assures patients that defense counsel will be limited to formal discovery.

After assuming the privilege had been waived, the court had to determine by what procedures and subject to what controls the defendant could obtain the information. The court recognized that ex parte interviews with nonparty treating physicians are neither authorized nor prohibited by North Carolina discovery rules. Although the defendant argued that depositions were expensive and time consuming, the court responded, as have several other courts, that depositions are not the only means of discovery. Some of the formal discovery devices are inexpensive and time efficient. In addition, they also protect the plaintiff's privacy right. Other courts addressing this issue have required plaintiffs to execute waivers on grounds of efficiency. Attempts to justify requiring the plaintiff to execute a waiver fail for two reasons. First, as the

128. See, e.g., Green v. Bloodsworth, 501 A.2d 1257, 1259 (Del. Super. Ct. 1985) (holding that once the physician-patient privilege is waived, "the physician becomes available for interview just like any other witness").


131. Id. at 334, 389 S.E.2d at 46. "Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examinations; and requests for admission." N. C. GEN. STAT. § 1A-1, Rule 26(a)(1983).

132. Id.

133. Id. at 334-35, 389 S.E.2d at 46. Other forms include written interrogatories which are very inexpensive, and medical records are easily obtainable pursuant to the rules. Id.


court noted, some forms of formal discovery are inexpensive. Second, the courts allowing ex parte interviews on these grounds "attempt to deal with a question of great societal importance by merely looking to a set of codified rules and procedures for the answer." The Crist court properly relied on the policy behind the rules. If some other method of discovery is going to be implemented, such as ex parte interviews, the job of enacting that plan is not for the courts. The task should be taken up by the legislature. Moreover, even though ex parte interviews may be less expensive and provide the defendant some method to equalize tactical advantage, this benefit to the defendant is greatly outweighed by the plaintiff's interest in preventing disclosure of personal and embarrassing facts which are irrelevant to the litigation.

The court next turned its attention to the possible liability of physicians who may inadvertently disclose privileged information. A physician could quite easily disclose privileged information without authorization, considering the difficulty of determining the extent of the patient's waiver. The Crist court believed the risk of liability was too great to warrant approval of ex parte interviews. At least one jurisdiction which allows ex parte interviews has attempted to deal with this concern by imposing two requirements on the defendant. The defendant must notify the plaintiff of the time and place of the interview, and must provide the physician with a description of the anticipated scope of the interview. But this approach defeats itself. Adopting such proce-

137. See Sweeney, 394 N.E.2d at 356 (stating that "the addition of a new discovery method, the court enforced waiver of privilege leading to ex parte informal interviews with physicians, should be accomplished by a change in the Rules of Civil Procedure, rather than by judicial fiat. Id.").
138. Crist v. Moffatt, 326 N.C. 326, 335, 389 S.E.2d 41, 46 (citing Nelson v. Lewis, 130 N.H. 106, 111, 534 A.2d 720, 723 (1987)). See also, Manion v. N.P.W. Medical Center, 676 F. Supp. 585, 595 (M.D. Pa. 1987) ("any infringement upon defense counsel's search for the truth is slight and is far outweighed by the protection afforded to the peculiar relationship between a patient and his physician." Id.).
140. See supra notes 96-100 and accompanying text.
dures would defeat the purposes of ex parte interviews - saving
time and litigation costs.\textsuperscript{142}

Although a physician may always refuse to participate in an
interview,\textsuperscript{143} the \textit{Crist} court states that the physician may not un-
derstand the difference between formal and informal discovery and
therefore may feel compelled to attend.\textsuperscript{144} The risks of the physi-
cian disclosing confidential information and the possible impropri-
eties which may take place during an ex parte interview\textsuperscript{145} are too
great for the court to approve of ex parte interviews.

\textbf{CONCLUSION}

The \textit{Crist} decision clearly demonstrates North Carolina's in-
terest in protecting the unique relationship between physicians
and patients. The question remains, however, whether this prohibi-
tion on ex parte interviews is limited to medical malpractice ac-
tions. Perhaps it should be extended to any witnesses with whom
a plaintiff has a unique relationship. Similar factors are present in
other confidential or fiduciary relationships, therefore the prohibi-
tion seems to apply with equal force to them.

The court also leaves open the issue of whether a plaintiff may
waive the physician-patient privilege prior to trial. The answer is
probably no. Considering the emphasis placed on maintaining the
confidential nature of the physician-patient relationship, the court
is not likely to violate this policy by finding a waiver prior to trial.
This factor along with the recognition of a cause of action for
wrongful disclosure by a physician leans against a finding of a pre-
trial waiver. Therefore, disclosure prior to trial by the plaintiff of
facts concerning his or her medical treatment or physical condition
should not be sufficient to constitute a waiver of the privilege.
Something more than mere disclosure by compliance with discov-

\textsuperscript{142} Roosevelt Hotel Ltd. Partnership v. Sweeney, 394 N.W.2d 353, 357
(Iowa 1986).

\textsuperscript{143} Crist, 326 N.C. at 335, 389 S.E.2d at 47.

\textsuperscript{144} Id. (citing Duquette v. Superior Court, 161 Ariz. App. 269, 276, 778 P.2d
634, 641 (1989)).

\textsuperscript{145} The defense counsel may bring up topics such as damage to a physi-
cian's professional reputation or the rising cost of malpractice insurance, or may
hint that the treating physician may be the next to be sued. Any number of things
could be discussed which may influence the treating physician's views. Manion v.
Every rules will be needed to prompt the court to find that the physician-patient privilege has been waived.

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