HIPAA as a Political Football and Its Impact on Informal Discovery in Employment Law Litigation

Brian K. Powell* and Richard A. Bales**

I. Introduction: A Political Football

The 1996 Health Insurance Portability and Accountability Act[1] ("HIPAA") is a bane of many employers;[2] it has been aptly described as the proverbial "riddle wrapped in a mystery inside an enigma."[3] Many have argued that the overly complex (some would say cryptic[4]) statute and regulations hinder its enforceability.

One issue that has proven particularly vexatious is how HIPAA affects a defendant-employer's ability to engage in *ex parte* contacts with a plaintiff-employee's treating physician. The issue often arises in employment cases when, for example, a defendant's counsel wants to learn informally about the plaintiff's claim of emotional injuries.

Prior to the 1996 enactment of HIPAA, many jurisdictions explicitly permitted a defendant-employer to engage in various degrees of *ex parte* contact with a plaintiff-employee's treating physicians. Such informal

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* Brian K. Powell, B.A. Northern Kentucky University (2002), J.D. Salmon P. Chase College of Law (2006). Special thanks to my Mother, Father, and sisters for their continued support and inspiration. This article is dedicated to my partner of nine years, Rob Dunaway, who passed away during the writing of this article. His love, encouragement, and dedication made this work possible.

** Richard A. Bales, Professor of Law, Salmon P. Chase College of Law.

1. Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in scattered sections of 42 U.S.C. and 29 U.S.C.).

2. Linda O. Goldberg, *Get Hip to HIPAA: New Privacy Rules Take Effect Soon*, HOT POINTS NEWSLETTER (Miller, Canfield, Paddock and Stone, P.L.C., Detroit, Mich.), Winter 2002, at 1, 4.

3. Michael Rozen, MD, *HIPAA Privacy Compliance for E-Health Sites*, www.ehcca.com/presentations/HIPAA2/607b.PDF (quoting Sir Winston Churchill) (last visited Oct. 29, 2005).

4. Kate Jackson, *Release the HIPAA Hounds*, FOR THE RECORD, June 28, 2004, at 17, http://www.fortherecordmag.com/archives/ftr_062804p17.shtml (last visited Oct. 29, 2005).

discovery was much faster and cheaper than formal discovery by depositions and expert reports, and arguably helped dampen the overall cost of litigation. However, HIPAA changed this dynamic profoundly since the statute sets a high standard of privacy protection, and broadly preempts contrary state law. Moreover, while plaintiff-employees can use HIPAA to thwart informal discovery by defendant-employers, defendant-employers cannot use HIPAA's privacy shield to thwart discovery by plaintiff-employees of the defendant-employers' human resources records. In this manner, HIPAA acts as both shield and sword in favor of plaintiff-employees.

Threaded throughout consideration of this issue is the notion that HIPAA is a statutory creature of politics—a "political football."[5] Enacted in 1996 by the Presidential pen of a Democratic Administration, its privacy guidelines were left for development and implementation by a Republican one.[6] The ebb and flow of politics shaped the creation of HIPAA and will shape its future.[7]

Part II of this article examines pre-HIPAA informal discovery including arguments for and against its permissibility, application and examination of the practical consequences *ex parte* communications had for plaintiffs and defendants alike, and state responses to *ex parte* communications prior to the enactment of HIPAA.[8] With the advent of HIPAA, Part III turns to a discussion on the statutory text, both within the original 1996 enactment as well as within the 2002 Privacy Amendments. Part IV proceeds to recent, post-HIPAA developments and the current state of unrest within the courts.

Some courts have taken the extreme approach that HIPAA flatly prohibits *ex parte* contacts with a party's treating physician. This approach has three policy advantages. First, it promotes frank and earnest discussion between patient and physician. Second, it provides a clear, bright-line rule, thereby establishing a baseline national standard for the treatment of protected health information. Third, it levels the playing field between the parties by curtailing informal fishing expeditions by defendants.

However, these policy advantages are counterweighed by three

5. Addy Hatch, *Health Care Braces for Rules: Federal Privacy Regulations Could Cost Medical Industry $20 Billion to $50 Billion*, SPOKANE J. BUS. (Oct. 26, 2001), *available at* https://www.dadair.com/spokanejournal/index.php?id=article& sub=914& keyword= (last visited Oct. 16, 2005).

6. *Id.*

7. *See generally* Vladimir I. Lenin, *Concerning a Caricature of Marxism and Concerning Imperialist Economism*, COLLECTED WORKS 79 (4th ed. 1949) ("Law is a political tool; it is politics.").

8. *See* discussion *infra* Part II. The State of Illinois is a representative microcosm of the national debate. *Id.*

policy disadvantages to such a broad prohibition of *ex parte* contacts. First, such a blanket prohibition results in increased litigation costs as parties are limited to expensive means of formal discovery. Second, it prolongs the discovery process, thereby eliminating the expediency that informal discovery often brings to pre-trial discovery. Third, it promotes trial inefficiency, taxing the courts in terms of their time and oversight.

Part V of this article argues that courts should adopt a compromise position found in a New Jersey Superior Court case, *Smith v. American Home Products Corp.*[9] *Smith* carefully balances the privacy expectations and standardization interests on the one hand with cost effectiveness and judicial expediency on the other. Courts should do so by permitting defendant-employers to engage in *ex parte* contacts with treating physicians, but only within the protective controls afforded by state law. This approach would cohesively blend federal privacy concerns with state procedural independence, generating a salutary spirit of cooperative federalism.

Part VI concludes with a retrospective analysis and future speculation designed to answer the central question of whether HIPAA represents a political touchdown or a political fumble.

II. The Pre-Game: The Judicial Landscape Prior to the Enactment of HIPAA

Setting the stage for the 1996 enactment of HIPAA necessarily requires an examination of the "pre-game" situation. HIPAA was a sociopolitical reaction (some would say appeasement[10]) to the ongoing judicial review of plaintiff health care and privacy rights. How the pre-HIPAA courts viewed *ex parte* communications as a legitimate means of legal discovery is a foundational component of this analysis, for it shaped the debate over HIPAA's passage and subsequent 2002 Privacy Amendments. Judicial response to the use of *ex parte* communications varied by jurisdiction and depended upon which argument, pro versus anti-informal discovery, successfully held sway. Illustrative of this variety of arguments and judicial reasoning is the 1986 Illinois Appellate Court decision, *Petrillo v. Syntex Laboratories., Inc.*[11] Because one finds in *Petrillo* many of the arguments that echoed in courtrooms across the country, which thereby set the backdrop against which the federal HIPAA debate transpired, this article has selected *Petrillo* as the

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

10. Dick Armey, *Just Gotta Learn From the Wrong Things You Done*, CATO JOURNAL Vol. 22, No. 1 (Spring/Summer 2002), *available at* http://www.cato.org/pubs/journal/cj22n1/cj22n1.html (last visited Oct. 16, 2005).

11. Petrillo v. Syntex Labs., Inc., 499 N.E.2d 952 (Ill. App. Ct. 1986).

representative example of the national debate.[12]

A. Illinois as a Microcosm of the National Debate

The selection of *Petrillo* is not accidental. The land of Lincoln is itself a reflection of American diversity. Its sociopolitical demographics mirror those of the rest of the country, from rural, traditional areas in the south to urban, progressive areas in the north. This blending separates Illinois from those states so decisively liberal or conservative and makes it an appropriate microcosm of the national debate.

1. *Petrillo v. Syntex Laboratories., Inc.* and its Progeny

The Illinois Appellate Court decision in *Petrillo* foreshadowed the debate over the HIPAA discovery protocols.[13] The case was a class action products liability suit against Syntex Laboratories.[14] During discovery, however, defense counsel Thomas F. Tobin ("Tobin") informed the trial court that he had engaged in *ex parte* communications with one of Petrillo's treating physicians.[15] Plaintiffs' counsel balked and asked for a prohibition against all future *ex parte* communications with any of plaintiffs' treating physicians.[16] The trial court granted plaintiffs' motion.[17] Thereafter, Tobin informed the court that he intended to continue speaking *ex parte* with plaintiffs' treating physicians because, in his view, the trial court erred in barring him from such conferences.[18] The trial court found him in contempt of court and fined him the sum of $1.[19]

Tobin immediately appealed his contempt[20] and asserted twelve rationales in support of the permissibility of *ex parte* communications with plaintiffs' treating physicians.[21] These included the following: (1) the lack of a public policy justification regarding patient-physician confidentiality, (2) the fairness of having freely available information,

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12. Within this area, today's employment law borrows extensively from tort law (particularly products liability and medical malpractice claims). *See id.* at 962. Reference to such case types is purposefully and unavoidable. *See id.*

13. Subsequently codified in 45 C.F.R. § 164.512(e) (2005).

14. *Petrillo*, 499 N.E.2d at 954.

15. *Id.* at 955.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Petrillo*, 499 N.E.2d at 956. The *Petrillo* trial was still proceeding. *Id.*

21. *Id.* at 955-56. The court divided these twelve justifications into two broad categories: those addressing the patient-physician privilege and those addressing Constitutional law claims. *Id.* at 955. Only those justifications relevant to the overarching HIPAA discussion will be addressed in the body of this article.

and (3) the costliness of formal discovery, in terms of time and money.[22] In Tobin's view, the tactical advantages, reduced costs and increased judicial expediency, as well as the plaintiff's presumed waiver, by placing his medical condition in dispute, warranted the continued viability of *ex parte* conversations.[23] The court, however, was foremost concerned with the sanctity of the patient-physician relationship and the public policy expectation that medical conversations remained confidential.[24] Therefore, it rejected Tobin's assertions and affirmed the contempt order.[25] In doing so, it announced what became known as the *Petrillo* Doctrine: a judicial preference for and requirement of formal discovery instead of unrestricted and unregulated informal discovery.[26] Thus, *Petrillo* recognized the tendency of informal discovery to digress into fishing expeditions for purposes of identifying alternative reasons for the plaintiff's aggrieved condition, thereby preempting the discovery process and placing the defendant on the road to summary judgment.[27] As other states considered the *Petrillo* doctrine, or their own versions of it, their acceptance or rejection of its holding led to a wide disparity in the *ex parte* accessibility of plaintiff's health information.[28] Such a divide was particularly discernable in pre-HIPAA litigation within the context of employment law, to which this article now turns.

2. *Ex Parte* Communications within an Employment Law Context

The protective *Petrillo* Doctrine quickly found favor with plaintiffs' attorneys partial to the Illinois court's expansive reading. As Robert S. Mantell, an employment law attorney with the Boston firm of Rodgers, Powers & Schwartz argued, liberal applications of state privacy law "often favor[ed] a plaintiff-friendly interpretation."[29] Such was the result

22. These justifications will be revisited and expanded upon in Part V *infra*.

23. *Petrillo*, 499 N.E.2d at 955-57.

24. *See id.* at 971.

25. *Id.*

26. *See id.* For hypothetical illustrations: at the time of her claim for intentional infliction of emotional distress, had the plaintiff employee sought (concurrently or previously) psychiatric care for another matter (death of a parent/child, for example) that contributed to her delicate emotional state? Or, at the time of his wrongful termination claim and request for general damages (e.g., pain and suffering), was the plaintiff employee receiving therapy for another matter (divorce, for example) that contributed to—if not caused—his state of depression? Affirmative answers to these questions placed defendant employers on the road to summary judgment with informal discovery as an attractive vehicle for getting there.

27. *See Petrillo*, 499 N.E.2d at 957-59.

28. *See, e.g.*, Langdon v. Champion, 745 P.2d 1371, 1375 (Alaska 1987).

29. *See* Robert S. Mantell, *The Liberal Interpretation of Chapter 151B*, http://www.theemploymentlawyers.com/Articles/Chapter%20151B.htm (last visited Nov.

when *Petrillo* was applied by the Fifth District Appellate Court of Illinois when it heard arguments in *Lewis v. Illinois Central Railroad Co.* in 1992.[30] Thomas Lewis was severely injured while working for his employer, Illinois Central Railroad.[31] Ultimately, two of his discs were removed and replaced by steel plates.[32] Facing permanent nerve damage and potential paralysis, Lewis could no longer work and filed suit against the Railroad.[33] During pretrial discovery, the Railroad engaged in *ex parte* talks with several of Lewis's treating physicians.[34] The Railroad apparently was banking on the physicians' desires to avoid timely depositions, and the physicians did not disappoint; in fact, upon the Railroad's request, seven produced the medical records which contained the entirety of Lewis's medical care, which were not limited to the scope of his workplace injuries.[35] Lewis formally objected to these *ex parte* contacts, and the trial court granted the sanctions prohibiting the Railroad from using the acquired medical information and from conducting such additional examinations.[36] At the trial's conclusion, a jury awarded Lewis $3,935,350 in damages.[37]

The Railroad appealed on several grounds. Chief among its complaints was that the trial court abused its discretion by sanctioning it for communicating *ex parte* with Lewis's physicians in violation of the *Petrillo* Doctrine.[38] On appeal, the Railroad argued that no *Petrillo* violation had occurred because the communications were written, not spoken.[39] The Illinois Appellate Court dismissed this technical reading, stating that *Petrillo* aimed to protect the patient-physician privilege *in toto* and that such a privilege extended to written records.[40] The Railroad also argued that the patient-physician privilege was not implicated because its communications were sent to the records' custodians and not to the physicians themselves.[41] The court dismissed this distinction as "wholly artificial and completely meaningless,"[42] citing to precedent that a request of the custodian is a request of the medical practitioner

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5, 2005) (arguing that Chapter 151B of Massachusetts' anti-discrimination statute requires a liberal interpretation to properly effectuate the purposes of the statute).

30. Lewis v. Ill. Cent. R.R. Co., 600 N.E.2d 504 (Ill. App. Ct. 1992).
31. *Id.* at 506.
32. *Id.* at 507.
33. *Id.*
34. *Id.* at 509.
35. *Lewis*, 600 N.E.2d at 509.
36. *Id.* at 509-10.
37. *Id.* at 509.
38. *Id.*
39. *Id.* at 510.
40. *Id.*
41. *Lewis*, 600 N.E. 2d at 510.
42. *Id.* at 520-21.

himself.[43] The appellate court affirmed the lower court's sanction, concluding that the Railroad's conduct struck at the heart of patient-physician privilege and amounted to an egregious misstep that was no different than saying, "[t]ell me everything you know about Lewis's medical history."[44] Such was wholly prohibited by the *Petrillo* doctrine.[45]

Contrast the *Petrillo* and *Lewis* state law rulings with that of *Patterson v. Caterpillar, Inc.*,[46] a 1995 ruling of the federal Seventh Circuit in which Illinois geographically resides. Lonnie Patterson ("Patterson"), a Wisconsin resident and career employee at Caterpillar, was diagnosed with multiple sclerosis in 1984 and began a medical leave of absence under Caterpillar's Disability Plan ("the Plan").[47] Under the terms of the Plan, as long as Patterson was deemed "totally disabled," he was entitled to receive his monthly income and company health benefits.[48] During the next five years, Patterson regularly submitted the necessary medical information from his treating physician, Dr. Cass Terry, which allowed him to maintain his total disability benefits.[49] In 1989, however, Caterpillar reassessed Patterson's condition and, after a company-sponsored medical examination and ten months of private investigation, concluded that Patterson no longer met the Plan standard for total disability.[50] Patterson filed suit under the Employee Retirement Income Security Act of 1974 ("ERISA"), seeking reinstatement of benefits.[51] In its defense, Caterpillar listed Dr. Terry, a noted authority in the field of multiple sclerosis, as an expert witness and conducted *ex parte* talks with him.[52] Patterson objected, and following a bench trial, the United States District Court for the Eastern District of Wisconsin overruled the objection and awarded judgment in favor of Caterpillar.[53] Patterson appealed.[54]

On appeal, Patterson contended that Caterpillar's *ex parte* communications with Dr. Terry were public policy violations of the patient-physician privilege.[55] Although in federal court, Patterson argued

43. *Id.* (citing Roberson v. Liu, 555 N.E.2d 999, 1003 (Ill. App. 1990)).
44. *Lewis*, 600 N.E.2d at 511.
45. *Id.* at 512.
46. Patterson v. Caterpillar, Inc., 70 F.3d 503 (7th Cir. 1995).
47. *Id.* at 504.
48. *Id.* The Plan, in part, designated an employee as "totally disabled if he is not engaged in regular employment or occupation for remuneration or profit." *Id.*
49. *See id.*
50. *Id.* at 504-05.
51. *Patterson*, 70 F.3d at 504-05.
52. *Id.* at 506-07.
53. *Id.* at 504.
54. *Id.* at 505.
55. *Id.* at 506.

that Wisconsin law governed the patient-physician relationship. Consequently, he argued, any *ex parte* talks between Caterpillar and Dr. Terry violated the privilege and were therefore prohibited.[56] The court rejected this argument, however, because ERISA fell under federal question jurisdiction, which does not recognize a patient-physician privilege.[57] Moreover, the court ruled that even if it were to recognize such a privilege, Patterson's argument would fail because Dr. Terry's role at trial was limited to that of an expert witness regarding the nature of multiple sclerosis:

> Although he was one of Patterson's treating physicians, Dr. Terry offered no testimony based on this physician-patient relationship. For example, with respect to the relative importance of a formal neurological examination in determining disability, Dr. Terry testified that 85 percent of the information can be derived through observation of the patient.[58]

In the alternative, Patterson argued that the communication of such commentary and insight by a treating physician to an adverse party, and that adverse party's subsequent decision to call plaintiff's treating physician as a witness, gave the appearance of impropriety and amounted to *ex parte* communications sufficient to taint Dr. Terry's testimony.[59] The court again disagreed and noted that Patterson's assessment of state law was wrong: in *Steinberg v. Jensen*, the Wisconsin Supreme Court expressly allowed *ex parte* communications in limited situations despite the patient-physician privilege.[60] The Seventh Circuit reasoned that neither federal law nor state law prohibited Dr. Terry's communications because he never disclosed confidential information about Patterson to Caterpillar.[61] Such communications fell outside of *ex parte* prohibitions.[62] Ergo, the court concluded that Dr. Terry was free to speak with Caterpillar or to testify on its behalf.[63]

B. Jurisdictional Posture Prior to HIPAA

The arguments presented before Illinois state courts and the Seventh Circuit were echoed in courtrooms across the nation. In jurisdictions

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56. *Id.*
57. *Patterson*, 70 F.3d at 506-07 (citing Whalen v. Roe, 429 U.S. 589, 602 n.28 (1977); U.S. v. Bercier, 848 F.2d 917, 920 (8th Cir. 1988)).
58. *Patterson*, 70 F.3d at 507.
59. *Id.*
60. *Id.* (citing Steinberg v. Jensen, 534 N.W.2d 361, 370 (1995)).
61. *Id.*
62. *Id.*
63. *Id.*

adopting the plaintiff-friendly approach of Illinois, employers had only the tools of formal discovery to acquire employee medical records.[64] This resource-consuming approach often frustrated defendant-employer summary judgment efforts.[65] Conversely, in jurisdictions adopting the defendant-friendly approach of Wisconsin and the Seventh Circuit, *ex parte* communications were permissible as a means of free discovery, giving employers a tactical edge and insight into their employees' mental and physical health.[66]

At the close of 1995 and on the eve of HIPAA, states were split on the availability of *ex parte* informal discovery.[67] In addition to Illinois, eighteen jurisdictions expressly denied such discovery.[68] Twenty

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64. *See infra* note 68.

65. *See id.*

66. *See, e.g.*, Law v. Zuckerman, 307 F. Supp. 2d 705, 711 (D. Md. 2004) (noting that *ex parte* contacts were key tools for the defense, allowing for the element of surprise that could alter—if not dispose of—the case at bar).

67. *See infra* notes 68 & 69.

68. *See* Horne v. Patton, 287 So. 2d 824, 830-31 (Ala. 1973) (ruling that employers do not have a legitimate interest in knowing each and every detail of an employee's health); Duquette v. Superior Court, 778 P.2d 634, 642 (Ariz. Ct. App. 1989) (holding that "defense counsel in a medical malpractice action may not engage in non-consensual *ex parte* communications with plaintiff's treating physicians"); Perez v. E. Airlines, Inc., 569 So.2d 1290, 1291 (Fla. Dist. Ct. App. 1990) (ruling that *ex parte* communications between treating physician and defendant employer are disallowed absent plaintiff permission); Cua v. Morrison, 636 N.E.2d 1248, 1248 (Ind. 1994) (ruling that *ex parte* communications pose a "substantial threat that privileged information would be disclosed . . . such information is not required for fair and efficient trial preparation"); Roosevelt Hotel Ltd. P'ship v. Sweeney, 394 N.W.2d 353, 357 (Iowa 1986) (ruling that forced consent to *ex parte* interviews with plaintiffs' health care providers was inconsistent Iowa law); La. C.E. Art. 510 (1993) (by code, there is no Louisiana case interpreting the statutory *ex parte* limitation); Scott by & Through Scott v. Flynt, 704 So. 2d 998, 1007 (Miss. 1996) (holding that "evidence obtained from *ex parte* contacts, without prior patient consent, by the opposing party which is subsequently used during a legal proceeding, is inadmissible"); Jaap v. District Court of the Eighth Judicial Dist., 623 P.2d 1389, 1392 (Mont. 1981) (holding that *ex parte* contacts defeat open disclosure and, therefore, undermine the prime objective of the Rules of Discovery); Nelson v. Lewis, 534 A.2d 720, 723 (N.H. 1987) (holding that one who places his medical condition at issue does not waive the physician-patient privilege so as to permit the interview of treating physicians *ex parte*); Church's Fried Chicken No. 1040 v. Hanson, 845 P.2d 824, 828-29 (N.M. Ct. App. 1992) (ruling impermissible any *ex parte* oral discussions by an employer or insurer with a worker's treating physician); Stoller v. Moo Young Jun, 499 N.Y.S.2d 790, 791 (N.Y. App. Div. 1986) (denying a special request for an *ex parte* interview with treating physician); Crist v. Moffatt, 389 S.E.2d 41 (N.C. 1990) (holding that public policy considerations prohibit defense counsel from interviewing plaintiff's treating physicians *ex parte* without plaintiff's express consent); Bohrer v. Merrill-Dow Pharm., Inc., 122 F.R.D. 217, 219 (D.N.D. 1987) (ruling that North Dakota law afforded physicians the discretion to refuse to speak with defense counsel and nothing short of formal discovery via subpoena could compel a treating physician to discuss pertinent medical information); Schaffer v. Spicer, 215 N.W.2d 134, 138 (S.D. 1974) (by implication) (ruling that unauthorized disclosure of protected patient-physician information was a violation of public policy and, therefore, actionable as physician

jurisdictions (including Wisconsin) allowed *ex parte* communications to varying degrees, depending upon the courts' interpretations of the patient-physician privilege and patient waiver.[69] Against this backdrop,

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malpractice); Horner v. Rowan Cos., 153 F.R.D. 597, 601 (D. Tex. 1994) (citing Texas evidentiary rules and concluding that unauthorized disclosures of medical records defeat the purpose of the patient-physician privilege); Loudon v. Mhyre, 756 P.2d 138, 142 (Wash. 1988) (holding that defense counsel may not engage in *ex parte* contacts with a plaintiff's physicians); State *ex rel.* Kitzmiller, 437 S.E.2d 452, 455 (W. Va. 1993) (holding that *ex parte* communications were prohibited because "they pose the danger of disclosing irrelevant medical information that may compromise the confidential nature of the doctor-patient relationship without advancing any legitimate object of discovery"); Wardell v. McMillan, 844 P.2d 1052, 1067 (Wyo. 1992) (concluding that *ex parte* communications violate public policy by pitting "physician against patient, potentially destroying a mutually beneficial relationship").

69. *See* Langdon v. Champion, 745 P.2d 1371, 1375 (Alaska 1987) (holding *ex parte* communications are permitted under Alaskan law: "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"); King v. Ahrens, 798 F. Supp. 1371, 1378 (D. Ark. 1992) (concluding that Arkansas law allows for physicians to elect to speak with defense counsel in spite of plaintiff's protests); Heller v. Norcal Mut. Ins. Co., 876 P.2d 999, 1006 (Cal. 1994) (concluding that plaintiff placed her physical condition in dispute and had no reasonable expectation of privacy regarding her medical records); Samms v. District Court, 908 P.2d 520, 526 (Colo. 1995) (holding that *ex parte* communications with treating physicians are permissible with reasonable notice to opposing counsel); Green v. Bloodsworth, 501 A.2d 1257, 1259 (Del. Super. Ct. 1985) (holding that, although not compelled to speak *ex parte* with defense counsel, treating physicians may do so in spite of plaintiff's objections without fear of reprisal for violation of the patient-physician privilege because such privileges are waived); Orr v. Sievert, 292 S.E.2d 548, 550 (Ga. Ct. App. 1982) (concluding that a plaintiff who places his medical condition in dispute waives any patient-physician privilege, and to ban communication between defense counsel and the treating physician would unfairly advantage a plaintiff by unfairly restraining the physician); Pearce v. Ollie, 826 P.2d 888, 889-90 (Idaho 1992) (noting that nonconsensual *ex parte* interviews between defense counsel and plaintiff's treating physicians was not sanctionable); Bryant v. Hilst, 136 F.R.D. 487, 488 (D. Kan. 1991) (citing K.S.A. 60-427(d) and noting that Kansas law provided no patient-physician privilege in an action where the condition of the claimant was in dispute); Roberts v. Estep, 845 S.W.2d 544, 547 (Ky. 1993) (noting that plaintiff's reliance on the *Petrillo* doctrine was misplaced and that Kentucky law has no similar prohibitions on *ex parte* communications); Domako v. Rowe, 475 N.W.2d 30 (Mich. 1991) (concluding that, where plaintiff places his medical condition in dispute, Michigan law presumes the patient-physician privilege waived and allows the treating physician to conduct *ex parte* interviews); Blohm v. Minneapolis Urological Surgeons, P.A., 449 N.W.2d 168, 171 (Minn. 1989) (holding that *ex parte* discussions between defense counsel and treating physician do not constitute discovery); Brandt v. Pelican, 856 S.W.2d 658, 662 (Mo. 1993) (holding that Missouri law prohibited the court from requiring medical authorizations before plaintiff's treating physician could engage in *ex parte* discussions); Stempler v. Speidell, 495 A.2d 857, 863-65 (N.J. 1985) (holding that, in order to encourage less costly means of discovery, authorizations to engage in *ex parte* communications would be compelled should plaintiff withhold consent); Covington v. Sawyer, 458 N.E.2d 465, 471 (Ohio Ct. App. 1983) (rejecting plaintiff's claim that *ex parte* conferences between defense counsel and plaintiff's treating physicians tainted the physicians' testimony); Seaberg v. Lockard, 800 P.2d 230, 231 (Okla. 1990) (holding that plaintiff placing his medical condition in dispute sufficiently waives his patient-physician

the stage was set for congressional action.

III. The Great Kickoff: 1996 HIPAA and the 2002 Privacy Amendments

A. Why HIPAA . . .

1. Historical Backdrop

HIPAA's genesis occurred in 1993 when First Lady Hillary Rodham Clinton spearheaded an exhaustive attempt to overhaul American health care. She delivered her Health Security Act to a Democratically-controlled Congress in October 1993.[70] Decried by conservatives as the "single largest and most ambitious power grab [by liberals] in the history of American health care,"[71] this sweeping, controversial proposal to achieve universal health care for all Americans landed with a thud and died under its own weight by Labor Day of the following year.[72] With the Republican ascendancy to Congressional

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privilege and consents to *ex parte* communications between treating physicians and defense counsel); MacDonald v. United States, 767 F. Supp. 1295, 1300 (M.D. Pa. 1991) (rejecting the notion of a public policy in Pennsylvania prohibiting *ex parte* contact with treating physicians); Lewis v. Roderick, 617 A.2d 119, 122 (R.I. 1992) (citing the cost effectiveness of *ex parte* communications and concluding that Rhode Island does not preclude such conversations between plaintiff's treating physician and defense counsel); Felder v. Wyman, 139 F.R.D. 85, 91 (D.S.C. 1991) (concluding that South Carolina law allows for *ex parte* communications where plaintiff's physical condition is at issue); Quarles v. Sutherland, 389 S.W.2d 249, 250 (Tenn. 1965) (concluding that communications between physician and patient were not privileged at common law and that Tennessee had not altered the rule by statute).

70. Cynthia Dailard, *Contraceptive Coverage: A Ten-Year Retrospective*, The Guttmacher Report on Public Policy (June 2004), http://www.guttmacher.org/pubs/tgr/07/2/gr070206.pdf (last visited Oct. 16, 2005).

71. Richard A. Epstein, *HIPAA on Privacy: Its Unintended and Intended Consequences*, CATO JOURNAL Vol. 22, No. 1 (Spring/Summer 2002), https://www.cato.org/pubs/journal/cj22n1/cj22n1-3.pdf (last visited Nov. 13, 2005).

72. Dailard, *supra* note 70. Then and now, critics on the Left and Right attribute Hillary Clinton's mismanagement and overreach as the fatal blow that brought down a Democratically-controlled Congress. John F. Harris, *Heeding the Past as She Looks to the Future: Centrist Strategy Shapes Hillary Clinton's Politics*, WASH. POST (May 31, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/05/30/AR2005053001004_pf. html (last visited Oct. 16, 2005). As stated in the Left-leaning *Washington Post*: "More than any politician still in power, she is identified with the strategic miscalculations of 1993 and 1994 that vaulted congressional Republicans into the majority status they have held since." *Id. Accord* Dailard, *supra* note 68 ("[P]artially in response to what many critics deemed the Clinton health care debacle, the "Republican revolution" would place Republicans in control of both houses of Congress for the first time in decades, and in many governorships across the nation."). *But see Armey*, *supra* note 10 ("People don't realize how close we came to passing the Clinton Plan in the

control in January 1995, the prospects for health care-related or HIPAA-type legislation seemed bleak.

Having defeated the Health Security Act, the new Republican Congress nonetheless recognized the emotional sentiment tapped by "Clinton Care."[73] The Republican majority began debate on a series of its own health care initiatives "as a way to make the political point that [its] new majority could govern and be compassionate at the same time."[74] The culmination in this political game of pass the ball came in 1996 with the enactment of HIPAA.

2. Preliminary Goals

What began as a limited means of addressing two pervasive concerns plaguing the health care industry, which included portability of coverage and elimination of Medicare fraud, quickly made its way into the nebulous realm of privacy rights.[75] As House Majority Leader Dick Armey would later recall, "[HIPAA] started out as a modest little bill, claiming to make coverage portable from job to job . . . [and to crack] down on Medicare fraud."[76] House Ways and Means Committee Reports seemingly substantiate Armey's assessment: "In order to address the problem of health care cost inflation and make insurance more affordable, it is important to focus on key sources affecting levels of the underlying health care costs. Two key sources of excessive cost are medical fraud and abuse, and the current medical paperwork burden."[77]

This Committee assessment, which noted that as much as ten percent of total health care costs were lost to fraud and abuse, gave HIPAA enough bounce to pass the conservatively-dominated House.[78] The less conservative Senate, however, had a more expansive agenda for HIPAA, and during House-Senate Conference, the following additional provisions were added to the limited goals cited above: promotion and use of medical savings accounts, improved access to long-term care services and coverage, simplification of health insurance administration, and privacy of individually identifiable health information.[79] Of

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summer of 1994. What could have been a catastrophe for America turned out to be a catastrophe for the Democrats. The fact that they proposed it is *the biggest reason* we took control of Congress that year." (emphasis added)).

73. Armey, *supra* note 10.

74. *Id.*

75. *Id.*

76. *Id.*

77. Doe v. United States, 253 F.3d 256, 267 (6th Cir. 2001) (quoting H.R. REP.NO. 104-496, at 69-70 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1865, 1869).

78. *Id.*

79. H.R. REP. No 104-736, at 1, 3 (1996) (Conf. Rep.), *as reprinted in* 142 CONG. REC. H9473 (daily ed. July 31, 1996).

particular import were the privacy regulations reserved for future promulgation at the discretion of the Department of Health and Human Services ("HHS").[80] In this form, HIPAA passed both Houses of Congress as an amendment to the Social Security Act, and with Presidential approval, it became law in 1996.[81]

B. . . . And What Does it Mean for Employers? The Reach of HIPAA

1. The Regulatory Provisions: Covered Entities and Protected Information

As enacted in 1996, HIPAA did little to disrupt day-to-day employer activities; it was intended as a means of improving the efficiency and effectiveness of health care systems by encouraging the use of electronic data interchange.[82] In this regard, HIPAA was a sleeping giant.[83] The wakeup call for employers came with the Privacy Rules promulgated by HHS in August 2002.[84] These rules, designed to regulate the means by which electronic health data would be securely transmitted, contained aggressive compliance regulations that affected not only the delivery of health care services in America but also the means by which employers do business with the health care industry and handle employee records in the process.[85] Ostensibly, the HIPAA privacy rules prevent regulated entities from accessing and disseminating individually identifiable health information without first obtaining the proper permission of the patient.[86] In practice, however, identifying who qualifies as a "regulated entity" has generated a great deal of confusion and anxiety for America's employers.[87] Determining who and what are regulated is the first step in addressing employer misunderstandings.

The 2002 HIPAA Amendments list three types of organizations that

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80. 67 Fed. Reg. 53,182 (Aug. 14, 2002). These promulgations were handed down by HHS on August 14, 2002, to be effective on October 15,2002. *Id.*

81. 45 C.F.R. §§ 164.500-164.534 (2005).

82. Peter Greaney, *Countdown to HIPAA: Avoid The Crush By Being Prepared* WORK CARE, INC., Jan. 29, 2003, http://www.workcare.com/knowledge/ doctors_desk _2003_05.asp.

83. Ryan D. Meade, *Handling Employees' Health Information: HIPAA Targets the HR Department*, ABA BUSINESS LAW TODAY, Nov./Dec. 2001, http://www.abanet.org/ buslaw/blt/2001-11-12/meade.html.

84. *See supra* text accompanying note 80.

85. Meade, *supra* note 83.

86. *Id.*

87. Maria Rodriguez & Tracy Silver, *HIPAA—Health Insurance Portability and Accountability Act of 1996: Why All the HOOPLAH About HIPAA?*, SILVER & FREEDMAN, http://www.silver-freedman.com/pressroom/hippa_rml.html (last visited Nov. 7, 2005).

qualify as "covered entities": (1) health plans, (2) health care clearinghouses, and (3) health care providers who transmit health information in electronic format.[88] Covered entities either create or come into possession of "Individually Identifiable Health Information," which recounts an individual's past, present, and future physical or mental health care.[89] With limited exceptions, Individually Identifiable Health Information is also known as "Protected Health Information" ("PHI").[90] Information becomes PHI when it is transmitted or maintained in either electrical format or other medium.[91] Essentially, therefore, all accumulated health data falls under the regulatory ambit.

Employers are fair to question the extent to which HIPAA applies. After all, most businesses do not act in the capacity of a covered entity. Employers are indirectly regulated, however, when they sponsor and provide group health benefits to their employees and interact with Individually Identifiable Health Information.[92] The fact that most employers do not qualify as covered entities is irrelevant. Under the Privacy Rules, covered entities, including health care providers, are required to enter into "business-associate agreements" with parties, like individual businesses, who interact with Individually Identifiable Health Information.[93] These agreements require employers to give covered entities satisfactory assurances that they will safeguard the confidentiality of the PHI they receive or maintain as if they were covered entities themselves.[94] Consequently, as a practical matter, all employers must become HIPAA compliant.[95] Additionally, and as demonstrated in Section II above and Sections IV and V below, the disclosure and acquisition of PHI, particularly via *ex parte* communications, becomes a serious bone of contention in employee-employer litigated matters where the employer's desire to limit the costs associated with formal discovery conflicts with the plaintiff's desire to protect the confidentiality of his medical history.

2. The Regulatory Provisions: Disclosures

Covered entities are permitted to disclose PHI without the patient's

88. 45 C.F.R. § 160.103 (2005).
89. *Id.*
90. *Id.* Exempted from PHI categorization are (1) education records covered by the Family Educational Right and Privacy Act, *as amended*, 20 U.S.C. 1232g; and (2) employment records held by a *covered entity* in its role as employer (emphasis added). *Id.*
91. 45 C.F.R. § 160.103 (2005).
92. Meade, *supra* note 83.
93. *Id.*
94. *Id.*
95. *Id.*

written authorization to provide continued treatment, facilitate payment, and investigate fraud.[96] Absent these circumstances, a covered entity is generally prohibited from using or disclosing PHI without the patient's written authorization as defined by the Privacy Rules.[97] In employment litigation, the Privacy Rules operate as a gag order on health care providers, prohibiting *any* disclosure of PHI to a defendant-employer absent the plaintiff-employee's written authorization.[98] This raises the issue of whether there is an applicable HIPAA guideline for situations in which plaintiff-employees are unwilling to provide release authorizations.

Section 164.512(e) permits discovery of PHI in judicial and administrative proceedings where a plaintiff-employee is unwilling to provide written release authorizations.[99] According to this section, unauthorized disclosures are permitted in the following two instances: (1) in response to a formal court order;[100] or (2) in the absence of a court order but in response to traditional discovery methods, such as a subpoena, a discovery request, or other lawful process.[101] The second provision, however, contains a notable caveat: where no formal court order exists, the covered entity must receive from the defendant-employer either "satisfactory assurances"[102] or a qualified protective order ("QPO")[103] before disclosing the PHI. The covered entity receives satisfactory assurances when the defendant-employer demonstrates its good faith attempt to provide a written notice to the plaintiff-employee.[104] Notice includes sufficient information about the proceeding, permits the plaintiff-employee to object,[105] and demonstrates that the time allowance for objections has elapsed.[106] Absent satisfactory assurances, the QPO may be implicated, (1) prohibiting the parties from using or disclosing the PHI for any purpose other than the litigation or proceeding,[107] and (2) requiring the return or destruction of the PHI at the end of the litigation or proceeding.[108] Because HIPAA regulates PHI

96. 45 C.F.R. § 164.506(c) (2005).
97. *See* 45 C.F.R. § 164.508(c) (requiring, at a minimum, the patient's name, authorized recipients, a description of the information to be disclosed and its purpose, an expiration date, and authorized signatures).
98. *See* 45 C.F.R. § 164.508(c) (2005).
99. 45 C.F.R. § 164.512(e) (2005).
100. *Id.* at § 164.512(e)(1)(i).
101. *Id.* at § 164.512(e)(1)(ii).
102. *Id.* at § 164.512(e)(1)(ii)(A).
103. *Id.* at § 164.512(e)(1)(ii)(B).
104. *Id.* at § 164.512(e)(1)(iii)(A).
105. 45 C.F.R. § 164.512(e)(1)(iii)(B) (2005).
106. *Id.* at § 164.512(e)(1)(iii)(C).
107. *Id.* at § 164.512(e)(1)(v)(A).
108. *Id.* at § 164.512(e)(1)(v)(B).

disclosure by the covered entity and not by the defendant-employer, the covered entity is always empowered to make "reasonable efforts" to independently seek or verify the existence of satisfactory assurances or a QPO before complying with any request.[109]

These new disclosure provisions change the dynamic within those jurisdictions following the Seventh Circuit's logic in *Patterson v. Caterpillar*.[110] This is the equivalent of sidelining informal discovery and shifting control of the ball deep within the plaintiff-employee's end zone. Implicitly, it would appear that the *Petrillo* Doctrine is now the governing standard, thereby precluding *ex parte* communications as a means of permissible discovery.[111] For employers, this would be disheartening news, especially if the result were to obliterate existing employment law maxims that permit employers to attack those medical conditions placed in dispute by employees.[112] Sections IV and V below consider these important implications; however, a discussion of HIPAA's preemption provisions must first be conducted.

3. The Regulatory Provisions: Preemption of State Laws

HIPAA is a federal floor, not a ceiling.[113] It serves not as a doctrine of unilateral federal preemption but as a minimum standard of care to be extended to PHI.[114] Determination of HIPAA's "stringency standard" is critical when determining whether federal or state law applies.[115] HIPAA defines state law as "a constitution, statute, regulation, rule, common law, or other State action having the force and effect of law."[116] Where an employer cannot comply with both state and federal law (i.e., where state law is contrary to HIPAA requirements), courts will make a preemption assessment using Section 160.202.[117] First, the court must

109. *See id.* at § 164.512(e)(1)(vi).

110. *See supra* text accompanying notes 46-63.

111. *See id.*

112. *See* Jaffee v. Redmond, 518 U.S. 1, 15 (1996); *accord* Schoffstall v. Henderson, 223 F.3d 818, 823 (8th Cir. 2000); Jackson v. Chubb Corp., 193 F.R.D. 216, 225 (D.N.J. 2000); Sarko v. Penn-Del Directory Co., 170 F.R.D. 127, 130 (E.D. Pa. 1997); Vann v. Lone Star Steakhouse & Saloon, Inc., 967 F. Supp. 346, 349-50 (C.D. Ill. 1997); EEOC v. Danka Indus., Inc., 990 F. Supp. 1138, 1142 (E.D. Mo. 1997).

113. Citizens for Health v. Leavitt, 428 F.3d 167, 174 (3d Cir. 2005); *accord* Smith v. Am. Home Prods. Corp. Wyeth-Ayerst Pharm., 855 A.2d 608, 614 (N.J. Super. Ct. Law Div. 2003).

114. *See Leavitt*, 428 F.3d at 174.

115. *See generally* 45 C.F.R. § 160.203(b) (2005) ("The provision of State law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter.").

116. 45 C.F.R. § 160.202 (2005).

117. *Id.*

determine if state law provides "specific purposes of protecting the privacy of health information or affects the privacy of health information in a direct, clear, and substantial way."[118] If state law does not, then preemption is not implicated and HIPAA governs as the federal floor.[119] If state law does, however, then the court must continue its assessment by determining if the affected state law more stringently protects a patient's PHI than HIPAA.[120] Recall that HIPAA is the mandatory floor, and if state law is less protective of PHI, then HIPAA will preempt state law and govern the judicial or administrative proceeding.[121] If, however, state law is more stringent, HIPAA is inapplicable and *defers* to applicable state law.[122]

IV. Half-Time: Recent Developments in HIPAA Litigation and Potential Impact for Employers

The 2002 HIPAA Privacy Amendments (a/k/a the Privacy Rules) took effect on April 14, 2003.[123] Given the relative recency of these enactments, case law is just now bubbling up. The Privacy Rules were first involved in a series of tort cases that included *Law v. Zuckerman*,[124] a U.S. District Court for the Southern District of Maryland medical malpractice action, and *Crenshaw v. MONY Life*,[125] a U.S. District Court for the Southern District of California insurance law action. Since these tort cases set the tone for subsequent employment law litigation, they will be discussed first.

A. Tort and Insurance Cases as a Precursor for Employment Law Developments

1. *Law v. Zuckerman*

In *Law v. Zuckerman*, the U.S. District Court for the Southern District of Maryland ruled that HIPAA preempted Maryland law and that HIPAA expressly declared the end of informal discovery within the federal district.[126] Rosalynn Law brought a medical malpractice action

118. *Id.*
119. *Id.*
120. *Id.*
121. 45 C.F.R. § 160.202 (2005).
122. *Id.*
123. 45 C.F.R. § 164.524 (2002). Small health plans were given until April 14, 2004, to comply. 45 C.F.R. § 164.524(b)(2) (2002).
124. Law v. Zuckerman, 307 F. Supp. 2d 705 (S.D. Md. 2004).
125. Crenshaw v. MONY Life Ins. Co., 318 F. Supp. 2d 1015, 1018 (S.D. Cal. 2004).
126. *Law*, 307 F. Supp. 2d at 707.

against Dr. David Zuckerman in federal court based on diversity of citizenship.[127] After Law disclosed her medical records to Zuckerman, his defense counsel met with Law's treating physician, Dr. Thomas Pinckert, and engaged in *ex parte* communications.[128] Zuckerman also listed Dr. Pinckert as one of his fact witnesses.[129] Citing HIPAA's Privacy Rules, Law moved to preclude further *ex parte* interviews with Dr. Pinckert.[130] At issue before the court was the permissibility of Zuckerman's continued *ex parte* contact with Dr. Pinckert.[131]

Judge Charles B. Day began his assessment by noting that neither Maryland law nor HIPAA expressly precluded all *ex parte* communications with a treating physician for an adverse party.[132] Notwithstanding, Judge Day also acknowledged that HIPAA clearly regulated the methods of PHI disclosure.[133] As such, any conflicts between state and federal law required resolution under HIPAA's stringency standard before proceeding.[134] Judge Day then rejected Zuckerman's contention that the Maryland Confidentiality of Medical Records Act ("MCMRA") was more stringent and, therefore, controlling.[135] Judge Day concluded that MCMRA provided Law with less control over her medical records than did HIPAA and was, therefore, preempted by HIPAA's federal floor.[136] Judge Day denied Law's motion, however, noting that during pretrial litigation, Zuckerman's counsel operated under a good faith belief that MCMRA governed, which would have allowed such *ex parte* interviews.[137] With the advent of HIPAA, the trial court erected appropriate barriers, including a complete ban on Dr. Pinckert's testimony should his testimony stray into proscribed areas, to effectively remedy any potential violation.[138]

In so holding, the District Court declared that in the Southern District of Maryland, informal discovery of PHI was now prohibited by HIPAA absent patient consent.[139] This was a dramatic step within the

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127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Law*, 307 F. Supp. 2d at 708.
133. *Id.*
134. *Id.*
135. *Id.* at 709.
136. *Id.* at 709-11. "HIPAA's permissive disclosure requirements give each patient more control over the dissemination of their medical records than MCMRA, while MCMRA sacrifices the patient's control of their [PHI] in order to expedite malpractice litigation." *Id.* at 711.
137. *Law*, 307 F. Supp. 2d at 713.
138. *Id.*
139. *Id.* at 711.

State of Maryland, which had not previously ruled on the permissibility of *ex parte* conversations. Nonetheless, Judge Day decisively articulated its unwelcomeness within his federal jurisdiction, a holding that would resonate within insurance and employment law in ways that will be discussed below.

2. *Crenshaw v. MONY Life*

The issue of HIPAA's preemption in federal diversity cases also arose in *Crenshaw v. MONY Life Insurance Co.*[140] In 1976, Roger Crenshaw, a psychiatrist, purchased a disability insurance policy from Mutual of New York Life Insurance Company ("MONY") and maintained that coverage through October 1998.[141] At that time, he claimed an inability to continue his practice and filed for disability benefits pursuant to his policy.[142] Crenshaw sought treatment and obtained disability certification from Dr. Jeffrey Harris.[143] MONY began payments in February 1999, but discontinued them in May 2002 subsequent to a follow-up investigation.[144] Crenshaw then filed suit one week later.[145] During discovery, MONY contacted Dr. Harris, conducted *ex parte* interviews with him, and ultimately, listed him as a defense expert witness.[146] Crenshaw invoked the Privacy Rules and raised numerous objections and motions to disqualify MONY's counsel and to disqualify Dr. Harris's testimony.[147]

Regarding only those motions pertaining to HIPAA, the court noted that HIPAA materially altered the means by which physicians practicing in California were permitted to disclose PHI.[148] Because California law did not prohibit all *ex parte* contacts, the court found such practices in conflict with the letter and spirit of HIPAA.[149] The court referenced *Law v. Zuckerman* and stated: "HIPAA and the standards promulgated by the Secretary of Health and Human Services ("'Secretary"') in the Code of Federal Regulations set for the baseline for the release of health information."[150] Based on the statutory text of HIPAA and the decision in *Law v. Zuckerman*, the court reasoned that HIPAA governed unless

140. Crenshaw v. MONY Life Ins. Co., 318 F. Supp. 2d 1015, 1027 (S.D. Cal. 2004).
141. *Id.* at 1018.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Crenshaw*, 318 F. Supp. 2d at 1019.
147. *Id.* at 1017-18.
148. *Id.* at 1027.
149. *Id.* at 1028.
150. *Id.* at 1027 (quoting Law v. Zuckerman, 307 F. Supp. 2d 705, 708 (S.D. Md. 2004)).

state law proved more stringent.[151] By employing *Byrd*-balancing,[152] the court weighed California's interest in having its rules recognized by federal courts with the federal courts' interest in enforcing federal principles and obtaining uniform outcome.[153] The scales tipped in favor of federal interests, and the court ruled that HIPAA governed.[154] Notwithstanding, the U.S. District Court refused to suppress Dr. Harris's testimony, concluding that lesser sanctions remained available to remedy the situation and that Crenshaw's request was extreme and unwarranted.[155]

Crenshaw, like *Law*, reflected the post-Privacy Rules tendency of federal courts to liberally construe the HIPAA Preemption Doctrine. Prior to 1996, the State of Maryland had not specifically ruled on the permissibility of *ex parte* communications, whereas California had ruled.[156] Neither state passed the HIPAA stringency standard, and consequently, the federal floor of HIPAA came crashing down on both state prerogatives.[157] Combined, these cases demonstrate an increasing federal encroachment on state PHI regulatory law deemed inconsistent with, or less stringent than, HIPAA Section 160.202. They serve as a harbinger of future developments in the employment law context.

B. Ex Parte Developments in the Employment Law Context

Disputes within the employment law context over the continued permissibility of *ex parte* communications in light of the 2002 Privacy Rules have only recently surfaced. As seen above, other legal disciplines previously considered the subject.[158] As such, courts invoking employment law borrow heavily from those holdings.[159] For plaintiff-employees, this represents a positive development, for those courts liberally construed the Preemption Doctrine against the *ex parte* interests of defendants.[160] This trend was repeated in employment law cases,

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151. *Crenshaw*, 318 F. Supp. 2d at 1028.

152. *See* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 536 (1958) (concluding that federal practices supersede state practices if the state procedure is "not a rule intended to be bound up with the definition of the rights and obligations of the parties").

153. *Crenshaw*, 318 F. Supp. 2d at 1029.

154. *Id.*

155. *Id.* at 1030-31.

156. *See supra* note 69.

157. *See supra* note 69.

158. *See supra* Part IV.A and accompanying text

159. *See, e.g.*, EEOC v. Boston Market Corp., No. CV 03-4227, 2004 U.S. Dist. LEXIS 27338 (E.D.N.Y. Dec. 16, 2004).

160. *Id.*

beginning with *EEOC v. Boston Market Corp.*[161]

1. *EEOC v. Boston Market* and the HIPAA Preemption Doctrine

Following the 2002 HIPAA privacy amendments, *Boston Market* represented the first employment-related judicial pronouncement on the continuing viability of *ex parte* communications between defense council and plaintiff's treating physician. The Equal Employment Opportunity Commission ("EEOC") prosecuted this case on behalf of plaintiff Christine Gagliardi, who alleged discrimination claims pursuant to Title VII and the Americans with Disabilities Act ("ADA") against her former employer, Boston Market Corporation ("Boston Market").[162] Before the Federal District Court for the Eastern District of New York, Boston Market presented a motion for an order permitting it to engage in *ex parte* communications with a variety of individuals, including two of Gagliardi's psychologists.[163] All parties agreed that Gagliardi had placed her medical condition at issue and that Boston Market was, therefore, entitled to receive Gagliardi's medical records and physician statements.[164] Both Gagliardi and the EEOC, however, objected to Boston Market's request to hold *ex parte* talks with Gagliardi's treating physicians, arguing that HIPAA and various New York privileges and privacy rights precluded such *ex parte* interviews with her psychologists.[165]

Observing that Gagliardi was in court on federal question jurisdiction, the court began its review of Boston Market's motion by determining whether state law privileges applied at all in this lawsuit.[166] Typically, actions involving both federal and state law claims are determined under federal law.[167] Notwithstanding, Federal Rule of Evidence 501 provides that evidentiary privileges should be governed by federal common law "*only if* a relevant rule of law has not been 'otherwise . . . provided by Act of Congress.'"[168] The district court concluded that, with HIPAA, Congress spoke to the protection to be

161. EEOC, 2004 U.S. Dist. LEXIS 27338.
162. *Id.* at *2.
163. *Id.* at *1.
164. *Id.* at *1-2.
165. *Id.* at *2.
166. *Id.* at *6.
167. *Boston Mkt.*, 2004 U.S. Dist. LEXIS 27338 at *7 (citing Tesser v. Bd. of Educ., 154 F. Supp. 2d 388, 391 (E.D.N.Y. 2001)).
168. *Boston Mkt.*, 2004 U.S. Dist. LEXIS 27338 at *7 (quoting FED. R. EVID. 501 (emphasis added)); *see also* City of Milwaukee v. Illinois, 451 U.S. 304, 313 (1981) (noting the general principle that courts develop federal common law only when Congress has not spoken to a particular issue).

extended to PHI.[169] Therefore, HIPAA and its associated promulgations control the release of PHI to Boston Market, *not* Rule 501 and federal common law.[170]

The court then turned its consideration to HIPAA, and, quoting *Law v. Zuckerman,*[171] it noted that HIPAA "radically changed the landscape of how litigators can conduct informal discovery in cases involving medical treatment."[172] Because plaintiffs were relying on state privacy laws to defeat Boston Market's motion, the court focused on HIPAA's preemption provision to determine the applicability of New York law to the case at bar.[173] Reciting the stringency standard promulgated in the HIPAA Privacy Rules, Gagliardi argued that New York law was more stringent than HIPAA and, therefore, was controlling.[174] The court disagreed, perceiving a difference between a "federal law that does not preempt a state law and a federal law that incorporates a state rule of law."[175] The court invoked previous authority within its federal district and within the Seventh Circuit to conclude that more stringent state laws do not govern in federal question cases.[176] Accordingly, New York law was inapplicable.[177]

With HIPAA as the applicable law, the court turned to the permissibility of Boston Market's request for *ex parte* interviews.[178] It began by proclaiming that HIPAA neither expressly prohibited nor expressly authorized *ex parte* communications with health providers for an opposing party.[179] However, as a practical matter, the court found it unlikely that many health care providers would be willing to participate in *ex parte* communications with adverse counsel for fear of violating HIPAA.[180] Acknowledging that Boston Market could not cite to any post-HIPAA case allowing *ex parte* contact with plaintiff's treating physicians,[181] the court identified only two courts having considered the propriety of such contact, *Law v. Zuckerman* and *Crenshaw v. MONY*

169. *Boston Mkt.*, 2004 U.S. Dist. LEXIS 27338 at *7.
170. *Id.*
171. Law v. Zuckerman, 307 F.Supp. 2d 705 (S.D. Md. 2004).
172. *Boston Mkt.*, 2004 U.S. Dist. LEXIS 27338 at *8 (quoting *Law*, 307 F. Supp. 2d at 711).
173. *Boston Mkt.*, 2004 U.S. Dist. LEXIS 27338 at *10.
174. *Id.* at *10-11.
175. *Id.* at *12 (quoting Nat'l Abortion Fed'n v. Ashcroft, 03 Civ. 8695 (RCC), 2004 U.S. Dist. LEXIS 4530, *1, *13 (S.D.N.Y. Mar. 19, 2004)).
176. *Boston Mkt.*, 2004 U.S. Dist. LEXIS 27338 at *12 (citing Northwestern Mem'l Hosp. v. Ashcroft, 362 F.3d 923, 925 (7th Cir. 2004)).
177. *Boston Mkt.*, 2004 U.S. Dist. LEXIS 27338 at *13.
178. *Id.* at *16.
179. *Id.*
180. *Id.* at *19.
181. *Id.* at *20.

Life Ins. Co.[182] Referencing them as guideposts and persuaded by their analyses, the court ruled that *ex parte* communications regarding the disclosure of PHI, although not expressly barred by HIPAA, nonetheless posed "too great a risk of running afoul of that statute's strong federal policy in favor of protecting the privacy of patient medical records."[183] Therefore, to the extent that Boston Market requested *ex parte* release of Gagliardi's PHI, the court declined to so permit.[184] In this regard, *Boston Market* represents the continued, pro-plaintiff, expansionist application of the HIPAA Preemption Doctrine, favoring PHI confidentiality over the defendant's (in this case, the defendant-employer's) interests in *ex parte* communications.

2. *Beard v. City of Chicago*[185] and the Covered Entity Defense

Plaintiffs' counsel continued to receive the benefits of post-Privacy Rules protectionism in *Beard v. City of Chicago*, a 2005 case from the U.S. District Court for the Northern District of Illinois.[186] Although consistent with the above case law, *Beard* is distinctive in that its plaintiff-employee actually uses HIPAA as a tool of compulsory discovery as opposed to a tool of protective shielding.[187] Here, Lisa Beard, an African-American female suffering from major depression, worked as a paramedic for the City of Chicago Fire Department.[188] When the Department terminated her employment, Beard filed suit in federal court, alleging gender and race discrimination in violation of Title VII and 42 U.S.C. § 1983, and disability discrimination in violation of the Americans with Disabilities Act ("ADA").[189] During discovery, Beard requested documents relating to medical leaves of absences taken by other paramedics for psychological and substance abuse on the ground that these co-workers were similarly situated and, therefore, discoverable as a means to press her discrimination claims.[190] The Department objected on numerous grounds, including an assertion that such production was prohibited by HIPAA.[191]

Considering the Department's HIPAA claims, the court first addressed the Department's contention that it was a covered entity within

182. *See supra* notes 123-55 and accompanying text for a discussion of these two cases.
183. *Boston Mkt.*, 2004 U.S. Dist. LEXIS 27338 at *18.
184. *Id.* at *20.
185. Beard v. City of Chicago, 2005 U.S. Dist. LEXIS 374 (N.D. Ill. 2005).
186. *Id.* at *1.
187. *See id.*
188. *Id.*
189. *Id.* at *1-2.
190. *Id.* at *2.
191. *Beard*, 2005 U.S. Dist. LEXIS 374 at *2.

the meaning of HIPAA and, thus, prohibited from providing the information.[192] To this the court ruled that the Department did not meet the definition of a "health plan" or a "health care clearinghouse."[193] Regarding the Department's claim that it was a "health care provider," the court expressed doubt but held that, even if true, the Department was not engaged in the electronic transmission as required by HIPAA for the standard to be applicable.[194]

Next, the Department contended that the records were PHI and, therefore, undiscoverable.[195] The court summarily rejected this claim, noting that HIPAA exempts from PHI classification such documentation held by "a covered entity in its role as employer."[196] Having implied that the Department did not qualify as a covered entity, the court found the statute inapplicable.[197] Assuming that the Department qualified as a covered entity, which it did not, it maintained the records only in connection with leaves of absences, and, therefore, held the records solely within its capacity as employer.[198] Such retention was exempted from HIPAA coverage.[199]

Finally, the court rendered its decision that HIPAA was wholly inadequate to shield the Department from discovery.[200] If the Department was not a covered entity, then HIPAA would be inapplicable and unsuited for the Department's defense.[201] If, however, the Department qualified as a covered entity, HIPAA's disclosure rules found in Section 164.512(e) would allow for the disclosure of PHI in response to a discovery request absent a court order, as seen here.[202] As such, HIPAA presented no bar to discovery, and Beard's motion to compel production was granted.[203]

Beard could easily be minimized as a quirky, technical aberration with little impact on the national debate over HIPAA's impact on defense discovery motions. However, a less restrained interpretation, particularly within the realm of employment law, reads *Beard* as the first instance in which HIPAA was successfully used as a plaintiff's *sword* against a defendant's efforts to exclude discoverable materials.

192. *Id.* at *7.
193. *Id.* at *7.
194. *Id.* at *8.
195. *Id.*
196. *Id.* (quoting 45 C.F.R. § 160.103 (2004)).
197. *Beard*, 2005 U.S. Dist. LEXIS 374 at *9.
198. *Id.*
199. *Id.*
200. *See id.* at *6-10.
201. *See id*, at *9.
202. *See id.*
203. *Beard*, 2005 U.S. Dist. LEXIS 374 at *24.

Combined with *Boston Market's* successful utilization of the Privacy Rules as a plaintiff-employee's shield against defendant-employer's informal discovery methods,[204] these HIPAA-empowered, sword-and-the-shield approaches to litigation demonstrate the growing resilience that plaintiffs have in defeating defense counsel efforts to engage in *ex parte* discovery.

C. *An Alternative Approach:* Smith v. American Home Products Corp.[205] *and the Prospect of Federal-State Cohesion*

To date, substantive case law regarding the Privacy Rules within the employment law context has transpired at the federal level. One would expect that previous developments in federal courts would, therefore, hold sway in subsequent employment law litigation. *Law* and *Crenshaw* did just that, having influenced the holdings in *Boston Market* and *Beard*. Consequently, the opportunity for state courts to impact the national HIPAA debate and, perhaps, temper the arguably heavy-handed HIPAA preemption afforded by federal courts, has yet to be realized. One such case, well received but scantly cited, appeared in September 2003 when the New Jersey Superior Court heard arguments in *Smith v. American Home Products Corp.*[206] Plaintiff-consumers (collectively, "Plaintiffs") brought this personal injury class action lawsuit against American Home Products Corp. and other manufacturers (collectively, "Defendants") of the drug phenylpropanolamine ("PPA").[207] Immediately before the court was a unified motion by Defendants to compel *ex parte* interviews with Plaintiffs' treating physicians.[208] Plaintiffs objected, claiming that the Privacy Rules preempted such informal discovery procedures previously permitted under New Jersey law in *Stempler v. Speidell*.[209]

The court began its detailed analysis by acknowledging that the passage of HIPAA and the enactment of the Privacy Rules dramatically altered the practices of medicine and law.[210] However, the court rejected Plaintiffs' contention that HIPAA unilaterally dismantled *Stempler*

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204. *See* EEOC v. Boston Mkt. Corp., No. CV 03-4227, 2004 U.S. Dist. LEXIS 27338, at *18 (E.D.N.Y. Dec. 16, 2004).

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

206. *Id.*

207. *Id.* at 610.

208. *Id.* Another defense motion—not discussed in the body of the above examination—was to request judicial approval of a revised, HIPAA-compliant medical authorization form. *Id.* The court rejected the adequacy of the form, finding it deficient because it did not accurately represent the permissible scope of PHI disclosure allowable under *Stempler* and HIPAA. *Id.* at 626.

209. *Smith*, 855 A.2d at 626. For a discussion on *Stempler*, *see supra* note 69.

210. *Smith*, 855 A.2d at 619.

interviews as a tool for defense counsel.[211] In the court's view, New Jersey had long-established confidentiality protocols that sufficiently preserved the privacy of PHI, as required by HIPAA.[212] Specifically, in *Stempler,* the New Jersey Supreme Court guaranteed the sanctity of the patient-physician relationship by constructing three privacy barriers around defense counsel when conducting *ex parte* interviews: (1) provide plaintiff's counsel with reasonable notice as to the time and place of the interview, (2) provide the physician with a description of the anticipated scope of the conversation, and (3) clearly communicate that the physician's participation was voluntary.[213] The sanctity of this relationship notwithstanding, the court nonetheless noted that the New Jersey statute, as in HIPAA, contained an exception for civil litigation.[214] Where plaintiffs place their medical condition in question, "discovery, including the use of informal discovery methods such as ex parte interviews, is available to the defense within the safeguard authorizations set forth in *Stempler*."[215] The court reasoned that changes to these discovery techniques were the exclusive province of the legislature.[216] In its task to decide the narrow issue of whether HIPAA preempted the informal discovery techniques, the court concluded that the "answer is plainly 'no.'"[217]

The court, steeped in federalist rhetoric, invoked the strong national policy against federal court intervention with pending state judicial proceedings absent extraordinary circumstances.[218] Such doctrine limited the "congressional intrusion into states' traditional prerogative and general authority to regulate for the health and welfare of their citizens."[219] Premising its logic on the maxim that "preemption [was] not to be lightly presumed,"[220] the court concluded that the issue of

211. *Id.* at 625-26.

212. *Id.* at 619.

213. *Id.* at 612 (citing Stempler v. Spiedell, 495 A.2d 857, 864 (N.J. 1985)). The court cited subsequent case law to substantiate this assertion, including Estate of Behringer v. Med. Ctr. at Princeton, 592 A.2d 1251, 1255 (N.J. Super. Ct. Law Div. 1998) (finding the hospital liable for damages when it breached its duty of confidentiality by failing to safeguard the privacy of a surgeon/employee operating in his capacity as a patient).

214. *Smith*, 855 A.2d at 620 (citing N.J. STAT. ANN. § 2A:84A-22.4 (2006)).

215. *Smith*, 855 A.2d at 620.

216. *See id.* at 621.

217. *Id.*

218. *Id.* (quoting Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423, 431 (1982)).

219. *Smith*, 855 A.2d at 621 (quoting City of Boerne v. Flores, 521 U.S. 507, 534 (1997)).

220. *Smith*, 855 A.2d at 621 (quoting Vill. of Ridgefield Park v. N.Y., Susquehanna & W. Ry. Corp., 750 A.2d 57, 61 (N.J. 2000) (quoting Franklin Tower One, L.L.C. v. N.M., 725 A.2d 1104, 1111 (N.J. 1999)).

preemption would turn on congressional intent.[221] After examining the legislative record, the court could find no congressional intent to displace any existing state law or ruling that favored *ex parte* communications.[222] Nor could the court find in the statutory text of HIPAA any mention of *ex parte* interviews with treating physicians.[223] Because informal discovery was not expressly addressed under HIPAA, the court determined that state law should govern.[224] Therefore, *ex parte* interviews as a means of informal discovery were permissible under *Stempler*.[225]

Critics can easily dismiss *Smith* as mere persuasive authority, not binding on the courts of the federal judiciary. They would be correct in their assessment but, arguably, shortsighted in their approach. *Smith* stands for the prospect of cohesion, balancing the privacy concerns of HIPAA with the preservation of state legislative and judicial prerogatives. Since its announcement in September 2003, *Smith* has been followed by only one court, the U.S. District Court for the Eastern District of Michigan, in the 2005 case of *Croskey v. BMW of North America, Inc.*[226] However, should additional federal courts follow suit, *Smith* and its interest-balancing approach has the potential of supplanting *Law* and *Crenshaw* as the formulary model by which future courts will assess privacy concerns and HIPAA preemption.

V. Time Out: Analysis and Proposal Going Forward for Employment Law Litigants

A. Analysis

While litigation pertaining to the Privacy Rules remains in its infancy, several telltale signs from the above case law suggest that HIPAA has fundamentally altered discovery in employment law litigation by dramatically limiting defendant-employer's informal accessibility to plaintiff-employee's PHI. Within those federal and state

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221. *Smith*, 855 A.2d at 621, 626.
222. *Id.* at 622.
223. *Id.*
224. *Id.* at 623.
225. *Id.* at 624. The court ultimately denied the defendant's motion, however, but based its conclusion on the size of the plaintiff class and the "extreme" complexity of the plaintiffs' mass tort case. *Id* at 625. Combined, these elements made the performance of *ex parte* interviews unwieldy and unnecessary. *Smith,* 855 A.2d at 626-27. Notwithstanding, *Stempler* interviews remained a viable discovery tool for future litigants. *Id.* at 627.
226. Croskey v. BMW of N. Am., Inc., No. 02-CV-73747-DT, 2005 U.S. Dist. LEXIS 3673 (E.D. Mich. Feb. 14, 2005).

jurisdictions that previously allowed *ex parte* communications, HIPAA's preemption doctrine has apparently foreclosed upon the continued viability of *ex parte* talks between defendant-employer and plaintiff-employee's treating physicians.[227] This foreclosure encompasses both state and federal causes of action: litigation invoking state law (for example, an employee's suit alleging intentional infliction of emotional distress) is just as susceptible to the preemption doctrine as are wholly federal question lawsuits (for example, an employee's suit claiming violations of the ADA). In this regard, HIPAA knows no boundaries. Nor are those pre-HIPAA jurisdictions denying *ex parte* communications categorically immune from the preemption doctrine. Should the PHI protections afforded by these states fail HIPAA's stringency standard, they will be preempted by the federal floor afforded by the Privacy Rules. Only otherwise would the more stringent state law prevail. The consequences of such changes are mixed, as the Privacy Rules have generated advantages and disadvantages impacting plaintiff-employee and defendant-employer alike.

There are three major advantages inaugurated by HIPAA's discovery rules. First is the realization of public policy. Society in general expects that conversations with treating physicians will remain in the strictest of confidences.[228] HIPAA facilitates this. As with the analogous attorney-client privilege, discussions between patients and physicians build trust and empower physicians to better address, care for, and treat patients and their symptoms. Absent such expectations of privacy, patients might be less forthcoming about their medical conditions for fear of subsequent, legal disclosure. This, in turn, would limit the physician's means of and successes in treatment. In this regard, the public policy remedy, HIPAA's prohibitions on *ex parte* communications, is logically sound. This promotion of public health care ideals at the expense of some defendant-employer discovery methods transcends a mere plaintiff-employee procedural victory. Simultaneously, it cannot be unilaterally pooh-poohed by employers either, for they indirectly benefit in two key areas. In their personal capacities, managers and employer officers, as individual patients, benefit from the freedom of communications fostered by HIPAA's Privacy Rules. In their professional capacities, employers arguably experience indirect benefits through lower health care premiums,[229]

227. *See supra* note 67.

228. Petrillo v. Syntex Labs., Inc., 499 N.E.2d 952, 960 (Ill. App. Ct. 1986).

229. Annual health care premiums increase or decrease based upon the volume and expense associated with the employer-provided health plan – *i.e.*, for all but the smallest employers, the premiums are experience-rated. *See* Robert F. Rich & Julian Ziegler, *Genetic Discrimination in Health Insurance—Comprehensive Legal Solutions for a (Not*

lower lost opportunity costs,[230] and potentially lower damage awards in employer-employee litigated matters.[231] On balance, therefore, the public policy advantages of HIPAA's *ex parte* preclusions benefit both plaintiff-employees strategically and defendant-employers tangentially.

A second advantage of HIPAA's *ex parte* prohibitions is that the Privacy Rules established a baseline national standard for treating PHI. As noted above, over twenty pre-HIPAA jurisdictions allowed some form of *ex parte* talks between defense counsel and plaintiff's treating physician.[232] Nationalized, this jurisdictional split resulted in a schizophrenic treatment of identically situated plaintiff-employees not because of merit but because of mere residency status. The federal floor corrected this inequitable result by ensuring that plaintiff-employees in all jurisdictions are afforded a minimum standard of PHI care. Operating as a "statutory *stare decisis*," if you will, this approach extends continuity and predictability where previously absent, and it discourages (but does not eliminate) forum shopping in which some national or multinational defendant-employers may seek to engage, if available.

A third advantage of the Privacy Rules is that they work to level the playing field between the parties by curtailing informal fishing expeditions by defendant-employers. Absent HIPAA and the *ex parte* prohibitions, in numerous jurisdictions, defendant-employers were allowed to quiz a plaintiff's treating physicians in a variety of manners. Ostensibly, defendant-employers proceeded under the Fairness Doctrine: if plaintiff-employees have unfettered access to such information, it is only fair that defendant-employers have the same. Most assuredly fairness was only part of the concern; defendant-employers also wanted access to additional information (related or not) that would prove, or at least imply, alternative causes for the plaintiff-employee's aggrieved condition. In doing so, they could potentially embarrass the plaintiff into dropping the suit or settling for a pittance, especially if the plaintiff had a history of mental health issues. If this failed, they could file motions for summary judgment that, if granted, threw them into the appellate courts (if even appealed) where the standards of review favored them over those of an unpredictable jury trial. By curtailing this practice, the Privacy

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So) Special Problem?, 2 IND. HEALTH L. REV. 5, 11 (2005)." Uninhibited patient-physician communication should yield better medical care and faster treatments, thus resulting in fewer continuous claims and, correspondingly, lower health care costs.

230. Such lost opportunity costs include the indirect financial costs associated with medically-related employee absences (such as the cost of finding a replacement) and decreased productivity.

231. Confidential patient-physician communication should result in better, faster treatment. This, in turn, should result in reduced medical costs and, correspondingly, reduced damages incurred by plaintiff-employees."

232. *See supra* note 69 and accompanying text.

Rules better situated plaintiff-employees in their efforts to survive summary judgment, thereby allowing them their proverbial day in court.

Short-term pleasures can result in long-term regrets, as these above advantages—promotion of public policy, realization of a national PHI standard, and elimination of unmonitored fishing expeditions—are not without three significant counterbalances. The first critical disadvantage of HIPAA's *ex parte* prohibitions is the sheer cost that formal discovery alone entails. Informal discovery is cheap, and in an increasingly litigious society, cost implications cannot be ignored. In response to this concern, the *Petrillo* court was somewhat Pollyannic when it proposed, among other things, interrogatories as a suitable substitution for depositions.[233] Most practitioners will agree that interrogatories elicit limited useful information as they, unlike depositions, are routinely completed by attorneys or submitted only after legal review. As such, the elements of spontaneity and unpredictability are usually lacking. The depositional costs of formal discovery, including attorneys and supporting staff, court recorders, and travel expenses, combined with scheduling conflicts exponentially increase the costs for defendant-employers. Nor are plaintiff-employees insulated, for the mere fact that depositions are necessary reflects plaintiff's objection to *ex parte* communications. Consequently, they, too, must endure the costs associated with having their counsel in attendance. By eliminating *ex parte* talks, HIPAA stands to raise the bar and the costs associated with all related employer-employee legal disputes.

In addition to increased costs, the second and third disadvantages of the Privacy Rules, discussed in tandem, are its impact on the expediency and efficiency (collectively, the timeliness) of the litigation process. While plaintiffs' attorneys understandably bemoan so-called fishing expeditions sometimes utilized by unscrupulous defendants searching for proverbial red herrings, these processes also serve as a means of ferreting out those unscrupulous plaintiffs wishing to hedge damning information that either directly or indirectly bears upon their aggrieved condition. Presumably, the prevalence of such abuses is limited, whereas legitimate endeavors served to remove meritless claims from the courts, thereby facilitating greater judicial expediency. In eliminated this balance, the Privacy Rules nationally prescribed a mild form of judicial favoritism, a Cinderella syndrome, if you will—aiding plaintiff-employees at the expense of the sensibility and attractiveness of the Fairness Doctrine favored by several pre-HIPAA courts. Where informal discovery traditionally served as an effective tool for hastening the discovery process, increased formalization of the pretrial process brought about by

233. *See Petrillo*, 499 N.E.2d at 960.

the elimination of *ex parte* communications taxes both parties and the courts in terms of time and oversight, respectively. Cumulatively, and strategically, the Privacy Rules have benefited plaintiffs on-balance, but what plaintiffs have won is a Pyrrhic victory in terms of decreased efficiency and increased time and money costs.

B. Proposal

Balancing the competing interests of privacy expectations and national standardization on the one hand with cost effectiveness and procedural timeliness on the other is no easy task. Advocates on each side of the issue raise legitimate concerns impacting plaintiff-employees and defendant-employers alike. The most measured approach to date, one that maximized the advantages and minimized the disadvantages, is that adopted by the New Jersey Superior Court in *Smith*.[234] There, the court balanced the plaintiff's privacy expectations against the defendant's desire for cost effectiveness and judicial expediency.[235] It concluded by adopting a compromise standard that permitted *ex parte* contacts by defense counselors within protective controls afforded by state law.[236] It, therefore, receives the endorsement of this article.

Smith is most respectful of federalist principles and state privacy law. At the same time, it is most consistent with the policy intent behind the 2002 HIPAA Privacy Rules: preservation of the confidentiality of patient PHI. With *Smith* came the recognition that the competing interests of plaintiffs and defendants can be appropriately balanced through synthesis, not subordination, of state and federal law. Whereas *Law*, *Crenshaw*, and their progeny trumpeted an expansive HIPAA Preemption Doctrine that virtually thwarted health-related *ex parte* interviews within their respective jurisdictions, the *Smith* court declined to adopt such a radically pro-plaintiff policy that simultaneously and unilaterally dismantled state privacy laws via preemption. Rather, the *Smith* court recognized the parity between HIPAA's privacy concerns on the one hand with the state's general authority to regulate its own judicial and administrative proceedings on the other. This was accomplished by pointing out two underlying facts. First, neither HIPAA's statutory text nor the Congressional record indicated a federal desire to proscribe *ex parte* communications. As such, state law governed in this area. Second, both New Jersey statute and HIPAA carved out PHI exceptions for civil litigation, thereby requiring plaintiffs who place their medical

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

235. *See id.* at 615.

236. *See id.* at 625-26.

conditions in dispute to fairly expose themselves to the elements of defense critique. This allowance, which facilitated faster and less expensive discovery, was tempered, however, and not intended to serve as a blank check for defense counselors. The *Stempler* privacy barriers constructed around defendants remained controlling while the attorneys conducted *ex parte* interviews. This approach, which balanced the privacy concerns of the plaintiffs with the fairness and judicial expediency concerns of the defendants, best harmonized the advantages and disadvantages discussed above, and it is the encouragement of this article that courts adopt its logic in order to address and effectuate the privacy and cost concerns of all parties going forward.

VI. Conclusion: Touchdown or Fumble?

The debate over HIPAA continues ten years after its enactment. Particularly within rank-and-file Republican circles, this discussion has intensified. Once the champion of simple health care reform and an original backer of HIPAA, former House Republican Leader Dick Armey now laments his decision to support HIPAA in light of its perceived and unintended consequences:

> HIPAA is a classic example of legislative panic. . . . The fact is that HIPAA was a mistake. It was oversold. It had unintended consequences. It turned out that HIPAA did little to make insurance more portable, but it did set a dangerous precedent for the federal regulation of health insurance. We thought we were cracking down on Medicare fraud. Instead, we turned doctors into criminal suspects, with armed federal agents seizing their filing cabinets. We felt confident that we had guaranteed medical privacy and paperless billing, but HIPAA appears to have expanded bureaucrats' access to our medical records without a search warrant.[237]

In Armey's view, HIPPA was proposed as a conservative counterbalance to Clinton Care; however, it became the first *installment* of Clinton Care.[238] Political conservatives echo Armey's assessment. As Professor Richard Epstein of the University of Chicago College of Law writes, "HIPAA continued the search for government control [of the health care industry] by the salami tactic: take control over the industry one slice at a time."[239] If true, for conservative politicians HIPAA represents a

237. Dick Armey, *Just Gotta Learn From the Wrong Things You Done*, CATO JOURNAL Vol. 22, No. 1, at 6-7 (Spring/Summer 2002), http://www.cato.org/pubs/journal/j22n1/cj22n1-2.pdf (last visited June 18, 2006).

238. *Id.* at 7.

239. Richard A. Epstein, *HIPAA on Privacy: Its Unintended and Intended Consequences*, CATO JOURNAL Vol. 22, No. 1, at 27 (Spring/Summer 2002), https://www.cato.org/pubs/journal/cj22n1/cj22n1-3.pdf (last visited June 18, 2006).

political miscalculation of seismic proportions.

Politics temporarily aside, within the context of employment law litigation, HIPPA, and particularly the 2002 Privacy Rules, represents a sea change for informal discovery tactics. Prior to HIPAA's 1996 enactment, no fewer than twenty-one state and federal jurisdictions explicitly permitted various degrees of *ex parte* communications between defendant-employer and plaintiff-employee's treating physicians. HIPAA and the 2002 Privacy Rules altered this dynamic in a fundamental manner, as demonstrated in *Law*, *Crenshaw*, and *Boston Market*: the availability of informal discovery is no longer a certainty. Just the opposite: prognosticating on the topic would lead one to conclude that the future availability of *ex parte* interviews is increasingly dim. HIPAA's federal floor of privacy protection combines with its preemption doctrine to supercede any state law to the contrary. *Beard* further complicated matters for defense counsel: unlike plaintiff-employees, defendant-employers will rarely, if ever, succeed in availing themselves of HIPAA's privacy shield to suppress discovery of human resource records. In this regard, HIPAA not only acts as a shield for the plaintiff-employee's use to deflect requests for *ex parte* talks; it also serves as a sword that plaintiff's counsel can wield to attack defense counsel's discovery tactics and limit any attempts at and potential gains from a fishing expedition.

Through these lenses, therefore, HIPAA and the 2002 Privacy Rules represent a mixed bag. For plaintiff-employees, HIPAA is political touchdown, inadvertently secured by pro-business Republicans for the ultimate benefit of pro-labor plaintiff's counsel. For defendant-employers, HIPAA is a political fumble, unintentionally limiting their means of PHI acquisition to onerous formal discovery requests. The death knell of informal discovery has sounded, but is it complete? *Law*, *Crenshaw*, *Boston Market*, and *Beard* imply as much, but the New Jersey ruling in *Smith* combined with the relative newness of the 2002 Privacy Rules warrant additional time before the obituary can be written. And, in the politically charged world of health care reform, change is just a ballot box away.

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