

2006

John P. Barbuto, individually and John P. Barbuto,
M.D., P.C., dba Neurology in Focus v. Nicolas
Sorensen, Kevin Sorensen, and Pamela Sorensen,
limited guardians and conservators of Nicholas
Sorensen : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

JOHN P. BARBUTO, individually; and
JOHN P. BARBUTO, M.D., P.C., dba
NEUROLOGY IN FOCUS,

Defendants/Appellants,

vs.

NICHOLAS SORENSEN, KEVIN
SORENSEN, and PAMELA
SORENSEN, limited guardians and
conservators of Nicholas Sorensen,

Plaintiffs/Appellees.

APPELLANT'S BRIEF
ON
WRIT OF CERTIORARI

Case No. 20060816-SC

Court of Appeals No. 20050502-CA

APPEAL BY WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

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JAN 17 2007

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STATEMENT OF JURISDICTION

The Supreme Court has appellate jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(a), Rule 51, Utah R. App. P., and Order of this Court dated November 29, 2006.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Did Appellees, by filing a personal injury suit and placing the physical condition of Nicholas Sorensen at issue, waive the physician-patient duty of confidentiality thereby permitting *ex parte* communications between Dr. Barbuto, a prior treating physician, and the defendant's counsel in the personal injury litigation? Standard of review: "The issue of whether a duty exists is entirely a question of law to be determined by the court." Smith v. Frandsen, 2004 UT 55, ¶ 14, 94 P.3d 919, 923-924.

Preservation: This issue was preserved at the trial court and addressed by the Court of Appeals in Sorensen v. Barbuto, 2006 UT App 340, 143 P.3d 295.

2. Did the Court of Appeals err in its application of Rule 506, Utah R. Evid. and Utah Code Ann. § 78-24-8(4) in ruling that neither provision modified the physician-patient duty of confidentiality?

Standard of Review: Proper interpretation and application of a statute is a question of law reviewed for correctness with no deference afforded to the lower court's legal conclusions. State v. One Lot of Pers. Prop., 2004 UT 36, ¶ 8, 90 P.3d 639, 641.

Preservation: This issue was preserved at the trial court and addressed by the Court of Appeals in Sorensen v. Barbuto, 2006 UT App 340, 143 P.3d 295.

PROVISIONS OF CONSTITUTION, STATUTES,
ORDINANCES AND RULES

Utah Code Ann. § 78-24-12(4) (emphasis added):

A physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient. However, this privilege shall be deemed to be waived by the patient in an action in which the patient places his medical condition at issue as an element or factor of his claim or defense. Under those circumstances, a physician or surgeon who has prescribed for or treated that patient for the medical condition at issue may provide information, interviews, reports, records, statements, memoranda, or other data relating to the patient's medical condition and treatment which are placed at issue.

Rule 506, Utah Rules of Evidence (relevant portions):

(b) *General rule of privilege.* If the information is communicated in confidence and for the purpose of diagnosing or treating the patient, a patient has a privilege, during the patient's life, to refuse to disclose and to prevent any other person from disclosing (1) diagnoses made, treatment provided, or advice given, by a physician or mental health therapist, (2) information obtained by examination of the patient, and (3) information transmitted among a patient, a physician or mental health therapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or mental health therapist, including guardians or members of the patient's family who are present to further the interest of the patient because they are reasonably necessary for the transmission of the communications, or participation in the diagnosis and treatment under the direction of the physician or mental health therapist.

(d) *Exceptions.* No privilege exists under this rule:

(d)(1) *Condition as element of claim or defense.* As to a communication relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which that condition is an element of any claim or defense, or, after the patient's death, in any proceedings in which any party relies upon the condition as an element of the claim or defense.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an action against John P. Barbuto, M.D. (“Dr. Barbuto”), a prior treating physician of plaintiff Nicholas Sorensen (“Nicholas”). In their complaint, plaintiffs (collectively the “Sorensens”) allege breach of contract and various tort causes of action based upon Dr. Barbuto’s participation with defense counsel in a separate personal injury action. The Sorensens base their claims on alleged breach of confidentiality and allegedly false or incorrect information provided by Dr. Barbuto to defense counsel.

B. COURSE OF PROCEEDINGS

After evaluation of the complaint and before answering, Dr. Barbuto sought dismissal of the complaint pursuant to Rule 12(b)(6), Utah R. Civ. P. for failure to state a legally cognizable claim for relief. After written and oral arguments, the trial court ruled in Dr. Barbuto’s favor, dismissing the complaint. The Sorensens appealed that decision to this Court which, pursuant to Utah Code Ann. § 78-2-2(4) transferred the appeal to the Court of Appeals.

The Court of Appeals affirmed in part and reversed in part. In its affirmation, the court held that the Sorensens failed to state claims for breach of implied contract and invasion of privacy. It also held that Dr. Barbuto’s deposition testimony was protected by judicial privilege. The court reversed the trial court decision in part holding that Dr. Barbuto’s *ex parte* communications with defense counsel breached a “fiduciary duty of confidentiality,” that the breach of confidentiality was sufficient to state a claim for intentional infliction of emotional distress, and that the privilege provisions of Rule 506 did not protect Dr. Barbuto from the tort claim.

C. STATEMENT OF FACTS

Nicholas was injured in an automobile rollover accident on July 24, 1999. (R. 2 ¶ 5.) Beginning on or about that date and continuing for approximately one and one-half years, Dr. Barbuto provided medical care to Nicholas. (R. 2 ¶ 6.) At that time, Dr. Barbuto ceased being a listed provider under the Sorensens' insurance plan and Michael Goldstein, M.D. assumed the duty to treat Nicholas. (*Id.*)

Nicholas subsequently commenced personal injury litigation based upon his injuries in the accident. (R. 2 ¶ 7.) Nicholas prevailed in that action. (*Id.*) Prior to trial, Nicholas's medical records, including those in the possession of Dr. Barbuto, were produced during discovery.

In May 2003, the defense counsel in the personal injury case subpoenaed Dr. Barbuto to testify at trial which was set to begin later in the month. (R. 3 ¶ 8.) The trial was subsequently postponed until October 2003 and, during the interim period, Dr. Barbuto communicated *ex parte* with defense counsel. (R. 3 ¶¶ 8-9.) Dr. Barbuto was subsequently retained by defense counsel to review all the medical records produced during discovery, including those documenting Nicholas's symptoms and treatment after Dr. Barbuto's treatment ended, and to offer expert opinions at trial on the cause of Nicholas's symptoms.

Ultimately, Nicholas had Dr. Barbuto excluded from testifying as an expert at trial, because he had been untimely designated as an expert witness. (R. 4 ¶ 11.) Because of Dr. Barbuto's association with the defense counsel in the personal injury action, the Sorensens commenced action against him.

SUMMARY OF ARGUMENT

The Court of Appeals has created a common law fiduciary duty of physician confidentiality which undermines this Court's authority to establish rules regarding

privilege and is inconsistent with the legislature's regulation of the practice of medicine. In doing so, it has separated two integral concepts, confidentiality and privilege, both of which arise from the physician-patient relationship and differ only by semantic distinctions. By making the duty of confidentiality a "fiduciary" one, the Court of Appeals has imposed expectations beyond those normally attached to the physician-patient relationship, dramatically expanding the scope of a physician's duty. Additionally, the Court of Appeals pronouncement of a new common law duty is held to apply *ex post facto* to Dr. Barbuto.

There is no question that a physician owes his patient a duty of confidentiality which survives termination of the physician-patient relationship. The issue before this Court is whether that duty of confidentiality continues where the patient places his or her physical condition at issue in litigation in light of this Court's pronouncement in Rule 506, Utah R. Evid. that no privilege exists under this circumstance. More specific to this case is whether the Sorensons' complaint even states a claim for relief where (1) Dr. Barbuto's records regarding Nicholas had already been made part of the litigation record by way of discovery, and (2) Dr. Barbuto's *ex parte* communications with defense counsel in the personal injury matter related to medical records made by other physicians after Dr. Barbuto had ceased to act as Nicholas's physician and which had also been disclosed as part of the personal injury case.

The fiduciary duty created by the Court of Appeals would preclude a treating physician without prior approval from his past patient from ever discussing the patient's treatment or records with anybody, not only defense counsel, despite the absence of a privilege under Rule 506.¹ The duty pronounced by the Court of

¹The irony in this case is that had Dr. Barbuto's observations and comments been more supportive of Nicholas's personal injury claims, the Sorensons would

Appeals, however, is in direct conflict with the legislative determination that a physician is free to discuss a patient's condition where the patient has placed that condition at issue in litigation. More fundamentally, the Court of Appeals creation of this duty is implicitly based upon a semantic distinction between the physician duty of confidentiality and the physician-patient privilege. The court, however, fails to identify that distinction or to explain why it exists. In reality, the two concepts are the same, especially under circumstances where the patient places his medical condition at issue in litigation. Separating them by common law judicial fiat introduces confusion and unpredictability into an area of law that is clearly defined by statute and/or court rules.

By loosely using the term "fiduciary," the Court of Appeals has injected two other elements into what is otherwise a settled area of law. First, it has minted new common law for the State of Utah which will require additional future litigation to define its scope and applicability. Secondly, by lax use of a term of art, it has imposed upon a physician a duty to say nothing which could be viewed as detrimental to the litigation interests of a patient or former patient. While some courts from some other jurisdictions have used the term "fiduciary" in describing a physician's duty, their analysis and holdings expressly limit the scope of that duty to the realm of providing patient diagnosis and treatment. Adding the term "fiduciary" to the duty of patient confidentiality adds no clarification to that duty and acts only to broaden the potential scope of the duty beyond the reasonable expectations of the physician or patient and to the potential detriment of the search for truth in the litigation process.

never have objected. It seems patently obvious that it is not Dr. Barbuto's *ex parte* conversation, but rather the content of his opinions that is driving their legal action.

The Court of Appeals' ruling also does not deal with the scope of the physician-patient privilege as defined in other appellate court holdings. In fact, scope is not an issue in this case: all of the medical records regarding Nicholas had already been produced during discovery prior to the *ex parte* communications complained of here.² It is clear, therefore, that there was no impermissible disclosure of confidential communications. The real issue is that Dr. Barbuto opined about the causes of Nicholas's symptoms in a way that was not supportive of his claims in the litigation. It is the expression of those medical opinions for which the Sorensens seek to punish Dr. Barbuto. This is inconsistent with this Court's approach to the privilege issue. The bottom line is that privilege must give way to the search for truth. To the extent that the Court of Appeals' newly created fiduciary duty discourages that open search for truth, it undermines the level field of litigation in favor of the plaintiff/patient.

It is important for this Court to address the new fiduciary duty of confidentiality created by the Court of Appeals. The procedural rules of litigation should be predictable and uniformly applied to all parties. The Court of Appeals' decision undermines this uniformity and predictability. Under the current state of the law, it is unclear whether a treating physician can ever without a patient's prior consent, discuss a patient's condition with anybody other than the patient or the patient's lawyer. May a physician as a "fiduciary" testify honestly about his opinions regarding the cause of a patient's symptoms, or must he first clear his opinion with the patient and testify only if his patient is satisfied with the content of his prospective testimony and "permits" the physician to testify?

²If this Court deemed it appropriate to limit *ex parte* communications or the scope of continued privilege under Rule 506, that could be accomplished by amendment to the rule. However, as discussed below, limiting a physician's ability to discuss a patient's records may be an infringement on legislative prerogative.

The Court of Appeals' new common law duty is also inconsistent with its prior rulings and those of this Court on physician-patient privilege. This new duty and its application undermine this Court's determination of the extent of the privilege under Rule 506. This new duty, as applied here to *ex parte* communications, is also in direct conflict with the legislature's regulation of physician practice. In addition, by making the new duty a fiduciary one, it invites future litigation to define the scope of that fiduciary duty. It is therefore appropriate for this Court to reverse the Court of Appeals ruling and affirm the trial court's dismissal of the complaint for failure to state a claim for relief.

ARGUMENT

I. THE COURT OF APPEALS' CREATION OF A NEW DUTY OF CONFIDENTIALITY INFRINGES ON THIS COURT'S RULE MAKING AUTHORITY AND IS FACIALLY INCONSISTENT WITH THE LEGISLATIVE REGULATION OF PHYSICIAN PRACTICE.

While the duty of confidentiality, in normal circumstances, extends beyond the termination of the physician-patient relationship, the confidentiality of patient information is not absolute. See *State v. Cardall*, 1999 UT 51, ¶ 29, 982 P.2d 79, 85 (holding privilege under Rule 506, Utah R. Evid. is not absolute). The Complaint establishes that Nicholas initiated the personal injury litigation based upon his physical injuries. (R. 2, ¶ 7.) The Complaint also establishes that Dr. Barbuto's records regarding his care for Nicholas were part of the evidence in that case. (R. 3, ¶ 8.) The Utah Rules of Evidence specifically provide that no privilege exists when physical condition is placed at issue in litigation.

No privilege exists under this rule:

. . . As to communication relevant to an issue of physical, mental or emotional condition of the patient in any proceeding in which that condition is an element of any claim or defense . . .

Rule 506(d)(1), Utah R. Evid.³ Utah statute goes beyond this proclamation of no privilege to expressly permit a treating physician to discuss the patient's records:

A physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient. However, this privilege shall be deemed to be waived by the patient in an action in which the patient places his medical condition at issue as an element or factor of his claim or defense. Under those circumstances, a physician or surgeon who has prescribed for or treated that patient for the medical condition at issue may provide information, interviews, reports, records, statements, memoranda, or other data relating to the patient's medical condition and treatment which are placed at issue.

Utah Code Ann. § 78-28-8(4) (emphasis added). This is precisely what Dr. Barbuto did in Nicholas's personal injury action. In addition, however, he also reviewed and evaluated other medical records, an activity for which there is no duty of confidentiality. It is apparently this review of other records for defense counsel which stirred the animosity of the plaintiffs' bar, giving rise to this action.⁴

The Court of Appeals observed that Rule 506 supersedes § 78-24-8(4). Sorensen v. Barbuto, 2006 UT App 340, ¶ 12, 143 P.3d 295, 299. The problem with that observation is that the court refused to address the issue presented by Dr. Barbuto, i.e., does Rule 506(4) expressly or implicitly overrule the legislative

³The Utah rule does not, as in some states and in the replaced statutory privilege in § 78-24-8(4), create a waiver of the physician-patient privilege. Because the rule simply eliminates the privilege, issues regarding waiver and scope of the waiver don't apply under Rule 506.

⁴Counsel for the Sorensens stress in the Complaint and vehemently reiterated in argument before the trial court and the Court of Appeals historical conduct on the part with Dr. Barbuto that the "plaintiffs' bar" finds offensive. The "facts" related to Dr. Barbuto's involvement with defense attorneys are advanced in the Complaint (R. 4-5, ¶¶ 12-13), the hearing transcript (T. 8:15 through 10:5), and the Appellant's Brief to the Court of Appeals (Aplt's Brf. Pp. 5-7). None of those allegations have any bearing on the sufficiency of the complaint, but do illustrate that more is involved here than the establishment of a duty to protect patients in litigation.

determination as to what a physician may do under the last sentence in § 78-24-8(4)? Without discussing the issue, the Court of Appeals assumed this to be the case. However, no Utah appellate court has ever addressed the issue. The conclusory approach used by the Court of Appeals ignores the fundamental distinctions between the two portions of the statute. The first two sentences deal with the physician-patient privilege. The last statement instructs physicians on what they may do when the privilege ceases to protect patient confidentiality. The legislature has never repealed § 78-24-8(4) and this Court has never declared the last provision to be invalid.⁵

This Court discussed a similar issue in Ryan v. Gold Cross Services, Inc., 903 P.2d 423, 425 (Utah 1995). In a challenge to a statute as an infringement on judicial rule making authority, the Ryan court explained that while this Court had authority under Article VIII, section 4 of the Constitution of Utah to create rules of evidence, the legislature retains authority over non-procedural substantive issues. The scope of privilege is a rule of evidence over which the Supreme Court has control, subject to legislative review. The issue of regulation of physician activities, however, is a substantive one reserved to the legislature. There is simply no authority on which the Court of Appeals could conclude that this Court's establishment of a rule of evidence can constitute a repeal of a legislative act dealing with such substantive issues. The Ryan analysis rejects any such conclusion.

⁵The only way to make the Court of Appeals decision consistent with § 78-24-8(4) is to judicially impose a restriction on *ex parte* interviews. As often recognized by this Court, this interpretation is not consistent with the rules of statutory construction. A "cardinal rule of statutory construction is that courts are not to infer substantial terms into the text that are not already there. Rather, the interpretation must be based on the language used, and the court has no power to rewrite the statute to conform to an intention not expressed." Berrett v. Purser & Edwards, 876 P.2d 367, 370 (Utah 1994) (citations omitted).

The Court of Appeals' holding also interferes with this Court's rule making authority inasmuch as application of the duty created by that court brings into question the viability and applicability of Rule 506 to the obligations arising from the physician-patient relationship. If the elimination of the privilege under Rule 506 does not permit a physician to discuss anything related to the patient's condition, what purpose is served by Rule 506? There is no need to create a physician-patient privilege if the duty of confidentiality is separate from and encompasses that privilege. There is no purpose in removing the privilege for purposes of litigation if the duty of confidentiality applies independently from the privilege rule and trumps any waiver created by placing physical condition at issue in the litigation.

Both the Sorensens and the Court of Appeals placed considerable emphasis on the Dr. Barbuto's *ex parte* discussions with defense counsel. There is, however, no legal significance to the *ex parte* nature of those discussions. There is no restriction in § 78-24-8(4) on the physician's "interviews" or other activities. Before the Court of Appeals, Dr. Barbuto pointed out that the Utah State Bar, consistent with Rule 506 and § 78-24-8(4), had issued an ethical opinion prior to the events at issue here, stating that "[n]o rule prohibits any *ex parte* contact with plaintiff's treating physician when plaintiff's physical condition is at issue." Utah State Bar Ethics Advisory Opinion Committee Opinion No. 99-03 (copy enclosed as Addendum B.)¹⁰ Accord, Stempler v. Speidell, 495 A.2d 857 (N.J. 1985).

Apparently without examining the analysis in the ethics opinion, the Court of Appeals concluded that it "addresses the responsibilities of attorneys, not physicians. Because the issue in this case concerns a physician's duty, the ethics opinion does not

¹⁰The plaintiffs' bar vigorously opposed this conclusion before the ethics panel and bar commissioners, but were unable to establish any legal authority for reaching a different conclusion.

apply.” Sorensen, 2006 UT App ¶ 16 n. 3. The conclusory nature of this approach ignores two things. First, the ethics panel’s inquiry into the *ex parte* nature of the discussions was very extensive and its analysis sound. Second, it is not good policy to permit attorneys to instigate *ex parte* discussions with treating physicians and then hold the physician liable for responding. Obviously, attorneys with a presumptive knowledge of the law should not be permitted to lead physicians, lacking that legal background, into violating a common law duty owed to the patient. The rule should consistently apply to both. As it stood at the time of Dr. Barbuto’s activities, there was nothing in the law which would have placed him or any other physician on notice that engaging in *ex parte* discussions about a patient’s medical condition at issue in a personal injury lawsuit would expose him to a tort claim.

Creating a common law “fiduciary” duty of confidentiality which is broader than and different from the physician-patient privilege as defined by statute and/or evidentiary rule creates common law ambiguity where clear standards should apply. If there is to be a change in these rules, it is the prerogative of this Court to make them under its rule making authority rather than leave their amendment to the vagaries of a newly developing common law duty.

II. THE COURT OF APPEALS’ CREATION OF A FIDUCIARY DUTY IS UNSUPPORTED BY UTAH LAW AND GOES WELL BEYOND THE DUTIES ARISING FROM THE PHYSICIAN-PATIENT RELATIONSHIP.

One of the significant concerns with the Court of Appeals’ decision is not only that it creates a new duty of confidentiality which extends beyond the legal termination of the physician-patient privilege, but it also makes the duty a fiduciary one.

Consistent with the reasoning of *Debry*, we hold that *ex parte* communication between a physician and opposing counsel

constitutes a breach of the physician's fiduciary duty of confidentiality.

Sorensen, 2006 UT App ¶ 16(emphasis added). Additionally, this fiduciary duty, applies only to communications with counsel defending a party sued by the doctor's prior patient. *Ex parte* communications with plaintiff's counsel is presumed to be with the patient's consent. The Court of Appeals decision potentially imposes a duty on a physician that favors testimony favorable to his patient (to whom a fiduciary obligation is owed) over medically objective truth.

The fiduciary duty is "[a] duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied by law." Black's Law Dictionary, 625 (6th Ed.1990). In discussing fiduciary duty the Restatement of Torts notes that "[a] fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." Restatement (Second) of Torts § 874, Comment a. (citing Restatement (Second) Trusts § 2) (emphasis added). It is well-established that "[a] fiduciary duty is the duty to act primarily for another's benefit." E.g., Haluka v. McRedmond v. Estate of Marianelli, 46 S.W.3d 730, 738 (Tenn. App. 2000). Fiduciary relationships are those in which the fundamental nature of the relationship between the parties imposes a broad general duty to protect the welfare of the other party, such as attorney-client, Shaw Resources Ltd., L.L.C. v. Pruitt, Gushee & Bachtell, P.C., 2006 UT App 313, 142 P.3d 560, corporate directors, C & Y Corp. v. General Biometrics, Inc., 896 P.2d 47 (Utah App. 1995), partnerships, Ong Int'l (U.S.A.) Inc. v. 11th Ave. Corp., 850 P.2d 447 (Utah 1993). Even so, some attorneys and accountants may not owe fiduciary duties to a client, depending upon the actual nature of the relationship. Harmon City, Inc. v. Nielsen & Senior, 907 P.2d 1162,

1169 (Utah 1995). It is the nature of the relationship and the reasonable expectations of the parties as they enter the relationship which dictates whether it is or is not fiduciary.

Implicit in the Court of Appeals' decision here is that a physician, by way of a fiduciary duty, has the obligation to act only in the best interests, particularly the financial interests of the patient. The case law is replete with complaints alleging breach of fiduciary duty against physicians. As a rule, however, most courts which have examined the issue of a fiduciary duty in a physician-patient relationship have declined to find a fiduciary duty beyond the duties which arise from and are based upon that relationship. Those courts which have used the term "fiduciary" in defining this physician's duty have restricted that duty to (1) competent evaluation and treatment of a patient's condition, (2) a duty to disclose information material to the patient's condition, (3) a duty to disclose adverse events, and (4) a duty of confidentiality with respect to patient information. Only one court, that can be determined from research, has held that the physician-patient relationship imposes a broad duty of "good faith and fair dealing" encompassing the duty to speak only for the patient's financial or other benefit. *E.g., Watts v. Cumberland County Hospital System, Inc.*, 343 S.E.2d 879, 884 (N.C. 1986).⁷ Every other court has found only a limited fiduciary duty based upon reasonable expectations of the physician and the patient, *i.e.*, a duty to exercise appropriate skill, to advise the patient of all information necessary and pertinent to a course of treatment, and to maintain confidentiality. For example, in *Wogan v. Kunze*, 623 S.E.2d 107, 119 (S.C. App. 2005) the court concluded that the breach of fiduciary duty claim was related to a physician's duty to provide "treatment and care . . . in a proper,

⁷It is significant that the *Watts* case has not been cited or applied outside the state of North Carolina. Apparently, North Carolina stands alone in this position.

professional, ethical, competent and appropriate manner.” Indeed, the court in Wogan expressly rejected a claim that a physician had a fiduciary duty arising from the physician-patient relationship that required him to assist his patient’s economic interests by helping him to file a medicare claim. Id.

In Brandt v. Medical Defense Assoc., 856 S.W.2d 667, 670 (Mo. 1993) (en banc), discussed below, the court stated its belief that “a physician has a fiduciary duty of confidentiality not to disclose any medical information received in connection with his treatment of the patient.” It then proceeded to limit the scope of that duty, essentially removing its fiduciary nature and holding that the duty does not apply to *ex parte* discussions where the patient’s condition was at issue in litigation. Id. at 670-71.

Michigan similarly recognizes a fiduciary duty arising from the physician-patient relationship which is limited to the scope of medical care provided to the patient. Burton v. William Beaumont Hospital, 373 F. Supp.2d 707, 723-24 (E.D. Mich. 2005). In Melychenko v. Clay, 393 N.W.2d 589, 591 (Mich. App. 1986), the court observed that the fiduciary relationship between physician and patient is “founded on the proper diagnosis and treatment of medical problems.” The Melychenko court held that this limited fiduciary duty does not preclude a treating physician from testifying for a defendant in a malpractice case. Id.

Other courts have similarly limited the scope of the “fiduciary” duty owed by a physician. Wiseman v. Alliant Hospitals, Inc., 37 S.W.3d 709, 713 (Ky. 2000) (“The fiduciary relationship between the parties grants a patient the right to rely on the physician’s knowledge and skill.”); Daly v. Metropolitan Life Ins. Co., 782 N.Y.S.2d 530, 534 (N.Y. Supp. 2004) (noting that the claim of breach of fiduciary

duty “in the context of physician-patient relationships, arises as a result of a physician’s unauthorized disclosure of a patient’s confidential medical records.”).

Reviewing Massachusetts law, the court in Korper v. Weinstein, 783 N.E.2d 877 (Mass. App. 2003) discussed the scope and limits of fiduciary duties arising from the physician-patient relationship.

The existence of the relationship in any particular case is to be determined by the facts established. In addition to the obvious obligation to make medical decisions in the patient’s best interest, a physician has a fiduciary duty to maintain the confidentiality of a plaintiff’s medical records. However, the existence of a fiduciary relationship does not mean that all interaction between the parties to that relationship is measured by the standards applicable to fiduciaries; the fiduciary is held to a higher standard of conduct only as to matters within the scope of the fiduciary relationship. Even though the physician-patient relationship is one of many familiar and well recognized forms of fiduciary relationships, the scope of the fiduciary duty is defined by the incidents and undertakings of the defendant as a physician.

Id. at 881 (punctuation, citations, footnotes omitted, emphasis added). The Korper court expressly refused to “expand the scope of the fiduciary duty a doctor owes a patient to include conduct beyond the context of medical treatment.” Id. at n. 11.

While it may arguably be appropriate to characterize the physician-patient relationship as a fiduciary one, it adds nothing to the duties arising from that relationship to refer to them as fiduciary. It is also inappropriate to impose upon that relationship a duty to act solely for the benefit of the patient well after the relationship has terminated. See In re Diet Drugs Products Liability Litigation, 352 F. Supp.2d 533, 543 (E.D.Pa. 2004) (declining to find a fiduciary duty where physician-patient relationship no longer existed). There is no question that a physician has duties to provide competent care to the patient, to disclose all medically pertinent information, and to maintain patient confidentiality. It is also unquestionable that the duty to maintain confidentiality continues after termination

of the physician-patient relationship, unless otherwise terminated as a matter of law. The fiduciary duty created by the Court of Appeals, however, potentially goes beyond the scope of providing confidential and competent treatment of the patient. The Court of Appeals' introduction of the word "fiduciary" in defining the common law duty leaves physicians to wander and lawyers to argue that a physician may only speak of causation of injuries if the opinion serves the financial interest of a patient or former patient. It appears to permit the physician to confer with attorneys for the patient because that would be in the patient's financial interests. It prevents the physician from speaking with defense counsel because that might be adverse to the patient's financial interests. Neither of these relates in any way to the purpose for which the physician-patient relationship was created; competent diagnosis and treatment of the patient's condition.

III. THE DUTY OF CONFIDENTIALITY AND THE PHYSICIAN-PATIENT PRIVILEGE ARE IDENTICAL AND SHOULD BE TREATED AS SUCH.

The duties owed by a doctor arise from the physician-patient relationship. E.g., Pegalis and Wachsmann, American Law of Medical Malpractice (1980) § 2:3 at 45. See also Nixdorf v. Hicken, 612 P.2d 348, 353 (Utah 1980) (recognizing physician-patient relationship as source of duty owed to patient). The physician-patient privilege defined by Rule 506 is expressly conditioned upon this relationship. Once a patient places his or her condition at issue in litigation, however, the physician-patient privilege ceases to exist with respect to that condition because there is as a matter of law no reasonable expectation of confidentiality related to the medical conditions at issue. This rule is based upon sound public policy. A person seeking to recover damages for personal injuries allegedly caused by another should

not be permitted to hide behind the privilege as a way to prevent inquiry into the cause of his or her symptoms.

Additionally, one of the ultimate issues to be resolved in personal injury litigation is the cause or causes of injury and damage. In order to arrive at the legal and factual “truth” of the causation issues, medical experts, whether treating physicians or retained experts, must be allowed to express their opinions within the bounds of evidentiary rules of foundation. Such causation opinions often differ bringing them within the province of the fact finder to determine which are accurate. The introduction by the Court of Appeals’ decision of a “fiduciary” duty that prevents communication about the cause of a patient’s ailments that are the subject of litigation chills rather than promotes the search for legal and medical truth.

The Court of Appeals relied on its analysis in Debry v. Goates, as the basis for its imposition of a duty of confidentiality superseding the physician-patient privilege. Sorensen ¶¶ 2006 UT App 14-16. However, neither the facts nor the basis for the Debry case apply here. In Debry, the patient did not place her condition at issue, her husband did so in the divorce action. The patient did not consent to the release of the information. The Debry court concluded that “under these circumstances, a patient must at least be afforded the opportunity for protection.” Id. at ¶ 14.

(Emphasis added.) The court continued to quote from Debry:

Before disclosing confidential patient records or communications in subsequent litigation, a physician or therapist should notify the patient. Even if the communications may fall into [the] exception to the privilege, the patient has the right to be notified of the potential disclosure of confidential records . . . Such notice assures that the patient can pursue the appropriate procedural safeguards in court to avoid unnecessary disclosure.

Id. at ¶ 15 (citing Debry). The Court of Appeals’ reliance on its Debry ruling in this matter is inapposite. Not only was Nicholas aware that Dr. Barbuto had released his

medical records to defense counsel, he expressly consented to that release. In other words, Dr. Barbuto subsequently revealed no confidential information. All the information that Dr. Barbuto reviewed and commented on was already part of the discovery record and had been disclosed before Dr. Barbuto's involvement with defense counsel.

This brings us to the core of the Court of Appeals' ruling on a physician's fiduciary duty of confidentiality. In order for such a duty to exist where the physician-patient privilege does not exist and the relevant medical information has already been released pursuant to patient authorization, the duty must be totally independent of the physician-patient privilege. This concept is not supported by cases where courts have addressed that very issue.

A Louisiana appellate court addressed the issue in Glenn v. Kerlin, 248 So.2d 834 (La. App. 1971). In Glenn, the patient, who was litigating a case involving his physical conditions sued his physician for engaging in a conference with defense counsel. The court noted that "[d]uring that conference, it is alleged, Dr. Kerlin revealed plaintiff's physical condition and made available plaintiff's medical records without any authorization by plaintiff and without being so ordered by this court." Id. at 834-35.⁸ The trial court dismissed the claim on the basis of statutory language similar to § 78-24-8(4). The appellate court treated the issue somewhat differently, viewing the claim as an invasion of privacy claim, but affirmed on similar grounds. The Glenn court noted that a patient may not continue to claim a right to privacy governing the physician where he commences litigation which puts his physical condition at issue. Id. at 836. Based upon the allegations of the

⁸It is important to note that the facts in Glenn were much different from those here, but the analysis relating to *ex parte* discussions of supposedly confidential information applies here.

complaint, the Glenn court found that the plaintiff failed to state a cause of action. Id.

In Moses v. Williams, 549 A.2d 950 (Pa. Super. 1988), a case strikingly similar to this one, the physician engaged in *ex parte* pretrial discussions with a defendant's attorney and testified against the patient at trial. The trial court granted summary judgment, finding no duty. In Moses, the plaintiff claimed that she first became aware of the physician's involvement when her attorney was advised that the defense intended to call him as an expert witness at trial. Id. at 952. The plaintiff in Moses made many of the same arguments advanced by the Sorensens, including application of AMA ethics guidelines and the Hippocratic Oath. She argued that the physician "had a duty to refrain both from taking any actions which would be adverse to her interests in the malpractice litigation and from making any disclosures to other parties of information gained in the course of his treatment of her, unless authorized to do so either by her or by law." Id. (emphasis added).

The Moses court first addressed the breach of confidentiality issue, finding no cause of action where the patient had placed her physical condition at issue.

We find that within the narrow factual context of this case, appellant has failed to state a cause of action for breach of confidentiality. To find otherwise would undermine several well-established principles of this Commonwealth. We must keep in mind that when Dr. Krane made his disclosures, appellant had voluntarily instituted a medical malpractice action against Albert Einstein and had thereby placed in issue her medical condition. Given a patient's qualified right to privacy in his or her medical records and an individual's reduced expectation of privacy as a result of filing a civil suit for personal injuries in conjunction with the policies supporting both the physician/patient privilege statute and the absolute immunity from civil liability granted to witnesses in judicial proceedings, we will not recognize the cause of action for breach of confidentiality as pled in this case.

Id. at 953-54 (emphasis in original, footnotes omitted). In its analysis of the plaintiff's arguments, the Moses court noted that "a patient's right to confidentiality

is less than absolute.” *Id.* at 954. Accord *Cardall, supra*. “The law is replete with statutory justifications for disclosure that are deemed to outweigh the patient’s right to confidentiality.” *Moses*, 549 A.2d at 954. The *Moses* court discussed a Pennsylvania statute substantively similar to § 78-24-8(4) and concluded that the legislation reflected a balancing of the interests in confidentiality against the interests of justice. *Id.* at 955.

The *Moses* court also rejected a variety of bases for finding a duty which the physician had breached.

[C]ontrary to appellant’s assertions, ethical considerations and the commonwealth’s medical licensing statutes do not provide a clear-cut source for recognizing a cause of action for breach under the facts as alleged in this case. The Hippocratic Oath does not serve as an absolute bar to disclosures . . . Similarly, the 1980 statement by the American Medical Association concerning a doctor’s release of information is broad, provides little guidance, and does not in any event, prohibit Dr. Krane’s actions . . . Even the Current Opinions of the Judicial Council of the AMA do not absolutely bar disclosures of confidences. In fact, Section 5.07 states that “[a] physician should respect the patient’s *expectations of confidentiality* concerning medical records that involve the patient’s care and treatment.” As we have already noted, an individual’s expectations of confidentiality are diminished when that individual files a civil action for personal injuries. To allow recovery at law for conduct such as Dr. Krane’s that occurred within the context of a judicial action voluntarily instituted by appellant would ignore the fact that appellant’s privacy interest was diminished by her commencement of the malpractice suit.

Id. at 956 (emphasis added).

A patient in Missouri similarly sued his treating physicians for breach of confidentiality arising from *ex parte* discussions of his medical conditions with defense counsel and testifying at trial against his interests. *Brandt v. Medical Defense Associates*, 856 S.W.2d 667 (Mo. 1993) (en banc).⁹ The *Brandt* court

⁹In *Brandt*, the trial court dismissed the complaint; the court of appeals reversed; and the Supreme Court ultimately affirmed the dismissal.

struggled with the issue of a fiduciary duty of confidentiality and its relationship to ethical concerns, concluding that there was such a legal duty but that it was independent of any ethical duties.

We believe a physician has a fiduciary duty of confidentiality not to disclose any medical information received in connection with his treatment of the patient. This duty arises out of a fiduciary relationship that exists between the physician and the patient. If such information is disclosed under circumstances where this duty of confidentiality has not been waived, the patient has a cause of action for damages in tort against the physician. In addition to a physician's legal duty, a physician also has a separate ethical duty to maintain the confidentiality of information received from a patient. While the ethical principles may evidence public policy that the courts may consider in framing the specific limits of the legal duty of confidentiality, this legal duty is to be distinguished from the ethical duty.

Id. at 670-71 (emphasis added, citing the Hippocratic oath and the AMA Principles of Medical Ethics). Having found a duty, the Brandt court noted that it was not absolute.

Of course, the physician's testimonial privilege and the fiduciary duty of confidentiality are not absolute; they must give way if there is a stronger countervailing societal interest. One such countervailing societal interest arises when a patient initiates litigation concerning the patient's medical condition. Because the patient will of necessity be required to waive the medical privilege in presenting evidence at trial, it is common for courts to find an implied waiver during the discovery stage of the litigation. The question presented here is whether *ex parte* discussions with the plaintiff's treating physicians are included within this implied waiver.

Id. at 671. The court concluded that the *ex parte* discussions fell within the waiver.

The fiduciary duty that the physician owes the patient to maintain in confidence medical information concerning the patient's mental or physical condition does not apply to an *ex parte* conference that is within the scope of the waivers.

Id. at 674.

The Brandt plaintiff, as do the Sorensens, argued that the physician owed a duty not to engage in any activities adverse to his interests. The Brandt court rejected that argument.

The plaintiff's contention here seems to be bottomed on the assumption that a treating physician's duty to act with good faith requires the physician to give testimony that is favorable and beneficial to the patient and detrimental to the opponent. Such an assumption is invalid; a trial is a search for the truth and the primary obligation that the treating physician or any other witness owes in a trial is to tell the truth. If, for instance, a physician has determined that a patient made a full recovery and this issue is relevant to the litigation, the treating physician may, and in fact should, testify to this fact even though the patient may be claiming to the contrary.

The situation is no different where the treating physician is asked to testify as an expert. There is nothing embodied within the relationship between a treating physician and the patient that necessarily dictates either the style or the substance of the testimony that the treating physician must give at trial, even as an expert witness. It is not unusual for a party to elicit opinions from an opponent's expert that support the cross-examiner's side of the litigation. This is no less true in the case of the treating physician than with any other witness.

Id. at 673-74 (emphasis added).

Other courts have reached similar results. In Aufrichtig v. Lowell, 609 N.Y.S.2d 214 (N.Y. App. 1994), the court, though critical of the doctor's actions, found no cause of action in a two-paragraph opinion.

While defendant physician's cavalier attitude in providing admittedly careless and contradictory testimony, called "negligent testimony", which he seeks to blame on the representations allegedly made to him by counsel for both sides, is hardly commendable, no action lies against him for breach of plaintiff patient's confidentiality, plaintiffs having waived confidentiality by affirmatively placing the insured patient's medical condition in issue in seeking to enjoin the reduction of insurance benefits.

Id. at 214.

The Alabama Supreme Court affirmed, in part, a motion to dismiss a breach of confidentiality claim in Mull v. String, 448 So.2d 952 (Ala. 1984). Recognizing that there was a cause of action for “unauthorized disclosure of information acquired during the physician-patient relationship,” the court found no cause of action for breach of confidentiality.

[W]hen a patient sues a defendant other than his or her physician, and the information acquired by the physician as a result of the physician-patient relationship would be legally discoverable by the defendant in that litigation, then the patient will be deemed to have waived any right to proceed against the physician for the physician's disclosure of this information to that defendant or that defendant's attorney.

Id. at 954.

In Street v. Hedgepath, 607 A.2d 1238 (D.C. App. 1992), the court affirmed a directed verdict, holding that *ex parte* interviews were permissible and that the claim of breach of confidentiality was barred by placing the patient's condition at issue.

It is significant to note that courts dealing with this physician patient disclosure issue seem to use the terms “confidentiality,” “privacy,” and “privilege” synonymously. Even in cases where courts have discussed the duty of confidentiality without using the term “privilege,” the same legal constructs are applied. Where there is no privilege, by virtue of the litigation process, there can be no continued expectation of confidentiality or privacy. In other words, the duty of confidentiality and the physician-patient privilege are coextensive and cannot be judicially separated without creating a conflict in their independent application. Here the Court of Appeals has created a duty of confidentiality clearly independent from the physician-patient privilege. This common law duty is inconsistent not only with Utah statute and Utah Rules of Evidence, but is also with the bulk of the case law on point.

IV. PUBLIC POLICY IS NOT WELL-SERVED BY HAVING A DUTY OF CONFIDENTIALITY WHICH EXCEEDS THE SCOPE OF THE PHYSICIAN-PATIENT PRIVILEGE.

As discussed above, the duties running from a physician to a patient arise solely from the physician-patient relationship. Absent that formal relationship, there is no duty. The same is true with the physician-patient privilege. The privilege exists only because confidential information is exchanged during the existence of the relationship. The analytical problem present here is that both the duty of confidentiality and the privilege are based upon the need to preserve a patient's reasonable expectation of privacy with respect to confidential information. If we permit a patient to place his or her condition at issue in litigation, thereby losing the privilege, but superimpose an ongoing duty of confidentiality on the part of the physician, we create an unworkable dichotomy. We make it virtually impossible for a physician to determine when it is appropriate for him to discuss the patient's condition and when it isn't. The simple solution for the physician is to refuse to discuss patient condition with anybody. This presents an unnecessary impediment to truth seeking in the litigation process.

The quest for truth is similarly impeded where rules or duties require that a physician only provide support for the patient's claims, regardless of whether there is medical evidence for those claims. Truth requires that a physician testify as to his honest conclusions based upon examination and treatment, regardless of whether those opinions are ultimately accurate.

The avowed purpose of the Rules proclaimed by this Court, as well as the frequently pronounced desire to produce judicial economy, is to permit efficient resolution of litigation at the lowest reasonable cost. Informal discussion between counsel and a treating physician to determine whether it is worth the time and

expense to depose the physician or call him/her as a witness at trial is an efficient method of fact finding that costs substantially less than deposing every treating physician. Under the duty created by the Court of Appeals, however, engaging in that phone call, regardless of what transpired, would be an actionable breach of the duty of confidentiality for which the lawyer is immune from liability but the physician is not. This is true even though the patient's records had already been produced in the litigation. As a result, the only way for defense counsel to make the initial evaluation of whether a physician's testimony is necessary at trial would be to go to the expense of conducting a formal deposition of the physician and even then, according to the Court of Appeals, the physician would be precluded from testifying.

Public policy supports rules of law which are constant, predictable and universally applicable. The Court of Appeals' decision undermines such a policy. Before this matter, Dr. Barbuto could not have reasonably anticipated that his participation with defense counsel would give rise to tort litigation. Even after the decision by the Court of Appeals, there is no resolution of the inconsistencies between the rules of privilege, the applicable statute, and the common law fiduciary duty of confidentiality. Added to this mix is the Court of Appeals' conclusion that attorneys are legally permitted to engage in *ex parte* communications with physicians, but a physician who engages in *ex parte* communications with an attorney may be civilly liable for that same act. The Court of Appeals' decision creates a new rule of law which is neither predictable nor universally applicable. Public policy concerns weigh in favor of reversing that decision.

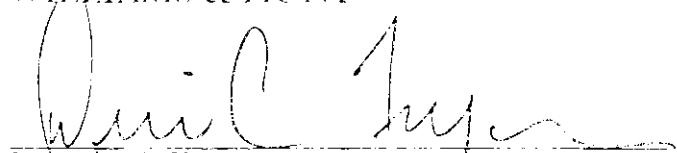
CONCLUSION

The Court of Appeals' decision establishes a physician duty of confidentiality which is not subject to waiver when the patient places his condition at issue in

litigation. Based upon that duty, the ruling prohibits *ex parte* communications by a physician, despite statutory authorization to engage in them and absent any provision in this Court's rules which would support that result. This new common law duty cannot coexist with the applicable rules of privilege and the legislative authority for physician conduct. Public policy weighs against the creation of a duty of this type. Dr. Barbuto therefore respectfully requests that this Court reverse the Court of Appeals ruling on the duty issue and affirm the trial court's dismissal of the Sorensens' Complaint.

DATED this 16 day of January, 2007.

WILLIAMS & HUNT

A handwritten signature in dark ink, appearing to read "Dennis C. Ferguson", is written over a horizontal line.

Dennis C. Ferguson
Attorneys for Defendants Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 18 day of January, 2007, I caused two (2) true and correct copies of the foregoing **APPELLANT'S BRIEF ON WRIT OF CERTIORARI** to be mailed, postage prepaid, by first class mail in the United States mail, to the following:

Counsel for Plaintiffs/Appellants

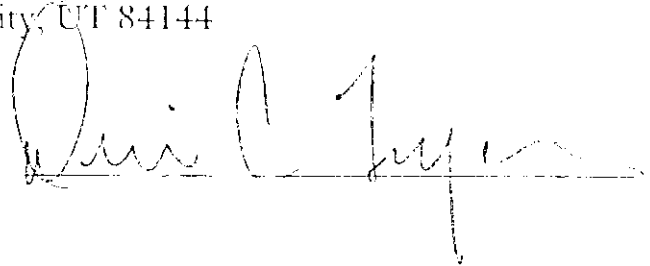
L. Rich Humpherys

Karra J. Porter

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50 S. Main Street, Suite 1500

Salt Lake City, UT 84144

A handwritten signature in dark ink, appearing to read 'Karra J. Porter', is written over a horizontal line.

ADDENDUM

- A. Sorensen v. Barbuto, 2006 UT App 340, 143 P.3d 295.
- B. Utah State Bar Ethics Advisory Opinion Committee Opinions No. 99-03 and 99-03R.

10/2/2014

Addendum A

--- P.3d ---, 2006 WL 2291182 (Utah App., 2006 UT App 340)
(Cite as: 2006 WL 2291182 (Utah App.))

NOTICE: THIS OPINION HAS NOT BEEN
RELEASED FOR PUBLICATION IN THE
PERMANENT LAW REPORTS. UNTIL
RELEASED, IT IS SUBJECT TO REVISION OR
WITHDRAWAL.

Court of Appeals of Utah.

**Nicholas SORENSEN, Kevin Sorensen, and
Pamela Sorensen, limited guardians and
conservators of Nicholas Sorensen, Plaintiffs and
Appellants,**

v.

**John P. BARBUTO, individually; and John P.
Barbuto, M.D., P.C., dba Neurology
In Focus, Defendants and Appellees.
No. 20050501-CA.**

Aug. 10, 2006.

Background: Patient, who was injured as result of being passenger in single-automobile accident, brought action for breach of contract, and various tort claims, against former treating physician after physician engaged in ex parte communications with defense counsel in patient's underlying personal injury action against alleged tortfeasor. The Third District Court, Salt Lake Department, Tyrone Medley, J., granted physician's motion to dismiss. Patient appealed.

Holdings: The Court of Appeals, Bench, J., held that:

- (1) physician's conduct would not support claim for breach of implied contract;
- (2) physician's ex part communications constituted breach of physician's fiduciary duty of confidentiality;
- (3) physician could be liable for negligent breach of fiduciary duty of confidentiality;
- (4) physician's ex parte communication was not public disclosure required to maintain claim for invasion of privacy;
- (5) doctor's statements in deposition were protected by judicial proceeding privilege;
- (6) physician's conduct met threshold necessary to maintain action for intentional infliction of emotional distress; and
- (7) judicial proceeding privilege did not apply to protect physician from patient's claim for intentional infliction of emotional distress.

Affirmed in part and reversed in part.

[1] Appeal and Error ⚖️842(1)

30k842(1)

Propriety of trial court's decision to grant or deny motion to dismiss for failure to state claim on which relief can be granted is question of law that Court of Appeals reviews for correctness. Rules Civ.Proc., Rule 12(b)(6).

[2] Appeal and Error ⚖️919

30k919

In reviewing trial court order granting motion to dismiss for failure to state claim on which relief can be granted, appellate court must accept material allegations of complaint as true, and appellate court will affirm trial court's ruling only if it clearly appears complainant can prove no set of facts in support of his or her claims. Rules Civ.Proc., Rule 12(b)(6).

[3] Health ⚖️642

198Hk642

Conduct of patient's former treating physician in engaging in ex parte communications with defense attorney in patient's underlying personal injury action against alleged tortfeasor would not support claim for breach of implied contract; breach of duty of confidentiality could not be pursued as breach of implied contract.

[4] Health ⚖️625

198Hk625

Statute on liability of health care provider to patient for breach of contract does not preclude all contract claims against physician absent written contract signed by physician or his designated agent, as statute specifically provides that claim against physician must be in writing if it is based on "guarantee, warranty, contract or assurance of result." West's U.C.A. § 78-14-6.

[5] Health ⚖️642

198Hk642

Statute on liability of health care provider to patient for breach of contract did not apply to patient's claim against former treating physician for alleged breach of implied contract by communicating ex parte with defense counsel in patient's underlying tort action against alleged tortfeasor; patient did not contend that physician had promised particular result with his treatment. West's U.C.A. § 78-14-6.

[6] Torts ⚖️350

379k350

Courts have immediately recognized legally compensable injury in wrongful disclosure of confidential information based on variety of grounds for recovery: public policy; right to privacy; breach of contract; and breach of fiduciary duty.

[7] Health ☞ 579
198Hk579

[7] Health ☞ 642
198Hk642

Doctor and patient enter into simple contract, with patient hoping that he will be cured, and doctor optimistically assuming that he will be compensated and, as implied condition of that contract, doctor warrants that any confidential information gained through relationship will not be released without patient's permission.

[8] Health ☞ 578
198Hk578

[8] Health ☞ 642
198Hk642

From contractual relationship between patient and physician arises fiduciary obligation that confidences communicated by patient should be held as trust, which gives rise to implied covenant which, when breached, is actionable, but physician-patient relationship contemplates additional duty of confidentiality, springing from, but extraneous to, contract and breach of such duty is actionable as tort rather than as breach of contract.

[9] Health ☞ 642
198Hk642

Although physician-patient relationship had terminated before physician engaged in ex parte communications with defense counsel in patient's underlying personal injury action against alleged tortfeasor, tort-based duty of confidentiality continued after termination of physician-patient relationship, and thus physician's ex parte communications constituted breach of physician's fiduciary duty of confidentiality.

[10] Witnesses ☞ 219(4.1)
410k219(4.1)

Exception to physician-patient privilege applicable when patient's condition is element of claim or defense is not without limits. Rules of Evid., Rule 506(D)(1).

[11] Witnesses ☞ 208(1)

410k208(1)

[11] Witnesses ☞ 214.5
410k214.5

As part of therapeutic relationship, doctor or therapist has obligation to protect confidentiality of his patients that transcends any duty he has as citizen to voluntarily provide information that might be relevant in pending litigation. Rules of Evid., Rule 506(D)(1).

[12] Health ☞ 642
198Hk642

Physician could be liable for negligent breach of fiduciary duty of confidentiality by engaging in ex parte communications with defense counsel in former patient's underlying personal injury action against alleged tortfeasor.

[13] Torts ☞ 351
379k351

Physician's ex parte communication with counsel for defense in former patient's underlying personal injury action against alleged tortfeasor, and several of defense counsel's associates, was disclosure to small group of persons, and was not public disclosure required to maintain claim for invasion of privacy.

[14] Torts ☞ 350
379k350

Size of audience that receives communication, though important consideration, is not dispositive of issues in invasion of privacy case; rather facts and circumstances of particular case must be taken into consideration in determining whether disclosure was sufficiently public so as to support claim for invasion of privacy.

[15] Torts ☞ 359
379k359

Although physician's alleged ex parte disclosure of former patient's confidential information to defense counsel in patient's underlying personal injury action against alleged tortfeasor was made matter of public record through deposition of physician taken in patient's action against physician for invasion of privacy, doctor's statements were protected by judicial proceeding privilege; physician's statements in deposition were part of judicial proceeding, physician's description of his communications with defense counsel was directly related to purpose of deposition, and physician testified as witness in deposition.

[16] Torts Ⓒ 359
379k359

To establish judicial proceeding privilege to claim of invasion of privacy action, statements must be: (1) made during, or in course of, judicial proceeding; (2) have some reference to subject matter of proceeding; and (3) be made by someone acting in capacity of judge, juror, witness, litigant, or counsel.

[17] Damages Ⓒ 57.25(4)
115k57.25(4)

Physician's conduct in engaging in ex parte communications with defense counsel in former patient's underlying tort action against alleged tortfeasor, and in agreeing to act as paid advocate for former patient's adversary, met threshold necessary to maintain action for intentional infliction of emotional distress.

[18] Damages Ⓒ 208(6)
115k208(6)

It is for court to determine, in first instance, whether defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery for intentional infliction of emotional distress.

[19] Damages Ⓒ 57.49
115k57.49

Because physician's acts of communicating ex parte with defense counsel in former patient's personal injury action against alleged tortfeasor, and agreeing to be expert witness for defense, were not legally justified, judicial proceeding privilege did not apply to protect physician from former patient's claim for intentional infliction of emotional distress.

West Codenotes

Validity Called into Doubt

West's U.C.A. § 78-24-8(4)

L. Rich Humpherys and Karra J. Porter,
Christensen & Jensen, PC, Salt Lake City, for
Appellants.

Dennis C. Ferguson, Williams & Hunt, Salt Lake
City, for Appellees.

Before BENCH, P.J., BILLINGS, and ORME, JJ.

OPINION

BENCH, Presiding Judge:

*1 ¶ 1 Nicholas Sorensen (Sorensen) and his limited guardians, Kevin and Pamela Sorensen, appeal the trial court's order granting Dr. John P. Barbuto's (Barbuto) motion to dismiss. We affirm in part and reverse in part.

BACKGROUND [FN1]

¶ 2 In 1999, Sorensen sustained serious back and head injuries as a passenger in a single-automobile accident. Over the next year and a half, Barbuto treated Sorensen for head injuries and seizures. The treatment included diagnostic examinations, prescriptions for medicine, and cognitive therapy. When Sorensen's medical insurer removed Barbuto from its approved providers list, Sorensen terminated his physician-patient relationship with Barbuto and continued his treatment with another physician.

¶ 3 Sorensen then filed a personal injury action against the driver's liability insurer (the personal injury action). In that action, Barbuto produced Sorensen's medical records, and the trial court admitted the records as stipulated evidence. Defense counsel subpoenaed Barbuto for trial, which was initially scheduled for May 2003. The court later postponed the trial until October. Between May and October, Barbuto engaged in ex parte communications with defense counsel, prepared a ten-page report for defense counsel's use, and agreed to testify as an expert witness for the defense. Contrary to his earlier diagnosis, Barbuto asserted that psychological and social factors contributed to Sorensen's medical injuries.

¶ 4 Sorensen first learned about Barbuto's ex parte communications with defense counsel during a deposition of another witness. Consequently, Sorensen's counsel deposed Barbuto and filed an emergency motion in limine. The trial court excluded Barbuto's testimony, and Sorensen prevailed in the personal injury action.

¶ 5 Subsequently, Sorensen filed this action against Barbuto. In this complaint, Sorensen asserts breach of contract and various tort causes of action based on Barbuto's ex parte communications with defense counsel. Barbuto filed a rule 12(b)(6) motion to dismiss. *See* Utah R. Civ. P. 12(b)(6). The trial court granted the motion to dismiss, and Sorensen now appeals.

ISSUE AND STANDARD OF REVIEW

[1][2] ¶ 6 Sorensen asserts that the trial court erred

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in granting Barbuto's motion to dismiss. "The propriety of a trial court's decision to grant or deny a motion to dismiss under rule 12(b)(6) is a question of law that we review for correctness." *Mackey v. Cannon*, 2000 UT App 36, * 9, 996 P.2d 1081 (quotations and citation omitted); *see also* Utah R. Civ. P. 12(b)(6). "[A]n appellate court must accept the material allegations of the complaint as true" and will affirm the trial court's ruling only "if it clearly appears the complainant can prove no set of facts in support of his or her claims." *Mackey*, 2000 UT App 36 at * 9, 996 P.2d 1081 (quotations and citation omitted).

ANALYSIS

I. Contract Claim

[3][4][5] * 7 Sorensen asserts that the trial court erred in dismissing his claim that Barbuto breached his contractual duties. Barbuto argues, and the trial court agreed, that Sorensen's contract claim fails because the parties did not enter into a written agreement. Barbuto relies on Utah Code section 78-14-6, which provides:

"2 No liability shall be imposed upon any health care provider on the basis of an alleged breach of guarantee, warranty, contract or assurance of result to be obtained from any health care rendered unless the guarantee, warranty, contract or assurance is set forth in writing and signed by the health care provider or an authorized agent of the provider.

Utah Code Ann. § 78-14-6 (2002). Barbuto contends that, under this section, "Utah law precludes [all] contract claims against a physician absent a written contract signed by the physician or his designated agent." We disagree. The statute is not as broad as Barbuto asserts. It specifically provides that a claim against a physician must be in writing if it is based on a "guarantee, warranty, contract or assurance of result." *Id.* (emphasis added). Sorensen does not contend that Barbuto promised a particular result with his treatment. Rather, he claims that Barbuto breached an implied contract by communicating ex parte with defense counsel in the personal injury action. Therefore, section 78-14-6 is not applicable.

* 8 Sorensen's implied contract claim fails, however, on other grounds. Sorensen terminated the physician-patient relationship prior to Barbuto's ex parte communications with defense counsel. *See Ricks v. Budge*, 91 Utah 307, 64 P.2d 208, 211 (1937) (stating that the physician-patient relationship can be terminated "by the discharge of the physician

by the patient"). Although Barbuto concedes that "the duty of confidentiality extends beyond the termination of the physician-patient relationship," a breach of this duty cannot be pursued as a breach of an implied contract.

[6][7] * 9 "Courts have immediately recognized a legally compensable injury in ... wrongful disclosure based on a variety of grounds for recovery: public policy; right to privacy; breach of contract; [and] breach of fiduciary duty." *MacDonald v. Clinger*, 84 A.D.2d 482, 446 N.Y.S.2d 801, 802 (N.Y.App.Div.1982) (citing 61 Am.Jur.2d *Physicians, Surgeons and Other Healers* § 169) (other citation omitted). In *MacDonald*, the court discussed whether a party can allege a breach of implied contract based solely upon a doctor's breach of the duty of confidentiality to a former patient. *See id.* at 802-03. A "[d]octor and patient enter into a simple contract, the patient hoping that he will be cured and the doctor optimistically assuming that he will be compensated." *Id.* at 803 (quoting *Hammonds v. Aetna Cas. & Sur. Co.*, 243 F.Supp. 795, 801 (D. Ohio 1965)). In addressing the nature of this contractual relationship, the court stated that "[a]s an implied condition of that contract ... the doctor warrants that any confidential information gained through the relationship will not be released without the patient's permission." *Id.* (quoting *Hammonds*, 243 F.Supp. at 801).

[8] * 10 "[F]rom the contractual relationship arose a fiduciary obligation that confidences communicated by a patient should be held as a trust." *Id.* (citing *Hammonds*, 243 F.Supp. at 803). "It is obvious then that this relationship gives rise to an implied covenant which, when breached, is actionable." *Id.* at 804. The *MacDonald* court concluded, however, that "the relationship contemplates an additional duty [of confidentiality] springing from but extraneous to the contract and that the breach of such duty is actionable as a tort." *Id.* The court therefore "dismissed the cause of action for breach of contract." *Id.* at 805; *see also Doe v. Community Health Plan-Kaiser Corp.*, 268 A.D.2d 183, 709 N.Y.S.2d 215, 217 (N.Y.App.Div.2000) ("[T]he duty not to disclose confidential personal information springs from the implied covenant of trust and confidence that is inherent in the physician-patient relationship, the breach of which is actionable as a tort."). We similarly conclude that Sorensen can pursue his breach of confidentiality claim under tort theory, but not under contract theory.

II. Tort Claims

A. Breach of Professional Duty

*3 ¶ 11 Sorensen asserts that Barbuto breached various duties, including fiduciary duties of confidentiality and loyalty, and violated several professional standards. [FN2] Barbuto contends that he did not breach a duty of care because his actions were protected under Utah Code section 78-24-8(4) and rule 506(d)(1) of the Utah Rules of Evidence. See Utah Code Ann. § 78-24-8(4) (1992); Utah R. Evid. 506(d)(1).

¶ 12 This court expressly held in *Debry v. Gouttes*, 2000 UT App 58, 999 P.2d 582, that rule 506 has superseded section 78-24-8(4). See *id.* at ¶ 24 n. 2 ("[T]he statutory privilege has no further effect. Physician-patient and therapist-patient privileges are now exclusively controlled by [r]ule 506."); see also *Burns v. Boyden*, 2006 UT 14, ¶ 12, 133 P.3d 370 (confirming that rule 506 superseded the statutory privilege in section 78-24-8(4)). Therefore, we will address the issue only under rule 506.

[9][10] ¶ 13 Rule 506 defines physician-patient privileges and delineates exceptions:

No privilege exists under this rule:

As to a communication relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which that condition is an element of any claim or defense, or, after the patient's death, in any proceedings in which any party relies upon the condition as an element of the claim or defense[.]

Utah R. Evid. 506(d)(1). Barbuto argues that because Sorensen placed his condition at issue in the personal injury action, Sorensen waived the physician-patient privilege. This exception to the physician-patient privilege, however, is not without limits. See *Debry*, 2000 UT App 58 at ¶ 26, 999 P.2d 582.

[11] ¶ 14 In *Debry*, this court held that because the husband had the right to put at issue his wife's mental state as a defense in a divorce proceeding, the exception of rule 506(d)(1) applied. See *id.* at ¶ 25. Based on that exception, the husband solicited an affidavit from the wife's therapist regarding the wife's mental condition. See *id.* at ¶ 5. The therapist submitted his affidavit "without consulting [with the wife] or obtaining her consent." *Id.* "From all that appears, [the therapist] voluntarily furnished an affidavit about his patient's mental condition to her adversary in divorce litigation." *Id.* at ¶ 27. This court held that "under these circumstances, a patient

must at least be afforded the opportunity for protection." *Id.* at ¶ 28. "As part of a therapeutic relationship, a doctor or therapist has an obligation to protect the confidentiality of his patients that transcends any duty he has as a citizen to voluntarily provide information that might be relevant in pending litigation." *Id.*

¶ 15 Sorensen and Barbuto both discuss at length whether ex parte communication between a party's physician and the opposing side in pending litigation is a breach of the physician's fiduciary duty of confidentiality. Although *Debry* did not explicitly state that a physician's ex parte communication with the opposing side constitutes a breach of confidentiality, its reasoning readily leads to such a conclusion. The court stated that "[b]efore disclosing confidential patient records or communications in subsequent litigation, a physician or therapist should notify the patient. Even if the communications may fall into [the] exception to the privilege, the patient has the right to be notified of the potential disclosure of confidential records." *Id.* "Such notice assures that the patient can pursue the appropriate procedural safeguards in court to avoid unnecessary disclosure." *Id.*

*4 ¶ 16 Consistent with the reasoning of *Debry*, we hold that ex parte communication between a physician and opposing counsel constitutes a breach of the physician's fiduciary duty of confidentiality. [FN3] See *id.* at ¶¶ 24-29. This holding is consistent with the approach of other courts. See, e.g., *Manion v. N.P.W. Med. Ctr. of N.E. Pa., Inc.*, 676 F.Supp. 585, 593 (D.Pa.1987) ("[T]he prohibition against unauthorized ex parte contacts regulates only how defense counsel may obtain information from a plaintiff's treating physician, i.e., it affects defense counsel's methods, not the substance of what is discoverable.... In addition, the prohibition extends beyond the termination of medical treatment and applies with equal force to a plaintiff's current and former treating doctors."); *Petrillo v. Syntex Labs., Inc.*, 148 Ill.App.3d 581, 102 Ill.Dec. 172, 499 N.E.2d 952, 957 (1986) ("We believe ... that ex parte conferences between defense counsel and a plaintiff's treating physician [jeopardize the sanctity of the physician-patient relationship, and, therefore, are prohibited as against public policy."); *Morris v. Consolidation Coal Co.*, 191 W.Va. 426, 446 S.E.2d 648, 651 (1994) ("The patient's implicit consent ... is obviously and necessarily limited; he does not consent, simply by filing suit, to his physician's discussing his medical confidences with

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third parties outside court-authorized discovery methods, nor does he consent to his physician discussing the patient's confidences in an *ex parte* conference with the patient's adversary." (quotations and citation omitted); Philip H. Corboy, *Ex Parte Contacts Between Plaintiff's Physician and Defense Attorneys: Protecting the Patient-Litigant's Right to a Fair Trial*, 21 Loy. U. Chi. L.J. 1001, 1002 (1990) ("Recent state court decisions, including several overruling prior precedent, now reflect a strong majority view that condemns *ex parte* conferences."). Therefore, the trial court erred in dismissing Sorensen's claim for breach of confidentiality.

[12] ¶ 17 Sorensen additionally argues that the trial court erred in dismissing his negligence claim. Barbuto contends that Sorensen's negligence claim fails as a matter of law because no duty existed. Because we have determined that a duty exists, the trial court erred in dismissing Sorensen's claim for negligence.

B. Invasion of Privacy

[13] ¶ 18 Sorensen contends that the trial court erred in dismissing his invasion of privacy claim. Barbuto asserts that Sorensen's claim fails as a matter of law because "there was no public disclosure of private information by Dr. Barbuto." In *Shattuck-Owen v. Snowbird Corp.*, 2000 UT 94, 16 P.3d 555, the Utah Supreme Court ruled that "communicating a private fact to a small group of persons ... does not constitute public disclosure." *Id.* at ¶ 12 (quotations and citation omitted). The supreme court concluded that the defendant's disclosure to approximately twelve to thirteen people did not constitute a public disclosure. *See id.* at ¶ 13. According to the complaint in our case, Barbuto disclosed private information to defense counsel and a few of his associates. Thus, Barbuto disclosed the information to "a small group of persons." *Id.* at ¶ 12.

*5 [14] ¶ 19 Sorensen contends that there is no specific "body count" required to constitute an invasion of privacy. The *Shattuck-Owen* court specified that "the size of the audience that receives the communication, though an important consideration, is not dispositive of the issues." *Id.* "Rather, the facts and circumstances of a particular case must be taken into consideration in determining whether the disclosure was sufficiently public so as to support a claim for invasion of privacy." *Id.* When considering all the circumstances in this case,

we are not persuaded that the disclosure to defense counsel and a few incidental people constitutes a public disclosure.

[15][16] ¶ 20 Sorensen also contends that because he had to depose Barbuto to find out the extent of his inappropriate actions, Barbuto's disclosures became a matter of public record. Barbuto argues in his brief that this cannot constitute an invasion of privacy because of the judicial proceeding privilege. We agree. "To establish the judicial proceeding privilege, the statements must be (1) made during or in the course of a judicial proceeding; (2) have some reference to the subject matter of the proceeding; and (3) be made by someone acting in the capacity of judge, juror, witness, litigant, or counsel." *Debry v. Godbe*, 1999 UT 111, ¶ 11, 992 P.2d 979 (quotations and citation omitted). Under the first prong, Barbuto's statements in the deposition were clearly part of a judicial proceeding. *See id.* at ¶ 14. ("The privilege applies to every step in the proceeding until final disposition." (quotations and citation omitted)). Second, Barbuto's description of his communications with defense counsel was directly related to the purpose of the deposition. And third, Barbuto testified as a witness in the deposition. Because the judicial proceeding privilege applies to the deposition, Sorensen's invasion of privacy claim fails as a matter of law.

C. Intentional Infliction of Emotional Distress

[17][18] ¶ 21 Sorensen next contends that the trial court erred in dismissing his claim of intentional infliction of emotional distress.

[A]n action for severe emotional distress, though not accompanied by bodily impact or physical injury, [may lie] where the defendant intentionally engaged in some conduct toward the plaintiff, (a) with the purpose of inflicting emotional distress, or, (b) where any reasonable person would have known that such would result; and his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality.

Id. at ¶ 25 (alterations in original) (quotations and citation omitted). "[I]t is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." *Schiurman v. Shingleton*, 2001 UT 52, ¶ 23, 26 P.3d 227 (quotations and citation omitted). The trial court in this case found that Barbuto's actions, as a matter of law, were not "extreme and outrageous." We

disagree. Barbuto not only communicated ex parte with defense counsel--Barbuto actually became a paid advocate for Sorensen's adversary. "We conclude that the conduct alleged here ... meets the threshold necessary to maintain an action for intentional infliction of emotional distress." *Walter v. Stewart*, 2003 UT App 86, * 27, 67 P.3d 1042.

*6 [19] * 22 Barbuto also argues that even if his conduct satisfied the extreme and outrageous requirement, the claim is barred by the judicial proceeding privilege. *See Debray*, 1999 UT 111 at * 25, 992 P.2d 979 (applying the judicial proceeding privilege to an intentional infliction of emotional distress claim). Because Barbuto's acts of communicating ex parte with defense counsel and agreeing to be an expert witness for the defense were not legally justified, the judicial proceeding privilege does not apply. *See id.* at * 21; *Brachany v. Nordstrom, Inc.*, 812 P.2d 49, 58 (Utah 1991) (concluding that the "plaintiff can show abuse of [a] privilege by proving that the defendant acted with malice or that the publication of the defamatory material extended beyond those who had a legally justified reason for receiving it").

CONCLUSION

* 23 Barbuto and Sorensen's relationship ended before Barbuto communicated ex parte with defense counsel. However, Barbuto's tort-based duty of confidentiality continued. Further, because a duty existed, the trial court erred in dismissing Sorensen's claim for negligence.

* 24 Sorensen's invasion of privacy claim fails because Barbuto's disclosure to defense counsel did not constitute a public disclosure, and his statements in the deposition fall under the judicial proceeding privilege. We conclude, however, that Barbuto's actions meet the threshold to maintain a claim for

intentional infliction of emotional distress.

* 25 Accordingly, we reverse in part the order granting Barbuto's motion to dismiss, and remand for further proceedings.

* 26 WE CONCUR: JUDITH M. BILLINGS and GREGORY K. ORME, Judges.

FN1. "Because this is an appeal from a motion to dismiss for failure to state a claim, we accept the factual allegations in the complaint as true and draw all reasonable inferences from those facts in the light most favorable to [Sorensen]." *Mackey v. Cannon*, 2000 UT App 26, * 2, 996 P.2d 1081 (quotations and citation omitted).

FN2. Barbuto contends that Sorensen is not entitled to a private right of action for breach of professional standards. Sorensen does not contend in his brief, however, that a private right of action exists. Rather, he asserts that the professional standards contribute to the proper standard of care, citing the Health Insurance Portability and Accountability Act (HIPAA), the American Medical Association's Principles of Medical Ethics, and the Hippocratic Oath.

FN3. Barbuto argues that ex parte communications are allowed pursuant to the Utah State Bar Ethics Advisory Opinion No. 99-03. However, the Utah State Bar Ethics Advisory Opinion Committee addresses the responsibilities of attorneys, not physicians. Because the issue in this case concerns a physician's duty, the ethics opinion does not apply.

--- P.3d ---, 2006 WL 2291182 (Utah App.), 2006 UT App 340

END OF DOCUMENT

Addendum B

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UTAH STATE BAR Ethics Advisory Opinion Committee Opinion No. 99-03

Rule Cited:

4.3

(Approved May 28, 1999)

Issue: May a defense lawyer make *ex parte* contact with plaintiff's treating physician?

Opinion: No ethical rule prohibits *ex parte* contact with plaintiff's treating physician when plaintiff's physical condition is at issue.

Analysis: It is neither uncommon nor improper, under the Utah Rules of Professional Conduct, for an attorney to make *ex parte* contacts with witnesses involved in a controversy, including witnesses for the adversary. When that witness is a medical doctor, especially one who has treated the plaintiff in a litigation, concerns may be raised about the physician's and both lawyers' ethical responsibilities to maintain confidences and to abide by other professional responsibilities.

In cases where the witness-physician is not separately represented by another lawyer in the matter, there is no provision of the Rules of Professional Conduct that prohibits a defense attorney from making an *ex parte* contact with the plaintiff's treating physician.

Although there may be a potential for ethical misconduct arising out of such a contact, such misconduct can be separately addressed and remedied in accordance with the appropriate rules. In an opinion issued in 1993, the American Bar Association held that no provision of the Model Rules of Professional Conduct directly prohibits *ex parte* contacts with the other side's witnesses in civil matters. The ABA opinion discusses the ethical rules in light of expert witnesses as well as fact witnesses.

There are nonetheless some ethical limitations that apply to contacts with any witness, and some additional limitations that may have different application to expert witnesses. Among the former, the principal limitations are the obligations of candor imposed by Rule 4.3 on dealing with unrepresented persons. When a lawyer contacts any witness, lay or expert, actual or potential, a lawyer must not knowingly leave the witness in ignorance of the lawyer's relationship to the case that gives occasion to the contact. Further, the lawyer may not, consistent with Rule 4.1(a), convey the message, directly or indirectly, that

the witness *must* speak to the lawyer. As with any other witness not under subpoena, an expert witness may choose not to discuss the case with the lawyer. In fact, the opposing party or its lawyer may properly have asked the expert *not* to discuss the case with the inquiring lawyer. See Model Rule 3.4(f).

The ABA opinion also warns about attempts to induce an opposing witness to reveal confidences:

{B}oth fact witnesses and experts may be in possession of confidences of the opposing party, or work product of that party's lawyer, about which it would be improper to inquire. See *American Protection Insurance Co. v. MGM Grand Hotel—at Vegas*, 748 F.2d 1293, 1301 (9th Cir. 1984), holding that "A corollary of the attorney's duty not to reveal confidences of a client is the duty not to seek to cause another to do so." 1

Using an *ex parte* contact to attempt to obtain information protected by the physician-patient privilege would violate Utah Rules of Professional Conduct 3.4(c), 4.4, and 8.4(d). Other considerations arise when the physician's role is to appear as an expert witness; the Committee notes that an expert witness may be privy to opposing counsel's legal theories and thought processes and there may be little information from that physician-expert that would not be protected by the appropriate confidential privileges.

In addition to the concerns raised in ABA Opinion 93-378, it would also be improper for the attorney to attempt to persuade the witness not to testify; 2 to disobey or to circumvent the appropriate court rules concerning discovery and evidence; 3 to ask a person other than a client to refrain from voluntarily giving relevant information to another party; 4 or use the *ex parte* contact in a way that may tend to embarrass, delay or burden the doctor. 5 Overreaching by counsel in the ways discussed above is prohibited by the ethics rules, as is similar improper influence on the part of plaintiff's counsel.

The mere possibility of misconduct by an attorney during an *ex parte* contact with a physician does not justify a blanket prohibition on such *ex parte* contacts. Thus, it would not be appropriate to assume that an *ex parte* interview conducted by either plaintiff or defendant would be outside the bounds of proper discovery. 6 An attorney must conform to the rules of the court and particular rules of evidence and discovery in each case. The court may limit or condition *ex parte* contacts, but as a matter of professional ethics and the existing rules, there is no bar to such *ex parte* contacts. Many states have come to the same opinion that attorneys for a defendant in a personal injury case have the right to interview plaintiff's treating physician *ex parte*. 7

The attorneys involved in an *ex parte* contact of an opposing witness may appropriately be concerned about the extent of a physician-patient privilege.

The nature and extent of that privilege is carefully defined in statute, rule and court decision and is, therefore, a matter for legal interpretation. It is not the function of this Committee to offer legal advice regarding the extent of the privilege; in situations where the question is a close one, the matter should be addressed by the parties in concert with the court, applying applicable rules of discovery and evidence.

Footnotes

1. ABA Comm. On Ethics & Prof. Responsibility, Formal Op. 93-378. The opinion also reminds attorneys that Rule 3.4(b) prohibits attorneys from "counsel[ing] or assist[ing] a witness to testify falsely."
2. "A lawyer shall not . . . unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act." Utah Rules of Professional Conduct 3.4(a).
3. "A lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." *Id.* 3.4(c).
4. "A lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) The person is a relative or other agent of a client; and (2) The lawyer reasonably believes that the person's interests will not be adversely affected from giving such information." *Id.* 3.4(f).
5. "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." *Id.* 4.4.
6. *State ex rel. Stufflebam v. Appelquist*, 694 S.W.2d 882 (7th App. 1986).
7. See, e.g., Mich. Ethics Op. 60 (Dec. 1980); Mich. Ethics Op. 177 (July 1958); Wash. State Bar Ethics Op. 108 (April 1962); Wash. State Bar Ethics.



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