STATE EX REL. PROCTOR V. MESSINA AND *EX PARTE* COMMUNICATIONS UNDER THE HIPAA PRIVACY RULE: THE "JUDICIAL PROCEEDINGS" SPLIT

Daniel J. Sheffner*

I. INTRODUCTION

In *State ex rel. Proctor v. Messina*,[1] the Supreme Court of Missouri held that the Health Insurance Portability & Accountability Act (HIPAA) Privacy Rule does not authorize court orders permitting defense counsel to enter into informal *ex parte* communications with a plaintiff's treating, non-party health care provider, absent the plaintiff's authorization.[2] In overruling the trial court's order allowing such *ex parte* communications, the 2010 decision comports with the majority[3] of state courts that prohibit such informal discovery techniques.[4] Notably, however, the Missouri court did not rest its holding on any state substantive rule expressly prohibiting *ex parte* communications, but on the court's interpretation of the HIPAA Privacy Rule.[5] The *Proctor* court is the only tribunal that has held that the HIPAA Privacy Rule, as opposed to state substantive law, does not authorize such communications, pitting itself against many sister state courts that have interpreted the HIPAA confidentiality regulations to the contrary.[6]

Following surgery in 2004, Bobbie Jean Proctor brought suit against Dr. Timothy L. Blackburn, Kansas City Heart Group, P.C., and St. Joseph Medical Center, alleging medical malpractice.[7] On motions filed by the defendants, on June 17, 2009, the trial court issued an order authorizing Mrs. Proctor's non-party, treating health care providers to meet and communicate informally with defendant's attorneys *ex parte*.[8] The order stated, in part,

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* Law Clerk, Honorable Kenneth J. Meyers, U.S. Bankruptcy Court, Southern District of Illinois.

1. 320 S.W.3d 145 (Mo. 2010) (en banc).
2. *Id*. at 155.
3. David G. Wirtes, Jr. et al., *An Important Consequence of HIPAA: No More* Ex Parte *Communications Between Defense Attorneys and Plaintiffs' Treating Physicians*, 27 AM. J. TRIAL ADVOC. 1, 2 (2003).
4. *See* Melissa Phillips Reading & Laura Marshall Strong, Ex Parte *Communications Between Defense Counsel and Treating Physicians—Has HIPAA Really Changed the Landscape?*, FOR THE DEF., Oct. 2011, at 33.
5. *See Proctor*, 320 S.W.3d at 157.
6. Reading & Strong, *supra* note 4, at 34.
7. *Proctor*, 320 S.W.3d at 147.
8. *Id*.

> TO: All Hospitals, Clinics, Pharmacies, Physicians, Social Workers, Educators, Psychiatrists, Psychologists, Therapists, Governmental Agencies, (State and Federal); All Other Medical Institutions, Practitioners, Health Care Providers, Past and Present.
>
> . . . .
>
> You are further notified that, pursuant to federal and state law, counsel for the defendants are hereby authorized to talk with Bobbie Jean Proctor's treating physicians or other health care providers, without counsel or the parties, including the plaintiff, being present or participating, provided the health care provider consents to the interview.[9]

The court also "enter[ed] a qualified protective order consistent with 45 C.F.R. [§] 164.512(e)(1)[(v)]."[10]

On appeal, the Court of Appeals held the order invalid, writing that the HIPAA Privacy Rule does not authorize informal, *ex parte* communications between defense counsel and a plaintiff's non-party treating physician.[11] The court, after issuing a preliminary writ of prohibition, ordered that the writ be made absolute.[12] The Supreme Court of Missouri granted transfer and, in a unanimous decision, upheld the appellate court's order.[13]

Part II briefly explains "*ex parte* communications" as used in this Article.[14] Part III examines the HIPAA Privacy Rule and 45 C.F.R. § 164.512(e)(1)'s "judicial proceedings" exception to the general prohibition of the use or disclosure of protected health information absent patient authorization.[15] Part IV discusses the *Proctor* decision and the general rule from the cases that hold, contrary to *Proctor*, that § 164.512(e)(1) authorizes *ex parte* communications.[16] Finally, Part V explains that the *Proctor* decision comports with general public policy reasons that militate against interpreting the HIPAA Privacy Rule as authorizing *ex parte* communications, and supplies a better reading of § 164.512(e)(1).[17]

II. *EX PARTE* COMMUNICATIONS

Ex parte communications, as used within this Article, are oral communications between defense counsel and a plaintiff's treating, non-party health care provider, without the presence of plaintiff or plaintiff's

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9. *Id.* at 154.
10. *Id.* at 155.
11. State *ex rel.* Proctor v. Messina, No. WD71326, 2009 WL 3735919, at *13 (Mo. Ct. App. 2009), *transferred to*, 320 S.W.3d 145 (Mo. 2010) (en banc).
12. *Proctor*, 320 S.W.3d at 147.
13. *Id.* at 147, 158.
14. *See infra* Part II.
15. *See infra* Part III.
16. *See infra* Part IV.
17. *See infra* Part V.

counsel.[18] Such communications are less expensive than formal discovery procedures and allow defense attorneys to elicit information from physicians or other health care providers in a more open environment than is provided by a deposition or through other formal discovery measures.[19] *Ex parte* communications are, as such, a favored and oft used tool for defense attorneys in jurisdictions in which they are permitted.[20]

Currently, a majority of states either prohibit *ex parte* communications between defense counsel and plaintiff's non-party health care provider[21] or place strict procedural restrictions on such communications that effectively render them prohibited.[22] Courts holding that *ex parte* communications are prohibited do so for public policy reasons,[23] the protection and maintenance of the physician-patient privilege,[24] or the physician's ethical duty of confidentiality.[25] Other courts, however, have held that *ex parte* communications are permitted under their substantive laws.[26] Courts upholding such communications have done so for a variety of reasons, including the public's interest in reducing health care costs[27] and because the patient is deemed to waive the physician-patient privilege when he or she places his or her injury at issue by bringing suit.[28]

Accordingly, there is a state law split as to whether *ex parte* communications are generally permissible. There is another, narrower split, however, as to whether the federal HIPAA Privacy Rule, as opposed to state law, authorizes such communications.

III. THE HIPAA PRIVACY RULE

Due to the increased use of electronic medical technology, the ever-expanding size of the health care industry, and the varying levels of state

18. J. Christopher Smith, Comment, *Recognizing the Split: The Jurisdictional Treatment of Defense Counsel's* Ex Parte *Contact with Plaintiff's Treating Physician*, 23 J. LEGAL PROF. 247, 247 (1999).
19. Natalie Theresa Johnston, Note, Ex Parte *Communications: Informal Discovery that HIPAA May Formally Eliminate*, 37 AM. J. TRIAL ADVOC. 177, 177 (2013); Scott Aripoli, Comment, *Hungry Hungry HIPAA: Has the Regulation Bitten Off More Than It Can Chew by Prohibiting* Ex Parte *Communication with Treating Physicians?*, 75 UMKC L. REV. 499, 504 (2006).
20. Aripoli, *supra* note 19, at 504.
21. *See, e.g.*, Crist v. Moffatt, 389 S.E.2d 41, 47 (N.C. 1990); Petrillo v. Syntex Labs., Inc., 499 N.E.2d 952, 957 (Ill. App. Ct. 1986); Sorenson v. Barbuto, 2008 UT 8, ¶21, 177 P.3d 614; Bulsara v. Watkins, 387 S.W.3d 165, 170 (Ark. 2012); Hasan v. Garvar, 108 So. 3d 570, 572 (Fla. 2012).
22. *See, e.g.*, MINN. STAT. § 595.02(5) (2013).
23. *See Crist*, 389 S.E.2d at 47.
24. *See Hasan*, 108 So. 3d at 574.
25. *See* Steinberg v. Jensen, 534 N.W.2d 361, 361 (Wis. 1995).
26. *See, e.g.*, Morris v. Thomson, 937 P.2d 1212 (Idaho 1997).
27. *In re* Collins, 286 S.W.3d 911, 920 (Tex. 2009).
28. Aripoli, *supra* note 19, at 507.

protections of private medical information,[29] the Department of Health and Human Services (HHS) promulgated rules in 2002 regulating the use[30] and disclosure[31] of protected health information (PHI),[32] pursuant to congressional delegation contained in HIPAA.[33] Recently amended in 2013,[34] these confidentiality regulations (the HIPAA Privacy Rule),[35] serve as a federal floor, permitting state laws governing the use and disclosure of PHI that are comparable or more stringent.[36]

As a general rule, the HIPAA Privacy Rule prohibits "covered entities,"[37] including most health care providers,[38] from using or disclosing PHI without obtaining the patient's prior written authorization or without giving the patient an opportunity "to agree to or prohibit or restrict" such uses or disclosures.[39] Countervailing considerations, however, counsel against prohibiting wholesale the use or disclosure of PHI without patient authorization. Therefore, the HIPAA Privacy Rule permits covered entities to use or disclose PHI without such authorizations in many instances related to treatment, payment, and health care operations,[40] as well as for numerous public policy purposes.[41]

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29. Standards for Privacy of Individually Identifiable Health Information, 64 Fed. Reg. 59,918-01, 59919-20 (Nov. 3, 1999) (to be codified at 45 C.F.R. pts. 160, 164).
30. As used in the HIPAA Privacy Rule, "use" refers to, *inter alia*, a covered entity's utilization of PHI. 45 C.F.R. § 160.103 (2013) (definition of "use").
31. As used in the HIPAA Privacy Rules, "disclosure" refers to a covered entity's transferring of PHI to another entity. *See id.* (definition of "disclosure").
32. *Id.* (definition of "protected health information"). Section 160.103 states:
    > [PHI] means individually identifiable health information
    > (i) Except as provided in paragraph (2) of this definition, that is:
    > (ii) Transmitted by electronic media;
    > (iii) Maintained in electronic media; or
    > (iv) Transmitted or maintained in any other form or media.

    Id.
33. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 101 Stat. 1936 (1996). Congress specifically delegated administrative authority to the U.S. Department of Health and Human Services to promulgate rules concerning confidentiality and privacy protections with relation to health information in HIPAA §§ 261–64.
34. *See* Other Modifications to the HIPAA Rules, 78 Fed. Reg. 5566 (Jan. 25, 2013).
35. 45 C.F.R. §§ 164.500-.534 (2013).
36. *Id.* § 160.203(b).
37. The term "covered entity" refers to (1) health plans, (2) health care clearing houses, and (3) health care providers "who transmit[] any health information in electronic form in connection with a transaction" prescribed by the HIPAA Privacy Rule. *Id.* § 160.103 (definition of "covered entity").
38. *See id.* (definition of "health care provider").
39. *Id.* §§ 164.508(a), .510.
40. *See id.* § 164.506(b)(1).
41. *Id.* § 164.512. The full list of public policy exceptions are as follows:
    - Uses and disclosures required by law.
    - Uses and disclosures for public health activities.
    - Disclosures about victims of abuse, neglect, or domestic violence.
    - Uses and disclosures for health oversight activities.
    - Disclosures for judicial and administrative proceedings.

One such public policy exception is codified in 45 C.F.R. § 164.512(e)(1). That regulation states, in part,

> (e) Standard: Disclosures for judicial and administrative proceedings.
> (1) Permitted disclosures. A covered entity may disclose [PHI] in the course of any judicial or administrative proceeding:
> (i) In response to an order of a court . . .; or
> (ii) In response to a subpoena, discovery request, or other lawful process . . . , if:
> (B) The covered entity receives satisfactory assurance . . . that reasonable efforts have been made . . . to secure a qualified protective order . . . .[42]

A "qualified protective order," as referenced in subsection (1)(ii)(B), includes a court order that limits the scope of any disclosure to the purpose of the litigation.[43]

Section 164.512(e)(1) therefore indicates that the HIPAA Privacy Rule permits covered entities to disclose PHI without prior patient authorization in certain circumstances pertaining to judicial or administrative proceedings. Few courts, however, have interpreted § 164.512(e)(1) with relation to the permissibility of *ex parte* communications.[44] Of those that have, most have held that the regulation does not prohibit courts from ordering *ex parte* communications as long as such orders limit the scope of the disclosures.[45] On the other hand, the Supreme Court of Missouri held that § 164.512(e)(1) *does not* authorize *ex parte* communications,[46] placing the Missouri court by itself in the "judicial proceedings" split.

- Disclosures for law enforcement purposes.
- Uses and disclosures about decedents.
- Uses and disclosures for cadaveric organ, eye, or tissue donation purposes.
- Uses and disclosures for research purposes.
- Uses and disclosures to avert a serious threat to health or safety.
- Uses and disclosures for specialized government functions.
- Disclosures for workers' compensation.

Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,462–63 (Dec. 28, 2000) (to be codified at 45 C.F.R. pts. 160, 164).

42. 45 C.F.R. § 164.512(e)(1)(i)-(ii).
43. *Id*. § 164.512(e)(1)(iv).
44. *See* Reading & Strong, *supra* note 4, at 31.
45. *Id*. at 33 (writing that the following courts determined that the HIPAA Privacy Rule allows *ex parte* communications: Robeck v. Lunas Constr. Clean-Up, Inc., No. 53576, 2011 WL 2139941 (Nev. 2011); Baker v. Wellstar Health Sys., 703 S.E.2d 601 (Ga. 2010); Lowen v. Via Christi Hosps. Wichita, Inc., No. 10-1201-RDR, 2010 WL 4739431 (D. Kan. Nov. 16, 2010); Holman v. Rasak, 785 N.W.2d 98 (Mich. 2010); Lee v. Superior Court, 177 Cal.App. 4th 1108 (Cal. Ct. App. 2009); Holmes v. Nightingale, 2007 OK 15, 158 P.3d 1039; Arons v. Jutkowitz, 880 N.E.2d 831 (N.Y. 2007); Reutter v. Weber, 179 P.3d 977 (Colo. 2007); Santaniello *ex rel.* Quadrini v. Sweet, No. 3:04CV806(RNC), 2007 WL 214605 (D. Conn. Jan. 25, 2007); Roberts v. Estep, 845 S.W.2d 544 (Ky. 1993)).
46. *See* State *ex rel.* Proctor v. Messina, 320 S.W.3d 145, 155 (Mo. 2010) (en banc).

IV. *STATE EX REL. PROCTOR V. MESSINA* AND THE "JUDICIAL PROCEEDINGS" SPLIT

If a state's medical confidentiality laws are less stringent than the HIPAA Privacy Rule,[47] or are silent on an issue as to which the HIPAA Privacy Rule speaks,[48] the federal regulations control the court's analysis.[49] Currently, a handful of courts have interpreted the permissibility of *ex parte* communications pursuant to the HIPAA Privacy Rule. Of those that have, all save one has found that the most applicable provision, § 164.512(e)(1)'s "judicial proceedings" exception, does not prohibit *ex parte* communications. Subpart A discusses the *Proctor* decision, and Subpart B explains the general rule advocated by the courts on the other side of the split.

A. *Proctor*: 45 C.F.R. § 164.512(e)(1) Does Not Authorize *Ex Parte* Communications

In a unanimous decision, the Supreme Court of Missouri, in *Proctor*, upheld the appellate court's invalidation of the trial court's order authorizing *ex parte* communications between defense counsel and plaintiff's heath care providers.[50] The court held that the HIPAA Privacy Rule does not authorize orders permitting informal *ex parte* discussions between a patient's health care provider and defense counsel, and that in issuing such an order the court exceeded its authority.[51] The Missouri Supreme Court first evaluated whether the HIPAA Privacy Rule preempted Missouri's *ex parte* communication rules.[52] Following this, the court determined whether § 164.512(e)(1) authorized *ex parte* communications.[53]

Examining the applicable law, the court found that Missouri law neither authorizes, nor prohibits *ex parte* communications; case law provides merely that plaintiffs may not be compelled to authorize *ex parte* communications, and a plaintiff's physician may not be compelled to take part in such communications.[54] The court held that the HIPAA Privacy Rule, on the other hand, does, absent exceptions,[55] prohibit *ex parte* communications.[56] The court therefore concluded that, although there was no preemption issue,

47. 45 C.F.R. § 160.203(b) (2013).
48. *See Proctor*, 320 S.W.3d at 152.
49. 42 U.S.C. § 1320d-7(a) (2012); Johnston, *supra* note 19, at 180.
50. *Proctor*, 320 S.W.3d at 158.
51. *Id.* at 155, 158.
52. *Id.* at 147–53.
53. *Id.* at 153–57.
54. *Id.* at 150–51 (citing Brandt v. Pelican, 856 S.W.2d 658, 662 (Mo. 1993) (en banc) (reaffirming State *ex rel.* Woytus v. Ryan, 776 S.W.2d 389 (Mo. 1989)) (en banc))).
55. *See generally* 45 C.F.R. § 164.502(a) (2013).
56. *Proctor*, 320 S.W.3d at 152.

because there was no applicable Missouri law on point, the HIPAA Privacy Rule provisions controlled the analysis.[57]

The court next determined whether § 164.512(e)(1), the applicable exception, in this instance,[58] to the HIPAA Privacy Rule's general prohibition of the unauthorized disclosure of PHI,[59] authorized *ex parte* communications.[60] The court determined the answer to this question by analyzing the meaning of the words "in the course of" and "judicial proceedings" as contained in § 164.512(e)(1).[61] The court presumed that the words were used in accordance with their plain and ordinary meanings.[62] The common understanding of "in the course of" a judicial proceeding "include[s] matters that occur while a case is pending in a judicial forum."[63] The court interpreted "judicial proceeding" narrowly,[64] as the phrase is used in Missouri's criminal code, to mean a proceeding "authorized by or held under the supervision of a court . . . ."[65] "Authorize" and "supervise," as defined in *Black's Law Dictionary*, mean, *inter alia*, "[t]o endow with authority or effective legal power, warrant, or right" and "[t]o have general oversight over," respectively.[66]

Based on the preceding definitions, the court determined that the language "in the course of a judicial . . . proceeding," as used in

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57. *Id.* at 153.

58. The court noted that the HIPAA Privacy Rule permits *ex parte* communications between treating physicians and defense counsel when the patient issues an authorization pursuant to 45 C.F.R. § 164.508(a)(1). *Proctor*, 320 S.W.3d at 154. Section 164.508(a)(1) states,

> Except as otherwise permitted or required by this subchapter, a covered entity may not use or disclose [PHI] without an authorization that is valid under this section. When a covered entity obtains or receives a valid authorization for its use or disclosure of [PHI], such use or disclosure must be consistent with such authorization.

45 C.F.R. § 164.508(a)(1). The court correctly noted that Mrs. Proctor issued no such written authorization. *Proctor*, 320 S.W.3d at 154. Therefore, the court examined the applicable "judicial proceedings" exception contained in 45 C.F.R. § 164.512(e)(1). *Proctor*, 320 S.W.3d at 153–57.

59. 45 C.F.R. § 164.508(a).

60. *Proctor*, 320 S.W.3d at 153–57.

61. *Id.* at 155–57.

62. *Id.* at 155.

63. *Id.* at 155–56. The Court held that this comported with the dictionary definition of the phrase. *Id.* at 156 (citing THE NEW OXFORD AMERICAN DICTIONARY 389 (2d ed. 2005)).

64. The court interpreted "judicial proceedings" narrowly because it concluded that "a narrow definition is implicit in HIPAA's regulatory requirement in 45 C.F.R. § 164.512(e)(1) . . . ." *Proctor*, 320 S.W.3d at 156. In support of this proposition, the court cited the following language,

> In § 164.512(e) of the final rule, we permit covered entities to disclose [PHI] ***in a*** judicial or administrative proceeding if the request for such [PHI] is made through or pursuant to an order from a court or administrative tribunal or in response to a subpoena or discovery request from, or other lawful process by [,] a party to the proceeding.

Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,529 (Dec. 28, 2000) (to be codified at 45 C.F.R. pts. 160, 164) (cited in *Proctor*, 320 S.W.3d at 156) (emphasis provided by the court)).

65. *Proctor*, 320 S.W.3d at 156 (citing MO. REV. STAT. § 575.010(4) (2013)) (internal quotation marks omitted).

66. *Id.* (citing BLACK'S LAW DICTIONARY 122, 1290 (5th ed. 1979)) (internal quotation marks omitted).

§ 164.512(e)(1), requires disclosures made under that exception "be [made] under the supervisory authority of the court either through discovery or through other formal court procedures."[67] Trial courts in Missouri do not have supervisory authority over informal proceedings, of which are included *ex parte* communications.[68] Accordingly, the court held that the "judicial proceedings" exception does not authorize such communications,[69] "and, consequently, a trial court has no authority to issue a purported HIPAA order advising the plaintiff's non-party treating physicians that they may or may not participate in informal discovery via *ex parte* communications."[70]

Therefore, because informal *ex parte* communications are not authorized by the HIPAA Privacy Rule, the court affirmed the court of appeal's invalidation of the trial court's order to the contrary.[71] In so doing, however, the court positioned itself apart from her sister state courts.

B. The Majority Rule: 45 C.F.R. § 164.512(e)(1) Does Not Prohibit *Ex Parte* Communications

Missouri stands alone. All other courts that have examined § 164.512(e) with respect to *ex parte* communications have held that the regulation authorizes such communications.[72] These courts generally hold that unauthorized *ex parte* communications between a plaintiff's non-treating health care provider and defense counsel do not violate the HIPAA Privacy Rule so long as the communications are accompanied by a protective order limiting the scope of such discussions to medical information at issue in the case.[73] Some courts only require assurances that the defendant has used "reasonable efforts" in securing a qualified protective order by the court.[74]

In *Holmes v. Nightingale*, the Supreme Court of Oklahoma held that "45 C.F.R. § 1645.512 clearly anticipates the issuance of court orders allowing *ex parte* communications with physicians."[75] In *Holmes*, Theresa Lee Elam's estate filed a malpractice suit against Interim Healthcare of Tulsa and St. John Health System, Inc.[76] The trial court issued an order allowing *ex parte* communications concerning "any record of any health care provider[']s care and treatment of [decedent]."[77] The state high court determined that

67. *Id*. at 156.
68. *Id*. at 157.
69. *Id.*
70. *Id.*
71. *See id.* at 158.
72. Reading & Strong, *supra* note 4, at 33.
73. *See, e.g.*, Holman v. Rasak, 785 N.W.2d 98, 109 (Mich. 2009).
74. *See* Holmes v. Nightingale, 2007 OK 15, ¶ 16, 158 P.3d 1039, 1044.
75. *Id*. at ¶ 24, 158 P.3d at 1046.
76. *Id*. at ¶ 5, 158 P.3d at 1043.
77. *Id*. at ¶ 24, 158 P.3d at 1046 (internal quotations omitted).

§ 164.512(e)(1)(i) forecasts that *ex parte* "disclosures may be allowed where a court order so provides."[78] Therefore, the court held that, rather than bar *ex parte* communications, the HIPAA Privacy Rule permits such disclosures as long as they are accompanied by "certain procedures," including a narrowly tailored trial court order drafted in permissive language.[79] The court, however, took issue with the court order's overly broad permitted disclosures, as well as the absence of any statement assuring health care providers that they are not *compelled* to disclose the decedent's PHI with defense counsel, and so, invalidated the order.[80]

Some courts hold that the HIPAA Privacy Rule only requires that defendants use "reasonable efforts" to secure a court order limiting the PHI sought in *ex parte* communications to those at issue in the litigation.[81] This view is based on subsection (ii) of § 164.512(e)(1), which states a covered entity may disclose PHI,

> [i]n response to a subpoena, discovery, request, or other lawful process that is not accompanied by [a court order], if . . . (B) [t]he covered entity receives satisfactory assurance . . . from the party seeking the information that reasonable efforts have been made . . . to secure a qualified protective order that meets the requirements of [§ 164.512(e)(1)(v)].[82]

Based on this subsection, in *Holman v. Rasak*, the Michigan Supreme Court held that § 164.512(e) does not prohibit *ex parte* communications because such communications qualify "at least [as] 'other lawful process[es]'" and, therefore, are permitted under the HIPAA Privacy Rule even absent a court order, so long as health care providers are satisfactorily assured that defense counsel has made "reasonable efforts" to receive a qualified protective order from the court.[83]

Holmes and *Holman* represent the general approaches the majority of courts that have interpreted § 164.512(e)(1) with respect to *ex parte* communications have utilized. They do not, however, comport with the general policy reasons that militate against judicial allowance of *ex parte* communications absent a patient's authorization, nor do they exemplify the most straightforward interpretations of § 164.512(e).

78. *Id.* at ¶ 11, 158 P.3d at 1044.
79. *Id.* at ¶ 31, 158 P.3d at 1044.
80. *Id.* at ¶ 28, 158 P.3d at 1046–47.
81. *See* Baker v. Wellstar Health Sys., Inc., 703 S.E.2d 601, 603 (Ga. 2010).
82. 45 C.F.R. § 164.512(e)(1)(ii)(B) (2013).
83. Holman v. Rasak, 785 N.W.2d 98, 100, 106 (Mich. 2009).

V. *PROCTOR*, POLICY, AND PLAIN MEANING

While the minority, *Proctor* was correctly decided. By holding that the HIPAA Privacy Rule does not authorize *ex parte* communications, the Missouri high court complied not only with prevailing notions of public policy, but also with the most direct and plain reading of § 164.512(e)(1). For these reasons, *Proctor* provides a better rule than those embraced by *Holman*, *Holmes*, and the other courts in the majority. Section A discusses the public policy rationales that align with the *Proctor* decision, and Section B discusses the regulatory interpretation issue.

A. Public Policy

The court in *Proctor* issued a ruling that comports with many of the public policy rationales certain state courts have articulated when determining the validity of *ex parte* communications under their states' substantive laws. In particular, the Missouri court's decision complies with the policies of protecting physicians from unfair penalties under a harsh federal penalty scheme, ensuring physician-patient confidentiality is respected, and favoring a level of fairness provided by the use of formal discovery procedures. This Section discusses these rationales.

The *Proctor* court's reading of § 164.512(e)(1) comports with the general policy of protecting physicians from the risk of unfair sanctions caused by inadvertently divulging protected information during *ex parte* communications.[84] While the *Proctor* court rested its decision on its interpretation of the HIPAA Privacy Rule, it also noted, at the end of its opinion, that

> [c]ompliance with [the] HIPAA [Privacy Rule] and this [c]ourt's rules of discovery will ensure the disclosure of the health information and at the same time limit the potential liability of a treating physician who was prompted to provide [protected information].[85]

In a decision issued pre-HIPAA Privacy Rule, the Supreme Court of North Carolina in *Crist v. Moffat* articulated multiple policy rationales that weighed in favor of barring *ex parte* communications, including that of protecting physicians from liability.[86] In *Crist*, the North Carolina court feared that, either due to "inadvertence or pressure by the interviewer," physicians might breach patient confidentiality and so open themselves up to tort liability or

84. Crist v. Moffat, 389 S.E.2d 41, 47 (N.C. 1990).
85. State *ex rel.* Proctor v. Messina, 320 S.W.3d 145, 158 (Mo. 2010) (en banc).
86. *Crist*, 389 S.E.2d at 47.

even professional sanctions.[87] Under the HIPAA Privacy Rule, however, as noted in *Proctor*, unlawful disclosures may lead not only to state medical association sanctions or lawsuits instituted by former patients, but also, for example, fines up to $50,000, up to one year of imprisonment, or both, as provided by federal statute.[88] Therefore, the *Proctor* decision provides much needed protection to health care providers, untrained in the law, who find themselves witnesses in malpractice actions and subject to possible federal, civil, and monetary penalties, by strictly limiting the availability of *ex parte* communications to those authorized by the patient.

Other important public policy considerations that militate against reading § 164.512(e)(1) as permitting *ex parte* communications include those of physician-patient confidentiality and the suitability of formal discovery tools.[89] Interpreting § 164.512(e)(1) as allowing *ex parte* communications engenders possible violation of the physician's duty of confidentiality, as mentioned above, and is at odds with the HIPAA Privacy Rule's general prohibition of the unauthorized disclosure of confidential information. While Missouri plaintiffs waive the physician-patient privilege and the ethical duty of confidentiality regarding medical information at issue in the proceeding,[90] in refusing to read § 164.512(e)(1) as permitting *ex parte* confidential disclosures absent authorization, the *Proctor* court implicitly acknowledged the seriousness with which the HIPAA Privacy Rule considers the use and disclosure of PHI. In so acknowledging, the Missouri court assured protection of both physicians, at risk of exorbitant fines or of imprisonment if found to have violated the HIPAA Privacy Rule, and patients, at risk of suffering from broad disclosures of confidential information, a risk compounded by the growing prevalence of electronic medical records, one of the main impetuses behind the creation of the HIPAA Privacy Rule.[91]

The *Crist* court noted that use of formal discovery methods strikes a balance between permitting defense counsel to attempt to find all facts pertinent to his or her client's case, while protecting patient confidentiality through the imposition of formal requirements, such as the presence of plaintiff's counsel or court proceedings.[92] In reading the HIPAA Privacy Rule as favoring formal discovery methods over the unrestrained use of informal tools, *Proctor* ensured that the balance identified by *Crist* is

87. *Id*.
88. *Proctor*, 320 S.W.3d at 158 n.9; 42 U.S.C. § 1320d-6(b).
89. *Crist*, 389 S.E.2d at 47.
90. *See Proctor*, 320 S.W.3d at 152; Ted Agniel et al., Ex Parte *Communications with Treating Health Care Providers: Does HIPAA Change Missouri Law?*, 63 J. MO. B. 296, 296–97 (2007).
91. *See* Standards for Privacy of Individually Identifiable Health Information, 64 Fed. Reg. 82,462, 82,467 (Dec. 28, 2000) (to be codified at 45 C.F.R. pts. 160, 164) (providing examples of unauthorized medical record disclosures that proved the necessity of a federal medical information regulatory scheme).
92. *Crist*, 389 S.E.2d at 46.

observed in Missouri. This guarantees a modicum of fair play in medical malpractice and other related fields of litigation, an especially important aspiration in an era in which the notion of protecting confidential health information is deemed sufficiently important to be codified in federal statute and regulations.

Therefore, *Proctor* is in line with very important public policy rationales, which are even more relevant in the age of the HIPAA Privacy Rule.

B. 45 C.F.R. § 164.512's Plain Meaning

Proctor is not merely correct on public policy grounds. The Missouri high court's decision also comports with the plain meaning of § 164.512(e). That courts such as *Holman* and *Holmes* utilize a more strained interpretation of the "judicial proceedings" exception only gives further support to the correctness of *Proctor*'s reading of the regulation.

To summarize *Proctor*'s interpretation of § 164.512(e), the court determined that subsection (1) of that provision, which allows health care providers to disclose PHI "in the course of any . . . judicial proceeding," means that PHI may be disclosed pursuant to formal discovery methods which, in Missouri, are utilized under the supervisory authority of a court. Because *ex parte* communications are informal discovery tools, they are not implicated by § 164.512(e)(1). This construction, based on ordinary dictionary definitions of "in the course of" and "judicial proceeding," correctly applied the canon of construction that a legislative act's plain meaning "should be conclusive," unless that meaning is found to be inimical to the drafters' purposes.[93] *Proctor* gives due respect to the most obvious reading of the regulatory language, and so, is the most reasonable interpretation.

On the other hand, the interpretation supplied by the majority is not consistent with the most direct reading of § 164.512. In her dissent in the *Holman* case mentioned above, Justice Hathaway of the Michigan Supreme Court provided a compelling counterargument to the interpretation that protective orders, or "reasonable efforts" to secure such orders, are sufficient predicates upon which to authorize *ex parte* communications. Justice Hathaway's argument is based on § 164.512's introductory paragraph. That paragraph provides:

> A covered entity may use or disclose [PHI] without the written authorization of the individual . . ., or the opportunity for the individual to

93. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989) (citing Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)).

> agree or object . . ., in the situations covered by this section, subject to the applicable requirements of this section. *When the covered entity is required by this section to inform the individual of,* or *when the individual may agree to, a use or disclosure permitted by this section, the covered entity's information* and the individual's agreement may be given *orally*.[94]

As argued by Justice Hathaway, this language limits the availability of oral disclosures of PHI to those instances in which a patient is required to authorize, or be given the opportunity to agree or object to, the disclosure of PHI.[95] Because the *ex parte* discussions at issue are primarily oral communications, the introduction to § 164.512 explicitly bars such communications from its reach, absent application of the heightened authorization or opportunity to object protections afforded by the HIPAA Privacy Rule.[96] This interpretation is based on the plain meaning of the regulation and, thus, should be given effect over other, more strained interpretations.

Proctor provides a plain meaning interpretation of § 164.512 that is properly tethered to the regulatory language and gives clearer insight into Congress's and HHS's intent than the majority of courts that have approached this question. Along with Justice Hathaway's dissent, *Proctor* provides the better answer to the question whether the HIPAA Privacy Rule permits *ex parte* communications between a patient's treating, non-party health care provider and defense counsel when compared to *Holman* and the other cases' artificial interpretations. Together with its alignment with important public policy interests, *Proctor* provides the better rule.

VI. CONCLUSION

In holding that the HIPAA Privacy Rule does not by its terms authorize *ex parte* communications between defense counsel and plaintiff's treating, non-party health care provider, the Supreme Court of Missouri placed itself in the minority. The *Proctor* court's decision, however, complied both with important public policy rationales related to the protection of health care providers from severe federal penalties (along with possible civil liability and licensing sanctions), the protection of harmful and unnecessary disclosures of confidential health information, and the procedural fairness that inheres in the use of formal discovery tools. Further, *Proctor*'s interpretation of the "judicial proceedings" exception of § 164.512(e) is more reasonable than the majority's construction. Therefore, *Proctor* provides the better answer to the

94. 45 C.F.R. § 164.512 (2013) (emphasis added).
95. Holman v. Rasak, 785 N.W.2d 98, 112 (Mich. 2009) (Hathaway, J., dissenting).
96. *Id.* at 110, 112.

"judicial proceedings" split, and its analysis should be utilized by Missouri's sister state courts.