

IF YOU HAVE QUESTIONS REGARDING
THIS MATTER, PLEASE CONTACT:



Amy Leila Saberian
Associate, Dallas
901 Main Street, Suite 4400
Dallas, Texas 75202
214.651.4706
amy.saberian@strasburger.com

EDITORS

Kathryn Midboe Darling
Brian G. Hamilton
Laura Reilly O'Hara

HEALTHCARE GROUP

Tejal P. Banker
Debra W. Biehle
Thomas W. Burton
Renee Chafitz
Merritt M. Clements
Joseph F. Coniglio
Kathryn Midboe Darling
William Duane Darling
Rebecca L. Davis
R. Bradley Fletcher*
Brian G. Hamilton
John R. Lowry
Bryan J. Maedgen
Cynthia Schafer Marietta
Stuart Miller
David G. Moore
Craig H. Myers
C. Scott Nichols
Laura Reilly O'Hara
Jeffrey S. Osgood
David L. Ovard
Donald Patrick Owens
Paul W. Sheldon
Joseph A. Turano
Melissa Webb
Carol D. Williamson
Ivan Wood
Kevin M. Wood

*Not licensed to practice in the state of Texas

PERMISSIBILITY OF *EX PARTE* COMMUNICATION WITH NONPARTY TREATING PHYSICIANS

Generally, communications between a treating physician and a patient are privileged and confidential, and thus may not be disclosed to third parties. Exceptions to this general rule do exist, particularly where a patient in a civil suit has put his or her medical treatment at issue.

Rule 509 of the Texas Rules of Evidence, titled Physician-Patient Privilege, defines confidential communication between physician and patient and establishes the general rule of privilege in civil proceedings. Confidential communications and records of identity, diagnosis, evaluation, or treatment are privileged and may not be disclosed. There are, however, exceptions to this general rule, also contained within Rule 509. Mostly these exceptions apply when the patient has made his or her treatment an issue in a civil proceeding or has given his or her express consent to waiving privilege. The Texas Occupational Code similarly states that communications between a physician and patient, as well as records of identity, diagnosis, evaluation, or treatment, are privileged and may not be disclosed. But the Occupational Code also contains numerous exceptions, and in particular, an exception to the privilege of confidentiality where the patient has brought suit based on his or her treatment. The Health and Safety Code provides that information in hospital records is privileged and cannot be disclosed without authorization. Yet none of these statutes or rules explicitly address *ex parte* communication when an exception to privilege applies.

Texas state courts have explicitly permitted *ex parte* communication for practicality and efficiency reasons. Such courts would not narrow the exception to physician-patient privilege by disallowing informal interviews concerning matters relevant to a lawsuit. Generally, the courts allowing *ex parte* communication rely on attorneys' sense of professionalism for responsible questioning during such interviews. They discredit the idea that patients would refrain from being open and honest with their physicians about their health based on potential future lawsuits. Further, because treating physicians during formal discovery are asked to refrain from revealing information irrelevant to the lawsuit, as a practical matter they should also be able to refrain during informal interviews.

However, there are a few Texas federal district cases adopting a different rule. Courts disallowing *ex parte* communication recognize the exceptions to the physician-patient privilege, but are concerned potential breaches in confidentiality could have a chilling effect upon open and honest communication between patient and physician. These courts focus on the purpose of the privilege, *i.e.* to encourage candid communication between patient and physician. To foster this purpose, a defendant must be limited to the formal methods of discovery, rather than informal interviews, absent a plaintiff's express consent.

All of the cases on this issue predate the substantial changes made to

Texas health law as part of the Medical Malpractice and Tort Reform Act of 2003, frequently referred to as House Bill 4. The Act, codified as Chapter 74 of the Texas Civil Practice and Remedies Code, contains a new section authorizing the release of protected health information. Section 74.052 requires a plaintiff to completed a detailed authorization form and include it with the notice sent to physicians and health care providers against whom he or she has filed a health care claim. The form expressly authorizes the physician or health care provider to obtain and disclose health information, oral and written, in the custody of the treating physicians listed by the plaintiff. The form's language is taken essentially verbatim from the federal requirements of Health Insurance Portability and Accountability Act (HIPAA). If the patient fails to include the form, all proceedings against the physician or health care provider are abated until the physician or health care provider receives the form, and are abated for another sixty days after receipt of the form.

Because this form provides for the patient's express consent, it should obviate any concerns of courts disallowing *ex parte* communication. Once a physician or health care provider receives the authorization form, their counsel should be able to pursue interviews with those treating physicians. Courts, however, have yet to definitively address this section in light of *ex parte* communication, and the legislative history of Section 74.052 offers little as to the Texas Legislature's intent. Without more specific case law recognizing the addition of Section 74.052, defense attorneys should continue to be cautious in those jurisdictions where courts have frowned on *ex parte* communication between defense counsel and nonparty treating physicians.