A PROPOSAL TO IMPROVE WASHINGTON'S RULES ON EX PARTE CONTACT

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Abstract: Privilege doctrines play an important role in allowing clients to confide in their trusted attorneys and doctors. The intersection of two privilege doctrines in medical malpractice litigation—physician-patient privilege and attorney-client privilege—places physicians working at corporate hospitals in a catch-22 of allegiances. On one hand, physicians cannot disclose patient information, whereas on the other, they must assist their employer in defending the case. These concerns are heightened when attorneys seek to communicate with non-party physicians ex parte—that is, unsupervised. In *Youngs v. Peacehealth*, the Washington State Supreme Court allowed corporate defendants to communicate ex parte with the plaintiff's treating physician under the veil of attorney-client privilege. The *Youngs* standard is relatively ambiguous on the scope of acceptable communication, however. This leaves patients at risk of having their privileged information inadvertently disclosed and physicians at risk for accidentally doing so. It also potentially provides unfair litigation advantages to corporate defendants. To help solve these issues, this Comment offers modifications to the Washington State Civil Rules that (1) require parties to conduct a Rule 26(f) discovery conference before engaging in ex parte communications with non-party treating physicians; and (2) require defendants to submit a motion to the Superior Court explaining why the ex parte communications are necessary to their discovery process.

INTRODUCTION

Consider the following scenario.[1] A patient checks into a major Washington hospital to receive knee surgery and their physicians collect an extensive medical record. Blood diagnostics reveal they may be at risk for a future heart condition. Their surgical team includes Doctors A, B, C, and D. Following the surgery, the patient develops sepsis and loses both of their legs. The plaintiff sues for medical malpractice, naming Doctor A and the corporate hospital as parties. By filing the suit, the plaintiff waives the confidentiality of limited information[2] that is related to their injury. As the case proceeds into discovery, the hospital's counsel deposes Doctor A. The hospital's counsel also requests to interview Doctors B, C, and D without

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1. The facts of this hypothetical are largely borrowed from Youngs v. Peacehealth, 179 Wash. 2d 645, 316 P.3d 1035 (2014).

2. *See infra* notes 49–51 and accompanying text.

the plaintiff's counsel present, arguing that these interviews are necessary for them to collect information to defend the lawsuit. The plaintiff's counsel files a motion to object, arguing that these interviews should only take place in a deposition, since the patient's confidential information might be inadvertently disclosed. How does the trial court rule?

Under Washington law, the trial court must rule for the hospital's counsel, and allow them to interview Doctors B, C, and D about "the facts of the alleged negligent incident."[3] Those doctors each state that the plaintiff's injury was not caused by a breach in the standard of care. After interviewing those doctors, the hospital's counsel incorporates their testimony into a motion for summary judgment and secures a dismissal of the plaintiff's case.

The *Youngs v. Peacehealth*[4] standard is problematic for several reasons. First, physicians and counsel alike are required to guess where to draw the line as to what information is permissible to disclose.[5] Second, physicians may be exposed to liability for inadvertently exposing confidential patient information.[6] Third, without the presence of opposing counsel to regulate the flow of information, defense counsel may gain an unfair advantage by manipulating a physician's testimony.[7]

This Comment provides several approaches to solve these problems. It begins by offering amendments to the Washington State Local Civil Rules that require parties to conduct a Rule 26(f) discovery conference before engaging in ex parte communications with a nonparty treating physician. Next, should the party still seek to interview the physician ex parte, this Comment proposes that defendants should be required to submit a motion to the superior court explaining why the ex parte communications are necessary for discovery. These proposals expand the procedures used to evaluate whether parties can communicate ex parte with a nonparty treating physician.

This Comment proceeds in four parts. Part I provides an overview of medical malpractice litigation in Washington State. Part II discusses the two competing privilege doctrines—physician-patient confidentiality and attorney-client privilege—and sets forth their legal foundations in Washington law. Part III explores the intersection of these doctrines and summarizes arguments both for and against ex parte contact with treating physicians. Part IV sets forth a solution to the issues described.

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3. *Youngs*, 179 Wash. 2d at 664, 316 P.3d at 1045.
4. 179 Wash. 2d 645, 316 P.3d 1035 (2014).
5. *See id.* at 673–74, 316 P.3d at 1049 (Stephens, J., concurring in part and dissenting in part).
6. *See id.*
7. *See id.*

I. THE CONTEXT: EX PARTE COMMUNICATIONS IN MEDICAL MALPRACTICE LITIGATION

Medical malpractice cases form an important part of the civil docket in Washington state courts.[8] In 2015, twenty-nine medical malpractice claims were filed per 100,000 Washington residents.[9] Between 2012 and 2016, Washington plaintiffs secured over $312.9 million in total compensation by filing these claims.[10] In turn, significant costs were placed on insurers, which are passed onto consumers via increased insurance costs.[11]

In Washington, medical malpractice claims typically take three forms: (1) professional negligence; (2) breach of warranty; or (3) failure to obtain informed consent.[12] These claims require the plaintiff to establish the traditional elements of negligence—duty, breach, causation, and damages[13]—albeit at an elevated level of technical expertise due to the suit's underlying subject matter.[14] Washington also recognizes the doctrine of corporate negligence in medical malpractice claims.[15] This doctrine is increasingly important, given that many patients in Washington receive healthcare at incorporated hospitals.[16] If a patient is suing for medical

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8. *See, e.g.*, Roger Stark, *The Cost of Medical Malpractice Lawsuits in Washington State—Lessons from Texas Reform*, WASH. POL'Y CTR. (April 11, 2016), https://www.washingtonpolicy.org/publications/detail/the-cost-of-medical-malpractice-lawsuits-in-washington-state-lessons-from-texas-reform [https://perma.cc/G2LW-PTTV] (summarizing, across the past several decades, three waves of medical malpractice crises in Washington state).

9. Laura Dyrda, *A State-by-State Breakdown of Medical Malpractice Suits*, BECKER'S HOSP. REV. (Jan. 11, 2017), https://www.beckershospitalreview.com/hospital-physician-relationships/a-state-by-state-breakdown-of-medical-malpractice-suits.html [https://perma.cc/XK4G-A3E3]; *see also* CIVIL JUSTICE RES. GRP., MEDICAL MALPRACTICE BY THE NUMBERS (2019), https://centerjd.org/cjrg/Numbers.pdf [https://perma.cc/2MGK-WYPV] (reporting that 0.8% to 1% of all hospital patients "become victims of" medical malpractice); *The Critical Role of a Medical Expert Witness in a Medical Malpractice Case*, HG EXPERTS, https://www.hg.org/legal-articles/the-critical-role-of-a-medical-expert-witness-in-a-medical-malpractice-case-41400 [https://perma.cc/5GB5-CFDZ] [hereinafter HG EXPERTS] ("[A]bout 12 million adults that have sought treatment in the United States have been misdiagnosed each year.").

10. MIKE KREIDLER, OFFICE OF THE INS. COMM'R FOR WASH. STATE, 2017 MEDICAL MALPRACTICE ANNUAL REPORT 10 (2017), https://www.insurance.wa.gov/sites/default/files/tdocuments/2017-med-mal-annual-Report.pdf [https://perma.cc/M9TU-FX9N].

11. *See* Stark, *supra* note 8.

12. *See* WASH. REV. CODE § 7.70.030 (2019) (outlining medical malpractice claims).

13. *See* Paetsch v. Spokane Dermatology Clinic, 182 Wash. 2d 842, 850, 348 P.3d 389, 393 (2015).

14. Coulter Boeschen, *Medical Malpractice: Using Expert Witnesses*, NOLO, https://www.nolo.com/legal-encyclopedia/medical-malpractice-using-expert-witnesses-30087.html [https://perma.cc/Z4V2-2L28].

15. *See* Lowy v. PeaceHealth, 159 Wash. App. 715, 717, 247 P.3d 7, 8 (2011).

16. *See* Youngs v. Peacehealth, 179 Wash. 2d 645, 680, 316 P.3d 1035, 1060 (2014) (Stephens, J.

malpractice, it is now standard procedure for the patient to name both the treating physicians and the corporate hospital as defendants.[17]

A. Pre-trial case development in medical malpractice litigation

Medical malpractice suits often settle in negotiations before trial.[18] These suits are technically complex and usually require expert testimony.[19] Therefore, discovery plays an immensely important role in allowing both plaintiffs and defendants to seek out relevant information and to develop their cases.[20] Oftentimes, a favorable outcome in a medical malpractice claim is contingent upon the counsel's effectiveness in conducting robust discovery.[21]

Washington attorneys employ a mix of both formal and informal discovery tools,[22] with the Washington Superior Court Local Civil Rules (LCRs) guiding the formal discovery process.[23] In the medical malpractice context, the three primary methods of formal discovery include depositions, interrogatories, and requests for production.[24] Depositions are particularly important—for example, nearly 80% of treating physicians report being deposed in malpractice suits, and depending on what information the deposed reveals, "the deposition has the potential to make or break a medical malpractice case."[25]

Informal methods of discovery are also important.[26] These methods can include witness interviews, accessing government records, and internet

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dissenting) (noting how "many plaintiff-patients have no realistic opportunity to arrange for their health care outside the corporate setting").

17. *See, e.g.*, *id.* at 645, 316 P.3d at 1035 (naming both physicians and the hospital in the suit); *Lowy*, 159 Wash. App. at 715, 247 P.3d at 7 (same).

18. *See, e.g.*, *The Trial Process in a Medical Malpractice Lawsuit*, ALLLAW, https://www.alllaw.com/articles/nolo/medical-malpractice/trial-process-lawsuit.html [https://perma.cc/C9VG-U2QD] (reporting how, on average, 93% of medical malpractice claims are resolved before trial).

19. *See id.*

20. *See Discovery Techniques in Medical Malpractice Cases*, CROTHER L. FIRM, https://www.clf-law.com/Medical-Malpractice-Newsroom/Discovery-Techniques-in-Medical-Malpractice-Cases.shtml [https://perma.cc/W9Q3-2DSQ].

21. *See* HG EXPERTS, *supra* note 9, at 1.

22. Gerald Williams, *Formal Discovery Versus Informal Discovery*, WILLIAMS DIVORCE AND FAMILY LAW (2007), https://divorcelawyermn.com/2007/11/25/formal-discover/ [https://perma.cc/ZBQ8-9NU8].

23. *See* WASH. R. CIV. P 26.

24. *See Discovery Techniques in Medical Malpractice Cases*, *supra* note 20.

25. *See id*.

26. *See* Amy E. Morgan, *Informal Discovery: Simple Strategies for Cost-Effective Litigation*, 18 TRIALS & TRIBULATIONS (DRI, Apr. 23, 2012), https://www.polsinelli.com/-/media/files/articles-by-

searches.[27] Informal discovery is beneficial to litigants for at least three reasons: (1) it is more cost-effective than formal discovery; (2) it need not be conducted along formal discovery timelines; and (3) it can reveal "smoking-gun" evidence at an early stage.[28] And since plaintiffs' attorneys often operate on contingency-fee arrangements, the calculation of the costs required to bring the suit versus the amount of potential damages weighs heavily on whether an injured patient can find an attorney willing to litigate their claims.[29]

While not required in Washington, superior court judges may order the parties to participate in a discovery conference.[30] Alternatively, the parties may independently decide to participate.[31] Parties engaging in the discovery conference will draft a discovery plan, including: (1) a statement of the issues; (2) a plan and schedule of discovery; (3) any limitations proposed to be placed on the discovery; (4) any other proposed orders regarding the discovery; and (5) other matters.[32] Then, following the conference, the court will issue an order identifying the "discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action."[33]

Discovery conferences are viewed as valuable opportunities to streamline discovery and forestall costly discovery disputes.[34] In particular, counsel can discuss concerns including preserving documents, collecting and producing data, and discussing work product, physician-patient, and attorney-client privilege limitations.[35] These investments

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attorneys/morgan_april_2012.pdf [https://perma.cc/XE8G-NQ95].

27. *See id.*

28. *See id.*

29. *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 670 n.2, 679–80 (1986).

30. *See* WASH. R. CIV. P. 26(f) ("At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery.").

31. *See id.*

32. *See id.* § 26(f)(1)–(5).

33. *See id.*

34. Helen Geib, *How to Use a Rule 26(f) Conference to Cut Discovery Costs and Disputes*, L. TECH. TODAY (Feb. 2, 2015), https://www.lawtechnologytoday.org/2015/02/use-rule-26f-conference-cut-discovery-costs-disputes/ [https://perma.cc/6T8U-KD92].

35. *See* Steven D. Ginsburg, *Tips on Meet-and-Confer Conferences*, A.B.A. (Feb. 28, 2017), https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/practice/2017/tips-on-meet-and-confer-conferences/ [https://perma.cc/KM69-BTES] ("Resolving issues either because counsel recognize that the court would order it if litigated, or to

prior to discovery yield later benefits by reducing discovery motions and judicial intervention.[36] The parties do not have to reach a consensus; as long as the parties "take defensible positions, communicate those positions, and listen to what each other has to say, they have done everything that the discovery rules require."[37]

B. Ex Parte Communications are a Valuable Discovery Tool

Ex parte communications with nonparty witnesses are informal interviews where the rules of discovery do not apply.[38] Attorneys use these interviews to assess whether witnesses have sufficiently valuable information to warrant a deposition or to build their knowledge of the facts underlying the case.[39] These interviews are a useful tool, given that they can be "more efficient and cost effective in obtaining information than a deposition because no costly court reporter is present and no opposing counsel interrupts . . . questions with objections."[40] Witness statements from these informal interviews can then be introduced into evidence via a declaration attached to a motion.[41]

However, ethics guidelines and privilege doctrines limit the availability and scope of ex parte communications. The Washington Rules of Professional Conduct state that "a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the

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expedite and economize the discovery process, are goals worth considering."); Matt Bryant, *Making Your Rule 25(f) Meet and Confer an Effective Mechanism for Focusing Discovery and Mitigating Discovery Costs*, OHRENSTEIN & BROWN (Oct. 17, 2017), http://www.oandb.com/making-your-rule-26f-meet-and-confer-an-effective-mechanism-for-focusing-discovery-and-mitigating-discovery-costs/ [https://perma.cc/4JQM-TAD9].

36. *See* Steven S. Gensler, *Bull's Eye View of Cooperation in Discovery*, 10 SEDONA CONF. J. 363, 368 (2009) (noting that discovery conferences "ensure that the parties only present 'real' discovery disputes to the judge, not sloppy misunderstandings or uninformed stonewalling"); Ginsburg, *supra* note 35 ("Attorneys can resolve issues . . . at the onset of a matter and minimize the need for judicial intervention.").

37. *See* Ginsburg, *supra* note 35.

38. *See* John Jennings, *Physician-Patient Relationship: The Permissibility of Ex Parte Communications Between Plaintiff's Treating Physicians and Defense Counsel*, 59 MO. L. REV. 441, 459 n.101 (1994).

39. *See id.*

40. *See* Morgan, *supra* note 26; *see also* CJB LAW, CONDUCTING EX PARTE INTERVIEWS 1 (2019), http://www.lawcjb.com/wp-content/uploads/2014/12/Ex-Parte.pdf [https://perma.cc/2L74-6QZZ] ("[I]nformal ex parte interviews remain the hallmark of efficient trial preparation.").

41. *See* WASH. REV. CODE § 9A.72.085 (2019) ("Whenever . . . any matter in an official proceeding is required or permitted to be supported . . . the matter may with like force and effect be supported . . . by an unsworn written statement . . .").

consent of the other lawyer or is authorized to do so by law or a court order."[42] That is, lawyers can engage in communication informally with a witness unless the witness is represented by opposing counsel (for instance, if the witness is a party to the suit).[43]

Applying these rules to a hypothetical medical malpractice suit, the plaintiff or defendant is allowed to communicate ex parte with any of the plaintiff's treating physicians not named in the lawsuit. The parties may only communicate with a treating physician named in the suit when opposing counsel is present. But the scenario is further complicated—and constrained—by the privilege doctrines of physician-patient confidentiality and attorney-client privilege.

II. COMPETING PHYSICIAN-PATIENT AND ATTORNEY-CLIENT PRIVILEGES AND DUTIES IN MEDICAL MALPRACTICE LITIGATION

Privilege doctrines regulate the flow of information in a lawsuit. These doctrines protect the content of a confidential communication made in the course of a privileged relationship.[44] They are often narrowly construed, since they contradict the fundamental evidentiary principle that "the public . . . has a right to every [person's] evidence."[45] Two such doctrines are explored below: the physician-patient privilege and the attorney-client privilege.

A. The Physician-Patient Privilege Doctrine

Physician-patient privilege protects a patient's information from being disclosed to third parties and ensures that a patient's communications with

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42. WASH. R. PROF'L CONDUCT § 4.2; *see also* JOHN K. VILLA, EX PARTE INTERVIEWS WITH CURRENT AND FORMER EMPLOYEES 124, 128 n.6 (2007), https://www.wc.com/portalresource/lookup/poid/Z1tOl9NPluKPtDNIqLMRVPMQiLsSwa3Dm0!/document.name=/Line%20308_PUBLICATION%20%20Ex%20Parte%20Interviews%20with%20Current%20and%20Former%20Employees.pdf [https://perma.cc/Q2Q3-TPLG] (internal citations omitted); *see also Ex Parte*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Done or made at the instance and for the benefit of one party only, and without notice to, or argument by, anyone having an adverse interest; of, relating to, or involving court action taken or received by one party without notice to the other . . . .").

43. *See* WASH R. PROF'L CONDUCT § 4.2; *see also* WASH. R. CIV. P. 17 (defining a "party").

44. *See generally* THOMAS E. SPAHN, MCGUIRE WOODS LLP, A PRACTITIONER'S SUMMARY GUIDE TO THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE (2013), https://media.mcguirewoods.com/publications/Practitioners-Summary-Guide-Attorney-Client-Privilege.pdf [https://perma.cc/WF2A-3L3D].

45. *See* Daniel W. Shuman, The Origins of the Physician-Patient Privilege and Professional Secret, 39 SW. L.J. 661, 663 n.7 (1985) (quoting Trammel v. United States, 445 U.S. 40, 50–51 (1980)) (discussing past prohibitions on collecting privileged information).

their doctor cannot be used against the patient in most legal proceedings.[46] This privilege is an increasingly important aspect of the modern healthcare system.[47]

All states afford their citizens with at least some form of privilege that prevents third parties from accessing or disclosing confidential information shared with their physicians.[48] Both the Washington State Legislature and Washington courts have helped construct the state's physician-patient privilege doctrine. RCW 5.60.060(4) states "a physician . . . shall not, without consent of his or her patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him or her to prescribe or act for the patient."[49] Two important exceptions limit RCW 5.60.060(4). First, judicial proceedings regarding a child's injury, neglect, or sexual abuse or the cause thereof are exempted—meaning physician-patient confidentiality is waived per se.[50] Second, a plaintiff-patient waives this privilege ninety days after filing an action for personal injuries or wrongful death.[51] But waiving this privilege does not resolve the inquiry,

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46. *See What is Physician-Patient Privilege and Why is it Important?*, HG LEGAL RES., www.hg.org/legal-articles/what-is-physician-patient-privilege-and-why-is-it-important-31873 [https://perma.cc/4W27-A59R?type=image]; *see also* Jennings, *supra* note 38, at 447–48 n.40 ("No person duly authorized to practice physic or surgery, shall be compelled to disclose any information which he may have acquired in attending any patient, in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him, as a surgeon."); Frank A. Riddick, *The Code of Medical Ethics of the American Medical Association*, 5 OCHSNER J. 1, 10 (2003) (noting that physicians are required to "protect the privacy and confidentiality of those for whom [they] care").

47. Gerald L. Higgins, *The History of Confidentiality in Medicine: The Physician-Patient Relationship,* 35 CAN. FAM. PHYSICIAN 1 (1989), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2280818/pdf/canfamphys00158-0229.pdf [https://perma.cc/VM9M-9H7R] ("Confidentiality of medical information is so important to the doctor-patient relationship that it is now regarded as the norm for physicians.").

48. Joseph Regalia & Andrew Cass, *Navigating the Law of Defense Counsel Ex Parte Interviews of Treating Physicians*, 31 J. CONTEMP. HEALTH L. & POL'Y 35, 43 n.52 (2015) (discussing how all but six state legislatures have introduced physician-patient privilege statutes). On the federal level, there may be other protections, but that is a topic beyond the scope of this Comment.

49. WASH. REV. CODE § 5.60.060(4)(a) (2019); *see also* Carson v. Fine, 123 Wash. 2d 206, 212, 867 P.2d 610 (1994) (noting two purposes of the statute are to: (1) "surround patient-physician communications with a 'cloak of confidentiality' to promote proper treatment by facilitating full disclosure of information"; and (2) "protect the patient from embarrassment or scandal which may result from revelation of intimate details of medical treatment").

50. *See* WASH. REV. CODE § 5.60.060(4)(a).

51. *See id.* § 5.60.060(4)(b) ("Ninety days after filing an action for personal injuries or wrongful death, the claimant shall be deemed to waive the physician-patient privilege. Waiver of the physician-patient privilege for any one physician or condition constitutes a waiver of the privilege as to all physicians or conditions, subject to such limitations as a court may impose pursuant to court rules".). The Washington State Legislature added this exception via two amendments in 1986 and 1987. *See id.*

since issues then arise surrounding the scope of the subject matter waived. For example, an opposing counsel might probe into a patient's medical affairs in an ex parte interview or deposition with their treating physician, thus triggering the issue of whether the information was "necessary to enable him or her to prescribe or act for the patient."[52]

Several other modifications to the statute are relevant. First, Washington courts interpret RCW 5.60.060 as a procedural safeguard and not as a substantive or constitutional right.[53] Second, for the purposes of this statute, "physician" encompasses physicians, surgeons, and osteopathic physicians and surgeons.[54] However, Washington courts have interpreted "physician" rather narrowly—as opposed to including other medical professionals within this definition—since other sections of the RCW categorically include various medical professionals within the privilege doctrine, such as nurses.[55] Third, the Washington State Supreme Court held that the waiver doctrine applies to physician-witnesses of both fact and opinion.[56] Fourth, once a patient's privilege is waived, the treating physician has an "independent duty to testify honestly and truthfully in a court of law, be it in favor of the plaintiff or the defense [regarding the patient's information]."[57]

While Washington courts have narrowly construed certain aspects of RCW 5.60.060, they have broadly defined the scope of a physician's permissible testimony regarding treatment administered to a patient.[58] For

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52. WASH. REV. CODE § 5.60.060(4)(a).

53. *See Carson*, 123 Wash. 2d at 212, 867 P.2d at 610 ("The [physician-patient] privilege is a creature of statute, and thus is a procedural safeguard and not a rule of substantive or constitutional law.") (citing Dep't of Soc. & Health Servs. v. Latta, 92 Wash. 2d 812, 819, 601 P.2d 520 (1979)).

54. *See* State v. Ross, 89 Wash. App. 302, 307, 947 P.2d 1290, 1292 (1997).

55. *See id.* at 307, 947 P.2d at 1293; *see, e.g.*, WASH. REV. CODE § 5.62.020 ("No registered nurse providing primary care or practicing under protocols, whether or not the physical presence or direct supervision of a physician is required, may be examined in a civil or criminal action as to any information acquired in attending a patient in the registered nurse's professional capacity, if the information was necessary to enable the registered nurse to act in that capacity for the patient . . ."); *id.* § 18.53.200 (holding the same for optometrists); *id.* § 18.83.110 (psychologists); § 5.60.060(6) (certain social workers, therapists, and other counselors). While interesting issues might arise when applying the issues addressed in this Comment to health professionals beyond physicians, these questions are beyond its scope.

56. *See Carson*, 123 Wash. 2d at 216, 867 P.2d at 616 ("We conclude that a plaintiff's waiver of the physician-patient privilege extends to all knowledge possessed by the plaintiff's doctors, be it fact or opinion.").

57. *See* Christensen v. Munsen, 123 Wash. 2d 234, 239, 867 P.2d 626, 629 (1994) (citing *Carson*, 123 Wash. 2d at 218–19, 867 P.2d at 618).

58. *Ross*, 89 Wash. App. at 302, 947 P.2d at 1292; *see also* Randa v. Bear, 50 Wash. 2d 415, 420–21, 312 P.2d 640, 644 (1957) ("[P]rivilege applies to all information acquired by physician for purpose of enabling him to treat patient, including that which he learns from observation as well as

instance, the physician is permitted to describe the nature and the extent of examination they made while the patient was under their care.[59] This can include oral communications,[60] hospital records,[61] or other types of data such as the results of a urinalysis test.[62] Furthermore, patient information is not confidential if the opposing counsel can show that the matter was also disclosed to a non-physician third party.[63] For instance, *Smith v. Orthopedics International*[64] involved a patient who underwent heart surgery and developed a bacterial infection that ultimately caused her death.[65] During discovery, the hospital's defense counsel transmitted public records (including the plaintiff's expert testimony) to the treating physician, who was called as a fact-witness for the defense.[66] The court held that since the records were effectively public information, there was no violation of the physician-patient confidentiality rule.[67]

Even in light of these guidelines, each medical malpractice case presents a unique challenge in assessing what exact information is privileged.[68] Further, these challenges are heightened given that most physicians are not aware of the contours of the law.[69]

B. The Policy Concerns of Releasing a Patient's Privileged Medical Information

Maintaining the physician-patient privilege is becoming increasingly more important. Advances in information technology now allow physicians to keep detailed electronic records about their patients.[70] These records can include demographic, financial, personal, and social

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through communication with him. [It] also extends to X-ray photographs made at physician's direction and to hospital records containing information supplied by him.").

59. *See* Strafford v. Northern Pac. Ry. Co. 95 Wash. 450, 164 P. 71 (1917).

60. *See* State v. Mines, 35 Wash. App. 932, 671 P.2d 273 (1983).

61. *See id.*

62. *See* State v. Rochelle, 11 Wash. App. 887, 527 P.2d 87 (1974).

63. *See* State v. Broussard, 12 Wash. App. 355, 529 P.2d 1128 (1974).

64. 149 Wash. App. 337, 340, 203 P.3d 1066, 1067 (2009).

65. *See id.*

66. *See id.*

67. *See id.* at 343, 203 P.3d at 1069.

68. *See* Loudon v. Mhyre, 110 Wash. 2d 675, 756 P.2d 138 (1988).

69. *See* Youngs v. Peacehealth, 179 Wash. 2d 645, 67980, 316 P.3d 1035, 1052 (Stephens, J. dissenting) (citing *Loudon*, 110 Wash. 2d at 678, 756 P.2d 138 (admitting that from a physician's perspective, "[w]e are concerned . . . with the difficulty of determining whether a particular piece of information is relevant")).

70. *See generally* Amarra Etzioni, *The Limits of Privacy*, *in* CONTEMPORARY DEBATES IN APPLIED ETHICS 266 (Andrew I. Cohen & Christopher H. Wellman eds., 2005).

information such as sexual orientation and addictions, as well as traditional medical information including diagnoses, treatments, and family medical histories.[71] Genetic information is of particular importance, in part driven by the advances of the Human Genome Project.[72] Genetic testing now allows physicians to predict an individual's propensity for future illnesses and behaviors, thus revealing "sensitive . . . unique and immutable attributes . . . not just personal, but shared by family members as well."[73]

In the course of litigation, medical records are brought before the court as evidence. When the case ends, this data must be carefully disposed of to avoid inadvertent disclosure; however, patient data is often leaked to the public.[74] In fact, such data is viewed as a valuable commodity.[75] As the availability of information has increased, so has the number of third parties seeking to exploit such information.[76] Physician-patient privilege is an increasingly important aspect of the both the healthcare and legal systems and patients have valid cause for concern should their private information be disclosed.

C. Attorney-client privilege in corporate medicine

Attorney-client privilege is another important privilege embedded in the American judicial system.[77] Washington primarily uses a statutory

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71. Ralph Ruebner & Leslie A. Reis, *Hippocrates to HIPAA: A Foundation for a Federal Physician-Patient Privilege*, 77 TEMP. L. REV. 505, 521 (2004).

72. *See An Overview of the Human Genome Project*, NAT'L HUM. GENOME RES. INST. (Oct. 28, 2018), https://www.genome.gov/human-genome-project/What [https://perma.cc/BM3X-JXB3]. The Human Genome Project determined "the order, or 'sequence,' of all the bases in our genome's DNA; ma[de] maps that show the locations of genes for major sections of all our chromosomes; and produc[ed] what are called linkage maps, through which inherited traits (such as those for genetic disease) can be tracked over generations." *Id.*

73. Joanne L. Hustead & Janlori Goldman, *Genetics and Privacy*, 28 AM. J.L. & MED. 285 (2002).

74. TERESA D. LOCKE, HOLLAND & HART, MEDICAL RECORDS ISSUES: CONTENT, MAINTENANCE, AND RETENTION 87 (2016), https://www.hollandhart.com/pdf/DHCP_medical_records_webinar.pdf [https://perma.cc/8DJA-7SZ3].

75. *Using Medical Malpractice Litigation for Healthcare Analytics,* HEALTH IT ANALYTICS (Sep. 23, 2014), https://healthitanalytics.com/news/using-medical-malpractice-litigation-for-healthcare-analytics [https://perma.cc/U5JC-BVWZ].

76. *See, e.g.*, Richard Harris, *If Your Medical Information Becomes A Moneymaker, Could You Get A Cut?*, NPR (Oct. 15, 2018, 4:45 PM), https://www.npr.org/sections/health-shots/2018/10/15/657493767/if-your-medical-information-becomes-a-moneymaker-could-you-could-get-a-cut [https://perma.cc/8LU2-X6CF] ("Hospitals and health plans are increasingly using the huge amount of medical data they collect for research. It's a business worth billions of dollars, and sometimes those discoveries can be the foundation of new profit-making products and companies.").

77. *See* Geoffrey C. Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF.

approach to govern attorney-client privilege.[78] RCW 5.60.060(2) states that "[a]n attorney shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment."[79] This privilege is twofold: first, it allows communications between a client and their attorney to be confidential; and second, it ensures that attorneys can maintain an open line of communication with their clients.[80] Otherwise, attorneys might be unable to comply with their duties to be effective advocates for their client.[81]

In *Upjohn v. United States*,[82] the United States Supreme Court discussed attorney-client privilege in the corporate context.[83] However, the Court clarified that the privilege does not attach to facts disclosed in the communications themselves:

> [T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?,' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.[84]

The Court then held that corporations may be entitled to attorney-client privilege like any other client.[85] The Court overruled precedent limiting the privilege to counsel's communications with the corporate "control group"—for instance, upper-level management—and held that the privilege can extend to communications with certain lower-level

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L. REV. 1061 (1978).

78. WASH. REV. CODE § 5.60.060(2) (2019).

79. *See id.*

80. *See* Hazard, *supra* note 77, at 1061.

81. *See* MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 1 (AM. BAR ASS'N 2002) ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."); *see also* Upjohn v. United States, 449 U.S. 383, 389 (1981) ("The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.").

82. Upjohn Co. v. United States, 449 U.S. 383 (1981).

83. *See id.* at 384; *see also* Sherman v. State, 128 Wash. 2d 164, 190, 905 P.2d 355, 370 (1995) (citing *Upjohn*, 449 U.S. at 394–95, for the principle that "correspondence between an attorney for a corporate entity and that entity's employees [may be] subject to the attorney-client privilege of the corporate entity").

84. *Upjohn*, 449 U.S. at 395–96 (quoting Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962)).

85. *See id.* at 389–90.

employees.[86] This does not mean that *all* employees of a corporation are within the ambit of attorney-client privilege. Instead, the privilege applies to communications to certain corporate employees, where the communications "concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice."[87]

While *Upjohn* opened the door for corporate attorney-client privilege, the Court's holding left room for lower courts to tailor the doctrine to the specific contexts.[88] The *Upjohn* doctrine is particularly important in the medical malpractice context, given that most opportunities for medical treatment are located in centralized, corporate entities.[89]

III. THE INTERSECTION OF PHYSICIAN-PATIENT AND ATTORNEY-CLIENT PRIVILEGE IN EX PARTE CONTACT

There is tension at the intersection of ex parte communications, patient-physician privilege, and attorney-client privilege, thus placing physicians in contradictory positions. On one hand, they must maintain their duty of confidentiality to their patients. On the other, they must maintain allegiance to their employers.

A. Arguments For and Against Allowing Ex Parte Contacts With Non-Party Treating Physicians

Given the value of ex parte communication in litigating medical malpractice cases, it is not surprising that opposing sides of the bar are engaged in a spirited debate on the subject.[90]

Those against allowing defendants to use ex parte interviews with non-party physicians tend to make the following arguments. First, since the rules of civil procedure do not expressly allow ex parte interviews on behalf of defense counsel, some argue that ex parte interviews should not

86. *See id.*

87. *See id.* at 394.

88. *See* Youngs v. Peacehealth, 179 Wash. 2d 645, 663, 316 P.3d 1035, 1044 (2014).

89. *See id.* at 680, 316 P.3d at 1052 ("[M]any plaintiff-patients have no realistic opportunity to arrange for their health care outside the corporate setting . . . .").

90. *See* Jennings, *supra* note 38, at 454–59.

be permitted.[91] Relatedly, some argue that formal discovery options are sufficient for defendants to gather relevant medical information.[92]

Other courts have focused their concerns on the patient's privileges. For instance, the Washington State Supreme Court has cautioned that allowing a defendant unrestricted access to treating physicians might discourage patients from discussing health-related matters openly with their physicians, thus undermining physician-patient privilege.[93] Furthermore, the Arizona Court of Appeals has pointed out that since physicians lack legal training, the risks of inadvertent disclosures of sensitive, confidential information might be heightened in these interviews.[94] Lastly, some courts have recognized that ex parte communication may allow defense counsel to unduly influence a physician's testimony.[95] This is critical because it may provide an unfair advantage to the hospital's defense counsel.[96]

Those arguing in favor of ex parte interviews tend to make the following arguments.[97] First, they argue that allowing defense counsel to communicate ex parte makes discovery more equitable to the parties.[98] Rules of civil procedure are often required to be "construed, administered, and employed . . . to secure the just, speedy, and inexpensive

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91. *S*ee King v. Ahrens, 798 F. Supp. 1371, 1373 (W.D. Ark. 1992) (discussing how courts prohibiting ex parte defense interviews typically argue that the procedural rules discuss formal depositions with physicians but not ex parte interviews).

92. *See* Horner v. Rowan Cos. Inc., 153 F.R.D. 597, 602 (S.D. Tex. 1994) ("Formal discovery, on the record, with notice and an opportunity to other parties to be present and to participate in the proceedings, is simply the fairest and most satisfactory means of obtaining discovery from a treating physician.").

93. *See* Loudon v. Mhyre, 110 Wash. 2d 675, 679, 756 P.2d 138, 141 (noting how it is difficult to imagine how a physician could engage in ex parte communication without endangering the truth and faith that patients invest in physicians).

94. *See* Duquette v. Superior Court, 778 P.2d 634, 641 (Ariz. App. 1989) ("A physician may lack an understanding of the legal distinction between an informal method of discovery such as an *ex parte* interview, and formal methods of discovery such as depositions and interrogatories, and may therefore feel compelled to participate in the *ex parte* interview." (emphasis in original)).

95. *See* Youngs v. Peacehealth, 179 Wash. 2d 645, 673–74, 316 P.3d 1035, 1049 (2014) (Stephens, J., concurring in part and dissenting in part) (quoting Smith v. Orthopedics Int'l, Ltd., 170 Wash. 2d 659, 668, 244 P.3d 939, 944 (2010) ("[T]he *Loudon* rule is particularly important to avoid the risk that the plaintiff's health care providers might be unduly 'shaped and influenced by' ex parte contact or 'improperly assume a role akin to that of an expert witness for the defense.'")).

96. *See id.*

97. For a helpful discussion of these arguments and counterarguments, *see* Jennings, *supra* note 38, at 458–59.

98. Morrison v. Brandeis Univ., 125 F.R.D. 14, 19 (D. Mass. 1989) (stating that "interviewing witnesses without the presence of opposing counsel in order to gain information" is an "important function[ ] which counsel traditionally play[s] in litigation").

determination of every action and proceeding."[99] Since ex parte communication bypasses formalities—like the scheduling and administrative hassles inherent in depositions—defense counsel argue that these interviews makes their representation significantly more efficient.[100] Costs are an important aspect of medical malpractice discovery, and ex parte communications reduce costs.[101]

Alternatively, in support of allowing these interviews, some courts have held that physicians are to be treated as important fact witnesses after the physician-patient privilege has been waived.[102] That is, physicians should be treated less like the patient's witness and more like an objective witness. To this end, certain courts have acknowledged that requiring defendants to depose treating physicians gives plaintiffs a tactical advantage by enabling them to monitor defendants' case preparation.[103] As defense counsel have noted, they will have no opportunity other than formal discovery procedures to prepare their case if ex parte communication is not permissible.[104]

Both sides of the bar have valid arguments. In some jurisdictions, plaintiffs have prevailed and ex parte communication with non-party treating physicians is prohibited.[105] In other jurisdictions, defendants have won out and ex parte communication is encouraged—or at least, accepted.[106] As discussed below, Washington's approach falls in the middle by allowing limited ex parte interviews.

B. Washington's Approach to Ex Parte Communications

The Washington State Legislature affords patients a right to privileged communications with their physicians—but this privilege is waived when the patient places their medical status at issue in the litigation.[107] However,

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99. FED R. CIV. P. 1; *see also* Regalia & Cass, *supra* note 48, at 54–55.

100. *See* Regalia & Cass, supra note 48, at 36 ("One practice that may mitigate rising costs and save money for all parties involved is to allow ex parte interviews of treating physicians.").

101. *See id.* at 53–54.

102. *See* Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128 (D.D.C. 1983).

103. *See* Loudon v. Mhyre, 110 Wash. 2d 675, 677, 756 P.2d 138, 140 (1988).

104. *See id.*

105. *See* Benally v. United States, 216 F.R.D. 478, 480–81 (D. Ariz. 2003) (prohibiting ex parte defense interviews because the court interpreted the physician-patient privilege to exclude interviews as a matter of public policy).

106. *See supra* note 98; Samms v. District Court, 908 P.2d 520, 526 (Colo. 1995); Roberts v. Estep, 845 S.W.2d 544, 547 (Ky. 1993); Regalia & Cass *supra* note 48, at 54–56.

107. *See supra* section II.A.

privilege is only waived to a certain extent—and the scope is narrow.[108] In order to obtain this information once it has been waived, counsel can use formal and informal discovery tools, including depositions and ex parte interviews.[109] There are three cases critical to understanding Washington's approach on ex parte contact: (1) *Wright v. Group Health Hospital*,[110] (2) *Loudon v. Mhyre*,[111] and (3) *Youngs v. Peacehealth*. These cases discuss circumstances when counsel can communicate ex parte with a treating physician and highlight how physician-patient privilege intersects with attorney-client privilege.

1. Wright v. Group Health Hospital*: Plaintiffs Can Conduct Ex Parte Interviews with Nonparty Medical Staff*

Wright involved the issue of whether an incorporated hospital may prohibit its employee-physicians from participating in ex parte interviews with the plaintiff's counsel.[112] The plaintiff sued Group Health for medical malpractice during the plaintiff's delivery of her son.[113] The plaintiff named both the hospital and her primary treating physician in the suit.[114] During discovery, the plaintiff asked for the contact information of the nurses involved in her care for the purposes of conducting ex parte interviews with them.[115] The trial court denied the plaintiff's protective order for these interviews, finding they would violate the American Bar Association's Code of Professional Responsibility DR 7-104(A)(1),[116] which prohibits an attorney from speaking with another represented party to the litigation without consent.[117]

The Washington State Supreme Court reversed, allowing the plaintiff to conduct ex parte interviews with the nurses.[118] The Court held that: (1) the attorney-client privilege would not, of itself, bar an opposing

108. *See supra* section II.A.

109. *See supra* section II.B.3.

110. 103 Wash. 2d 192, 691 P.2d 564 (1984).

111. 110 Wash. 2d 675, 756 P.2d 138 (1988).

112. *Wright*, 103 Wash. 2d at 193, 316 P.3d at 565.

113. *See id.* at 193, 316 P.3d at 565–66.

114. *See id.* at 197, 316 P.3d at 567.

115. *See id.* at 194, 316 P.3d at 566.

116. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-104(A)(1) (AM. BAR ASS'N 1980).

117. *See id.* ("During the course of his representation of a client a lawyer shall not: (1) [c]ommunicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.").

118. *Wright*, 103 Wash. 2d at 195, 316 P.3d at 567.

attorney from interviewing employees of a corporation so long as the inquiries concerned factual matters and not communications between the employee and the corporation's attorney[119]; (2) current employees authorized to speak for a corporation would be considered "parties" with whom opposing counsel could not speak ex parte[120]; and (3) opposing counsel could interview employees of the corporation ex parte so long as such employees were not authorized to speak for the corporation or in a management status.[121]

Wright is important for two reasons. First, it affirms that physicians working for incorporated hospitals are corporate employees. This allowed the Washington State Supreme Court to later apply the *Upjohn* standard to permit a hospital's attorneys to communicate with its employees under the protection of attorney-client privilege.[122] Second, *Wright* permitted at least some sort of ex parte contact with the treating physician—although plaintiff's contact is not considered inherently problematic since plaintiff's counsel will be able to regulate the flow of information. And, at the very least, this bypasses some of the above arguments that ex parte contact should be per se prohibited since it is not expressly permitted in the rules of civil procedure.[123]

2. Loudon v. Mhyre*: Prohibiting Ex Parte Contacts Between the Plaintiff's Treating Physicians and Defense Counsel*

While *Wright* dealt with the scope of a defendant-corporation's attorney-client privilege, the court did not discuss the relationship between physician-patient privilege and ex parte contacts.[124] The court squarely addressed the physician-patient privilege issue in *Loudon*.[125]

In *Loudon*, the plaintiff's estate brought medical malpractice claims against two of the decedent's treating physicians.[126] The plaintiff had suffered from liver and kidney damage resulting from an automobile accident.[127] After treating him for a week, the two treating physicians

119. *See id.* at 194–95, 316 P.3d at 566.

120. *Id.* at 200–01, 316 P.3d at 569.

121. *Id.* at 201, 316 P.3d at 570.

122. *See* Youngs v. Peacehealth, 179 Wash. 2d 645, 664, 316 P.3d 1035, 1045 (2014) ("Under this rule, corporate defense counsel may have privileged ex parte communications with a plaintiff's nonparty treating physician . . . .").

123. *See supra* note 91 and accompanying text.

124. *See* Loudon v. Mhyre, 110 Wash. 2d 675, 681, 756 P.2d 138, 142 (1988).

125. *See id.* at 675, 756 P.2d at 139.

126. *See id.*

127. *See id.*

released him.[128] The plaintiff sought additional treatment from two other health care providers before his death.[129] During discovery, the plaintiff provided defendants' counsel with medical records from the two other health care providers, and the defendants moved for an order allowing ex parte communication with those physicians.[130] The trial court held that although the patients' privilege was waived, ex parte contact was prohibited and only formal discovery was allowable.[131]

The Washington State Supreme Court held that ex parte interviews between a plaintiff's treating physicians and the defendant's counsel should be prohibited as a matter of public policy.[132] The Court stated:

> The physician-patient privilege prohibits a physician from being compelled to testify, without the patient's consent, regarding information revealed and acquired for the purpose of treatment. A patient may waive this privilege by putting his or her physical condition in issue. Waiver is not absolute, however, but is limited to medical information relevant to the litigation. The danger of an ex parte interview is that it may result in disclosure of irrelevant, privileged medical information.[133]

The Court reviewed a number of cases where other jurisdictions have similarly prohibited such communications.[134] Furthermore, the court rejected the defendant's argument that ex parte contact should be permitted—given that plaintiffs can use CR 26(c)[135] to seek protective orders limiting the contact to good cause—since this would require the trial court to supervise all contact.[136]

With this holding, the Washington State Supreme Court appeared to bar defense counsel from using ex parte interviews, primarily relying on the policy rationale that a patient's information could be inadvertently disclosed.

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128. *See id.*

129. *See id.*

130. *See id.*

131. *See id.*

132. *See id.* at 681–82, 756 P.2d at 142.

133. *Id.* at 677–78, 756 P.2d at 140.

134. *See id.* at 677, 756 P.2d at 140 (citing Alston v. Greater S.E. Cmty. Hosp., 107 F.R.D. 35 (D.D.C. 1985); Roosevelt Hotel Ltd. P'ship v. Sweeney, 394 N.W.2d 353 (Iowa 1986); Wenninger v. Muesing, 240 N.W.2d 333 (Minn. 1976)); Petrillo v. Syntex Labs, Inc., 499 N.E.2d 952 (Ill. App. Ct. 1986).

135. WASH. R. CIV. P. 26(c).

136. *See Loudon*, 110 Wash. 2d at 679, 756 P.2d at 141.

3. The Majority's Position in Youngs v. Peacehealth

A little over a decade later, the Washington State Supreme Court again considered the intersection of these two privilege doctrines in *Youngs v. Peacehealth*.[137] This time, the court considered whether certain ex parte communications between a hospital's corporate defense counsel and hospital employees may be protected by *Upjohn* but barred by *Loudon*.[138]

Youngs implicated this conflict between privileges and involved two similar factual patterns consolidated before the Washington State Supreme Court.[139] The court granted certiorari to determine "whether *Loudon v. Mhyre*, which prohibits defense counsel in a personal injury case from communicating ex parte with the plaintiff's nonparty treating physician, applies to such physicians when they are employed by a defendant."[140]

The first set of facts involved a plaintiff who was admitted to the defendant PeaceHealth's facility for lung surgery.[141] While at the hospital, he developed sepsis, which eventually caused the loss of both his legs and hands.[142] He sued PeaceHealth for negligent postoperative care under the doctrines of corporate negligence, respondeat superior, res ipsa loquitor, and for failure to obtain informed consent.[143] In his complaint, the plaintiff identified two doctors whose conduct triggered the sepsis, but he did not name them as defendants.[144] The plaintiff did not object to ex parte contacts between PeaceHealth's defense counsel and the two doctors, but did object to ex parte contacts with any other physician who treated him while at the facility.[145] Ultimately, the trial court ruled for PeaceHealth, thus allowing defense counsel ex parte contact with any PeaceHealth employee who provided healthcare to him.[146]

The second set of facts involved a plaintiff who checked into the emergency room at University of Washington's Harborview Medical Center (Harborview) for chest pain.[147] After she checked in, she waited

137. 179 Wash. 2d 645, 316 P.3d 1035 (2014).
138. *Id.* at 653, 316 P.3d at 1039.
139. *See id.* at 650, 316 P.3d at 1038.
140. *Id.* (citations omitted).
141. *See id.* at 653, 316 P.3d at 1039.
142. *See id.*
143. *See id.* at 653–54, 316 P.3d at 1039.
144. *See id.* at 654, 316 P.3d at 1039.
145. *See id.*
146. *See id.* at 654, 316 P.3d at 1040.
147. *See id.*

over four hours for a nurse to take a blood sample.[148] Her blood work revealed significant risk of cardiac arrest, but the hospital discharged her.[149] Before she left the hospital, however, her treating physician's assistant realized he had looked at the wrong patients' blood work records and subsequently had the plaintiff transferred to the catherization room.[150] Shortly after, she suffered several cardiac arrests, underwent surgery, and was transferred in critical condition to the University of Washington Medical Center (UW Medical Center), another facility in the University of Washington hospital system. The plaintiff ultimately underwent a complete heart transplant at UW Medical Center.[151]

The plaintiff sued Harborview for negligently delaying her transfer to the catheterization room.[152] In the course of the litigation, she did not object to Harborview defense counsel's contact with any of its Emergency Department or Cardiology staff, as long as the individuals were not shown any records of her subsequent care at the UW Medical Center.[153] The trial court issued a protective order prohibiting Harborview's defense counsel from contacting any of the plaintiff's treating physicians at the UW Medical Center.[154]

The Washington State Court of Appeals consolidated the cases and transferred them to the Washington State Supreme Court for a ruling on the ex parte issue.[155] On appeal, the defendant-hospitals argued that the corporate attorney-client privilege guaranteed their right to communicate ex parte with any of their employees, thus overriding the *Loudon* rule (which establishes a patient-plaintiff's right to supervise his nonparty physician's communications with opposing counsel).[156] In response, the plaintiffs argued that, in spite of *Upjohn*, the *Loudon* rule nonetheless protects a patient's right to shield their nonparty treating physicians from ex parte communications.[157]

The majority's holding sought to strike an equitable balance between the two viewpoints. First, the court held that corporate attorney-client privilege trumps the *Loudon* rule where an ex parte interview enables

148. *See id.*
149. *See id.* at 654–55, 316 P.3d at 1040.
150. *See id.* at 655, 316 P.3d at 1040.
151. *See id.*
152. *See id.*
153. *See id.* at 656, 316 P.3d at 1040.
154. *See id.*
155. *See id.* at 656–57, 316 P.3d at 1041.
156. *See id.* at 656, 316 P.3d at 1040.
157. *See id.*

corporate counsel to "'determine what happened' to trigger the litigation."[158] That is, the court clarified that *Upjohn* overrides *Loudon* where the non-party treating physician is employed by an incorporated hospital—since the hospital's counsel is entitled to confer with physicians under attorney-client privilege. However, the court limited the scope of permissible communications, stating:

> Under this rule, corporate defense counsel may have privileged ex parte communications with a plaintiff's nonparty treating physician only where the communication meets the general prerequisites to application of the attorney-client privilege, the communication is with a physician who has direct knowledge of the event or events triggering the litigation, and the communications concern the facts of the alleged negligent incident.[159]

This rule means that an attorney hired by a corporate defendant to investigate or litigate an alleged negligent event may engage in privileged ex parte communications with the corporation's physician employee, where (1) the physician-employee has firsthand knowledge of the alleged negligent event, and (2) the communications are limited to the facts of the alleged negligent event.[160]

The court noted that this rule "strikes the proper balance between the attorney-client and physician-patient privileges," thus deferring *Loudon's* protections to allow corporate defense counsel the right to fully investigate their potential liability.[161] Furthermore, the majority noted that ex parte communications could encompass both written communications and interviews.[162]

4. The Youngs *Dissenting Faction Highlighted Deficiencies in this Holding*

The en banc Washington State Supreme Court was far from unified in *Youngs*. Three judges joined Justice Stephen's opinion dissenting in part and concurring in part, which criticized the majority's rule and urged for the court to instead "recognize that the *Loudon* rule applies fully to medical malpractice cases in which the plaintiff's nonparty treating

158. *See id.* at 664–65, 316 P.3d at 1044–45 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981)).

159. *See id.* at 664, 316 P.3d at 1045 (citations omitted).

160. *See id.*

161. *See id.*

162. *See id.*

physicians happen to be employed by the defendant."[163]

The dissent criticized the majority's approach on several grounds. First, Justice Stephens argued that the majority's rule was unworkable for both attorneys and physicians.[164] She noted that, since the corporate defendant can claim attorney-client privilege over what the plaintiff's physician tells the defense counsel, the physician cannot then relate that same information to the patient.[165] Therefore, she argued the rule would require physicians to "guess . . . about where to draw the line between providing confidential information to the employer and breaching a fiduciary duty to the plaintiff."[166] Indeed, she framed the majority's rule as both ambiguous and cumbersome for the involved parties.

Second, along those same lines, Justice Stephens argued that this rule subverts the public policy considerations set forth by the *Loudon* rule.[167] Building off the *Loudon* concerns, she argued that the majority improperly deferred to *Upjohn* when considering how attorney-client privilege intersects with physician-patient privilege doctrines by "turn[ing] a case about a corporate defendant's right to shield from disclosure internal employee questionnaires (*Upjohn*) into an entitlement to interview, ex parte, an opposing party's treating physician."[168] That is, she argued the majority overextended *Upjohn* by improperly drawing a distinction between being able to engage in *Upjohn* privileged communications and being able to engage in unregulated ex parte communications.[169]

Third, Justice Stephens discussed the hypothetical situation of when the plaintiff is also an employee-physician who suffered medical malpractice at the hands of their hospital[170] This example underscored the

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163. *See id.* at 682, 316 P.3d at 1053 (Stephens, J., dissenting in part and concurring in part).

164. *See id.* at 672, 675, 316 P.3d at 1049, 1050 ("How this rule will play out in practice is hard to describe.").

165. *See id.* at 675, 316 P.3d at 1050.

166. *See id.* at 682, 316 P.3d at 1053.

167. *See id.* at 674–75, 316 P.3d at 1049 (Stephens, J., dissenting) ("[T]his rule serves several important goals: it safeguards the plaintiff's confidentiality interest in not having irrelevant personal health care information disclosed; it protects the physician-patient fiduciary relationship and serves the physician's interest in avoiding inadvertent disclosures that might give rise to liability to the patient; and it serves the administration of justice, avoiding the risk that defense counsel may become an impeachment witness. In the context of medical malpractice litigation, the *Loudon* rule is particularly important to avoid the risk that the plaintiff's health care providers might be unduly 'shaped and influenced by' ex parte contact or 'improperly assume a role akin to that of an expert witness for the defense.'" (citations omitted)).

168. *See id.* at 675, 316 P.3d at 1050.

169. *See id.*

170. *See id.* at 677, 316 P.3d at 1051 (recognizing how this situation "is increasingly common in this era of large health care organizations that require employees to receive services inside their

Court's concern that the *Upjohn* extension would override physician-patient privilege.[171] Justice Stephens expressed concern that, under the majority's holding, "a plaintiff can do nothing but blindly trust that opposing counsel and her physician will discuss only 'the facts of the alleged negligent event.'"[172]

Lastly, Justice Stephens expressed concern about how the majority's holding would fit in with another component of the statutory physician-patient privilege regime under RCW 5.60.060(2)(a),[173] which prohibits examination of an attorney regarding attorney-client communication.[174] She noted that under this statute, a plaintiff would be prohibited from inquiring about inadvertent disclosures of privileged information given the attorney-client privilege prohibition.[175]

Having summarized these concerns, the dissent urged the majority to reconsider its significant extension of *Upjohn* and to instead recognize that the *Loudon* rule should fully apply to medical malpractice cases where the plaintiff's nonparty treating physicians are employed by the defendant.[176]

IV. SUGGESTIONS TO RECONCILE DEFICIENCIES IN *YOUNGS*

While opening the door to ex parte contact for corporate defense counsel, *Youngs* does not answer many of issues raised in its holding.[177] These issues are both procedural and substantive. From a procedural standpoint, the *Youngs* rule is ambiguous. It provides no clear system or metric for a physician to determine what information they are permitted to disclose.[178] Further, it does not provide guidance on how its holding fits into the litigation process. For instance, at what point can the defendant actually interview physicians ex parte? Before, during, or even after discovery has been concluded? This complicates the discovery process for both litigants and trial court judges. And from a substantive standpoint, it places the involved parties at risk of inadvertent information disclosure, liability, and unfair advantages or disadvantages in litigation.[179] This

system").

171. *See id.*

172. *See id.* at 678–79, 316 P.3d at 1051.

173. WASH. REV. CODE § 5.60.060(2)(a) (2019).

174. *See Youngs*, 179 Wash. 2d at 679, 316 P.3d at 1052.

175. *See id.* at 678–80, 316 P.3d at 1052.

176. *See id.* at 682, 316 P.3d at 1053.

177. *See id.*; *supra* section III.B.4.

178. *See supra* section III.B.4.

179. *See id.* These advantages typically arise from the fact that the defense counsel can use ex parte interviews to document a physician's opinion, introduce that opinion into a summary judgment

Comment seeks to remedy these concerns by proposing modifications to the Washington State Superior Court Civil Rules.

A. A Model Solution to Ex Parte Contact Issues in Medical Malpractice Litigation

Legal scholars have identified at least three critical components that should be reflected in a solution to the issues posed by ex parte interviews.[180] First, the type of authority (for instance, statutes, civil rules, etc.) setting forth the solution must be carefully selected.[181] Second, the solution should result in definitive standards that both attorneys and physicians can follow.[182] Third, the solution should balance competing policy concerns, including: (a) the patients' interest in protecting their confidential information; (b) the physicians' interest in insulating themselves from liability and maintaining their duty of care to their patients; and (c) plaintiff and defense counsels' interest in effectively litigating the suit.[183] This last interest has several variables, given that effective litigation can encompass costs, the ability to gather information and make informed decisions for their clients, and the ability to use certain procedural and evidentiary tools like depositions.

The first task is determining how to implement a solution. Because ex parte disputes are battles fought in trial courts, trial judges should play a critical role in implementing and administering such rules.[184] This Comment therefore proposes two amendments to the Washington Superior Court Civil Rules. It is helpful to first build on some existing scholarship. In a case study addressing Nevada's framework for assessing ex parte interviews, which was regulated only by common law, the authors proposed a model statute containing the following provisions:

> One provision allows the plaintiff to seek a protective order specifically delineating what topics the treating physician may discuss—upon the plaintiff making a sufficient showing that there is a "significant likelihood" of inadvertent disclosure of privileged information. A protective order is available where plaintiff

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motion via a declaration, and then to leverage a settlement. *See* Smith v. Orthopedics Int'l, Ltd., 170 Wash. 2d 659, 668–69, 244 P.3d 939, 944 (2010). Because the plaintiff will have had no opportunity to object at the interview, the defense counsel can secure favorable testimony. *Id.*

180. *See* Regalia & Cass, *supra* note 48, at 68.

181. *See id.*

182. *See id.*

183. *See generally id.* ("[T]he optimal solution will balance the competing policy interests of the plaintiff and defense bars, and also account for the interests of physicians.").

184. *See* Jodi S. Balsam, *The New Second Circuit Local Rules: Anatomy and Commentary*, 19 J.L. & POL'Y 469, 538 (2011) (discussing how local rules are effective in implementing policy solutions).

> demonstrates reasonable concerns that the treating physician may have trouble figuring out what information she is permitted to disclose even after the defense counsel complies with the procedural safeguards. Our proposed solution incorporates a number of provisions ensuring that the treating physician is informed of the proper topics of the interview and of her option not to participate. The statute also requires proper notice to the plaintiff so that in the event there is a reasonable basis to restrict ex parte contact, plaintiff's counsel has an adequate opportunity to seek protection from the court. One provision also requires that defense counsel memorialize the topics that were discussed so that plaintiff's counsel will be able to review the interview record if needed.[185]

This statute functioned to balance plaintiffs', defendants', and physicians' interests in regulating ex parte interviews.[186] Essentially, it allowed defendants to interview nonparty treating physicians ex parte, but allowed plaintiffs several measures to protect their interests.[187] This Comment uses this model statute as a guide to set forth a solution to the issues posed by *Youngs*.

B. Proposed Additions to Washington's Superior Court Civil Rules

This Comment offers a two-step process that could alleviate some of the problems posed by *Youngs*. First, if a party is seeking to engage in ex parte communications with a nonparty treating physician, then the parties should first be required to participate in a mandatory Rule 26(f) conference to discuss the scope of the interview and other important considerations. Second, following the conference, if the party still seeks to engage in the communication, that party should be required to submit a motion to the trial court. Principally, this motion should explain why ex parte communication, instead formal discovery channels, is necessary to gain information.

1. First, the Parties Should Engage in a Discovery Conference

The Superior Court Civil Rules should be amended to require opposing parties to meet and confer about their plans to communicate ex parte with a nonparty treating physician.

Since this conference would outline any issues that might arise throughout discovery, the parties should be required to discuss the extent

185. *See* Regalia & Cass, *supra* note 48, at 70.

186. *See id.*

187. *See Id.*

of waived information that is relevant to the litigation, or in the *Youngs* language, "the facts of the alleged negligent accident."[188] These conferences play a valuable role in complex discovery by ensuring that issues are addressed before sensitive information may be disclosed—instead of afterwards.[189] In particular, CR 26(f)[190] could include an amendment stating:

> (f)(iii) If any party has waived their physician-patient privilege pursuant to RCW 5.60.060 and the opposing party intends on engaging in ex parte contact with a nonparty treating physician, that party must disclose (1) the attorney-client relationship; (2) the scope of the communications intended; (3) the disclosure of any non-substantive concerns, such as scheduling and logistics; and (4) a short description of the alleged incident that the party seeks to discuss.

This amendment would ensure that any issues regarding the scope of sensitive information must be brought to the courts' attention before ex parte interviews are conducted.

These conferences would have several benefits. Principally, the court would be able to better monitor and regulate the scope of the communications via protective orders since both parties would share information and concerns.[191] This would ensure that ex parte discussions do not deviate from predetermined topics, allow counsel on both sides to be generally informed of discussion topics, and help to protect a patient's information. It would also help parties anticipate any concerns about ex parte interviews at the beginning of discovery and better plan their litigation strategy.

The conference provision would squarely comply with both the *Loudon* and *Youngs* rules. *Loudon* recognized the importance of protecting physician-patient confidentiality; this provision soundly furthers that public policy goal by affording patients procedural mechanisms to protect their privacy. Furthermore, the provision would help litigants and judges clarify the ambiguous "facts of the alleged negligent incident"[192] language that *Youngs* added—since the parties will be able to discuss what information is relevant to the underlying claims. Trial court judges are certainly well-positioned to help enforce these provisions on a case-by-case basis.

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188. *See* Youngs v. Peacehealth, 179 Wash. 2d 645, 653, 316 P.3d 1035, 1040 (2014) (emphasis omitted).

189. *See supra* notes 30–33 and accompanying text.

190. WASH. R. CIV. P. § 26(f).

191. *See, e.g.*, Stempler v. Speidell, 495 A.2d 857, 864–65 (N.J. 1985) (discussing court supervision of ex parte interviews).

192. Youngs v. Peacehealth, 179 Wash. 2d 645, 664, 316 P.3d 1035, 1045 (2014) (emphasis omitted).

Lastly, the conference could likely enable the parties to meet and share pertinent, non-privileged information under RCW 5.60.060(4). Sharing such information would reduce the need for parties to later engage in ex parte communications.

2. *Second, the Parties Should be Required to Submit a Motion for Ex Parte Communications*

Assuming that the parties still want to engage in ex parte communication following the discovery conference, the parties should then be required to submit a motion to the trial court.

When defendants seek to engage in ex parte interviews with plaintiff's nonparty treating physician, it is critical that trial judges inquire into the defendant's purpose for conducting interviews. Given the risks discussed above, at least some speculation is warranted when defendants seek to exercise this discovery strategy. But courts should also be cognizant that ex parte interviews are valuable tools. Therefore, litigants seeking to interview nonparty treating physicians should be required to submit a motion to the court that explains the reasons why the ex parte interview is necessary.

This motion would fit soundly within the existing legal framework. Recall that the patient, by filing a suit alleging personal injuries, waives the privilege of information, "which was necessary to enable . . . [the physician] to prescribe or act for the patient."[193] Therefore, RCW 5.60.060(4) defines the scope of medical information that the opposing party may attempt to discover. This information can be in the form of physician testimony or medical records, including the patient's chart. *Youngs* then allows ex parte interviews with "a physician who has direct knowledge" of the event but constrains the interview's scope to the "facts . . . [that concern] the alleged negligent incident."[194] Filing a motion would therefore be an intermediate step within this framework.

A possible counter argument is that adding such a requirement would conflict with the *Youngs* holding. But that is incorrect. Instead, this motion uses *Youngs* as a baseline, but adds several refinements to the existing rule; therefore, it does not change *Youngs*'s substantive requirements, but merely adds a layer of procedural clarification.

The next step is to outline who can file the motion, when it should be filed, and what it should say. The party seeking to engage in ex parte interviews with a patient's nonparty treating physician should be required to submit a motion that explains why normal discovery channels are insufficient. This includes both plaintiffs and defendants—although

193. WASH. REV. CODE § 5.60.060(4) (201); *see also supra* note 54 and accompanying text.

194. *See Youngs*, 179 Wash. 2d at 664, 316 P.3d at 1045 (emphasis omitted).

additional requirements are suggested for corporate defendants in order to comply with the *Youngs* holding.

The motion should be submitted following the mandatory discovery conference—although any specific timeframes seem largely unimportant here. Finally, the moving party should be required to show these five elements in order for the trial court judge to grant the motion:

> (1) The party must identify the nonparty physician(s) with whom it seeks to engage in ex parte communications;
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> (2) The party must submit proof that the physicians provided medical treatment to the patient;
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> (3) If the party is a corporate defendant, it must show that the proposed communication meets the general prerequisite to attorney-client privilege as stated in Washington law. This element does not apply to non-incorporated defendants;
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> (4) The party must identify the nature and scope of the patients' medical information it seeks to gain from the interview and explain how that information relates to the alleged negligent accident; and
>
> (5) The party must show that the ex parte interview is the preferred method to gain the information instead of formal discovery methods because the formal channels are unduly burdensome, costly, or otherwise ineffective.

Upon a showing of these elements, the trial court judge should permit the party to engage in ex parte communication with the nonparty treating physician.

CONCLUSION

Physician-patient privilege is a cornerstone of the healthcare system and must be protected. Concerns about breaches of this privilege are exacerbated when attorneys seek to communicate with physicians ex parte. The Washington State Supreme Court allows corporate defendants to engage in such communications under the veil of attorney-client privilege. However, the scope of assessing what exactly the physician may discuss is ambiguous, which exposes physicians to liability for inadvertently disclosing patient information and affording unfair litigation advantages to defendants. Any solution to the issues posed in the *Youngs* holding should rely on the expertise of superior court judges and allow for a flexible, case-by-case method of resolution. Amendments to the Washington Civil Rules do just that. These proposed modifications could help ensure that discovery in medical malpractice cases proceeds smoothly—and equitably balances the interests of the parties involved.