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John P. Barbuto, M.D., P.C., Neurology in Focus v. Nicholas Sorenson, Kevin and Pamela Sorenson : Amicus Brief

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN P. BARBUTO, individually, JOHN P. BARBUTO, M.D., P.C., dba NEUROLOGY IN FOCUS, Defendants - Appellants, vs. NICHOLAS SORENSON, KEVIN AND PAMELA SORENSON, limited guardians and conservators of Nicholas Sorenson, Plaintiffs – Appellees.	Case No. 20060816-SC

BRIEF OF AMICUS CURIAE UHA, UTAH HOSPITALS AND HEALTH SYSTEMS ASSOCIATION AND UTAH MEDICAL ASSOCIATION

ON CERTIORARI TO THE UTAH COURT OF APPEALS

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INTRODUCTION

Amici curiae UHA, Utah Hospitals and Health Systems Association ("UHA") and Utah Medical Association ("UMA") represent the major institutional and individual health care providers in the State of Utah. UHA is a trade association of 48 acute and specialty hospitals and 11 health systems operating in Utah. UMA represents some 3,100 individual members, including physicians, medical students, and non-physician affiliates throughout Utah. These Health Care Amici are keenly aware of the legal, ethical, and practical dimensions of patient confidentiality within (and outside of) the context of litigation and welcome the opportunity to provide their perspective of the issues before the Court. These issues are of great importance to our patients, our industry, and our system of state government. In addition, the parties to this appeal have consented to the submission of this brief and to a forthcoming brief of the Utah Trial Lawyers' Association. *See* Addendum A.

The central issue in this case is whether the plain language of Rule 506 of the Utah Rules of Evidence governs the disclosure of patient information in litigation or not. We believe that it does and that the Court of Appeals erred in not only failing to apply Rule 506 as written but also in making actionable as "tortious" and "outrageous conduct" communications (1) permitted by Rule 506 and Utah Code. Ann. § 78-24-8 and (2) considered to be entirely appropriate and beneficial when directed to plaintiffs counsel.

We strongly urge the Court to reverse the Court of Appeals' departure from Rule 506 and its creation of one-sided tort liability.

QUESTIONS PRESENTED

This Court identified the following issues in its Order granting the Petitioner's Writ of Certiorari:

(1) Whether by filing a personal injury suit Respondent waived any duty of confidentiality encompassing ex parte communications between Petitioner and the defendant in that suit.

(2) Whether the court of appeals erred in construing the scope of the privilege set forth in Rule 506 of the Rules of Evidence and/or the scope of the exception to the privilege set forth in subpart (d)(1).

In response, the Health Care Amici respectfully submit that:

(1) By filing a personal injury lawsuit, the physician-patient privilege no longer existed and Petitioner could disclose patient information in the context of the litigation; and

(2) The Court of Appeals erred in construing the scope of the litigation exception in Rule 506 by imposing an additional requirement--in the form of a fiduciary duty of confidentiality-- that does not appear in the Rule's text.

SUMMARY OF ARGUMENT

The Court of Appeal's ruling in this case not only impacts the parties to this action, the physicians of this state, and tort litigants in general, but it also impinges upon this Court's rulemaking powers.

This case is not about patient confidentiality in general. It is about patient confidentiality in the context of litigation, the application of Rule 506 of the Utah Rules of Evidence, and the Court of Appeals' departure from the Rule's plain language.

Rule 506 governs patient information in litigation. It establishes both the physician-patient privilege and the litigation exception to that privilege. Under the litigation exception, no privilege exists as to any communication that is relevant to a patient's condition that is at issue in a legal proceeding. This language is clear, and the Court of Appeals should have applied it as written.

Instead, the Court of Appeals circumvented Rule 506 and imposed a "fiduciary duty of confidentiality." *Sorenson v. Barbuto*, 2006 UT 340, ¶16. This court-made duty not only created a substantive right of prior notice to a patient before disclosure, but it also included the unconditional statement that "ex parte communication between a physician and opposing counsel constitutes a breach of" this duty. *Id.* at ¶15. The effect of this ruling is to (1) rewrite a Rule of Evidence that comes solely within the authority of this Court to amend and (2) make actionable that which is permitted under Rule 506.

Rule 506 is the result of a deliberative process by the appropriate branch of state government and is also reasonable in its scope and application. First, Rule 506 strikes a reasonable balance between patient information that is not privileged because it is at issue in a lawsuit and all other patient information for which the privilege remains. Second, even if a communication is not privileged under the litigation exception, a physician retains the discretion to maintain silence and not disclose patient information unless subpoenaed or court-ordered otherwise. Third, there is no restriction on the ability of a

party to seek a court order to either specifically restrict or expressly authorize ex parte communications as circumstances may warrant.

But regardless of its merits, the proper time and place and method for amending Rule 506 is through this Court's formal rulemaking process and not by judicial interpretation. Rule 501, the umbrella Rule for privileges, abolishes all common law privileges and limits the creation of privileges to Court Rule and existing statute. As such, Rule 501 unequivocally stands for the proposition that an amendment to Rule 506 is to be made through the Court's formal rulemaking process and not, as the Court of Appeals did here, through a common law pronouncement.

Lastly, there are serious and problematic ramifications of the Court of Appeals decision if permitted to stand. The first is the inappropriate and potentially harmful effect of recasting the physician-patient relationship as one that goes beyond the recognized duty to diagnose and treat to include the notion that a physician is legally obligated to side with and advocate for a patient in matters of litigation. When it comes to litigation, the role of a physician should be limited to that of a party or that of a witness with the same rules and expectations of truthfulness, accuracy, and objectivity applied to them as anyone else.

The second is the uneven playing field that the Court sanctions and protects by making it tortious for one party in a lawsuit to do what another party does as a matter of course. It is our view that there are good and valid reasons to permit plaintiff's counsel to engage in informal discovery, including ex parte interviews with potential witnesses, to decrease costs and fully and expeditiously uncover the truth. These reasons, however, are

equally applicable to defense counsel, and it would be patently unjust to not recognize that fact.

For these reasons, the Court should reverse the Court of Appeals decision and apply Rule 506 as written.

ARGUMENT

I. RULE 506 GOVERNS PATIENT INFORMATION IN LIGATION AND THE COURT OF APPEALS ERRED IN RESTRICTING AND MAKING ACTIONABLE COMMUNICATIONS THAT RULE 506 PERMITS

This case is about patient confidentiality in the context of litigation, the application of Rule 506 of the Utah Rules of Evidence, and the Court of Appeals departure from the Rule's plain language. It is not about patient confidentiality in general.

A. WHEN A PATIENT'S CONDITION IS AT ISSUE IN A LEGAL PROCEEDING, NO PRIVILEGE EXISTS

Rule 506 of the Utah Rules of Evidence governs the physician-patient privilege and the litigation exception. See *Burns v. Boyden*, 2006 UT 14, 133 P.3d 370. The physician-patient privilege extends broad protection to patient information communicated confidentially by a patient to a physician in the course of diagnosis and treatment. Rule 506(b) provides:

> (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.

The purpose of the physician-patient privilege is "to promote full disclosure within a physician-patient relationship and thereby facilitate more effective treatment," and to "alleviate patients' fear that their medical records could be disclosed to the public and cause embarrassment." *Id.* at ¶11.

The physician-privilege is not absolute. Rule 506 includes three specific exceptions. *See* Rule 506(d), Utah R. Evid. These exceptions do not constitute a waiver of the privilege. Instead, when these exceptions apply, no privilege exists. *See* Utah R. Evid. 506 Advisory Committee Notes. One such exception is the litigation exception in Rule 506(d)(1), which states:

> (d) *Exceptions*. No privilege exists under this rule:
>
> (d)(1) *Condition as an element of a 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 proceeding in which any party relies upon the condition as an element of the claim or defense.

The effect of this language is to unequivocally remove legal protection from a communication that is relevant to a patient's condition when it becomes the subject of a legal proceeding, provided that the limitations included in Rule 506(d)(1) are followed.

First, the removal of the privilege only pertains to a communication that is relevant to a condition at issue in the legal proceeding. The privilege would continue to apply with full force and effect to any other patient communication that falls outside of the proceeding. Second, there must be a legal proceeding. While this normally will consist

of the filing of a complaint in a civil action, it may take other forms such as the initiation of a criminal investigation. *Id.* at ¶13.

In pointing out the explicit limitations in the litigation exception, it is equally important to clarify what Rule 506 does not say. First, there is nothing in Rule 506 that compels a treating physician to verbally disclose patient information to any party in a lawsuit unless compelled to do so by a subpoena or court order. It merely makes such disclosures permissible by removing the physician-patient privilege. This is as true for a plaintiff as it is for a defendant.

Lastly, there is nothing in Rule 506 that would limit the ability of a party to seek a court order to either expressly authorize or expressly restrict ex parte communications between a treating physician and a party to the legal proceeding. *See* Rule 26, Utah R. Civ. P. (outlining the purpose, scope, and limitations of discovery, including a protective order under Rule 26(c)).

B. THE HISTORICAL BASIS FOR PROTECTING PATIENT INFORMATION IN LITIGATION IS FOUND IN STATUTE AND NOT THE COMMON LAW

As authority for the proposition that a fiduciary duty of confidentiality existed outside of Rule 506, the Court of Appeals cited *Debry* in which it is extended to a patient "the right to be notified of the potential disclosure of confidential [information]...even if the communications may fall into [the exception] to the privilege." *Sorensen v. Barbuto*, 2006 UT App 340, ¶ 15 *quoting Debry* at ¶ 28. The Court reasoned that this duty of confidentiality for a physician "transcends any duty he has as a citizen to voluntarily provide information that might be relevant in pending litigation."

The Court's decision to superimpose a duty of confidentiality on Rule 506 is not only at odds with this Court's rule making authority and the plain language of Rule 506, but it is also inconsistent with the common law. At common law,

> a physician called to testify as a witness was competent to disclose any information required by, or communicated to, him in the course of his attendance upon, or treatment of his patient in a professional capacity, nor could the physician refuse to give, nor the patient by objection exclude, such testimony.

State v. Dean, 69 Utah 268, 272-73, 254 P. 142, 143 (Utah 1927). Consequently, it would be incorrect to attribute Utah's historical protection of patient information in litigation to the common law. Instead, the roots of such protection are in the statutorily created physician-patient privilege. *See Anderson*, 972 P.2d at 88 ("The physician-patient privilege never existed at common law."); *Burns* at ¶ 10 ("The physician-patient privilege was not recognized at common law but has been adopted in Utah, first by statute and subsequently by rule.")

The physician-patient privilege was statutorily enacted as a purposeful modification of the common law. *State v. Anderson*, 972 P.2d 86, 88 (Utah App. 1989). The privilege is now governed by Rule 506 of the Utah Rules of Evidence under the Court's "primary constitutional authority to promulgate procedural and evidentiary rules subject to the possibility of amendment by two-thirds absolute majority vote of the Legislature." *Burns* at ¶11. It has also been judicially recognized as both the expression of "the policy of the law to encourage confidence" of patient information, and the basis of a cause of action "for any injury suffered." *Berry v. Moench*, 331 P.2d 814, 817 (Utah 1958).

But even if one were to assume that the basis of the Court of Appeals' ruling to superimpose a duty could be found in some broader common law concept of negligence or privacy, any such application of the common law would be preempted by the language and effect of Rule 501.

C. RULE 501 BLANKETS THE FIELD OF PRIVILEGES AND PREEMPTS EXISTING AND DEVELOPING COMMON LAW

Rule 501 of the Utah Rules of Evidence serves as a substantive introduction to the Court's Rules on privileges and speaks to the limited method of their creation. Rule 501 states:

> Except as provided in the Constitutions of the United States and the State of Utah, no person shall have a privilege to withhold evidence except as provided by these or other rules adopted by the Utah Supreme Court or by existing statutory provisions not in conflict with them.

Two things stand out from this language. First, by stating that "no person shall have a privilege to withhold evidence," the Rule, in effect, cleans the slate and starts from the proposition that no privileges exists. This is a critical point in the present case because it represents a clear intent to abolish any common law privileges that may otherwise serve as a barrier to a physician disclosing patient information in context of litigation if permitted under Rule 506.

Second, by stating that the only way to create exceptions to the general rule of "no privilege" is by Court Rule and existing statute, the Rule, in effect, underscores the principle that privileges—because "they interfere with the establishment of the whole truth"—should not be the product of judicial pronouncement but by formal rulemaking or the legislative process. *See* Utah R. Evid. 501 Advisory Committee Note.

Together, these two points abolish common law privileges and preempt future judicial attempts to create the same. The comments of the Advisory Committee support this conclusion to a significant extent, although there is a noticeable reluctance on the part of the committee to completely foreclose the Court's authority to "create and shape privileges by its decisions in concrete cases." *Id.* Still, the comments go on to boldly state that the "language of 501, that there are no non-rule, non-statutory privileges, serves as a declaration by the Court that it intends to operate normally through formal rule-making procedures." *Id.*

The reluctance expressed by the Committee is understandable and not altogether unwise under the circumstances. However, the plain language of Rule 501 is quite clear and serves as a definitive statement of intent to preempt the application of the common law in matters of privilege, a fact that generally reduces, if not eliminates, the Court's need to look beyond the text of an enactment in determining its meaning. *See Summit Water Distr. Co. v. Summit County*, 2005 UT 73, ¶17 ("It is well settled in this court that our goal when interpreting a statute 'is to give effect to the legislative intent, as evidenced by the [statute's] plain language, in light of the purpose the statute was meant to achieve.' *Foutz v. City of S. Jordan*, 2004 UT 75, ¶ 11, 100 P.3d 1171 (internal quotation omitted). When evaluating the plain language of a particular statutory provision, we interpret it 'in harmony with other statutes in the same chapter and related chapters.' *Mountain Ranch Estates v. Utah State Tax Comm'n*, 2004 UT 86, ¶ 11, 100 P.3d 1206 (internal quotation omitted). However, '[i]f we find ambiguity in the statute's language, we look to

legislative history and other policy considerations for guidance.' *Exxon Mobil Corp. v. Utah State Tax Comm'n*, 2003 UT 53, ¶ 14, 86 P.3d 706.")

The idea of a statute or ordinance preempting the common law is neither new nor uncommon. In fact,

> [t]he rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state. The statutes establish the laws of the state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice.

Gottling v. P.R. Incorporated, 2002 UT 95, ¶ 7, *citing* Utah Code Ann. § 68-3-2 (Court held that statute preempted common law claims for employment discrimination in companies with fewer than 15 employees). Consequently, "where a conflict arises between the common law and a statute or constitutional law, the common law must yield," because "the common law cannot be an authority in opposition to our positive enactments." *Id.*

In determining whether "legislation is intended to blanket a particular field and thereby preempt existing or developing common law," a court may look to the express preemptive language of a statute or it may find a pervasiveness to a statute's structure and purpose, an irreconcilable conflict between a statute and the common law which makes compliance with both a physical impossibility, or the common law as an obstacle to the full purpose and objectives of the legislature. *Id.* at ¶ 8.

Here that same analysis can and should be applied to privileges found in Court Rule and the Court should apply Rule 501 as written to abolish and preempt existing and developing common law.

Finally, on a related point, it should be noted that Rule 501 is not the only body of law to consider on the issue of common law preemption. Utah Code Ann. § 78-24-8 previously governed the physician-patient privilege and the litigation exception, and parts of Section 78-24-8 may continue to be in effect pursuant to Rule 501 as an existing statutory enactment. That state statute preempted the common law can be drawn from the fact that it was necessary for a state statute to modify the common law to give patient information protection in the first place. *State v. Anderson*, 972 P.2d at 88. To now hold that the common law has not only gained a foothold in the statutory-based law of privileges, but that it has caught up to and surpassed the protection created in statute (and now governed by Court rule) would be a significant analytical stretch.

D. RULE 506 IS SUBJECT TO STRICT CONSTRUCTION AND SHOULD BE APPLIED AS WRITTEN

Rule 506 is the result of a deliberative process by a branch of state government with the primary constitutional authority to establish and amend its contours. Like the rest of Rule 506, it is carefully crafted to strike a reasonable balance between what should be privileged and what should not. As such an enactment, Rule 506 should be subject to the general and universal rules of construction that apply to statutes and ordinances, including the requirement that it be construed in accordance with its plain language, *LKL Assocs., Inc. v. Farley*, 2004 UT 51, ¶ 7, 94 P.3d 279 (*citing Dick Simon Trucking v. Utah State Tax Comm'n*, 2004 UT 11, ¶ 17, 84 P.3d 1197), the assumption that "each term . . . was used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable.'" *R.A. McKell Excavating, Inc. v. Wells*

Fargo Bank, N.A., 2004 UT 48, ¶ 8, 100 P.3d 1159 (*quoting Johnson v. Redevelopment Agency*, 913 P.2d 723, 729 (Utah 1995)), and a recognition of the distinct and significant difference between the role of the Court in interpreting language when functioning in a judicial capacity and drafting language when functioning in a rulemaking capacity. *See University of Utah v. Shurtleff*, 2006 UT 51, ¶ 51 ("No matter how persuasive we may find such [policy] arguments, we are constrained by our judicial role. Our role is one of interpreting, not drafting.")

That Rule 506 is to be strictly construed is amply demonstrated in *Burns*. In *Burns*, the State Department of Insurance sought to compel the production of patient records from a physician under investigation for insurance fraud, arguing that Utah Code Section § 31A-31-104(1) (b) impliedly trumped the physician-patient privilege by requiring insurers to release information or evidence of suspected insurance fraud to an authorized agency. The Court, however, refused to create such an exception, stating:

> The text of the statute [] does not impose any direct duty on a physician to release privileged information, and we decline to insert such a substantive requirement by judicial fiat. *See Arredondo v. Avis Rent A Car Sys., Inc.*, 2001 UT 29, ¶ 12, 24 P.3d 928 (refusing to infer "substantive terms" into the text of a statute if they are "not already there")."

Burns at ¶ 16.

The State then proceeded to argue that the physician-patient exception should be construed narrowly to create an exception for investigations into suspected insurance fraud. While the Court agreed that rule 506 should be "strictly construed and applied," since the effect of a privilege is to "close another window to the light of truth," *citing*

State v. Gotfrey, 598 P.2d 1325, 1327 (Utah 1979), it disagreed that such strict construction could yield the state's desired insurance fraud exception. *Id.* at ¶ 17.

Instead, the Court's strict construction of Rule 506 resulted in an affirmation that there are only three explicit exceptions to the Rule and that the creation of an exception for suspected insurance fraud would be "inconsistent with the intended effect of the rule." *Id.* at ¶ 18. In the same way that the Court applied strict construction in interpreting Rule 506 in finding that there was no valid basis for recognizing an exception to the physician-patient privilege for insurance fraud, the Court should likewise apply strict construction here and refrain from substantively modifying the litigation exception by inserting text that is not present.

E. PRIVILEGES SHOULD BE MODIFIED THROUGH THE FORMAL RULEMAKING PROCESS TO ENSURE PROSPECTIVE OPERATION AND THE OPPORTUNITY FOR PUBLIC COMMENT

In addition to the points above, there are two other reasons for the Court to modify privileges through the formal rulemaking process rather than by judicial interpretation or the extension of the common law. The first involves the issue of prospective versus retrospective operation, and the second is related to the significance of the Court's constitutional authority over matters of privilege.

When legislation is enacted, there is a strong presumption that it will operate prospectively only. Two things are required to overcome this presumption. First, a clear legislative intent for retrospective operation and, second, a determination that the "statute changes only procedural law by providing a different mode or form of procedure for

enforcing substantive rights'' without enlarging or eliminating vested rights. *Roark v. Crabtree*, 893 P.2d 1058, 1062 (Utah 1995) (*quoting Pilcher v. State*, 663 P.2d 450, 455 (Utah 1983).

In contrast, "[t]he general rule from time Immemorial" is that a "ruling of a court is deemed to state the true nature of the law both retrospectively and prospectively" and that "whether the general rule should be departed from depends on whether a substantial injustice would otherwise occur." *Malan v. Lewis*, 693 P.2d 661, 676 (Utah 1984) (petition for reh'g). As such, a judicial ruling that recognizes, interprets, or construes a common law duty will almost always operate prospectively *and* retrospectively, as demonstrated by the Court of Appeals' decision in this case, even if the ruling effectuates a substantial change in the law.

This contrast between a statutory change that only applies prospectively and a judicial ruling that applies both prospectively *and* retrospectively is real and significant. It is the difference between an enactment of potential liability for future acts and a ruling of immediate liability for past acts. It is the difference between actual notice of applicable legal standards and notice of significantly less.

As a matter of judicial restraint and given the preemptive language in Rule 501, we believe that the Court should limit itself to the formal rulemaking process to ensure the prospective operation of substantive changes and to avoid a significant restructuring of the existing framework for how legislative enactments and judicial rulings operate as currently reflected in *Roark* and *Malan*.

Lastly, using the formal rulemaking process to effectuate substantive changes would also ensure, at some level, the opportunity for the public to offer comment, testimony, and input to the Court before such changes would be finalized and adopted. One could certainly argue that the importance of this process within the judicial branch to receive public comment should only increase with the constitutional reduction of the Legislature's authority over such matters. It is also not too far fetched for one to argue that in matters of privilege, the Court should exercise restraint and only add substantive terms to Court rules through the formal rulemaking process in the same way that it would refuse to add substantive text to a statute. In both cases, those who petition the Court to write something into a statute or rule that cannot be found in its existing text should be reminded to seek policy changes in the appropriate forum and through the applicable legislative or judicial rulemaking process. This is, in essence, what the Court did in *Burns* when it refused to amend Rule 506 by virtue of a statute that did not expressly pierce the physician-patient privilege. That analysis should remain true here even when the basis for the change is not a nondescript statute but a common law pronouncement.

F. COMMUNICATIONS IN JUDICIAL PROCEEDINGS SHOULD NOT BE ACTIONABLE

While not identified by the Court as an issue for appeal, we believe that a final reason for applying Rule 506 as written is the fact the statements at issue here occurred within the context of litigation and should be considered in light of the judicial proceedings privilege, which also strikes a reasonable balance in "promot[ing] the integrity of the adjudicatory proceeding and its truth finding processes" by facilitating the

"free and open expression by all participants" which "will only occur if they are not inhibited by the risk of subsequent defamation" or related tortuous claims. *Debry v. Godbe,* 1999 UT 111, ¶10.

II. THE COURT SHOULD EXPRESSLY REJECT THE POLICY IMPLICATIONS OF THE COURT OF APPEALS' HOLDING

We have serious concerns regarding the policy implications of the Court of Appeals' holding that an "*ex parte* communication between a physician and *opposing* counsel constitutes a breach of the fiduciary duty of confidentiality," *Sorensen* at ¶ 16 (emphasis added), and finding that such a communication may also serve as the basis of a tort claim for intentional infliction of emotional distress. *Id.* at ¶ 21. These concerns are three-fold. First, the holding is seemingly stated so broadly as to foreclose all situations in which a physician may communicate with opposing counsel outside of the presence of plaintiff's counsel. Second, the holding only applies to "opposing counsel," suggesting that a physician may have a duty of partisanship in a lawsuit to which he is not a party. Third, the holding ignores the practical reality of formal discovery in litigation.

A. EX PARTE INTERVIEWS ARE NOT INHERENTLY EVIL

With the filing of a lawsuit, attorneys for both sides seek to expeditiously gather and weigh as much relevant information as possible in assessing the relative strengths and weaknesses of their respective positions. It is not uncommon for attorneys to seek this information through a variety of formal and informal means of discovery, including ex parte interviews. Among other things, ex parte interviews provide a cost-effective way of identifying essential and non-essential witnesses, quickly and efficiently gathering

initial and follow up information, and minimizing the intrusiveness of litigation on potential witnesses to the extent possible and where appropriate.

In 1999, The Utah State Bar Ethics Committee reviewed the ethical implications of opposing counsel engaging in ex parte contact with a treating physician and concluded that (1) "[t]here is no ethical rule that prohibits *ex parte* contact with plaintiff's treating physician when plaintiff's physical condition is at issue" and (2) "[t]he 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." Utah Bar Ethics Op. 99-03. The Committee, appropriately, limited its analysis to the ethical implications of ex parte contacts by lawyers and refrained from offering a legal opinion on the potential application or scope of the physician-patient privilege. *Id.*

Like the Ethics Committee, we recognize that an analysis of legal ethics does not directly answer the legal issues posed in this case. But we do think that the perspective of the Committee in recognizing the utility and efficiency of *ex parte* contacts in informal discovery is noteworthy. Also noteworthy is the recognized use and general acceptance of ex parte contacts by the plaintiffs' bar in the very manner that the Court of Appeals ruled would be tortuous if done by defense counsel.

On these points, we firmly believe that within the appropriate limits of the law, litigation needs to cost less—not more. It is not uncommon for a patient to be treated by dozens of physicians over a relevant period of time. Limiting a defense attorney to formal means of discovery would do nothing but drive up costs and create additional delay. More important, is the uneven playing field that such a one-sided prohibition

creates. Without the ability to interview physicians ex parte, defense counsel would always be required to expend funds to take a deposition to determine whether a physician may be in possession of relevant facts or opinions, a cost not applicable to plaintiffs. Plaintiffs, moreover, would have open and regular access to a witness, including crucial times just before depositions and trial, while defendant would be limited to a single "on the record" inquiry. Through this access, plaintiffs could seek and obtain advisory opinions from a witness both before and after a deposition and could offer literature, expert reports, and other medical records to a witness to encourage the witness to rethink medical conclusions without notice or interference by defense counsel. Similarly, with the ability to be present at every interview, plaintiff would also gain a considerable advantage in monitoring and evaluating the trial strategies, mental impressions, and legal theories of defense counsel. Clearly, it is not in the interests of justice to give one side of a dispute an advantage that the other does not share. *See Doe v. Eli Lilly & Co.*, 99 F.R.D. 126 (D.D.C. 1983); *see generally* Daniel P. Jones, Annotation, Discovery: Ex Parte Interview with Injured Party's Treating Physician, 50 ALR 4th 715 (1986) (discussion of states that permit or prohibit ex parte interviews). Nor is it appropriate to allow a privilege to be used in such a manner which has no relation to the purpose for which is exists. *Eli Lilly*, 99 F.R.D. at 128-129. A privilege designed to protect patient information should be limited to that and should not be used to disrupt the balanced scales of justice. Finally, it is not enough, as the Ethics Committee pointed out, for the possibility of attorney misconduct to justify a blanket prohibition against *ex parte*

contacts, especially since the possibility of ex parte misconduct exists regardless of who an attorney may represent.

On a more specific note, we would strongly urge the Court *not* to foreclose the opportunity for defense counsel to affirmatively seek a qualified protective order to engage in ex parte interviews with a treating physician under the framework established and authorized by HIPAA. Pursuant to 45 C.F.R. § 164.512(e) (1) (ii), a party in a lawsuit may obtain protected health information by obtaining:

> An order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:
>
> (A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and
>
> (B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

Such an order does not compel the treating physician to disclose information in an ex parte interview. It merely authorizes it. We believe that there is both utility and reliability for all parties in this process. As a point of clarification, HIPAA only applies to covered entities, which consists of health care providers who submit claims and billing information electronically. 45 CFR 160.102(a). HIPAA does not provide a private right of action. 65 FR 82566 (Congress could, but did not, create a private right of action); *Swift v. Lake Park High School Dist. 108*, 2003 WL 22388878 (N.D. Ill. 2003) ("No federal court reviewing the matter has ever found that Congress intended HIPAA to create a private right of action.") Instead, a violation of HIPAA is subject to federal

enforcement and federal sanctions, which can include the imposition of civil and criminal fines. *See* 42 U.S.C. Sec. 1320-5.

B. A PHYSICIAN'S DUTY IS TO THE TRUTH

Implicit in the Court of Appeals holding is the notion that a physician has a duty to assist a patient in litigation in a way that if done for the opposing party, would not only be a breach of a fiduciary duty of confidentiality, but would also constitute outrageous conduct for purposes of a cause of action for intentional infliction of emotional distress. *Sorensen* at ¶ 22. It our position that this is an unwarranted and imprudent extension of a physician's fundamental duty to diagnose and treat a patient and a dangerous precedent in viewing a physician as something other than a dispassionate and unbiased witness in a lawsuit.

Unlike an attorney, a treating physician has no direct interest in the outcome of a lawsuit in which a patient is a party. Whether a patient is in litigation or not, a physician's interest is in the physical and mental well-being of the patient. To suggest that it is appropriate for a physician to provide information to a patient's attorney on an ex parte basis but not afford the same opportunity to opposing counsel, is to subtly but significantly change the fundamental role of a physician in a lawsuit.

In 1971, the Utah Medical Association and the Utah Bar Association jointly published the Legal/Medical Interprofessional Code for Utah. *See* Addendum B. It has since been updated in 1982 and again in 1993. While the document has no direct legal significance, it does represent a consensus of both the legal and the medical community regarding the role and function of a physician witness in litigation.

Among other things, the document discusses the role of a treating physician in preparing an authorized report upon the request of the parties that details treatment, causation, pre-existing conditions, prognosis, and the probable cost of future treatment. It briefly discusses the physician-patient privilege and the impact of an "order, subpoena, or proper authorization" as an indication of a patient's waiver of the privilege. And it draws a clear distinction between a treating physician who may be called or deposed by either party and a retained physician with whom an opposing attorney may not talk or consult unless permission from the other side has been granted.

Of greatest significance here, however, is the following description of a physician as a witness:

> The physician carries the responsibility of aiding the administration of justice when called upon to testify in trial. The physician's testimony should be given without bias and the physician should be unembarrassed by the expectation of a fee or other reward. The physician must approach the subject in the capacity of a consultant who makes a diagnosis scientifically and who is unswayed by any thought other than that of giving a correct opinion in diagnosis. The physician may be firm in expressing his/her conviction if that is his/her state of mind. On the other hand, the physician must also remember that he/she is not in the courtroom as an advocate, and that he/she should not be argumentative or contentious.

Id. We believe that there is wisdom in limiting a physician's duty in litigation to offering testimony that is objective, accurate, and truthful and not turning a physician into the means by which one party in litigation enjoys an advantage over the other or that in any degree creates an implicit expectation of advocacy.

C. THERE ARE NO SECRETS IN DISCOVERY

There is nothing that a defense lawyer can find out in an ex parte interview that cannot be gained through formal discovery. Rule 26(b)(1), Utah R. Civ. P. ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the partying seeking discovery or to the claim or defense of any other party…."). It is only a question of whether a defense attorney should be limited to formal discovery and, if so, whether it would be appropriate to systematically limit all ex parte communications by all lawyers on all sides.

Our view is that there are no compelling reasons to create additional restrictions beyond the confines of Rule 506(d)(1), that informal discovery is beneficial to all sides in litigation, and that court orders can be used to limit informal discovery as the parties see fit to seek and courts see fit to grant. Otherwise, all parties should be limited to the same extent.

CONCLUSION

This is a significant case for a number of reasons. We appreciate the opportunity to share our analysis and thoughts on some of most critical underlying issues. We urge

the Court to apply Rule 506 as written and expressly reject the policy implications of the Court of Appeals' decision.

Respectfully submitted this 16th day of January, 2007.

KIRTON & McCONKIE

By: _____

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Merrill F. Nelson
Attorneys for Amici Curiae
and for
David C. Gessel
Attorney for Amici Curiae
UHA, Utah Hospitals and Health Systems Association
And for
Mark A. Brinton
Attorney for Amici Curaie
Utah Medical Association

CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing **BRIEF OF AMICUS CURIAE UHA, UTAH HOSPITALS AND HEALTH SYSTEMS ASSOCIATION AND UTAH MEDICAL ASSOCIATION** be mailed through United States mail, postage prepaid, this 16th day of January, 2007, to the following:

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UTAH MEDICAL ASSOCIATION

ADDENDUM A

CONSENT TO THE FILING OF AMICUS BRIEF BY UTAH TRIAL LAWYERS ASSOCIATION AND JOINT AMICUS BRIEF BY UHA, UTAH HOSPITALS AND HEALTH SYSTEMS ASSOCIATION AND UTAH MEDICAL ASSOCIATION

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Attorneys for Amicus Curiae

IN THE UTAH SUPREME COURT

JOHN P. BARBUTO, individually, JOHN P. BARBUTO, M.D., P.C., dba NEUROLOGY IN FOCUS, Defendants and Appellants, vs. NICHOLAS SORENSON, KEVIN AND PAMELA SORENSON, limited guardians and conservators of Nicholas Sorenson, Plaintiffs and Appellees.	**CONSENT TO THE FILING OF AMICUS BRIEF BY UTAH TRIAL LAWYERS ASSOCIATION AND JOINT AMICUS BRIEF BY UHA, UTAH HOSPITALS AND HEALTH SYSTEMS ASSOCIATION AND UTAH MEDICAL ASSOCIATION** Supreme Court Case No. 20060816 Court of Appeals Case No. 20050501

Pursuant to Rule 25 of the Utah Rules of Appellate Procedure, the parties to this action, by and through their respective counsel of record, hereby stipulate and give their consent for UHA, Utah Hospitals and Health Systems Administration and Utah Medical Association to file a joint brief as *amicus curiae* in support of the position of defendants/appellants John P. Barbuto, individually, John P. Barbuto, M.D., P.C., dba Neurology in Focus, within the time allowed for the submission of the brief of defendants/appellants, which is through and including January 16, 2007, and Utah Trial Lawyers Association to file an amicus brief as amicus curiae in support of the position of plaintiff/appeelles Nicholas Sorenson, Kevin and Pamela Sorenson, limited guardians and conservators of Nicholas Sorenson, within the time allowed for the submission of the brief of plaintiff/appelles, which is through and including February 15, 2007.

CHRISTENSEN & JENSEN, P.C.

Dated: Jan 11, 2007

L. Rich Humphreys
Karra J. Porter
Attorneys for Plaintiffs/Appellant

WILLIAMS & HUNT

Dated: January 10, 2007

Dennis C. Ferguson
Attorneys for Defendants/Appellees

AFFIDAVIT OF SERVICE

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Debra Domenici, being duly sworn, says that she is employed in the law offices of Kirton & McConkie, attorneys for Amicus Curiae herein; that she served the attached **CONSENT TO THE FILING OF AMICUS BRIEF BY UTAH TRIAL LAWYERS ASSOCIATION AND JOINT AMICUS BRIEF BY UHA, UTAH HOSPITALS AND HEALTH SYSTEMS ASSOCIATION AND UTAH MEDICAL ASSOCIATION** in Case No. 20050501 before the Court of Appeals, Case No. 20060816 before the Utah Supreme Court, upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

L. Rich Humphreys
Karra J. Porter
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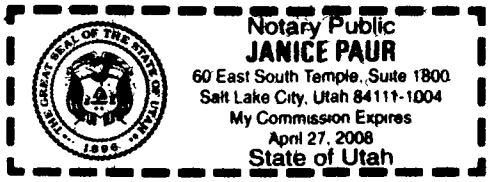
and causing the same to be mailed first class, postage prepaid, on the 12th day of January, 2007.

SUBSCRIBED AND SWORN TO before me this 12th day of January, 2007.



Notary Public

ADDENDUM B

LEGAL/MEDICAL INTERPROFESSIONAL CODE FOR UTAH

UMA Physicians who care for and about the people of Utah
310 East 4500 South, Suite 500
Salt Lake City, Utah 84107-4250
(801) 747-3500

THE LEGAL/MEDICAL INTERPROFESSIONAL CODE FOR UTAH

Published by:
UTAH STATE BAR 645 SOUTH 200 EAST SALT LAKE CITY, UTAH
UTAH MEDICAL ASSOCIATION 310 E. 4500 South, Suite 500 SALT LAKE CITY, UTAH

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FOREWORD TO FIRST EDITION

Increasingly in recent years, the medical and legal professions have encountered difficulties arising from the fact that patients with legal problems require the cooperative effort of physicians and attorneys in the solution of those problems. Neither profession appeared to understand and appreciate the obligations and difficulties encountered by the other in these medical-legal settings. Friction inevitably resulted and misunderstandings mounted.

In early 1970, Dr. J. Louis Schricker, Jr., and Dr. John N. Henrie, as President and President-elect, respectively, of the Salt Lake County Medical Society, determined that the welfare of the patients, the administration of justice and the relationship between the professions demanded resolution of these problems. This Interprofessional Code, prepared under their direction, is the culmination of their efforts and those offices of the Salt Lake County Bar Association, who joined enthusiastically in the project.

After the adoption of the Code by the Salt Lake County Medical Society and the Salt Lake County Bar Association, no reason appeared why the benefits of this Code should not be extended throughout the State of Utah. Accordingly, during

1971, the Utah State Bar and the Utah State Medical Association considered and then adopted the Code as applicable to the nearly 3,000 members of the legal and medical professions of this state.

The Utah State Bar, Utah State Medical Association, Salt Lake County Bar Association and Salt Lake County Medical Society urge their respective members to honor the letter and spirit of the Code and to refine and improve it in the years ahead for the benefit of the professions and the public they serve.

November 23, 1971

FOREWORD TO SECOND EDITION

Since the adoption in 1971, the first edition of the Interprofessional Code has assisted many members of the legal and medical professions in resolving difficulties which have arisen in medical-legal settings. However, with the passage of time and the entry of new members into each profession, the general level of familiarity with and use of guidelines set forth in the code were found to have diminished.

In recognition of the worthwhile contribution that a code of procedures and conducts for interprofessional contact makes toward the efforts of doctors and attorneys in rendering cooperative public service, the presidents of the Utah State Bar and the Utah Medical Association appointed representatives of their respective organizations who have particular interest, background and experience in medical-legal matters to prepare an updated and revised version of that Interprofessional Code.

The Interprofessional Committee, as it was called, began work in 1980. Following the format and content of the excellent product of its predecessors, the Interprofessional Committee modified some substantive provisions, where deemed appropriate, to more accurately comply with the dictates of good practice or the requirements of the law. The Committee also added definitional and explanatory material to assist doctors and attorneys in understanding and appreciating each other's roles. An index and table of contents have also been included so that specific provisions of that work could be more easily accessible to the busy practitioner.

This second edition of the code has been approved by the vote of the House of Delegates of the Utah State Medical Association and by vote of the Board of Commissioners of the Utah State Bar. Members of both medical and legal professions are urged to honor the letter and spirit of the code.

March 1, 1982

FOREWORD TO THE THIRD EDITION

The Utah State Bar has created a Legal-Health Care Committee to deal with issues relating to interprofessional relationships concerning our clients/patients. Both physicians representing the Utah Medical Association and attorneys

representing plaintiffs and defendants in their practices participated in producing this update.

The Code describes how physicians and attorneys should relate in resolving issues which involve patient care. It is the sincere hope of this committee that this Code will be helpful to both professions in their collaborative working relationships.

February 4, 1993

INTERPROFESSIONAL CODE
INTRODUCTION

The provisions of this Code are intended as guides for physicians and attorneys in the solution of mutual problems encountered by the two professions in connection with physical examinations of litigants and the need for medical testimony. The Code will serve its purpose if it promotes the welfare of patients and clients, improves the practical working relationship between the two professions, facilitates the administration of justice and reduces costs and time demands on all concerned. If you desire to give input regarding this Code or its application please contact the Legal/Health Care Committee of the Utah State Bar.

I. MEDICAL EXAMINATION

A. General

1. It is appropriate for a person making a claim for damages for personal injuries to undergo a medical examination by either a treating or non-treating physician. The purpose of the medical examination is to determine the nature and extent of the injuries complained of and any resulting impairment or disability. The examination may also be used to assess the relationship between the injury, impairment or disability in question and the incident giving rise to the damage claim.

2. When appointments are made for medical examinations, the physicians set aside a part of their day for that purpose. It is, therefore, important that attorneys exert their best efforts to insure that such appointments are kept or, if this proves to be impossible, that the physician be notified well in advance so that the time allotted can be devoted to another patient.

3. An attorney arranging for medical examination is responsible to see that diagnostic data such as x-rays, x-ray interpretations, laboratory reports, reports of consultation, etc., necessary for the proper performance of such examination are furnished to the examining physician.

B. Independent Medical Examination

1. In instances where there is a disputed claim for damages for personal

injury, a medical examination performed by a non-treating physician ("Independent Examination") may be required by agreement between opposing attorneys, or, if suit has been filed, by a court order.

2. Physicians who are willing to perform an independent medical examination render a significant service in the interest of justice. Independent examinations should be undertaken in an impartial manner and be performed with a degree of thoroughness and attention appropriate to the circumstances.

3. The physicians who perform an independent medical examination should communicate their findings and opinions only to the attorney who arranged the examination. The physician should not disclose findings and opinions to the patient or to the patient's attorney without the consent of the attorney who arranged the examination.

C. Scope of Examination

1. The scope of an examination may be limited by the agreement of both attorneys or by court order. The attorney arranging the examination has an obligation to notify the physician of any such restriction.

2. Subject to the above limitation, the physicians may take a history and perform such examinations as may be necessary to formulate an informed opinion regarding the nature and extent of the person's medical condition.

II. MEDICAL RECORDS

1. An attorney representing a patient is entitled to obtain copies of a physician's complete chart and notes pertaining to that patient. Upon proper patient authorization, the physician should promptly provide the attorney with the patient's complete medical records. The physician is entitled to reimbursement for the costs of copying records and furnishing them to the attorney.

2. Attorneys desiring to obtain only a copy of a physician's office records and not wishing to obtain a narrative medical report from the physician should so specify in their written request.

3. Production of a physician's office chart and notes (medical records) may also be required by subpoena. A subpoena may be served on the physician or on the custodian of the physician's records. If such a subpoena is served *the records must not be delivered or disclosed to the process server.* The subpoena specifies the time and place of delivery of the documents.

III. WRITTEN MEDICAL REPORTS

A. Attorney's Role

1. The attorney should not expect a physician to make a written report concerning the condition of the patient or of a party referred to the physician for an examination, unless the attorney submits to the physician a letter specifying the type of report required. If a medical report is requested, the attorney must furnish the physician with a written authorization signed by the patient and acknowledged before a notary public.

2. Independent medical examinations are arranged for by agreement between the attorneys. When an independent examination is to be made pursuant to such an agreement, or pursuant to a court order, the attorney's written request for a report should contain specific requests such as:

    a. Specify the injuries the party has claimed.
    b. Indicate how and when the injury occurred.
    c. The request should specify the history the doctor is expected to obtain, particularly if the patient claims an aggravation of a pre-existing condition or if previous injury or illness is suspected or involved.
    d. The request should state whether a partial or a complete examination is desired. It should indicate whether special studies, such as laboratory work, diagnostic x-rays, or a consultation, are to be permitted at the physician's discretion.
    e. A request for information concerning the physician's specific diagnosis, treatment (if applicable), and prognosis of the patient's condition should be made.
    f. The physician should be requested to evaluate the patient's degree of impairment and/or, if given appropriate facts, the degree of disability. If such a condition is detected, the physician should assess the extent to which the impairment and/or disability is temporary or permanent.
    g. The physician should be requested to express an opinion regarding the causal relationship between an alleged accident and the injury, impairment or disability of the patient.
    h. The attorney should ask if the physician believes a re-examination would be necessary in order to testify or make an informal prognosis.
    i. The attorney should reaffirm any previous arrangement concerning the physician's fees, and should provide other information needed for billing purposes.
    j. If the person examined is a patient of the physician, the physician should be requested to list the cost of treatment to date and to estimate the cost of future treatment.

B. Physician's Role

1. Physicians should understand their reports are of critical importance in the prompt disposition of the patient's claims. Failure of a physician to render a prompt and thorough report may prevent or delay resolution of a claim. Physicians should not agree to perform the examination unless they are willing to furnish a prompt and thorough report. Neither attorneys nor

insurance companies can reasonably evaluate the case until a written report is received from the physician. In some instances, the case cannot be placed on the trial calendar until receipt and distribution of the physician's report. There are two types of reports – treating MD and Independent. Both will be discussed.

The physician's report should not be made on blank forms where the spaces are filled in or checked unless specifically directed. Instead, the physician should make a narrative written report. Medical terminology should be kept to a minimum and, if necessary, a brief explanation in lay language should be made. The report should be specific, complete, concise, and should include the particular medical information requested by the attorney.

ATTORNEYS: Physicians might appreciate your inclusion of these specific points in your letter or a copy of this page included with your request for information.

Authorized reports regarding a physician's own patient should include the following:

a. How, when and where the accident or injury occurred.
b. Where and when the patient was first seen for this condition and the extent of the injuries at that time
c. A complete description of the necessary treatment which was given and its apparent results.
d. A prognosis, if the patient is still under treatment, including an evaluation of the patient's degree of impairment and/or the degree of disability. The report should also include a statement regarding the extent to which such impairment and/or disability is temporary or permanent.
e. The casual relationship between an accident or other occurrence and the injury, impairment or disability of the patient.
f. If there was a pre-existing disease or injury, its effect on the present condition and the extent to which the pre-existing disease or injury was aggravated.
g. The cost of treatment to date and the probable cost of future treatment.
h. The physician's record should reference all material used in support of the physician's findings such as reports of x-ray examinations, laboratory reports, reports of consultants, etc.

4 *Report by Non-Treating Physician.* Where physicians are asked for an independent examination, their reports should include the following:

a. History of the accident or injury as described by the patient being examined.
b. The person's account of the treatment received, and its results. If the person is still under treatment, a description of the current treatment should be reported.

c. A description of the examination of bodily systems, members or parts injured, with specific attention to abnormalities and whether x-rays or other consultations are indicated.
d. Comments on the results of the examination including the extent of injuries, the presence and extent of impairment or disability and whether the impairment or disability appears to be permanent or temporary. The physician should also indicate if a further examination or evaluation will be necessary to reach a final determination or to prepare for trial testimony.
e. The casual relationship between the accident or other occurrence and the patient's injury, impairment or disability.
f. If the history or the examination indicates a pre-existing disease or injury, the physician should also render an opinion as to how much was aggravated by the injury under consideration.

5. In recognition of the importance of medical reports in the prompt settlement or trial of cases, physicians should furnish requested reports within two weeks unless extraordinary circumstances require further delay.

C. Evaluation of Injury

1. Members of the medical and legal professions occasionally use the terms "impairment" and "disability" interchangeably. The terms, however, have distinct definitions and should be distinguished.

    a. *Impairment.* Impairment is considered a purely medical condition. Impairment is any objective or measurable abnormality in physical or mental function. It is not necessarily an indication of disability but may be a contributing factor to it.
    b. *Disability.* Disability is not a purely medical condition. Patients are disabled when their ability to engage in a certain type of activity is reduced or absent because of impairment or other abnormality.

2. The physician can ordinarily evaluate impairment on the basis of a medical examination and testing. In order to evaluate a disability, however, the physician may require information concerning the patient's work and activities.

3. Either impairment or disability may be temporary or permanent. A condition is considered permanent when it is stable after reasonable rehabilitation has been achieved.

IV. SUBPOENAS

A. Duty to Testify

Our system of justice requires the attendance of any citizen at a judicial

proceeding to give testimony regarding the case. Physicians have an obligation to respond to a subpoena, just as any other citizen, except where grave and life-threatening emergencies prevent them from doing so. An emergency can never be a mere matter of convenience to the physician. If physicians ignore subpoenas, they assume the obligation of convincing the court that the emergency was genuine and of sufficient gravity to justify their failure to appear.

B. Subpoena Explained

A subpoena is an order of the court commanding a person upon whom it is served to attend court, or a deposition, at a certain time and place to testify as a witness in a trial or deposition.

C. Differing Practices Concerning Service of Subpoenas

Many attorneys never subpoena physicians they expect to call as witnesses, preferring to make personal arrangements with the physicians and relying upon their promise to appear.

Other Attorneys always subpoena medical witnesses, contending:

1. Unless a subpoena has been served, the court may refuse to grant a continuance of the trial if the physician, for any reason, fails to appear; and

2. It is a typical advantage for the physician to be able to testify, if asked, that he/she came to court because a subpoena ordered him/her to do so.

D. Recommended Policy

1. A physician should not take offense to being served with a subpoena. However, the attorneys should inform the physician in advance that a subpoena will be served. The attorneys should give physicians their best estimate of the date and time the physician is likely to be called to testify and should notify the physician as promptly as possible of any change in the anticipated schedule.

   In recognition of the critical demands upon a physician's time, the attorney should make every effort to avoid unnecessary inconvenience or delay. Despite such efforts, the physician may not be called to testify as scheduled. The process of law and the time constraints of other parties involved in the case should be respected by the physician.

   The attorney should make every effort to notify the physician of the time and place of the trial. As soon as the trial date is certain, attorneys should immediately notify the physicians of the time of their appearance. The physician should understand that attorneys sometimes have very short notice of the precise day and time trial will start and an attorney cannot predict with certainty the length of testimony to be given by any prior witness. Mutual understanding of the problems of the two professions and

a genuine spirit of cooperation is the best guideline for these problem areas.

4. Fees for physician services are ultimately paid by the patient or client. Consideration of fair and reasonable charges must be made in order to control the ultimate costs to the injured party.

V. PHYSICIAN-PATIENT PRIVILEGE

Where a physician gives testimony or produces documents under court order, subpoena or pursuant to proper authorization in a personal injury lawsuit, the physician is relieved, to the extent specified by such order, subpoena or authorization, of the usual obligation to keep in confidence the information concerning the patient/client because the patient has usually waived the right to prevent disclosure of the information. In the unusual case where this is not true, the physician will be instructed, at the outset, by the court or by counsel, not to divulge a confidence, nor disclose such information until authorization by order of the court.

VI. DEPOSITIONS

(Testimony under oath outside of court)

A. Deposition Explained

A deposition is an official part of court proceedings in which a person, such as a physician, may be required to give testimony and to be cross-examined under oath, outside of court, in the presence of an official court reporter and the attorneys representing the parties. The physician may be required to produce pertinent medical records at the deposition hearing. The physician may also be requested to release the records to the court reporter, who, as an officer of the court, will then duplicate the records and return the original to the physician.

B. Time and Place of Deposition

The time and place of the deposition should be set by agreement with the physician. Unless there is a compelling reason to the contrary, it should be taken at the physician's office. Only under unusual circumstances should a deposition be scheduled during other than regular office hours.

C. Subpoena for Deposition

If the deposition of a physician cannot be set by agreement, his/her attendance can be required by subpoena. Where the testimony involves the physician's own patient, it is recommended that, even if the physician agrees to the time and place of deposition, a subpoena be served upon the physician, requiring the physician to appear and testify. This will authorize the physician to give confidential information if requested, and the physician should keep the copy of the subpoena for his/her future protection.

Sometimes a subpoena is served on a physician asking for medical records in lieu of a personal appearance. Upon receipt of a medical records subpoena, the physician should copy the patient's entire chart, including, but not limited to, the records, correspondence, billing and all information detailed by the subpoena. The physician should then mail the records to the attorney requesting the information. Physicians will be reimbursed for copying charges. Records generally should not be provided without a subpoena or an authorization signed by the patient. A Utah statute provides that any time a patient files a medical malpractice or personal injury action, putting the patient's medical, physical or psychological condition at issue, the patient-physician privilege is waived. (See U.C.A. §78-24-8(4)). However, a physician would be prudent to obtain a subpoena or an authorization signed by the patient before releasing copies of the patient'' records to anyone but the patient.

Attendance at Deposition is a Hardship

If it would create a hardship for the physician to appear for a deposition at the time and place stated in the subpoena, the physician should immediately bring this fact to the attention of the physician's attorney or to the attention of the attorneys involved in the case and, in such an instance, the attorneys should make every effort to avoid hardship by rescheduling the deposition.

Similarly, if an attorney must cancel a scheduled deposition, ample notice should be given to the physician so the physician can use the vacated time. If the deposition is canceled with such short notice that the physician cannot reschedule patients, it is reasonable to discuss the possibility of compensation for the time lost.

Preparation and Preparedness

Since the testimony from a deposition may be read at trial, it is important that the physician, prior to the deposition, prepare carefully. At trial, depositions may be used to impeach a witness' credibility if trial testimony is inconsistent with testimony given in a deposition.

Depositions proceed with questions and answers which are transcribed by the court reporter. It is important to remember to answer truthfully; audibly; to listen carefully to questions and answer only if you understand the questions; to never guess or speculate; to not speak when someone else is speaking; and to ask for clarification whenever you are uncertain. You may refer to your records in response to questions. Objections may be made by the attorneys present to "protect the record." Generally, witnesses are required to answer the questions asked during a deposition even if there are objections made. If a privilege exists or there is some other legal basis for an objection other than as to form, your attorney may instruct not to answer the question and you are entitled to rely on that instruction. Physicians may not raise legal objections to questions, but should ask for a break and confer with counsel, if concerned.

F. Scope of Deposition

A physician may be asked to testify as a fact witness if he/she provided medical treatment to a party. The physician will be asked for information regarding his/her education, training and experience; about information concerning the patient acquired through examinations and testing or through other sources upon which the physician has relied; and about opinions reached as a part of the physician's care of the patient including diagnosis, prognosis and the extent of any impairment and disability. A physician need not offer expert testimony in the form of opinions and conclusions unrelated to the physician's own care and treatment of the patient. As a fact witness, physicians are not legally required to receive more than a statutory witness fee for their deposition testimony; however, many law firms work with physicians to determine a reasonable compensation for the time expended.

A physician may also be deposed as an expert witness. An expert witness is certified by the court to testify as an expert on the issue. As such, the physician may be asked to state his/her opinions regarding the applicable medical standards of care and whether they were satisfied or breached. The physician will have to explain the basis or foundation for his/her criticism or support and may be asked detailed questions regarding current medical literature and the patient's medical records. As an expert witness, a physician is entitled to charge a reasonable amount for his/her preparation time and deposition time.

A physician can be both a fact witness and an expert witness. Generally, however, physicians prefer to remain neutral and objective if they have treated the patient as a patient and may feel uncomfortable criticizing either the other physician involved or the patient.

VII. RELATIONSHIP BETWEEN PHYSICIAN AND ATTORNEY

1. An attorney representing one side of a disputed personal injury claim should not attempt to consult with a physician who has been retained or specially employed by any person on the other side of the disputed claim, including a physician performing an independent medical examination, unless the attorneys for both sides agree that he or she may do so.

2. Except as required by the court, a physician who has consulted with or has been retained or specially employed by an attorney on one side of a disputed personal injury claim, including a physician performing an independent medical examination, should not consult with or provide information concerning the matter to any attorney or person representing the other side of the disputed claim unless attorneys for both sides agree that the physician may do so.

3. A physician who has consulted with or has been retained or specially employed by an attorney on one side of a disputed personal injury claim, including a physician conducting an independent medical examination, should not undertake to become a treating physician of the patient without the consent of the attorney who engaged those services.

4. A physician who has consulted with or has been retained or specially

employed by an attorney on one side of a disputed personal injury claim, including a physician conducting an independent medical examination should keep in mind that the patient ultimately pays for the time or services for which the physician charges.

A physician who is a treating physician for a patient may be deposed or called to testify as a fact witness on one side of a disputed personal injury claim. In these instances, the physician is not being retained or specially employed as an expert by an attorney, but is being deposed or called to testify as to his or her first hand knowledge of the patient's care, treatment, and medical condition.

VIII. CONDUCT OF TRIAL FROM PHYSICIAN'S STANDPOINT

A. Role of the Physician Generally

A trial is an adversary proceeding where evidence of the claims of the respective parties is presented for the purpose of helping the court or jury to decide the case. Where medical issues are beyond the knowledge of the ordinary layperson, physicians may be called to give their opinions on such issues. All physicians called as experts may not agree on a given issue about which they testify. In cased of disagreement among experts, it is the job of the court or jury to weigh the respective conflicting testimony and accept or reject such portions of it from each expert as it chooses. The reason for the court's or jury's acceptance or rejection of testimony by an expert may never become known or understood. If the other party challenges the physician's testimony or opinions, the physician should not take offense.

B. Physician as a Witness

1. The physician carries the responsibility of aiding the administration of justice when called to testify in a trial. The physician's testimony should be given without bias and the physician should be unembarrassed by expectation of a fee or other reward. The physician must approach the subject in the capacity of a consultant who makes a diagnosis scientifically and who is unswayed by any thought other than that of giving a correct opinion in diagnosis. The physician may be firm in expressing his/her conviction if that is his/her state of mind. On the other hand, the physician must also remember that he/she is not in the courtroom as an advocate, and that he/she should not be argumentative or contentious.

2. The physician should use simple language whenever possible. The physician should remember that his/her testimony is addressed to laypersons and not to a medical group. If the physician's testimony does not help explain and clarify the problems involved, it has not achieved its purpose. Technical expressions should be followed with simplified explanations or illustrations.

3. When a physician feels that a "yes" or "no" will not accurately answer a question, the physician should so state. The court will usually grant

permission for the physician to qualify or to explain his/her answer.

4. Some physicians are reluctant to express opinions based upon their own knowledge, experience and observation because other physicians, thought by them to be better qualified, may hold or have expressed a different conclusion. Of course, if new facts or other opinions are brought to the physician's attention which cause the physician to modify his/her opinion, the witness should not hesitate to express himself/herself accordingly.

IX. PHYSICIAN'S COMPENSATION FOR MEDICAL EXAMAINATIONS, REPORTS, COURT APPEARNCES AND DEPOSITIONS

It is impracticable to establish precise rules governing physicians' fees for medical examinations or reports, depositions and court appearances. It is important, however, that fees be reasonable, that they be discussed and, to the extent possible, that they be agreed upon in advance by the physician and the attorney. In this way, a major cause of misunderstanding and dissatisfaction may be eliminated. Ultimately, the patient/client bears the burden of paying fees charged by the physician.

A. Physician's Compensation May Not Be Contingent

Under no circumstances may a physician charge a fee for an examination, or for the physician's testimony, which is contingent upon the outcome of the lawsuit.

B. Reports to Patient's Attorney

A physician may charge for a report to a patient's attorney where the report is based upon records which the physician can obtain from the physician's own office and upon treatment and examinations already made by the physician for which the physician has received fees or an agreement to pay the physician fee.

If the physician is required to make an additional examination or is required to obtain or interpret records not in the physician's possession, the physician should fee free to make an additional charge for the time and professional services required.

C. Report on Person Referred for Examination Only

Where the attorney requests an examination and report concerning a person who is not the patient, the physician should either make such a charge as is customary in the physician's particular field for such examination and report or make a charge consistent with the amount of time and extent of professional service involved. The physician's statement of fees should reveal what portion of the total fee is attributable to charges for x-ray supplies or similar expenses. Again, the fee arrangement should be discussed with the patient's attorney prior to the examination.

D. Expert Witness Compensation

- An attorney should not request a physician to testify on deposition or in court, nor should he subpoena the physician, without making arrangements for reasonable compensation. While a physician may be subpoenaed to state facts known to the physician, it is inevitable that a physician who testifies will be required to formulate and to express expert opinions, and the physician should not be required to do so without reasonable compensation.

- If a physician is called to testify as an expert witness in a case where the physician has not been the treating physician, the physician should receive such compensation as is reasonable and customary for similar professional services in the physician's community and as may have been agreed upon with the attorney who calls the physician as a witness.

E. Responsibility for Payment of Physician's Charges

An attorney is ethically forbidden to pay debts, medical or otherwise, incurred by a client except as provided in Rule 1.8(e) of the Rules of Professional Conduct. However, where the attorney contracts for services on behalf of his/her client's case, the attorney should expect to make payments for the services. Therefore, while the attorney should not pay for or guarantee payment of medical services rendered to the client except where obligated by a written medical lien, the attorney should pay directly for medical reports, conferences with physicians, time spent in depositions or in court, and look to the attorney's client for reimbursement of these costs which the attorney has advanced on behalf of the client.

The physician should bill the patient and not the attorney for medical care rendered to the patient. The physician should bill the attorney for services rendered on behalf of the patient at the attorney's request. The attorney should pay these amounts promptly and as they are billed, and should not wait the outcome of litigation before paying the same.

Where the attorney is directed by his or her client not to honor, in whole or in part, an otherwise lawful written lien, an attorney shall either (1) hold in trust sufficient funds from the proceeds to pay of the lien and expeditiously pay the same upon receipt of a written authorization executed by the client and the provider, or (2) interplead sufficient funds to pay of the lien in the event that the client and provider cannot agree on a settlement amount.

F. What is Reasonable Compensation?

When a physician has been requested to provide services by an attorney, the physician should charge a "reasonable fee." If the physician has regularly provided services for a particular attorney, they will likely have evolved an understanding concerning reasonable compensation. However, in a new legal/medical relationship, an understanding as to be reasonable compensation should be promptly established. It is sufficient, for example, for the physician to

state an hourly charge, a fixed amount, an estimated amount or to identify the factors that will be taken into account in fixing the amount. When new developments occur that would render an earlier estimate inaccurate, a revised estimate should be provided. A written statement concerning the compensation reduces the possibility of misunderstanding or surprise. Furnishing a simple memorandum or a copy of the customary fee schedule is sufficient. The following factors may be considered in determining reasonable compensation:

1. The skill, experience, education, reputation, and ability of the physician providing the services.

2. The time and labor required.

3. The fee customarily charged in the community for similar services.

4. The loss of income from other sources in providing services.

5. The time limitations imposed.

X. MEDICAL MALPRACTICE

A. General

Physicians and attorneys have legal and ethical duties to provide services, to their patients and clients, in accordance with the standards of care applicable to their respective professions. If their conduct falls below the applicable standards of care and causes injury to patients or clients, physicians and attorneys may be subject to suit for malpractice.

Attorneys representing patients for injuries allegedly received as a result of medical malpractice are obligated to represent their clients zealously, with the bounds of the law and the Code of Professional Responsibility. Such representation should not be perceived or interpreted by the defendant physicians as improper, or as motivated by personal animosity or hostility, since such representation is often necessary to arrive at a fair and equitable resolution of the matter.

Correspondingly, attorneys have a legal duty and ethical obligation to fairly evaluate medical malpractice claims against physicians, and to refrain from prosecuting any action against physicians unless there is either objective evidence of a breach in the applicable standard of care resulting in injury, or a legitimate, good faith belief that the care provided fell below the applicable standard of care.

Even if initially an attorney may have been justified in bringing an action against a physician, continuation of the action is not justified if it becomes clear, after pretrial discovery, that the claim of malpractice is not meritorious.

B. Health Care Malpractice Actions in Utah

Healthcare malpractice actions in Utah are presently governed by the Utah Healthcare Malpractice Act, the full text of which is found in Title 78, Chapter 14, Utah Code Annotated 1953, as amended.

The stated legislative purpose for passing the Utah healthcare Malpractice Act ("The Act") is to provide a reasonable time in which actions may be commenced against health care providers and to provide procedural changes to expedite early evaluation and settlement of claims.

The Act sets forth a limitation within which a malpractice action may be commenced and certain rights may be enforced

The Act also contains a detailed section regarding failure of a physician to obtain informed consent. (The care provided by a physician is authorized by the patient after the patient has been fully informed of all material risks associated with a particular plan of treatment.) The section outlines what proof is required of the patient, defenses available and who may consent to health care.

The Act requires the Department of Commerce to provide a hearing panel in alleged medical malpractice cases against physicians. The panel is comprised of an attorney, a member who is licensed and practicing in the same specialty as the defendant and a lay panelist. The panel makes a non-binding decision regarding the merits of the alleged medical malpractice claim.

For additional information regarding the Act refer to the Utah Code section cited above.

Comments or questions regarding the UMA Web site should be directed to ***Mark Fotheringham, UMA V.P. of Communications****; phone (801)747-3500 or email to* ***mark@utahmed.org***

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