

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

MARC YOUNGS, Petitioner

vs.

PEACEHEALTH, a Washington corporation d/b/a PEACEHEALTH ST.
JOSEPH MEDICAL CENTER and d/b/a PEACEHEALTH MEDICAL
GROUP, and UNKNOWN JOHN DOES, Respondents

and

UNKNOWN JOHN DOES, Defendant.

APPELLANT'S REPLY BRIEF

LUVERA, BARNETT, BRINDLEY,
BENINGER & CUNNINGHAM
Joel D. Cunningham, WSBA #5586
Andrew Hoyal, WSBA #21349
701 Fifth Avenue, Suite 6700
Seattle, WA 98104
206/467-6090

LAW OFFICE OF JAMES L. HOLMAN
James L. Holman
4041 Ruston Way, Suite 101
Tacoma, WA 98402
206/627-1866

Counsel for Petitioner

2011 NOV 16 PM 4:33

COURT OF APPEALS
STATE OF WASHINGTON
FBI
PMT

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY OF ARGUMENT.....	1
ARGUMENT.....	3
1. A Corporate Attorney has no Right to Interview Ex Parte any Corporate Employee.....	3
A. A Corporate Employee is not a Party by Virtue of Employee Status.....	3
B. A Corporate Employee is not a Client by Virtue of Employee Status.....	5
C. Application of <i>Loudon</i> to PeaceHealth Does not Deny Violate its Due Process Rights.....	9
D. The Out of State Authorities Cited by Respondent are Inapposite.....	10
2. The 1986 and 1987 Amendments to RCW 5.60.060(4) did not Abolish the <i>Loudon</i> Rule for all Personal Injury Cases Filed On or After August 1, 1986.....	12
3. A <i>Loudon</i> Order Prohibiting Ex Parte Contact would not Conflict or Interfere with the Uniform Health Care Information Act, RCW 70.02.050.....	20
4. A Court Order Prohibiting Ex Parte Contact would not Conflict and Interfere with the Quality Assurance statute, RCW 70.41.200.....	22
5. Plaintiff should not be Denied a <i>Loudon</i> Order Because of Discovery Propounded to PeaceHealth.....	24

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>Anderson v. Breda</i> 103 Wn.2d 901, 700 P.2d 737 (1985).....	23
<i>Berger v. Sonneland</i> 144 Wn.2d 91, 26 P.3d 257 (2001).....	22
<i>Carson v. Fine</i> 123 Wn.2d 206, 867 P.2d 610 (1994).....	16
<i>City of Seattle v. McKenna</i> ___ Wn. 2d ___, 259 P.3d 1087 (2011).....	14
<i>Loudon v. Mhyre</i> 110 Wn. 2d 675, 756 P.2d 138 (1988).....	passim
<i>Smith v. Orthopedics Intern.</i> 170 Wn.2d 659, 244 P.3d 939 (2010).....	passim
<i>White v. Kent Medical Center</i> 61 Wn. App. 163, 810 P.2d 4 (1991).....	24
<i>Wright v. Group Health</i> 103 Wn. 2d 192, 691 P.2d 564 (1984).....	passim

OTHER CASES

<i>Aylward v. Settecase</i> 409 Ill. App.3d 831, 948 N.E.2d 769 (2011).....	12
<i>CFTC v. Weintraub</i> 471 U.S. 343, 105 S.Ct. 1986 (1985).....	7
<i>Galarza v. United States,</i> 179 F.R.D. 291 (S.D. Cal. 1998).....	9
<i>IBM Corp. v. Levin</i> 579 F.2d 271 (3 ^d 1978).....	22
<i>Luce v. New York</i> 266 A.D. 877, 697 N.Y.S.2d 806 (1999).....	9

<i>Petrillo v. Syntex Laboratories, Inc.</i> 148 Ill. App.3d 581, 499 N.E.2d 952 (1986).....	11, 12
<i>Ritter v. Rush Presbyterian St. Luke’s Medical Center</i> 177 Ill. App.3d 313, 532 N.E.2d 327 (1988).....	12
<i>Roosevelt Hotel v. Sweeney</i> 394 N.W.2d 353 (Iowa 1986).....	17
<i>Smith v. Driscoll</i> 442, 162 P. 572 (1917).....	19, 22
<i>U.S. v. Graf</i> 610 F.3d 1148 (9 th Cir. 2010).....	7
<i>U.S. v. Ruehle</i> 583 F.3d 600 (9 th Cir. 2009).....	7
<i>White v. Behlke, Rabin and OB/GYN Consultants, Inc.</i> 65 Pa. D. & C.4th 479 (Pa.Com.Pl. 2004).....	11

STATUTES

RCW 5.60.040(b)(4).....	13
RCW 5.60.060 et seq.....	12,13,21
RCW 70.02.050 et seq.....	20,21
RCW 70.41.200 et seq.....	22,23
<i>Law of 1986, Ch. 304 §11</i>	12
<i>Laws of 1987, Ch. 212 §1501</i>	13

RULES

CR 26(b)(1).....	17
CR 26(c).....	18
CR30(b)(6).....	25
RPC 1.13.....	6
RPC 4.2.....	8

INTRODUCTION AND SUMMARY OF ARGUMENT

The fundamental basis for the prohibition on ex parte communications with treating physicians in *Loudon v. Mhyre*, 110 W.2d 675, 225 P.3d 203 (1988) and *Smith v. Orthopedics*, 170 Wn.2d 659, 244 P.3d 939 (2010) is the concern to protect the “fiduciary confidential relationship which exists between a physician and patient,” the “unique nature of the physician-patient relationship,” and the “trust and faith invested” in that relationship.

The hospital’s brief does not betray any recognition that these interests or concerns exist, much less does it acknowledge their fundamental role in establishing and maintaining the rule in *Loudon*. The hospital ignores these concerns in what amounts to an implicit attack on *Loudon* by undermining its foundations.

The hospital argues that its defense counsel has a legal **right** to engage in ex parte communications with any of Mark Young’s non-party treating physicians simply because of their status as corporate employees. It presents no authority for such a right, and its brief essentially asks this Court to establish such a right as a matter of first impression. For reasons discussed below, it fails to make a case for such a right. Further, the hospital does not attempt to establish that any such “right” outweighs the broad policy against ex parte communications with treating physicians

articulated in *Loudon* and *Smith*. It cannot since it does not acknowledge the important interests supporting the *Loudon* rule.

But the hospital goes further, and presents as the centerpiece of its brief, an explicit and lengthy assault on *Loudon* and *Smith*. According to the hospital, when the Supreme Court decided *Loudon* on June 9, 1988, the public policy supporting *Loudon* was already superseded by a 1986 statute. *Loudon* rightly applied only to those personal injury cases filed before August 1, 1986, the effective date of the 1986 statute. See Respondent's Brief at 31-39.

The hospital's argument here is not limited to the specific issue of ex parte communications with physicians employed by a corporation. It is not limited to medical malpractice cases. It is a breathtaking argument that application of the *Loudon* rule in personal injury cases over the past 24 years by Washington courts, including the Washington Supreme Court in 2010, was mistaken and unnecessary and should be brought to an end.

In December 2010, the Supreme Court rejected an attempt to limit its holding, concluding instead that "that the prohibition on ex parte contact, which we set forth in *Loudon*, is broad." *Smith*, 170 Wn.2d at 666. A year later, the hospital is asking this Court to conduct a major retreat from *Smith*, and indeed to abandon *Loudon* altogether. This Court should reject that invitation.

ARGUMENT

1. A Corporate Attorney has no Right to Interview Ex Parte any Corporate Employee

The hospital argues: “It goes without saying - or should - that a corporation’s lawyer may interview, “*ex parte*,” any corporate employee” Resp. Br. at 31 (emphasis in original). In this instance, the phrase, “It goes without saying,” is another way of saying that no authority exists for the proposition asserted, and the hospital provides none.

Defendant attempts to locate such a right variously in agency law, in the attorney-client privilege, in the Rules for Professional Responsibility, and even in the due process clause. None of these sources provide a “right” to interview corporate employees *ex parte*, much less a right which would override the public policy set out in *Loudon* and *Smith*. Of course, in the absence of other considerations, a corporation’s attorney may conduct *ex parte* interviews with corporate employees, just as counsel may interview *ex parte* other witnesses in a case. But other considerations do exist here: the *Loudon* rule and underlying public policy prohibiting *ex parte* interviews with nonparty treating physicians.

A. A Corporate Employee is not a Party by Virtue of Employee Status

Smith held that *Loudon* applied to “nonparty treating physicians.” *Smith*, 170 Wn.2d at 664. In his opening brief, Plaintiff

argued that when a corporation is a party, the Court should employ the long-standing rule in *Wright v. Group Health* giving party status only to those employees who are managing or speaking agents for the corporation. See Appellant's Brief at 11-12.

The hospital dismisses the definition of "party" in *Wright v. Group Health*, but does not provide any other definition of "party." *Smith's* application of *Loudon* to "nonparty treating physicians" is presumably, on the hospital's view, irrelevant or dicta. But if so, the hospital offers no explanation why the language in *Smith* is irrelevant or dicta.

Wright's definition of "party" cannot be dismissed as involving an isolated and inapposite issue of attorney discipline. In order to determine who was a party, *Wright* went beyond the subject matter before it—the laws governing attorneys - and answered the question in reliance upon general principles of the law of agency and evidence. *Wright*, 103 Wn.2d at 201. It did so in order to address the same question the present case presents: What persons are to be considered as parties, when a corporation is the named party?

In reaching its answer, the Court in *Wright* examined at the policy reasons underlying particular rules. In the context of application of *Loudon*, the policy considerations favor the definition of party in *Wright*. Considered purely as a corporate employee, a treating physician is no

different than the maintenance worker, the accounting clerk, the marketing employee, or any of the other thousands of employees who may work for the corporation, and who has no special relationship to a plaintiff suing the corporation.¹ But a treating physician is not any other employee. The treating physician is subject to the “fiduciary relationship between doctor and patient,” participating in the “unique nature of the physician-patient relationship.” *Loudon*, 110 Wn.2d at 691. *Wright*’s definition of party protects the latter relationship. The hospital rejects the *Wright* definition because it never acknowledges the existence of this relationship which undergirds and drives the opinions in *Loudon* and *Smith*.

B. A Corporate Employee is not a Client By Virtue of Employee Status

Under *Wright v. Group Health*, and the Rules of Professional Responsibility, corporate employees as employees are not “clients” of the corporation’s attorney. Neither *Wright* nor the RPC’s give the attorney for the corporation the right to talk to one of these employee “clients.”

Wright v. Group Health - In *Wright*, a medical malpractice case brought against Group Health, Group Health argued that all of the nurses involved in the care of the plaintiff/patient “should be regarded as clients

¹ According to news reports from the recent merger of PeaceHealth with Southwest Washington Medical Center, PeaceHealth employs roughly 15,000 employees.

of the law firm.” *Id.*, 103 Wn.2d at 194. The Supreme Court rejected this argument as to any employees who were not managing/speaking agents. The Court did not recognize a right for a corporate attorney to speak with agents who were not managing or speaking agents ex parte. Moreover, *Wright* specifically exercised control over communications between a corporation’s attorneys and its non-client employees. It barred the corporation and its attorneys from instructing these employees not to talk to opposing counsel. *Id.* at 202-03.

RPC Rule 1.13 - RPC Rule 1.13 sets out a detailed rule with comments regarding the representation of organizations. The comments to Rule 1.13 are clear that corporate employees are not clients of the corporation’s counsel. Nowhere does the rule and its detailed and lengthy comments give a corporate attorney the right to speak ex parte with employees.

Comment 1 to Rule 1.13 defines **constituents** of a corporation broadly as “officers, directors, employees and shareholders.” Comment 2 to Rule 1.13 provides that attorney communications with these constituents are protected by Rule 1.6. But the comment goes on to provide: ***“This does not mean, however, that constituents of an organization client are the clients of the lawyer.”*** The organizational entity, not the employee, holds the privilege. The corporation may waive

the privilege notwithstanding the wishes or interests of the corporate employee “client.” *CFTC v. Weintraub*, 471 U.S. 343, 349-50, 105 S.Ct. 1986 (1985)(power to waive attorney–client privilege for bankrupt corporation passed to bankruptcy trustee).²

Far from giving the attorney a “right” to communicate ex parte with employees and other constituents, Rule 1.13 and its comments recognize the ever present potential that the relationship between the corporation’s attorney and the employee will become adversarial. Accordingly, the courts have adopted detailed rules governing and limiting these communications based upon relevant policy considerations.

The corporation’s attorney must be prepared to advise the employee that the attorney is representing the organization, not the employee, that their discussions may not be privileged and that the employee may need to obtain independent counsel. Rule 1.13(f) and Comment 10.³ Of course, if the employee retains independent counsel,

² This distinction can have devastating practical consequences for the employee who is the so-called “client.” If the corporation chooses to waive the privilege, the government can use the communications against the employee. *See e.g., U.S. v. Graf*, 610 F.3d 1148 (9th Cir. 2010)(upholding conviction and 25 year sentence of imprisonment based upon counsel’s testimony regarding previously privileged communication).

³ Some corporate attorneys now give so-called *Upjohn* or “corporate *Miranda*” warnings to employees. *See U.S. v. Ruehle*, 583 F.3d 600, 604 (9th Cir. 2009).

“Such warnings make clear that the corporate lawyers do not represent the individual employee; that anything said by the employee to the lawyers will be protected by the company’s attorney-client privilege subject to waiver of the privilege in the sole discretion of the company; and that the individual may wish to consult with his own attorney if he has any concerns about his own potential legal exposure.” *Id.*

RPC Rule 4.2 prohibits ex parte communications with that employee. Given the complexity of the issues surrounding contact with a corporate employee by an attorney for the corporation, it is not surprising that the RPC's do not give counsel a right to engage in ex parte communications.

Rule 1.13, is a general rule on professional conduct. It does not address specific legal issues, such as *Loudon*. Although *Loudon* certainly affects the conduct of legal professionals, it is intended as a rule to protect the physician-patient relationship, and thus is properly not part of the RPC's. The Court can enforce the *Loudon* rule as to nonparty treating physicians employed by a corporate defendant consistently with Rule 1.13.⁴

C. **Application of *Loudon* to PeaceHealth does not Violate its Due Process Rights**

The short answer to the hospital's argument that Plaintiff's proposed order would violate its constitutional right to retain hired counsel in a civil case is that the hospital has retained hired counsel in this civil

⁴Plaintiff also notes that the breadth of the "constituents" as defined in Rule 1.13, applying to employees **and** shareholders. For instance, Community Health Systems, Inc. based in Franklin, Tennessee, owns over a hundred hospitals throughout the country, including Deaconess Medical Center in Spokane, and Valley Hospital and Medical Center in Spokane Valley. Community Health Systems is publicly traded and listed on the New York Stock Exchange as CYH. See Community Health Systems website, <http://www.chs.net>. If Rule 1.13 limits *Loudon*, a Community Health Systems attorney could talk to any treating physician, whether or not employed by Community Health Systems, by having the physician purchase a share of stock in the company.

case. The *Loudon* order initially entered by the trial court order does not prohibit the hospital from hiring counsel. It does not prohibit counsel from taking depositions and conducting other discovery, filing and arguing motions, trying the case, and representing the hospital in any appeals which may follow. It does not prevent defense counsel from conferring privately with the client, defined as managing/speaking agents under *Wright*.

The hospital cites two cases for the proposition that prohibiting ex parte communications with an employee violates a corporation's due process right to retain counsel. Neither case mentioned a due process right. In *Galarza v. United States*, 179 F.R.D. 291, 294 (S.D. Cal. 1998), the United States Magistrate held that no federal law or policy prohibited ex parte communications with a treating physician, thereby rejecting any *Loudon*-type rule whatsoever. *Luce v. New York*, 266 A.D. 877, 697 N.Y.S.2d 806 (1999), is a two paragraph unsigned memorandum opinion from New York's appellate division. It does not mention the due process clause, or any constitutional right, and appears to be based upon application of New York privilege law. No court has ever cited it.⁵

⁵ In a footnote, the hospital also cites the Florida cases, and the Pennsylvania trial court decision discussed in this Reply Brief below. See Resp. Br. p.22 n. 11. These cases do not address the constitutional issue presented by the hospital.

The hospital also claims that it will be unable to investigate the claim and defend itself without ex parte communications with treating physicians. The *Loudon* rule itself is based upon the contrary premise. A defendant can investigate a case and defend itself through the use of formal discovery. The prosecution and defense of personal injury (and other) lawsuits often depend upon the testimony of witnesses who are under no obligation to talk privately with counsel, and whose facts and evidence can only be obtained by compulsion through formal discovery. A party is not deprived of the due process right to defend itself by having resort to formal discovery. The treating physicians who would be subject to a *Loudon* order here are witnesses. The obligation of a witness is to tell the truth. That truth can be told at a deposition with everyone present. Truth telling does not require a prior private meeting with defense counsel. Due process does not require a prior private meeting with defense counsel.

D. The Out of State Authorities Cited by Respondent are Inapposite

The case law from Florida and Pennsylvania is inapposite, involving interpretations of statutes and rules unique to those jurisdictions. The Florida cases turn on the construction of language in a statute excepting medical negligence cases from the statutory physician-patient

privilege. F.S.A. §456.057(8) (formerly F.S.A. §456.057(6)).⁶ No court outside Florida has followed this line of cases, because they are dependent upon Florida's unique statute.

Similarly, *White v. Behlke, Rabin and OB/GYN Consultants, Inc.*, 65 Pa. D. & C.4th 479, 485 (Pa.Com.Pl. 2004), is a trial court decision interpreting a Pennsylvania court rule expressly allowing an attorney to talk with treating physicians who are actual or ostensible employees of an attorney's client. Washington has no such rule, and no other state has relied upon the Pennsylvania court rule or case.

Illinois, on the other hand, has barred ex parte communications with treating physicians employed by a corporate defendant. In adopting the *Loudon* rule, the Supreme Court relied on, and quoted with approval from, the decision in *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App.3d 581, 499 N.E.2d 952 (1986) as follows: "We find it difficult to believe that a physician can engage in an ex parte conference with the legal adversary of his patient without endangering the trust and faith invested in him by his patient." *Loudon*, 110 Wn.2d at 679, quoting *Petrillo*, 148 Ill. App.3d at 595; see also *Smith v. Orthopedics*, 170 Wn.2d at 668.

⁶ Florida decided that ex parte "disclosure" of information within an institution was not really "disclosure" prohibited by the statute. *In re Stephens*, 911 So.2d 277, 281-82 (Fla. App. 2005). By contrast, the Washington Supreme Court in *Smith v. Orthopedics* read the *Loudon* prohibition broadly to encompass all ex parte communications, whether direct or indirect, whether done face to face or through attorney intermediaries. "[T]he prohibition on ex parte contact, which we set forth in *Loudon*, is broad" *Id.*, 170 Wn.2d at 666. *Smith v. Orthopedics* cannot be reconciled with the Florida case law.

Subsequently, in *Ritter v. Rush Presbyterian St. Luke's Medical Center*, 177 Ill. App.3d 313, 532 N.E.2d 327 (1988), the Court held that a defendant hospital was barred under *Petrillo* from ex parte communications with medical professional employees whose actions were not a basis for alleged liability. More recently in *Aylward v. Settecase*, 409 Ill. App.3d 831, 948 N.E.2d 769 (2011), the Court held that *Petrillo*, *Ritter* and their progeny applied even if were possible for the plaintiff to later add additional claims against a corporate defendant: “unless and until the actions of the MPG employee [MPG was the defendant medical clinic] are alleged to be a basis for plaintiff’s injuries, MPG cannot engage in ex parte communications with them.” *Id.*, 409 Ill. App.3d at 837.

2. **The 1986 and 1987 Amendments to RCW 5.60.060(4) did not Abolish the Loudon Rule for all Personal Injury Cases Filed On or After August 1, 1986.**

The Supreme Court decided *Loudon* on June 9, 1988. Since that time, the *Loudon* rule has been a fundamental part of Washington personal injury practice, with the Supreme Court reaffirming it in 2010 in *Smith v. Orthopedics Intern., Ltd.*, P.S. 170 Wn.2d 659, 244 P.3d 939, 944 (2010).

According to the hospital, the 1986 amendment to RCW 5.60.060(4), *Law of 1986, Ch. 304* §11, superseded *Loudon* as to any case

filed on or after its effective date of August 1, 1986. The amendment provides:

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.*⁷ (emphasis added)

The hospital's argument goes as follows: (1) The *Loudon* rule was intended solely to protect a personal injury plaintiff from disclosure of information privileged under the statutory physician-patient privilege, RCW 5.60.060; (2) prior to August 1, 1986, a personal injury plaintiff waived only medical information deemed relevant by a court; (3) the *Loudon* rule was intended solely as a prophylactic measure to prevent disclosure of non-relevant medical information, the privilege for which had not been waived; (4) the 1986 amendment provided that waiver of the privilege extended to all physicians and all conditions, whether or not relevant; (5) for cases subject to the 1986 amendment, there is no information privileged under the physician-patient privilege, the public policy announced in *Loudon* has been superseded and there is nothing left for *Loudon* rule to protect; (6) *Loudon* did not address the 1986

⁷ Resp. Br. at 31-39. The hospital also discussed the 1987 amendment to RCW 5.60.040(b)(4), which provided for automatic waiver of the physician-patient privilege 90 days after an action is filed. *Laws of 1987, Ch. 212 §1501*. The 1987 amendment, however, adds nothing substantive to the hospital's argument regarding the scope and effect of the waiver. The critical language on which the hospital relies is in the 1986 amendment. See Resp. Br. at 33-34.

amendments, because the case was filed before the August 1, 1986, effective date, a fact the Court itself recognized. 110 Wn.2d at 678 n. 2. This argument fails for numerous reasons.

First, *Smith v. Orthopedics* as well as the other cases upholding *Loudon* for cases filed on or after August 1, 1986, constitute a rejection of the hospital's construction of the statute. In *Smith*, all nine Supreme Court justices acted upon the assumption that *Loudon* remained the law after the 1986 statutory waiver amendment. Justice Fairhurst's opinion stated: "***Despite this waiver*** [under the 1986 amendment], the *Loudon* rule reflects our concern of a nonparty treating physician inadvertently disclosing irrelevant confidential information to the defense." *Id.* at 674 (emphasis added). Notwithstanding sharp disagreements on other issues, no justice disagreed with this statement.⁸ Further, the legislature is presumed aware that the judiciary has applied *Loudon* in cases subject to the 1986 amendment, and has not chosen to amend the statute. *See City of Seattle v. McKenna*, _ Wn.2d _, 259 P.3d 1087, 1093 (2011) (failure to amend statute following judicial decision indicates legislative acquiescence in interpretation).

⁸ There were three groupings of justices in *Smith*, split on two different issues. The lead opinion written by Justice Alexander and joined by Justices Owens and James Johnson, found that Defendants violated the *Loudon* rule. It is this opinion which Plaintiff has cited as the majority opinion, since Justices Charles Johnson, Sanders, Chambers and Stephens joined its holding and discussion on the *Loudon* violation. Of the nine justices, only Justices Fairhurst and Madsen found no *Loudon* violation.

Further, the hospital badly misreads the intention of the Supreme Court in issuing the directive in *Loudon*. The Supreme Court did not take direct review of the discretionary trial court order to issue a ruling **affirming** the trial court decision itself, and providing guidance to the limited and rapidly diminishing number of cases filed before August 1, 1986, and still in the court system in June 1988. The Court granted review in order to provide definitive guidance in the case before it and in all subsequent personal injury cases. It issued a comprehensive opinion on a subject which it knew would affect virtually every personal injury case involving medical treatment.

Footnote 2 in *Loudon* simply recognized that the fact that the 1986 and 1987 acts did not apply to the *Loudon* case itself, since that case was filed before August 1, 1986. The Court was fully aware that the 1986 and 1987 statutes would be in effect for future cases to which its ruling would apply.

Further, the Court in *Loudon* presupposed waiver of the patient-physician privilege. The trial court in *Loudon* entered an order that the physician-patient privilege had been waived without any qualification or limitation on the waiver. The Supreme Court affirmed both the waiver

and the prohibition on ex parte contact. 110 Wn.2d at 676.⁹ But the waiver of the privilege did not authorize ex parte communications. As the Court subsequently noted in *Carson v. Fine*, 123 Wn.2d 206, 211-212, 867 P.2d 610 (1994), “a plaintiff-patient’s waiver of the physician-patient privilege does not authorize ex parte communications between the defendant and the plaintiff’s treating physicians.” The waiver provisions of the 1986 amendment, in short, do not alter *Loudon*’s fundamental underpinnings.

In addition, the 1986 amendment did not broadly and absolutely abrogate the physician-patient privilege as the hospital would have it. The statute qualifies the waiver by the phrase, “subject to such limitations as a court may impose pursuant to court rules.” RCW 5.06.060(4). The hospital argues that this section is inoperative because no civil rules have been adopted to limit the waiver provision. Br. Resp. at 34. The hospital misreads the language, and imports a requirement not found in the statute.

The statute does not require the courts to adopt specific court rules regarding limitation of waiver, or nor does it require the courts to adopt any new rules at all. The plain language of the statute only requires that

⁹ Attached as **Appendix 1** is an excerpt from the Supreme Court brief for Defendant Kenny in *Loudon v. Mhyre* quoting the trial court’s June 17, 1987 order that “it appearing that plaintiff does not claim privilege against testimonial disclosure by discovery as authorized by court rule and that plaintiff waives the privilege as to discovery proceedings per court rule or court testimony . . . it is hereby ordered that: . . . plaintiff’s waiver of the physician-patient privilege is accelerated.”

limitations on waiver may be imposed by a court pursuant to court rules, without distinguishing between rules existing at the time of the 1986 act and rules promulgated subsequently subsequent to 1986.

The Supreme Court in footnote 2 of *Loudon* in fact recognized that the 1986 amendment. In the sentence immediately following footnote 2 citing the waiver provisions of the 1986 act, the Court stated: “Waiver is not absolute, however, but is limited to medical information relevant to the litigation. See CR 26(b)(1).” *Id.* at 678. In other words, *Loudon* acknowledging the existence of the 1986 statute allowing the court to limit the waiver pursuant to court rule, and then in the next sentence cited a court rule limiting the waiver based upon relevancy.

In treating *Loudon* as solely concerned with the protection of the statutory privilege, the hospital’s argument ignores the Court’s language in *Loudon* that the rule was also intended to protect a plaintiff from disclosure of irrelevant medical information:

We are concerned, however with the difficult of determining whether a particular piece of information **is relevant** to the claim being litigated. Placing the burden of determining **relevancy** on an attorney, who does not know the nature of the confidential disclosure about to be elicited, is risky.

Loudon, 110 Wn.2d at 678 (emphasis added)(quoting with approval *Roosevelt Hotel v. Sweeney*, 394 N.W..2d 353, 357 (Iowa 1986). In *Smith*,

even the justices who found no *Loudon* violation agreed that *Loudon* was intended to prohibit ex parte interviews that “would lead to inadvertent disclosures of irrelevant information.” *Smith*, 170 Wn.2d at 677 (Fairhurst, J., concurring).

Non-relevant medical information remains subject to protection by *Loudon*. Its disclosure to defense counsel in ex parte communications remains a violation of the physician-patient privilege. The *Loudon* court’s decision that this issue should not be the subject of case by case protective orders under CR 26(c) but handled instead by an across the board rule prohibiting all ex parte communications remains as good law as well as a workable way of handling the issue of inadvertent disclosure of irrelevant medical information. *See Loudon*, 110 W.2d at 679.

While protection of the statutory physician-patient privilege is certainly a fundamental purpose of *Loudon*, *Loudon* has not been limited to this testimonial purpose alone. *Smith* noted the concern for disclosure of irrelevant privileged medical information **and** other concerns:

One concern was that “ex parte interview[s] ... may result in disclosure of irrelevant, privileged medical information,” and the harm from such disclosure cannot be fully remedied by court sanctions. *Loudon*, 110 Wash.2d at 678, 756 P.2d 138. We also noted that “[t]he mere threat that a physician might engage in private interviews with defense counsel would, for some, have a chilling effect on the physician-patient relationship and hinder further treatment.” *Id.* at 679, 756 P.2d 138. Additionally, we

observed that “a physician has an interest in avoiding inadvertent wrongful disclosures during ex parte interviews” as a cause of action may lie against a physician for such disclosures. *Id.* at 680, 756 P.2d 138 (citing *Smith v. Driscoll*, 94 Wash. 441, 442, 162 P. 572 (1917) (dictum)).

Smith, 170 Wn.2d at 667-68. *Smith* held that the transmission of **public** documents from defense counsel to the treating physician violated *Loudon*, though these documents were certainly not privileged under the statute. *Id.*, 170 Wn.2d at 669. Further, *Smith* noted the additional concern in medical malpractice cases that counsel will use these ex parte communications to shape the treating physician’s testimony. *See* Appellant’s Brief at 8-9.

Underlying all of these considerations is the concern to protect the “trust and faith” invested in the physician-patient relationship. *Smith*, 170 Wn.2d at 669; *Loudon*, 110 Wn.2d at 679. *Loudon* protects the “the fiduciary confidential relationship which exists between a physician and patient.” *Id.*, at 681. It is predicated upon “the unique nature of the physician-patient relationship.” *Id.* These concerns were not superseded by the 1986 Act, and they have not diminished since the Court decided *Smith* in December 2010.

3. **A Loudon Order Prohibiting Ex Parte Contact Would Not Conflict or Interfere with the Uniform Health Care Information Act, RCW 70.02.050**

RCW 70.02.050 is part of the Uniform Health Care Information Act. In *Smith v. Orthopedics*, two justices relied on this statute in **dissenting** from the majority's holding that defense counsel's indirect and written communications with a nonparty treating physician violated the bright line rule in *Loudon*. The dissent made the same argument that the hospital now makes, i.e., that application of *Loudon* is contrary to RCW 70.02.050(1). According to this dissent:

[A] bright line rule prohibiting ex parte contact is contrary to state law that allows disclosure in some circumstances of health care information without the plaintiff's authorization. In RCW 70.02.050(1)(b), the legislature permits disclosure of health care information without a patient's authorization "[t]o any other person who requires health care information ... to provide ... legal ... services to, or other health care operations for or on behalf of the health care provider or health care facility." The lead opinion's creation of a bright line rule prohibiting all ex parte contact results in requiring authorization for disclosures made to health care providers or facilities.

170 Wn.2d at 677.¹⁰

Smith's seven justice majority, however, did not find that application of RCW 70.02.050(1)(b) conflicted with *Loudon*. That statute was expressly before the Court. But the majority regarded it as

¹⁰ Justice Fairhurst opined in dissent, that no *Loudon* violation occurred in *Smith*. This quotation is taken from that portion of her opinion. Justice Fairhurst with the lead opinion to form a majority that the *Loudon* violation was not prejudicial.

irrelevant.¹¹

RCW 70.02.050 is indeed irrelevant. The application of *Loudon* in this case does not conflict with RCW 70.02.050. This statute does not address or specifically allow *ex parte* communications. *Loudon* does not prohibit disclosure or communications; it prohibits *ex parte* communications.

Further, the legislature did not enact the Uniform Health Care Information Act as the *exclusive* statutory scheme for regulating disclosure of health care information. A health care provider who complies with the Act is not subject to remedial action *under the Act*. But the Act is not the only source of law relating to and protecting a patient's interest in confidentiality. The Act did not supplant the judicial power to control the conduct of counsel and parties in cases pending before the courts. It did not supplant the public policy set out in *Loudon* and *Smith*. It did not supplant or amend the physician-patient privilege, RCW 5.60.060, the proper construction of which Plaintiff has set out above.

The Supreme Court made clear that the Act was not exclusive in its

¹¹ The hospital's argument that the *Smith* majority did not consider this issue because it was only raised by amicus is not supported by any statement in the *Smith* opinion itself. An appellate court is not prohibited from considering arguments made only by amicus. When they are not considered for this reason, the courts usually say so. Further, the argument by amicus in *Smith* was presented in support of the rulings of the trial court and the Court of Appeals. As the hospital observes, on appeal the courts may affirm the trial court on any ground supported by the record, even if the trial court did not consider it. See Resp. Br. at 17.

decision in *Berger v. Sonneland*, 144 Wn.2d 91, 26 P.3d 257 (2001). The Act creates a cause of action for unlawful disclosure of health care information, with a two year statute of limitations. Plaintiff's claim was time-barred under the Act. *Berger* held that the Act is not the exclusive remedy for the unauthorized disclosure of health care information, and that plaintiff could bring a common law claim for unauthorized disclosure of medical information under the authority of *Smith v. Driscoll*, 94 Wash. 441, 162 P. 572 (1917) **and** *Loudon v. Mhyre. Berger*, 144 Wn.2d at 106, and n. 73.

4. **A Court Order Prohibiting Ex Parte Contact would not Conflict and Interfere with the Quality Assurance Statute, RCW 70.41.200**

Nothing in the Court's order or *Loudon* prevents a health care provider from conducting a QA investigation. The *Loudon* rule and QA investigations have existed side by side since *Loudon* was decided in 1988. The *Loudon* order only prevents defense counsel in this case from participating in a QA investigation. A *Loudon* order does not prevent a hospital from conducting a QA investigation and obtaining legal advice from counsel not involved in the defense of this lawsuit.

That restriction is hardly onerous or unfair. A party has no right to a particular lawyer. *IBM Corp. v. Levin*, 579 F.2d 271, 283 (3^d1978) and cases there cited. A health care provider has no right to utilize present

counsel both as its advocate in this medical malpractice case and as its attorney advising on its QA obligations in the same case. The potential for a conflict of interest in such a scenario is patent.

The Quality Assurance statutes provide for a confidential non-adversarial process allowing for “candor” and “constructive criticism” in the hospital’s self-assessment of the care it has provided through its employees as well as through outside physicians and health care providers 700 P.2d 737 (1985); RCW 70.41.200. The process allows the health care provider to reach critical judgments of health care. The conduct of defense counsel properly acting as the zealous advocate of the client in a medical malpractice case is antithetical to the role of the attorney advising the hospital in a QA proceeding.

Further, a QA investigation is not limited to physician/employees of the corporation, but extends to care given by any physician with staff privileges at a hospital regardless of the physician’s employee status. *See e.g.*, RCW 70.41.200(1)(b) (establishing a sanctions procedure for medical staff privileges); 70.41.200(1)(c) (requiring periodic review of credentials and competency of “all persons who are employed **or associated** with the hospital”). If *Loudon* must yield whenever a treating physician is subject to a hospital’s QA review, then *Loudon* would largely become a dead letter, with/for large hospitals such as PeaceHealth or Swedish, with

multitudes of physicians who are not employees, but who have medical staff privileges and are subject to a hospital QA review.

5. **Plaintiff should not be Denied a Loudon Order Because of Discovery Propounded to PeaceHealth**

The discovery issues raised by the hospital are premature, Resp. Br. at 47-50, and are not properly before the Court in this interlocutory appeal. See Resp. Br. at 47-50. They were raised for the first time in defendant's *reply* in its motion for reconsideration. See *White v. Kent Medical Center*, 61 Wn. App. 163, 810 P.2d 4 (1991)(court should not consider issues raised for the first time on reply). The parties exhaustively addressed the *Loudon* issue in the trial court. Plaintiff had no opportunity to respond to new issues raised in the reply filed two days before the hearing.

In fairness to the hospital, the discovery had just been served. Because this interlocutory appeal followed shortly thereafter, there were no responses, objections, discovery conferences, motions, hearings or other procedures ordinarily used to flesh out and resolve discovery disputes. It is premature for this Court to address the impact or resolution of the discovery before the trial court has addressed the issues raised under the ordinary procedures for considering discovery. The Court should rule on the *Loudon* issue presented, and leave it to the parties and the trial court

on remand to address these and subsequent discovery issues as those issues are impacted by the Court's ruling.

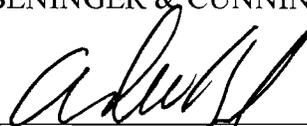
Given this procedural background, Plaintiff can only make a few general observations on the issue raised. Plaintiff obviously does not want defense counsel to engage in ex parte communications with treating physicians in order to answer written interrogatories. If in fact interrogatories cannot be answered without such communications, then that fact may be a valid objection to a question or qualification to an answer depending upon the particular circumstances.

Loudon contemplates discovery of treating physicians with all parties present, meaning depositions as a practical matter. It is likely that discovery under a *Loudon* order will involve more depositions than written discovery, but that certainly does not preclude asking questions in writing, and nothing else has occurred at this point.

The hospital's complaint about identifying CR30(b)(6) witnesses is an issue which should be discussed with counsel in conference. CR 30(b)(6) witnesses speak for the corporation and can bind it, and are parties under *Wright v. Group Health*. However, well before Plaintiffs' asked for CR 30(b)(6) depositions, the hospital refused to identify any managing or speaking agents. The hospital's complaint that it cannot identify such agents because of a *Loudon* order rings hollow.

DATED this 16th day of November, 2011.

LUVERA, BARNETT, BRINDLEY,
BENINGER & CUNNINGHAM



Joel D. Cunningham, WSBA #5586
Andrew Hoyal, WSBA #21349
701 Fifth Avenue, Suite 6700
Seattle, WA 98104
(206) 467-6090
Attorneys for Petitioner

CERTIFICATE OF SERVICE

THE UNDERSIGNED hereby certifies that she caused delivery of a copy of the foregoing Appellant's Reply Brief in the manner set forth below:

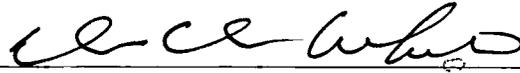
Mr. John C. Graffe
Johnson, Graffe, Keay, Moniz & Wick
925 Fourth Avenue, Suite 2300
Seattle, WA 98104

VIA LEGAL MESSENGER

Ms. Mary H. Spillane
Williams, Kastner & Gibbs
2 Union Square - #4100
Seattle, WA 98111-3926

VIA LEGAL MESSENGER

DATED this 16th of November, 2011.



Dee Dee White

FILED
COURT OF APPEALS, DIV 1
STATE OF WASHINGTON
2011 NOV 16 PM 4:34

Appendix 1

NO. 54148-5

SUPREME COURT OF THE STATE OF WASHINGTON

ROBERT LOUDON, individually and
as personal representative
of the Estate of DAVID LOUDON, deceased

Respondents,

v.

JAMES MHYRE, M.D., et ux., and
GERALD KENNY, M.D., et ux.,

Petitioners,

and

OVERLAKE HOSPITAL AND MEDICAL CENTER,
et al.,

Defendants.

by
FILED
NOV 10 1987
CLERK OF SUPREME COURT
STATE OF WASHINGTON

BRIEF OF PETITIONERS KENNY

Mary H. Spillane
June A. Kaiser
Williams, Kastner & Gibbs
Attorneys for Petitioners
Kenny

1400 Washington Building
P.O. Box 21926
Seattle, Washington 98111
(206) 628-6600

RECEIVED
NOV 10 1987

CLERK OF SUPREME COURT
STATE OF WASHINGTON

physicians not to speak with defense counsel, effectively undermined and nullified the remainder of the court's ruling granting accelerated waiver and allowing ex parte contact. (CP 121-153.) In his Memorandum in Opposition to Defendants' Motion for Reconsideration, plaintiff indicated that his counsel had already advised the treating physicians of the court's oral ruling. (CP 88-115.)

On June 17, 1987, Judge Reilly entered the Order on Civil Motion, modifying his oral decision and ordering that plaintiff's waiver of the physician-patient privilege was accelerated, but that defense counsel's investigation of the medical facts could be had only through formal discovery procedures, and that defendant's motion for an order authorizing ex parte contacts with plaintiff's physicians was denied. (CP 116.) Specifically, the Order on Civil Motion provided:

The above-entitled court, having received a Motion for Reconsideration of its oral decision and having reviewed the original materials as well as the newly submitted materials and cases cited therein; it appearing that

plaintiff does not claim privilege against testimonial disclosure by discovery as authorized by court rule and that plaintiff waives the privilege as to discovery proceedings per court rule or court testimony; defendant asserting an additional claim to a right to interview all health care providers ex parte, outside the scope of the rules of discovery; the court having in particular considered Kime v. Niemann, 64 Wn.2d 394, and the appellate briefs in that case; it appears that Kime v. Niemann, supra, controls and it appearing that further oral argument would not be of assistance NOW THEREFORE, it is hereby ordered that:

1. The oral decision is modified. The plaintiff's waiver of the physician-patient privilege is accelerated. Discovery may be had through the usual Discovery Procedures provided for by court rule.

2. Defendant's motion for an order authorizing ex parte contact with plaintiff's physicians is denied.

(CP 116.)

On July 17, 1987, Dr. Kenny and Dr. Mhyre moved for direct discretionary review by this Court. On October 2, 1987, the Commissioner of the Washington Supreme Court entered his Ruling Granting Motion for Discretionary Review.

viewed against the backdrop of gravel and foliage. The run-down condition of these markings suggests that the Schafers were indifferent regarding whether or not someone would collide with the cable.

Johnson v. Schafer, 47 Wash.App. 405, 411, 735 P.2d 419 (1987).

Moreover, in her affidavit Russell's mother stated the sagging cable hung about 1 foot off the ground. These facts are critical to the question of the Schafers' conduct.

Therefore, I find genuine issues of material fact have been raised which can only be determined at trial. The 1986 majority has improperly shifted the burden of proof in a summary judgment proceeding. I would affirm the Court of Appeals and remand this case for a trial on the merits.

DORE, GOODLOE and UTTER, JJ., concur.

UTTER, Justice (dissenting).

I agree with the dissent written by Justice Dolliver. I write separately only to state what I find to be the issues of material fact making summary judgment inappropriate in this case.

The majority first finds that the Schafers' allowing the signs and ribbons at the road's entrance to become obscured was mere "inadvertence." Majority, at 135. However, the focus is better placed on the fact that the Schafers or their agents actively attached the cable across the road after the markings were no longer visible. In fact, workers had used the road the day of the accident, and had rehung the cable across the road ½ hour before the accident. Clerk's Papers, at 25-26. In light of the difficulty in discerning the cable or any warnings, this seems to constitute reckless disregard of the consequences of their actions.

The majority states, "The guardian presented no evidence that the Schafers knew (or had reason to know) that a trespassing motorcyclist would use the road." Majority, at 135. This places a nearly insurmountable barrier at the summary judgment stage. In considering summary judgment motions we must make all reasonable

inferences from 1982 the evidence in favor of the nonmoving party. *E.g., Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wash.2d 255, 256, 616 P.2d 644 (1980). Here, the Schafers obviously intended to stop trespassing vehicles by having the cable hung across their road 2 feet above the ground, and have admitted as much in a memorandum in support of their motion for summary judgment. Clerk's Papers, at 25, 26. The effect of the cable was to stop such vehicles before it could be seen. Such a setup is very dangerous for any vehicle, whether a car, a bicycle, or a motorcycle.

Plaintiffs have presented sufficient evidence for an inference of wanton misconduct in the design and continued use of a cable hung across a road that stops trespassing vehicles in a way likely to cause injury or death. I would affirm and remand.



110 Wash.2d 675

1975 Robert LOUDON, individually and as personal representative of the Estate of David Loudon, deceased, Respondent,

v.

James MHYRE, M.D., and Jane Doe Mhyre, husband and wife, and the marital community composed thereof; Gerald Kenny, M.D., and Jane Doe Kenny, husband and wife, and the marital community composed thereof, Petitioners, and

Overlake Hospital and Medical Center; H.A. Grant, M.D. and Jane Doe Grant, husband and wife, and the marital community composed thereof; and John and Jane Does 1-6, Defendants.

No. 54148-5.

Supreme Court of Washington,
En Banc.

June 9, 1988.

In wrongful death suit, defendants moved for order declaring that physician-

patient privilege had been waived and authorizing *ex parte* communication with decedent's treating physicians. The Superior Court, King County, Stephen M. Reilly, J., held that privilege had been waived but that *ex parte* communications were not authorized. Defendants appealed. The Supreme Court, Callow, J., held that defense counsel may not engage in *ex parte* contacts with plaintiff's treating physicians.

Affirmed.

1. Witnesses ⇐211(2)

Physician-patient privilege prohibits a physician from being compelled to testify, without patient's consent, regarding information revealed and acquired for purpose of treatment. West's RCWA 5.60.060(4); CR 26(b)(1).

2. Witnesses ⇐219(5)

Patient may waive physician-patient privilege by putting his or her physical condition in issue; but waiver is not absolute and is limited to medical information relevant to litigation. West's RCWA 5.60.060(4); CR 26(b)(1).

3. Attorney and Client ⇐32(12)

Defense counsel may not engage in *ex parte* contacts with plaintiff's treating physicians after physician-patient privilege has been waived.

Lane, Powell, Moss & Miller by Reed P. Schifferman and Richelle Gerow Bassetti, Seattle, for petitioners Mhyre.

Williams, Kastner & Gibbs by Mary H. Spillane, Seattle, for petitioners Kenny.

Kargianis, Austin & Erickson by Bruce A. Wolf, Seattle, for respondent.

Patricia H. Wagner and Nancy E. Elliott, Seattle, on behalf of Washington Defense Trial Lawyers, amici curiae for petitioners.

Bryan P. Harnetiaux and Robert H. Whaley, Spokane, on behalf of Washington Trial Lawyers Ass'n, amici curiae for respondent.

CALLOW, Justice.

The issue presented is whether defense counsel in a personal injury action may communicate *ex parte* with the plaintiff's treating physicians when the plaintiff has waived the physician-patient privilege. We hold that defense counsel may not engage in *ex parte* contact, but is limited to the formal discovery methods provided by court rule.

This is a wrongful death action brought by Robert Loudon, individually and as personal representative of the estate of his son, David Loudon, involving malpractice claims against Drs. James Mhyre and Gerald Kenny. Drs. Mhyre and Kenny treated David for liver and kidney damage received in an automobile accident in Washington on December 14, 1985. Believing David's condition to be improving, the doctors released him from the hospital the following week. Upon return to his home in Oregon, however, David suffered complications and died on January 21, 1986.

Prior to his death, David received treatment from two Oregon health care providers. Loudon voluntarily provided Mhyre and Kenny with the medical records from those institutions. Defense counsel then moved for an order declaring that the physician-patient privilege had been waived and authorizing *ex parte* communication with David's treating physicians in Oregon.

Relying on *Kime v. Niemann*, 64 Wash. 2d 394, 391 P.2d 955 (1964), the trial court ruled that the privilege had been waived but that *ex parte* contact was prohibited. The court ordered that discovery could be had only through the procedures provided in the court rules. The defendants appealed. We granted discretionary review and we affirm the order of the trial court.

In *Kime*, this court set aside a pretrial order allowing *ex parte* contact, stating:

We have not heretofore been advised of the need for an easier, less formal, and more economical means for securing information from doctors and hospitals concerning the injuries and "general physical condition" of plaintiffs in personal injury actions. If our discovery and pretrial procedures need revising or

liberalizing to give counsel greater latitude, we are willing to consider any suggestions the bar, or the trial courts may have.

1677*Kime*, at 396, 391 P.2d 955.

The defendants now urge that there is a need for informal, *ex parte* interviews of treating physicians. They contend that depositions are more costly and less efficient; that requiring defendants, but not plaintiffs, to use formal discovery is unfair; and that requiring defendants to depose treating physicians gives plaintiffs a tactical advantage by enabling them to monitor the defendants' case preparation.

The jurisdictions which have addressed this issue are divided as to the appropriate answer. A number of courts have approved *ex parte* contact due to its advantages over depositions and the claimed unfair advantage given plaintiffs. See *Doe v. Eli Lilly & Co.*, 99 F.R.D. 126 (D.D.C. 1983); *Trans-World Inv. v. Drobny*, 554 P.2d 1148 (Alaska 1976); *Langdon v. Champion*, 745 P.2d 1371 (Alaska 1987); *Green v. Bloodsworth*, 501 A.2d 1257 (Del. Super.Ct.1985); *State ex rel. Stufflebam v. Appelquist*, 694 S.W.2d 882 (Mo.App.1985); *Stempler v. Speidell*, 100 N.J. 368, 495 A.2d 857 (1985). We decline to adopt the rule of these cases. We find that the burden placed on defendants by having to use formal discovery is outweighed by the problems inherent in *ex parte* contact. See *Alston v. Greater S.E. Comm'ty Hosp.*, 107 F.R.D. 35 (D.D.C.1985); *Petrillo v. Syntex Labs, Inc.*, 148 Ill.App.3d 581, 102 Ill.Dec. 172, 499 N.E.2d 952 (1986), *appeal denied*, 113 Ill.2d 584, 106 Ill.Dec. 55, 505 N.E.2d 361, *cert. denied sub nom. Tobin v. Petrillo*, — U.S. —, 107 S.Ct. 3232, 97 L.Ed.2d 738 (1987); *Roosevelt Hotel Ltd. Partnership v. Sweeney*, 394 N.W.2d 353 (Iowa 1986); *Wenninger v. Muesing*, 307

Minn. 405, 240 N.W.2d 333 (1976); *Smith v. Ashby*, 106 N.M. 358, 743 P.2d 114 (1987); *Nelson v. Lewis*, 130 N.H. 106, 534 A.2d 720 (1987); *Anker v. Brodnitz*, 98 Misc.2d 148, 413 N.Y.S.2d 582 (Sup.Ct.), *aff'd mem.*, 73 A.D.2d 589, 422 N.Y.S.2d 887 (App.Div.1979).

[1-3] We hold that *ex parte* interviews should be prohibited as a matter of public policy. 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. RCW 16785.60.060(4).¹ A patient may waive this privilege by putting his or her physical condition in issue. See *Randa v. Bear*, 50 Wash.2d 415, 312 P.2d 640 (1957); *Phipps v. Sasser*, 74 Wash.2d 439, 445 P.2d 624 (1968).² Waiver is not absolute, however, but is limited to medical information relevant to the litigation. See CR 26(b)(1).

The danger of an *ex parte* interview is that it may result in disclosure of irrelevant, privileged medical information. The harm from disclosure of this confidential information cannot, as defendants argue, be fully remedied by subsequent court sanctions. The plaintiff's interest in avoiding such disclosure can best be protected by allowing plaintiff's counsel an opportunity to participate in physician interviews and raise appropriate objections. We find the reasoning of the Iowa Supreme Court persuasive:

We do not mean to question the integrity of doctors and lawyers or to suggest that we must control discovery in order to assure their ethical conduct. We are concerned, however, with the difficulty of determining whether a particular piece of information is relevant to the claim being litigated. Placing the burden of

1. RCW 5.60.060(4) provides in part:

Subject to the limitations under RCW 71.05.250, a physician or surgeon or osteopathic physician or surgeon shall not, without the 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 ...

2. Under two recent amendments to the privilege, waiver is now required (see Laws of 1986, ch. 305, § 101, p. 1355) or is deemed to have occurred (see Laws of 1987, ch. 212, § 1501, p. 797) within 90 days of filing a personal injury or wrongful death action. These amendments do not apply here as Loudon filed this action before August 1, 1986. See Laws of 1986, ch. 305, § 910, p. 1367.

determining relevancy on an attorney, who does not know the nature of the confidential disclosure about to be elicited, is risky. Asking the physician, untrained in the law, to assume this burden is a greater gamble and is unfair to the physician. We believe this determination is better made in a setting in which counsel for each party is present and the court is available to settle disputes.

1979 *Roosevelt Hotel Ltd. Partnership v. Sweeney*, 394 N.W.2d at 357.

The defendants urge us to permit *ex parte* contact but allow plaintiff the opportunity to seek a protective order under CR 26(c) limiting or prohibiting such contact upon a showing of good cause. However, we foresee that a protective order would usually be sought by plaintiff's counsel which would involve the court system in supervision of every such situation. We reject such a procedure.

The mere threat that a physician might engage in private interviews with defense counsel would, for some, have a chilling effect on the physician-patient relationship and hinder further treatment. The relationship between physician and patient is "a fiduciary one of the highest degree . . . invol[ing] every element of trust, confidence and good faith." *Lockett v. Goodill*, 71 Wash.2d 654, 656, 430 P.2d 589 (1967). This close confidential relationship is recognized by the Hippocratic Oath and in the ethical guidelines of the American Medical Association.³ "[W]e find it difficult to believe that a physician can engage in an *ex parte* conference with the legal adversary of his patient without endangering the trust and faith invested in him by his patient." *Petrillo v. Syntex Labs., Inc.*, 148 Ill.App.3d at 595, 102 Ill.Dec. 172, 499 N.E.

3. Principle IV of the AMA Principles of Medical Ethics states:

A physician shall respect the rights of patients . . . and shall safeguard patient confidences within the constraints of the law. Section 5.05 of the AMA Current Opinions of the Council on Ethical and Judicial Affairs (1986) further provides:

The information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree. The patient should

2d 952. The presence of plaintiff's counsel as the protector of a patient's confidences will allay the fear that irrelevant confidential material will be disclosed and preserve the fiduciary trust relationship between physician and patient. *Wenninger v. Muesing*, 307 Minn. at 411, 240 N.W.2d 333.

In addition, a physician has an interest in avoiding inadvertent wrongful disclosures during *ex parte* interviews. We recognize, without deciding, that a cause of action may lie against a physician for unauthorized disclosure of privileged information. See *Smith v. Driscoll*, 94 Wash. 441, 442, 162 P. 572 (1917) (dictum); Ward, *Pre-trial Waiver of the Physician/Patient Privilege*, 22 Gonz.L.Rev. 59, 62-63 (1986-87); Annot., *Physician's Tort Liability, Apart from Defamation, for Unauthorized Disclosure of Confidential Information about Patient*, 20 A.L.R.3d 1109 (1968). The participation of plaintiff's counsel to prevent improper questioning or inadvertent disclosures enhances the accomplishment of the purpose of the physician-patient privilege by also providing protection to the physician.

We note also that permitting *ex parte* interviews could result in disputes at trial should a doctor's testimony differ from the informal statements given to defense counsel, and may require defense counsel to testify as an impeachment witness.

We are unconvinced that any hardship caused the defendants by having to use formal discovery procedures outweighs the potential risks involved with *ex parte* interviews. Defendants may still reach the plaintiff's relevant medical records, and the cost and scheduling problems attendant with oral depositions can be minimized

feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services. The patient should be able to make this disclosure with the knowledge that the physician will respect the confidential nature of the communication. The physician should not reveal confidential communications or information without the express consent of the patient, unless required to do so by law. See also Washington State Medical Association Judicial Council Opinion 5.06 (1985) (identical).

(though perhaps not as satisfactorily) by using depositions upon written questions pursuant to CR 31. Moreover, plaintiff's counsel may agree to an informal interview with both counsel present. Furthermore, the argument that depositions unfairly allow plaintiffs to determine defendants' trial strategy does not comport with a purpose behind the discovery rules—to prevent surprise at trial.

Finally, the defendants argue that prohibiting *ex parte* contact with physicians is inconsistent with *Wright v. 1981 Group Health Hosp.*, 103 Wash.2d 192, 691 P.2d 564 (1984) and with the Washington State Bar Association Formal Ethics Opinion 180 (1985).⁴ *Wright* held (1) that the attorney-client privilege would not, of itself, bar an opposing 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; (2) current employees authorized to speak for a corporation would be considered "parties" with whom opposing counsel could not speak *ex parte*; 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.⁵ *Wright v. Group Health Hosp.*, *supra*, was not concerned with the fiduciary confidential relationship which exists between a physician and patient. The unique nature of the physician-patient relationship and the dangers which *ex parte* interviews pose justify the direct involvement of counsel in any contact between defense counsel and a plaintiff's physician. Similarly, Ethics Opinion 180 states only that *ex parte* contact with physicians is not unethical, but it does not address the policy concerns which militate against such contact.

4. Washington State Bar Association Formal Ethics Opinion 180 reads:

Where no patient privilege exists or where the privilege has been declared waived by Court Order or by the express written consent of the patient, a lawyer may interview a physician in the same manner as any other witness.

5. The *ex parte* communications rule of CFR DR 7-104 was replaced after the filing of the opin-

¹⁹⁸⁸We hold that defense counsel may not engage in *ex parte* contacts with a plaintiff's physicians. The trial court's order is affirmed.

PEARSON, C.J., and DORE, UTTER, ANDERSEN, BRACHTENBACH, GOODLOE, DOLLIVER and DURHAM, JJ., concur.



Jerry ADKINS and Teresa Adkins,
husband and wife, Appellants,

v.

ALUMINUM COMPANY OF AMERICA,
a foreign corporation, Respondent.

No. 53309-1.

Supreme Court of Washington.

June 9, 1988.

Reconsideration Denied June 9, 1988.

ORDER CLARIFYING OPINION

PEARSON, Chief Judge.

IT IS HEREBY ORDERED that the opinion filed in *Adkins v. Aluminum Co. of Am.*, 110 Wash.2d 128, 750 P.2d 1257 (1988) on March 3, 1988 is clarified as follows:

At 110 Wash.2d, page 143 [second sentence, 4th paragraph, in the first column of page 1266, of 750 P.2d], the following second sentence in the first full paragraph is deleted:

We conclude that in this case the improper argument presumptively affected the

ion in *Wright v. Group Health Hosp.* Its replacement, RPC 4.2, presently reads:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.