67350-5 67350-5

87811-1

No. 67350-5-I

IN THE COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

AOLANI GLOVER, a single individual,

Respondent,

v.

THE STATE OF WASHINGTON d/b/a
HARBORVIEW MEDICAL CENTER; AND LULU M. GIZAW, PA-C,

Petitioners

RESPONDENT'S BRIEF

OTOROWSKI JOHNSTON MORROW & GOLDEN, PLLC
Thomas R. Golden, WSBA #11040
Attorneys for Respondent
AOLANI GLOVER

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 DEC 12 PM 3:11

Thomas R. Golden, WSBA #11040
OTOROWSKI JOHNSTON MORROW & GOLDEN, PLLC
298 Winslow Way West
Bainbridge Island, WA 98110
Telephone (206) 842-1000
Fax: (206) 842-0797

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
I. COUNTERSTATEMENT OF FACTS 1
II. PROCEDURAL HISTORY 5
III. COUNTERSTATEMENT OF ISSUE BEFORE THE COURT 6
IV. SUMMARY OF ARGUMENT 7
V. ARGUMENT 10
A. Loudon Unambiguously Provides That a Defense Counsel May Not, as a Matter of Public Policy, Have Ex Parte Contact With a Plaintiff's Treating Physician, Even Though Patient-Physician Privilege Was Waived 10
B. The Defendant Should Not Be Allowed to Evade the Holdings of Loudon and Smith by Contending UWMC Treating Physicians and Healthcare Providers are Somehow a Party to the Litigation 14
C. An Attorney-Client Relationship Does Not Exist Between Defense Counsel and Nonparty Treating Physicians and Other Healthcare Providers Merely Because the State of Washington is a Named Party 18
D. Sherman v. State and Upjohn Co. v. United States Do Not Support The Creation of an Attorney-Client Relationship to All Employees 19
E. Granting Defendants' Protective Order Would Result In Extreme and Irreversible Prejudice to Aolani Glover While Denial of the Motion For Protective Order Does Not Impair Defendants' Ability to Defend Itself 25
F. RCW 70.02.050(1)(B) and Federal Law Do Not Overrule Loudon and Smith 31
G. Restrictions Upon Ex Parte Communication with Nonparty Treating Physicians will not Impair Legitimate Quality Improvement Functions 33
H. Other Courts Have Barred Ex Parte Communications With Nonparty Treating Physicians 36
I. The Granting of the Protective Order Places Treating Physicians in a Conflict of Interest Situation 43
VI. CONCLUSION 45
VII. CERTIFICATE OF SERVICE 46

TABLE OF AUTHORITIES

CASES

Aylward v. Settecase,
409 Ill.App.3d 831, 948 N.E.2d 769 (2011) 38, 39
Baylaender v. Method,
230 Ill.App.3d 610, 594 N.E.2d 1317 (1992), *review denied*,
146 Ill.2d 622, 602 N.E.2d 446 (1992) 35
Brandt v. Pelican,
856 S.W.2d 658 (Mo. 1993)(Brandt I) 28
Burger v. Lutheran General Hospital,
198 Ill.2d 21, 759 N.E.2d 533 (2001) 39, 40, 41
Carson v. Fine,
123 Wn.2d 206, 234, 867 P.2d 610 (1994).....9, 13
Crenshaw v. Mony Life Ins. Co.,
318 F.Supp.2d 1015, 1028 (S.D.Ca 2004) 28
Diversified Industries, Inc. v. Meredith,
572 F.2d 596 (8th Cir.1978).....24
Harper & Row Publishers, Inc. v. Decker,
423 F.2d 487 (7th Cir. 1970) 24
Hunter v. Brown,
4 Wn.App 899, 484 P.2d 1162 (1971) 41
In re Medical Malpractice Cases Pending in the Law Div.,
337 Ill.App.3d 1016, 787 N.E.2d 237 (2003) 40, 41
Keefe v. Bernard,
744 N.W.2d 663 (Ia. 2009) 24, 25, 42, 43
Koninklijke Luchtvaart Maatschappij N.V. KLM v. Tuller,
292 F2d. 775 (D.C. Cir. 1961) 17
Law v. Zuckerman,
307 F.Supp.2d 705,707,711 (D.Md. 2004) 12, 28
Lockett v. Goodill,
71 Wn.2d 654, 430 P.2d 589 (1967) 14
Loudon v. Mhyre,
110 Wn.2d 675, 756 P.2d 138 (1988) .....passim
Morgan v. County of Cook,
252 Ill.App.3d 947, 625 N.E.2d 136 (1993) 37, 38, 39
Peters v. Ballard,
58 Wn.App. 921. 795 P.2d 1158 (1990) 13

Petrillo v. Syntex Labs, Inc.,
148 Ill.App.3d 581, 499 N.E.2d 952 (1986) .....passim
Proctor v. Messina,
320 S.W.3d 145 (Mo 2010) 28, 29
Ritter v. Rush-Presbyterian-St. Luke's Medical Center,
177 Ill.App.3d 313, 532 N.E.2d 327 (1988) 36, 37, 38, 39
Samaritans Found. v. Goodfarb,
176 Ariz. 497, 862 P.2d 870, 880-81 (1993) 43
San Roman v. Children's Heart Center,
352 Ill.Dec. 357, 954 N.E.2d 217 (2010) 44, 45
Sherman v. State,
128 Wn.2d 164, 905 P.2d 355 (1995) 19, 20, 21, 23, 24, 34
Smith v. Orthopedics International,
170 Wn.2d 659, 244 P.3d 939 (2010).....passim
Testin v. Dreyer Medical Clinic,
238 Ill.App.3d 883, 605 N.E.2d 1070 (1992),***vacated and dismissed on other grounds***, 162 Ill.2d 205, 642 N.E.2d 1264
(1994) 36, 37, 38, 39
Upjohn Co. v. United States,
128 Wn.2d 164, 905 P.2d 355 (1995).....19, 21, 22, 23, 24
U.S. v. Ruehle,
583 F.3d 600 604 (9th Cir.2009) 23
Wright v. Group Health,
103 Wn.2d 192, 691 P.2d 564 (1984) 15, 18, 19, 22, 23, 32
Young v. Group Health,
85 Wn.2d 332, 534 P.2d 1349 (1975) 6, 16, 17, 23

STATUTES

42 U.S.C. § 1320d-7(a)(2).....27
RCW 70.02.050(1)(b) 25, 26
RCW 70.41.200 .....31, 33, 35
RCW 7.70 .....8, 18
45 C.F.R. 160, 164 26
45 C.F.R. 160.103.....27
45 C.F.R. 164.506(2) 30
45 C.F.R. 164.508.....27
45 C.F.R. 164.512(e) 28, 29, 31
45 C.F.R. 164.514(d)(3)(iii)(c) 30
45 C.F.R. 164.512(e)(1)(II) 29
45 C.F.R. 164.512 (e)(1)(i) and (ii) 31
45 C.F.R. 164.528 30

LAW REVIEW

Phillip H. Corboy, *Ex Parte Contacts Between Plaintiff's Physician and Defense Attorneys: Protecting the Patient-Litigant's Right to a Fair Trial*, 21 Loy. U. Chi. L.J. 1001, 1001-02 (1990).....30

APPENDIX

210 ILCS 85/6.17 .....40, 41

I. COUNTERSTATEMENT OF FACTS

In early 2008, Aolani Glover was 28 years of age and otherwise in good health. Aolani was in the early stages of pursing a law enforcement career and in fact, was scheduled to undergo a physical fitness test on April 2, 2008. The fitness test is a component for the employment application with the Kent Police Department. Aolani had informal discussions with and encouragement from members of the Kent Police Department to apply. CP 85-86.

However, on the morning of April 2, 2008, Aolani Glover developed chest pain, which she had not previously experienced. When the pain did not subside, Aolani's father, Mr. John Glover, took her to Harborview Medical Center (HMC). They arrived at approximately 11:00 am and proceeded to the Emergency Department. CP 81. Aolani and John Glover advised HMC personnel that Aolani was having chest pains. They were advised that they needed to wait in line. CP 83. Aolani Glover waited 1½ hours just for her initial registration. The HMC patient registration record confirms Aolani Glover being registered at 12:34 pm. CP 74. Notwithstanding her chest pain complaint, Aolani was directed to wait. CP 83. Aolani was not taken from the waiting room for triage until 3:12 pm. CP 101. Aolani estimates her wait at four hours. CP 82. This is over four hours from when Aolani first presented to the HMC Emergency Department and 2 hours and 48 minutes

after registration.

From the waiting area, Aolani Glover was not taken to an examining room. Instead, she was parked on a gurney in the hallway under a letter "H" to wait at least another hour to be seen by defendant Gizaw, a physician's assistant. A nurse took vital signs of pulse, blood pressure, respirations, temperature and recorded a pain scale at 3:12 pm. CP 101. The initial "labs" or blood work and electrocardiogram (EKG) were ordered as part of an initial treatment plan. CP 102. A part of the blood tests includes cardiac enzyme testing for Troponin.[1] Mr. Gizaw first saw Aolani at 4:43 pm when she was still in the hallway. CP 99. At 4:43 pm, laboratory results of the first set of cardiac enzymes were available and indicated an elevated Troponin-I of 5.89 ng/ml. CP 105. The HMC laboratory normal reference range is < .40 ng/ml. CP 105. This same record indicates that a Troponin-I of 0.40 ng/ml or greater is probable myocardial infarction. CP 105. The abnormal Troponin level is indicative of cardiac muscle damage and requires an immediate cardiac consultation. CP 109,110. Notwithstanding the 4:43 pm abnormal Troponin-I result, Mr. Gizaw discharged Aolani Glover at an unknown time, believed to

[1] Troponin is a complex of three proteins integral to contraction of cardiac muscle. Troponin levels are used to test for heart disorders including myocardial infarction.

be approximately 6:30 pm.[2], Aolani was told by Mr. Gizaw that she was not having a cardiac event and that she was probably experiencing stress. CP 84.

Mr. Gizaw's purported explanation of Ms. Glover's premature and inappropriate discharge is that he reviewed another patient's laboratory test results, including Troponin levels, and wrote them on Aolani Glover's *original* Emergency Room Record. The lab values of this purported unknown patient were supposedly normal. Mr. Gizaw advised supervising Emergency Room attending physician Alice Brownstein, M.D., that Aolani Glover's laboratory test, including Troponin level, were normal prior to discharge. CP 111. Regardless of the credibility of Mr. Gizaw's explanation, it is undisputed that he did not ever review Aolani Glover's laboratory test prior to discharge. It was only after Aolani's discharge that Mr. Gizaw reviewed the electronic record showing Aolani's lab results, which had been available for approximately 2 hours before he realized his critical error. CP 100. Mr. Gizaw found Aolani and her father at the outpatient pharmacy and urgently requested that Aolani return to the Emergency Department. CP 100.

Upon her return to the Emergency Department, Aolani was reexamined, and at 7:20 pm there was a redraw of blood for cardiac enzymes. CP 102. At 8:00 pm, admission orders to send Aolani to the Intensive Care

[2] HMC has no documentation, electronic medical record or any paper records confirming when Aolani Glover was discharged. This information would have been and should have been entered on the *original* hand written emergency room record.

Unit (ICU) were written, as well as an order for a CT angiography of the chest. The CT was negative for aortic dissection. The second Troponin level increased four fold to 24.58 ng/ml. CP 102.

At 7:22 pm, Aolani Glover was taken to the HMC Cardiac Catheterization Room, where it was first discovered that Aolani Glover had been experiencing a right coronary artery dissection.[3] Upon admission to the cardiac catheterization room, Aolani Glover still had good vital signs but quickly experienced multiple cardiac arrests requiring cardiopulmonary resuscitation (CPR), defibrillation (electric shock) and placement of a balloon pump to maintain blood pressure. The HMC interventional cardiologists were never able to successfully stent the right pulmonary artery and reintroduce blood flow through the right coronary artery. CP 113. Aolani Glover's critical medical conditions included 1) cardiogenic shock; 2) right coronary artery dissection, unsuccessfully stented; 3) acute respiratory distress syndrome; 4) ventilator assisted pneumonia; and 5) acute renal failure. CP 113. On April 5, 2008, Aolani Glover was transferred to the University of Washington Medical Center (UWMC) in critical condition with multi-organ system failure for consideration of possible heart transplant. CP

[3] Coronary artery dissection results from a tear in the inner layer of the artery, the tunica intima. This allows blood to penetrate and cause an intramural hematoma in the central layer of the artery, the tunica media, and a restriction in the size of the lumen, resulting in reduced blood flow, which in turn causes myocardial infarction and can later cause sudden cardiac death.

120. Aolani remained hospitalized at UWMC until April 22, 2008. A subsequent dissection in a left coronary artery required hospitalization at UWMC on May 6, 2008. Aolani underwent a heart transplant on June 27, 2008 at UWMC.

II. PROCEDURAL HISTORY

Aolani Glover commenced this medical negligence action against the State of Washington d/b/a Harborview Medical Center and Lulu M. Gizaw, PA-C. CP 1-8. It is undisputed that plaintiff makes no allegations of negligence for her subsequent care at The University of Washington Medical Center *or* after Aolani Glover finally arrived at HMC cardiac catheterization laboratory. CP 30-31, 38-39. In correspondence to HMC and Mr. Gizaw's counsel, plaintiff counsel confirmed:

> It is our position that the negligence in this action occurred within the Harborview Medical Center Emergency Room Department and its untimely triage and diagnosis of Aolani Glover's cardiac event. We are not contending any negligence on the part of the invasive cardiologist or the HMC cardiologists and intensivists, who cared for Aolani during and after the catheterization up to her transfer to the University of Washington Medical Center. Likewise, we are not contending Ms. Glover's care at the University of Washington Medical Center was negligent.

CP 38.

The same correspondence objected to any attempt to have *ex parte* contact with Aolani's subsequent treating physicians based upon Loudon and

Smith. CP 38-39.[4]

On June 16, 2011, the Honorable Richard D. Eadie heard argument on defendant's motion for protective order. The trial court denied the motion for protective order and, further ordered that the defense counsel and the defendant's risk manager are prohibited from *ex parte* contact, directly or indirectly with any of plaintiff Aolani Glover's treating physicians at the University of Washington Medical Center. CP 171. The trial court then granted the parties' joint motion for certification for discretionary review to this Court. CP 172-173. This Court granted discretionary review (Order date August 23, 2011) and linked this action with another discretionary action involving the same issue. See Young v. Peace Health, 67013-1-I; CP 45-47.

III. COUNTERSTATEMENT OF ISSUE BEFORE THE COURT

The issue before this court is whether the unambiguous rule that defense counsel may not have *ex parte* contact with a nonparty treating physician established in Loudon v. Mhyre, 110 Wn.2d 675, 756 P.2d 138 (1988), and most recently Smith v. Orthopedics International, 170 Wn.2d 659, 244 P.3d 939 (2010), is inapplicable when the treating physician is an employee of corporate defendant.

[4] Plaintiff later offered to allow defense counsel to discuss the incident with HMC cardiac catheterization lab personnel and HMC cardiology physician regarding *their* care in the events of April 2, 2008, with the understanding that these persons and individuals would not be provided any records from University of Washington Medical Center or subsequent cardiology care or any medical information not known to them contemporaneously at the time of their care. CP 41

IV. SUMMARY OF ARGUMENT

Aolani Glover contends that Mr. Gizaw and HMC were negligent in the delayed diagnosis of her cardiac condition because of 1) the over five hour delay in being seen by a physician assistant and/or physician; and 2) this five hour delay was further exacerbated by the negligence of HMC's Lulu Gizaw, PA-C in failing to diagnose the abnormal cardiac condition. All total, Ms. Glover was at the HMC Emergency Department for approximately 8 hours (11:00 am - 7:00 pm) before Aolani's cardiac condition was first recognized. This eight-hour delay prevented early and controlled medical intervention to prevent the subsequent massive right-sided heart damage, kidney damage and also was a proximate cause of her subsequent heart transplant.

The only named defendants in this action are the State of Washington d/b/a Harborview Medical Center and Lulu Gizaw. PA-C. At no time has Aolani Glover ever alleged any negligent medical care at any other institutions or at any other time than that occurring at HMC on April 2, 2008. Aolani Glover has never alleged any negligence against UWMC or it's physicians who cared for her after transferring from the HMC Emergency Department and who have continuously cared for her in both inpatient and outpatient settings and continue to do so presently. Nevertheless, defense counsel erroneously argues that he is legally entitled to have *ex parte* contact

with any and all of Aolani Glover's nonparty treating UWMC physicians as well as any other RCW 7.70 healthcare providers within the University of Washington Medical system claiming that a purported attorney-client privilege exists. CP 21. This argument is a clear subterfuge to nullify the unambiguous principles and public policy of Loudon v. Mhyre, 110 Wn.2d 675, 756 P.2d 138 (1988) and Smith v. Orthopedics International, 170 Wn.2d 659, 244 P.3d 939 (2010) prohibiting defense counsel from having any direct or indirect *ex parte* contact with a patient's nonparty treating physician. A decision by this court recognizing that a patient suing a HMC physician or the institution itself for a specific negligent event creates, as a matter of law, an attorney-client relationship with every single person within the University of Washington medical system effectively nullifies Loudon and Smith and further allows the defense to coerce nonparty treating physicians into an unintended expert witnesses against their own patients.

The affirmation of the trial court's denial of a protective order does not impair defense counsel's ability to defend his client or to conduct timely and legitimate quality improvement. Any questions that he wishes to ask of Aolani's treating physician in a confidential *ex parte* situation, can be asked in a deposition. The State of Washington and its counsel can consult with other experts in transplant centers across the country to retain forensic expert witnesses, just as Ms. Glover must do. Granting the protective order would

fundamentally prejudice Aolani Glover's right to a fair trial. Justice Charles W. Johnson recognized the prejudicial impact of utilizing a treating physician as a defense expert witness:

> Such testimony can wreak havoc with a plaintiff's case and possibly sound its death knell. The prejudicial impact of a treating physician's adverse expert testimony almost always outweighs the probative value of the testimony.

Carson v. Fine, 123 Wn.2d 206, 234, 867 P.2d 610 (1994). (J. Johnson, dissent).

Further, the recognition of an attorney/client relationship with subsequent nonparty treating physicians would preclude any discovery of *ex parte* discussions to even have an opportunity to establish the necessary prejudice arising out of *ex parte* contact.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) does not create an exception to the Loudon and Smith prohibition against *ex parte* communications. HIPAA is complimentary to Washington case law.

A holding that hospital and/or institutional nonparty treating physicians may not participate in *ex parte* communications with *defense* counsel will not interfere with a timely and legitimate quality improvement investigation. The litigation *defense* attorney must not be the same quality improvement counsel so as not to be placed in a conflict of interest or to be

privy to otherwise nondiscoverable and inadmissible evidence.

Beginning with Loudon 23 years ago and through it's progeny, and most recently the Supreme Court opinion in Smith, our Supreme Court and Court of Appeals have never recognized any exceptions to the clear and unambiguous prohibition against defense counsel having indirect or direct *ex parte* contact with a patient's nonparty treating physician.

V. ARGUMENT

A. LOUDON UNAMBIGUOUSLY PROVIDES THAT A DEFENSE COUNSEL MAY NOT, AS A MATTER OF PUBLIC POLICY, HAVE *EX PARTE* CONTACT WITH A PLAINTIFF'S TREATING PHYSICIAN EVEN THOUGH PATIENT-PHYSICIAN PRIVILEGE WAS WAIVED.

In a unanimous decision, our Supreme Court stated:

> We hold that the defense counsel may not engage in *ex parte contact*, but is limited to the formal discovery methods provided by court rule.

Loudon at 676. The Supreme Court did not recognize or consider there to be any exceptions to this rule. Smith and Loudon are clear that prohibition on *ex parte* contact applies to all nonparty treating physicians. In a key paragraph summarizing the holding in Loudon, and identifying the situation to which Loudon applies, the Smith court states:

> In Loudon, we established the rule that in a personal injury action, "defense counsel may not engage in ex parte contacts with a plaintiff's physicians." Loudon, 110 Wash.2d at 682, 756 P.2d 138. Underlying our decision was a concern for protecting the physician-

> patient privilege. Consistent with that notion, we determined that a plaintiff's waiver of the privilege does not authorize ex parte contact with a plaintiff's ***nonparty*** treating physician. In limiting contact between defense counsel and a plaintiff's ***nonparty*** treating physicians to the formal discovery methods provided by court rule, we indicated that "the burden placed on defendants by having to use formal discovery is outweighed by the problems inherent in ex parte contact." Id. At 667, 756 P.2d 138. We rejected the argument that requiring defense counsel to utilize formal discovery when communicating with a ***nonparty*** treating physician unfairly adds to the cost of litigation and "gives plaintiffs a tactical advantage by enabling them to monitor the defendants' case preparation."

Smith at 665 (emphasis added).

The Smith court also recognized the importance of prohibiting defense *ex parte* contact with treating physicians, and especially so in medical negligence actions. The Supreme Court stated:

> Courts have recognized that, in the past, permitting "ex parte contacts with an adversary's treating physician may have been a valuable tool in the arsenal of savvy counsel. The element of surprise could lead to case altering, if not for case dispositive results." *Law v. Zuckerman,* 307 F.Supp.2d. 705, 711 (D.Md.2004) (citing *Ngo v Standard Tools & Equip., Co.,* 197 F.R.D. 263 (D.Md 2000)); *see also State ex rel. Woytus v. Ryan*, 776 S.W.2d 389, 395 (Mo.1989) (acknowledging that **ex parte contact in medical malpractice cases between defense counsel and a nonparty treating physician creates risks that are not generally present in other types of personal injury litigation**, including the risk of discussing " 'the impact of a jury's award upon a physician's professional reputation, the rising cost of malpractice insurance premiums, the notion that the treating physician might be the next person to be

> sued,'" amount others (quoting *Manion v. N.P.W. Med. Ctr. of N.E. Pa., Inc.*, 676 F.Supp. 585, 594-95 (M.D.Pa1987))), *abrogated on other grounds by Brandt v. Pelican*, 856 S.W.2d 658, 661 (Mo.1993).

Smith, at 669 n. 2 (emphasis added).

Additionally, the Smith court recognized that defense counsel *ex parte* contact transforms a treating physician into an expert witness advocating for the defense. The Supreme Court stated:

> Furthermore, permitting contact between defense counsel and a nonparty treating physician outside the formal discovery process undermines the physician's roll as a fact witness because during the process the physician would improperly assume a roll akin to that of an expert witness for the defense. Fact witness testimony is limited to 'those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.'

ER 701. Smith, supra at 668. See also Peters v. Ballard, 58 Wn.App. 921, 795 P.2d 1158 (1990) [A treating physician testifies based on knowledge and opinions derived solely from factual observation and does not qualify as a CR 26(b)(4)(B) "expert."][5]

The policy of physician-patient confidentiality rests on long-standing ethical principles that physicians adopt when they practice medicine. By

[5] Now CR 26(b)(5)(B)

taking the Hippocratic Oath,[6] physicians pledge that they will honor the confidentiality of information they obtain from the patient. Carson v. Fine, 123 Wn.2d 206, 220, 867 P.2d 610 (1994). The American Medical Association and the Washington State Medical Association recognize the close confidential relationship between physicians and patients in the AMA's ethical guidelines. Loudon, 110 Wn.2d at 679 n.3.[7] As the Washington Supreme Court has declared, the relationship between physician and patient is "a fiduciary one of the highest degree . . . involv[ing] every element of trust, confidence and good faith." Lockett v. Goodill, 71 Wn.2d 654, 430 P.2d 589 (1967) (quoted in Loudon, 110 Wn.2d at 679).

In the present case, Aolani Glover seeks only an order prohibiting *ex parte* contact with her nonparty treating physicians. She is not suggesting or arguing that the facts and opinions of the UWMC treating physicians cannot be obtained. Loudon and Smith specifically provide that such factual testimony from treating physicians shall be done thought the discovery process. Loudon at 680. ["We are unconvinced that any hardship caused the

---

[6] The Hippocratic Oath states: "Whatever, in connection with my professional practice or not in connection with it, I see or hear, in the life of men, which ought not to be spoken abroad, I will not divulge, as reckoning that all such should be kept secret." Petrillo v. Syntex Labs, Inc., 148 Ill. App.3d 581, 499 N.E.2d 952 (1986).

[7] Principle IV of the AMA Principles of Medical Ethics provides in part: "A physician shall respect the rights of patients . . . and shall safeguard patient confidences and privacy within the constraints of the law." *See also* Washington State Med. Ass'n Principals of Medical Ethics (As adopted by the 1984 WSMA House of Delegates from the 1980 AMA Principles of Medical Ethics). Morrow Declaration, Exhibit B.

defendants by having to use formal discovery procedures outweighs the potential risk involved with *ex parte* interviews"]. Had Aolani Glover's follow-up cardiology care and all other care been provided at Swedish Medical Center, there would be no motion before this court and the opinions of treating physicians would be elicited by deposition. Continuing the prohibition against *ex parte* contact by defense counsel and limiting contact only though the discovery process ensures that both counsel, and more importantly the trial court and jury, will receive untainted and impartial testimony from treating physicians based solely on their treatment of Aolani Glover.

B. THE DEFENDANT SHOULD NOT BE ALLOWED TO EVADE THE HOLDINGS OF LOUDON AND SMITH BY CONTENDING UWMC TREATING PHYSICIANS AND HEALTHCARE PROVIDERS ARE SOMEHOW A PARTY TO THE LITIGATION

Aolani Glover's subsequent treating physicians at UWMC are not parties to the action when the institution and/or medical corporation is a named defendant. Aolani Glover respectfully submits that if a treating physician is not a "party", whether a named party or a person whose conduct give rise to liability, then Loudon and Smith must apply. This question of who is a "party" was clearly answered in Wright v. Group Health, 103 Wn.2d 192, 691 P.2d 564 (1984), which stated:

> We hold the best interpretation of "party" in litigation

> involving corporations is only those employees who have the legal authority to "bind" the corporation in a legal evidentiary sense, *i.e.*, those employees who have "speaking authority" for the corporation.

Id. at 200.

Wright also arose in the context of a medical negligence action. The Supreme Court in Wright rejected a claim by Group Health that all of its employees were "parties" in a lawsuit brought against the corporation. Id. at 194. Only those employees who are speaking agents for the corporation are parties. Id. at 200-201. Nonparty treating physicians with whom *ex parte* communication is prohibited by Loudon and Smith cannot be simply transformed to a "client" merely by employee status.

In particular, defense counsel contends that Dr. Larry Dean, Dr. Dan Fishbein and "possibly" Dr. Edward Verrier and Dr. Charles Murray are speaking agents by virtue of their position in management. CP 33. The involvement by doctors Dean, Fishbein, Verrier and Murray was in their capacity as direct healthcare providers. Thus, any testimony is limited to their factual knowledge then existing and interactions with Aolani Glover as treating physicians. As previously noted, there is no claim against any UWMC healthcare provider, no claim against the UWMC institution itself or any institutional liability issue where a "speaking agent" issue arises.

Further, no evidence was submitted to the superior court or in the

Clerk's Papers establishing that Dr. Dean, Dr. Fishbein, Dr. Verrier and Dr. Murray are somehow presently authorized within their alleged administrated capacity to legally bind the State of Washington and Harborview Medical Center in any issue in this case. No evidence was submitted to the superior court or in the Clerk's Papers that UWMC physicians Dean, Fishbein, Verrier or Murray are responsible for or set any Emergency Department policy at HMC. These UWMC physicians have neither the administrative position nor day-to-day experience at HMC to be a "speaking agent" and legally bind the State of Washington and HMC. Nor is there any evidence that the alleged managerial status is the legal equivalent to that of a speaking agent.

While the Supreme Court in Young v. Group Health, 85 Wn.2d 332, 534 P.2d 1349 (1975) allowed the opinion of a Group Health physician[8] to opine on the material facts regarding the risk of a vaginal delivery with the fetus in a breech presentation as an ER 801(d)(2) admission against Group Health, the court also held the admissibility of speaking agents admissions are dependent upon a finding by the trial court that the declarant is qualified as an expert within the area to which his testimony pertains; *that the declarant was a speaking agent for the principal at the time when the statement was made*, and that the admission is otherwise necessary, reliable and trustworthy.

[8] The treating physician was also a managing agent ["the plaintiff agrees that Dr. Malan was the managing agent for Group Health"]. Id. at 337.

Young at 337-338 *citing* Koninklijke Luchtvaart Maatschappij N.V. KLM v. Tuller, 292 F.2d 775 (D.C. Cir. 1961). (Emphasis added). In this case, the superior court judge never ruled upon the issue of whether any subsequent nonparty treating physician is in fact a "speaking agent." The superior court's order denying the motion for protection order is completely silent on this issue. CP 170-171.

A determination of whether Dr. Dean, Dr. Fishbein, Dr. Verrier and Dr. Murray may be a speaking agent and to what specific issues is a matter yet to be decided by the trial court, and one which may be heavily dependent upon the resolution of this appeal. Until then, any argument by HMC that any of these nonparty treating physicians is a speaking agent is not a fact or issue before this court and therefore improper.

C. AN ATTORNEY-CLIENT RELATIONSHIP DOES NOT EXIST BETWEEN DEFENSE COUNSEL AND NONPARTY TREATING PHYSICIANS AND OTHER HEALTHCARE PROVIDERS MERELY BECAUSE THE STATE OF WASHINGTON IS A NAMED PARTY

Defense counsel erroneously argues that "the adherence to Loudon and Smith prohibiting *ex parte* contact with UWMC healthcare providers "interfere with the attorney-client relations between my firm and the University" and "obviates the attorney-client privilege." CP 32. Defense counsel wishes to make every UWMC physician, nurse, therapist, medical technician or any other RCW 7.70 health care provider who cared for Aolani

Glover at any time, at any location, and for any condition a "client" to permit otherwise prohibited *ex parte* contact. This argument was specifically rejected in Wright v. Group Health, 103 Wn.2d 192, 194, 691 P.2d 564 (1984):

> Group Health argues that as a corporation represented by counsel, its current and former employees are "client" of the law firm for purposes of the attorney-client privilege. ...We disagree.

Id. at 194. The Supreme Court in Wright answered the question of who is a party by relying upon general principles of law of agency and evidence in determining which individuals within a corporation are to be considered as a party when the corporation is a named party. Id. at 201. HMC's attempt to distinguish Wright on the basis that the case pertains only to defining the conduct of plaintiff's counsel is myopic.

From it's own public information website, the University of Washington Medicine provides medical care at Harborview Medical Center, University of Washington Medical Center, Northwest Hospital and Medical Center and University of Washington Neighborhood Clinics in Belltown, Factoria, Federal Way, Issaquah, Kent/Des Moines, Shoreline and Woodinville. CP 91-96. In it's 2009 report to the community, UW Medicine and University of Washington Medical Center stated that they had 1,823 physicians and 4,359 employees. CP 90. The defense cannot seriously

contend that it has over five thousand clients in this action. This Court's recognition that a suit against the overarching medical corporation automatically establishes an attorney-client relationship is not supported by law and ignores the public policy of Loudon and Smith protecting the interest of patients and the integrity of the adversarial judicial system.

D. SHERMAN V. STATE AND UPJOHN CO. V. UNITED STATES DO NOT SUPPORT THE CREATION OF AN ATTORNEY-CLIENT RELATIONSHIP TO ALL EMPLOYEES

The case of Sherman v. State, 128 Wn.2d 164, 905 P.2d 355 (1995), cited by defense, does not create an attorney-client relationship as to all corporate employees. In Sherman, the facts did not involve a medical negligence case or *ex parte* contact with nonparty treating physicians. The case involved a resident anesthesiologist in the residency program who was terminated for diversion and use of drugs and then sought damages for a variety of claims including retaliatory discharge, deformation, violation of civil rights, federal and state handicap discrimination as well as seeking reinstatement and retraction of the report sent to the national board of anesthesiology. Id. at 176.

In Sherman, the anesthesiologist contended an attorney-client relationship existed between himself and the state attorney general's office that was representing the University by virtue of AAG representation of Dr.

Sherman in a prior medical negligence claim. Id. at 188-189. Dr. Sherman relied upon an Assistant Attorney General (AAG) memorandum he received describing the document as being subject to the attorney privilege and work product. This same document identified the individual AAG as an AAG "for the University of Washington," Id. The same AAG also provided legal advice to the Chairman of the Department of Anesthesiology at the time of Dr. Sherman's termination. Dr. Sherman contended this alleged conflict required disqualification of the entire Attorney General's office as counsel for the University. The Supreme Court held there was no basis for a subjective belief that Dr. Sherman and the AAG had an attorney-client relationship. Id. at 190.

From the Sherman decision, defense counsel in this case seizes upon the following language as authority for extending his attorney-client relationship to every employee within the University of Washington medical system:

> In arguing that an attorney-client relationship was formed, Dr. Sherman relies almost entirely on the fact that the memorandum was headed "CONFIDENTIAL – ATTORNEY CLIENT PRIVILEGE AND WORK PRODUCT." (Clerk's Papers at 5430.) However, the only reasonable interpretation of these words in this context is that correspondence between an attorney for a corporate entity and that entity's employees is subject to the attorney-client privilege of the corporate entity. See Upjohn Co. v. United States, 449 U.S. 383, 394-95, 101 S. Ct. 677, 66L. Ed.2d 584 (1981)

See Appellant's Opening Brief p. 23; Sherman at 190.

In Sherman, the referenced attorney-client privilege in this wrongful termination action existed between the University of Washington administrative personnel involved in the termination decision and who were also being sued in their individual capacity. In Sherman, there was no issue of whether the attorney-client relationship extended beyond the actual participants in the termination and to every single University employee. Aolani Glover has never contended that Mr. Madden has ever represented her interest nor does she seek his disqualification. Sherman does not establish or stand for the proposition that a medical negligence action arising out of a single discrete incident at Harborview Medical Center creates by operation of law an attorney-client relationship with all 1,823 or more physicians and over 4,000 additional employees of the University system. The absurd result of such a ruling would allow Mr. Madden to speak with every single physician, nurse or therapist who has ever seen Aolani Glover, either as an inpatient or an outpatient as a neighborhood clinic, for whatever reason, and Ms. Glover would never be aware of such *ex parte* contact or know to inquire into the substance of the *ex parte* discussions.

Contrary to HMC's position, Upjohn Co. v. United States, 449 U.S. 383, 101 S.Ct. 677 (1981), does not recognize an attorney-client

relationship between corporation counsel and all corporation employees. As noted in Wright, any extension of the attorney-client privilege to lower level corporate employees would occur only in limited factual settings *to protect communications* and not the underlying facts. Wright at 195. Wright court noted that in Upjohn, the "communication" was correspondence between the corporate employee and corporate counsel. It has not been suggested, argued or facts presented that nonparty treating physicians have prepared any *communication* "separate and distinct" from Aolani Glover's medical records, to which there would be any potential privilege issue. The fact that the attorney-client relationship does not extend to *all* corporate employees is exemplified by the fact that corporate attorneys now give so-called Upjohn "corporate Miranda" warnings to employees which make clear that the corporate attorneys 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. U.S. v. Ruehle, 583 F.3d 600, 604 (9th Cir. 2009).[9] To the extent applicable to the facts of the

[9] This argument is specifically referenced in Appellant's Reply Brief in Youngs v. Peace Health, 67013-1-I (p.7), which has been linked to present case for argument.

present case, Aolani Glover referenced and adopts the arguments made in the briefs of appellant. If in fact the Wright court had recognized an attorney-client relationship as to *all* corporation employees as appellant suggests,[10] then the holding would be markedly different and our Supreme Court would not have emphatically rejected Group Health's argument that all current and former employees are "clients". Wright at 194.

On two occasions in Wright and Sherman, the Washington Supreme Court has considered Upjohn. In Wright, the court had concurrent Group Health employees were not considered "clients". Id at 194. Likewise in Sherman, the Court emphasizes the attorney-client privilege extends only to the correspondence between the attorney for the corporate entity and that the entity's employee is subject to the attorney-client privilege of the corporate entity. Sherman at 190, Upjohn Co. v. United States. In the present case, there are no "communications" outside of the medical records for an Upjohn issue to exist.

In Keefe v. Bernard, 774 N.W.2d 663 (Ia 2009), the Upjohn, or corporate attorney-client privilege issue within the specific context for the nonparty treating physician setting was addressed by the Iowa Supreme

[10] "Under Upjohn, the attorney-client privilege for the university extends not to just targeted physicians or the university's management physicians, but to all the university's health care providers/agents and employees, even those who are not part of management." Appellants Brief, p. 26.

Court.[11] The defense counsel argued *inter alia* that a corporate attorney-client privilege existed with the nonparty employee physician by virtue of his employee status. The Iowa Supreme Court disagreed. In Keefe, the court reviewed Upjohn, the "subject matter" test of Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir.1970) *affirmed by an equally divided court*, 400 U.S. 348, 91 S.Ct. 479 (1971) [communications by corporate employee to legal counsel were privileged where the employee disclosure were made at the direction of their corporate superiors], and the modified "subject matter test" of Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir.1978).[12] The Keefe court considered whether the subject matter of the communication concerns actions by employees that have exposed the corporation to liability. Keefe, at 774 N.W. 2d at 672. (Emphasis added.) In rejecting a corporate-attorney privilege to the nonparty employee physician, the Iowa court stated:

---

[11] The Keefe opinion regarding an alleged attorney-client relationship is discussed *infra* § G. Mr. Keefe sued Dr. Bernard and the McFarland Clinic for negligence for treatment of a shoulder injury. Dr. Bernard and the client were represented by defense attorney Rouwenhorst. Dr. Bernard referred Mr. Keefe to clinic orthopedist, Dr. Sneller, Id. at 666.

[12] Diversified held the attorney-client privilege applies to employees communications where (1) the communication was made for the purpose of securing legal advise; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the requests so that corporation could secure legal advise; (4) the subject matter of the communication is within the scope of the employee's corporate duties; (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its content. Diversified Industries, Inc. v. Meredith, 609; Keefe, 774 N.W.2d. at 671-672.

> We agree with the United Stated Supreme Court that the corporate attorney-client privilege should not be limited to those in the "control group." Instead, the test must focus on the substance and purpose of the communication. If an employee of a corporation or entity discusses his or her own actions relating to potential liability of the corporation, such relating to potential liability of the corporation, such communications are protected by the attorney-client privilege.[13]

Keefe 774 N.W.2d at 672. Nonparty treating physicians do not expose the State of Washington, HMC or Mr. Gizaw to liability.

E. RCW 70.02.050(1)(B) AND FEDERAL LAW DO NOT OVERRULE LOUDON AND SMITH

RCW 70.02.050(1)(b) does recognize the unauthorized disclosure of patient information for legal purposes but such disclosure of medical records is done by subpoena with notice to the patient. This statute does not permit *ex parte* contact with treating physician.

RCW 70.02.050 was enacted in 1998 - ten years after the Supreme Court established the Loudon rule. There is no reference that this statute was intended to abrogate or create an exception to Loudon. Second, the title to RCW 70.02 pertains to medical records information, not *ex parte* discussions. Third, the term "legal" with RCW 70.02.050(1)(b) is not defined. The logical interpretation is that medical records can be obtained in legal proceedings

[13] Citing Samaritan Foundation v. Goodfard, 176 Ariz.497, 862 P.2d 870, 876 (1993). The Iowa Supreme Court also considered ex parte communications with defense counsel for the clinic defendant. Defense Counsel Rouwenhorst never factored Sneller and made a memorandum etc.

pursuant to statutory provisions. The term 'legal" must be narrowly and logically construed within the meaning of the statute and should not be considered an exception to Loudon and Smith to help the overall legal defense of the legal institution. Finally, RCW 70.02 requires notice to the patient of any compulsory effort to obtain medical records, and then only by subpoena and deposition. An interpretation of RCW 70.02.050(1)(b), which would allow *ex parte* contact with treating physicians must be rejected.

Likewise, any suggestion that federal law, such as Health Insurance Portability and Accountability Act (HIPAA) provides a separate basis for allowing defense counsel *ex parte* contact with the treating physician is misplaced. *Ex parte* contacts with treating providers are prohibited under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), unless the parties have complied with its procedures. HIPAA's "Privacy Rule establishes, for the first time, a foundation of federal protections for the privacy of protected health information."[14] This federal patient privacy protection means that secret, *ex parte* communications may no longer be tolerated in any state. Effective April 14, 2003, Health and Human Services (HHS) adopted a final Privacy Rule now codified as 45 C.F.R. parts 160, 164. HIPAA and the Standards promulgated by the Secretary of HHS expressly

[14] U.S. Dep't of Health & Human Servs., Office for Civil Rights Summary of the HIPAA Privacy Rule (Apr. 11, 2003, rev. 5/03), available at: www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf.

supersede "any contrary provision of State law," except as provided in 42 U.S.C. § 1320d-7(a)(2), if the state law "relates to the privacy of individually identifiable health information," and is "more stringent" than HIPAA's requirements. Except as otherwise permitted or required, Protected Health Information (PHI) defined at 45 C.F.R. § 160.103 (2006)) may not be disclosed without a valid authorization, and any use or disclosure must be consistent with the authorization granted. 45 C.F.R. § 164.508 (2002). The Privacy Rule applies to both written and oral communications. 45 C.F.R. § 160.103 (2006).

As demonstrated by Loudon, Washington law is "more stringent" than HIPAA in protecting patient confidentiality and prohibiting *ex parte* interviews by defense counsel. Nevertheless, HIPAA's regulations recognize the same concerns as behind Washington law. Defense counsel, as specialists in medical malpractice law, are charged with knowledge of both federal and state law on this issue. Since HIPAA was enacted, courts have interpreted it as prohibiting *ex parte* interviews of a plaintiff's treating physician by defense counsel in the absence of strict compliance with HIPAA. e.g., Law v. Zuckerman, 307 F.Supp.2d 705, 707, 711 (D.Md 2004); Crenshaw v. Mony Life Ins. Co., 318 F.Supp.2d 1015, 1028 (S.D.Ca 2004); Proctor v. Messina, 320 S.W.3d 145 (Mo. 2010).

In Proctor, the Missouri Supreme Court considered the impact of

HIPAA upon existing Missouri law, which allowed under limited *ex parte* communication. Brandt v. Pelican, 856 S.W.2d 658 (Mo. 1993)(Brandt I) [there was no statutory basis in Missouri to prohibit *ex parte* communications]. Thus, Missouri law was less restrictive than HIPAA regarding *ex parte* communications.

The Missouri Court noted:

> Subsequent to *Brandt I* and *Brandt II*, Congress passed HIPAA. Although Missouri's statutory law and this Court's rules of discovery on the topic of the physician testimonial privilege has remained silent on the issue of voluntary ex parte communication with a litigant patient's treating physician, HIPAA is not silent. HIPAA's general rule is that ex parte communications with a litigant patient's physician are prohibited. Absent an exception to this general rule in the enumerated exceptions outlined in HIPAA, HIPAA plainly prohibits such communications.

Proctor, 320 S.W.3d at 152-3.

In confirming the writ of prohibition, the court stated:

> The trial court is correct that the Secretary created exceptions to HIPAA's general prohibition on the disclosure of plaintiff's protected health information and that some of those exceptions are listed in 45 C.F.R. § 164.512(e). The trial court, however, erred in its application of 45 C.F.R. § 164.512(e)(1) to this case because the plain and ordinary language of 45 C.F.R. § 164.512(e)(1) does not authorize the disclosure of protected health information during a meeting in which an attorney, without express authorization of the patient, has ex parte communications with a physician.

> Stated another way, 45 C.F.R. § 164.512(e)(1) permits a health care provider to disclose otherwise protected health information ***"in the course of any judicial or administrative proceeding"*** if that disclosure is in response to (i) an order of a court, or (ii) in response to a subpoena, discovery request, or other lawful process, that is not accompanies by an order of a court. (Emphasis added.) Thus, by the express language of 45 C.F.R. § 164.512(e)(1), the covered entity's disclosure must occur "in the course of a 'judicial proceeding,'" and it must be made in response either to a formal process, whether in the form of a court order, discovery request or other lawful process. (Emphasis in original.)

Proctor, 320 S.W.3d at 155.

The Privacy Rule provides that a health care provider may reveal PHI in the course of a judicial proceeding under certain circumstances defined in 45 C.F.R. § 164.512(e). Nowhere do the regulations permit health care providers to discuss PHI with defense attorneys because a lawsuit is pending, nor do they purport to permit *ex parte* communications. HIPAA's regulations for judicial proceedings permit disclosure of PHI and allow disclosure only in response to: (1) a court order expressly authorizing the disclosure of the requested PHI, or (2) a subpoena or discovery request issued pursuant to the Rules of Civil Procedure if a qualified protective order has been requested or a good-faith effort has been made to give notice to the individual and any objections have been resolved. 45 C.F.R. § 164.512(e)(1)(II) (2002).

HIPAA also provides a patient with "a right to receive an accounting of disclosures of protected health information" within 6 years before the

request. 45 C.F.R. § 164.528 (2002). Thus, a patient has the right to know whether his doctor has engaged in *ex parte* communications.

Ex parte communications between defense counsel and a plaintiff's treating physician for the purpose of gaining a strategic advantage in the defense of a civil lawsuit violate both the letter and the spirit of HIPAA. Courts have recognized for years that "*[e]x parte* contacts are a 'hardball' tactic long favored by the defense bar, particularly in medical malpractice suits." Phillip H. Corboy, *Ex Parte Contacts Between Plaintiff's Physician and Defense Attorneys: Protecting the Patient-Litigant's Right to a Fair Trial*, 21 Loy. U. Chi. L.J. 1001, 1001-02 (1990). "Secret meetings between defense lawyers and treating physicians are an affront to both the rights of patients, who are entitled to place their trust in their doctors, and the rights of plaintiffs to a fair trial of their claims against alleged wrongdoers." Id. at 1038.

45 C.F.R. § 164.506(2) and 45 C.F.R. § 164.514 (d)(3)(iii)(c) relied upon by defendants do not refer to or specially authorize *ex parte* communications. Defendants cite not case law from any court interpreting HIPAA that these regulations permit *ex parte* communications with nonparty treating physicians. Rather, these two regulations must be interpreted to complement the privacy purposes of HIPAA and the general prohibition against disclosure of plaintiff's protected health information except for the

limited circumstances of "any judicial or administrative proceeding", "in response to an order of a court" or "in response to a subpoena, discovery request or other lawful process". 45 C.F.R. § 164.512(e)(l)(i) and (ii).

Thus, to the extent that HIPAA may be an issue, it is consistent with and complements Loudon and Smith rather than creating an exception to established state law.

F. GRANTING DEFENDANTS' PROTECTIVE ORDER WOULD RESULT IN EXTREME AND IRREVERSIBLE PREJUDICE TO AOLANI GLOVER WHILE DENIAL OF THE MOTION FOR PROTECTIVE ORDER DOES NOT IMPAIR DEFENDANTS' ABILITY TO DEFEND ITSELF.

Granting of the defendant's Motion for Protective Order necessarily hinges upon the finding of an expansive definition an attorney-client relationship notwithstanding its conflict with Wright v. Group Health. The practical results of such an order would absolutely prevent any medical negligence plaintiff from establishing the requisite prejudice from potential *ex parte* contact. All treating provider ex parte contacts would be cloaked within the attorney-client relationships and the patient would be unable to present to the trial court evidence of actual prejudice from *ex parte* contact. See Smith, supra at 672. There will be no record of what was said in these conversations. Future testimony would be shaped by *ex parte* communication when heard by the trial court and jury, and cannot be remedied. Loudon and Smith establish

a prophylactic rule. The rule is designed to prevent harm from *ex parte* contact from occurring in the first place. Attempting to engage in *ex parte* communication with a treating physician under the guise attorney-client relationship is merely another end-run around Loudon and most recently, Smith. In Smith, the Supreme Court held that defense counsel cannot accomplish indirectly what they cannot accomplish directly. Smith at 668-669.

The defendants' sole purpose in seeking *ex parte* communication with nonparty treating physicians is unquestionably the defense of the medical negligence action. This appeal is designed to place the defense of the University of Washington medical system above state and federal law, medical ethics and society's expectations of the medical profession. "Loyalty" from all health care providers to the University of Washington medical system is expected by this institution.[15]

G. RESTRICTIONS UPON *EX PARTE* COMMUNICATION WITH NONPARTY TREATING PHYSICIANS WILL NOT IMPAIR LEGITIMATE QUALITY IMPROVEMENT FUNCTIONS

The statutorily mandated quality improvement program (QI) is intended in part to prevent medical negligence. RCW 70.41.200. Inherent

[15] All of the providers-whether "targeted" or not-are employees of the University and colleagues in UW Medicine and, in addition to duties to patients, each of them owes a duty of loyalty to the University, which would include a duty to corporate in the defense of this case. Appellants Opening Brief p. 17.

in a quality improvement system is prevention of the negligent acts --- in this case, the delay in providing Aolani Glover timely emergency medical care and a correct diagnosis of her coronary condition. *Ex parte* communication with nonparty treating physicians who are uninvolved with the HMC Emergency Department care are totally unnecessary for legitimate QI functions. The QI committee would have *all* subsequent institutional medical records for QI review. A prohibition against *ex parte* communications with nonparty treating physicians would not alter the relevant facts before the QI committee. Further, if prevention of medical negligence is the stated goal, the prevention must focus upon the negligent care providers. The long-term patient consequences of the negligent care should be irrelevant to the QI committee.

At no place in RCW 70.41.200 is *ex parte* communication specifically identified or allowed. Defendant provides no information or evidence as to why patient medical records of institutional care are insufficient for QI purposes and why *ex parte* communications are required to supplement the official medical records. It strains credulity to believe that after over twenty years in existence, it is only now being argued that *ex parte* communications with nonparty treating physicians is integral to a QI program. Conversely, does defense counsel acknowledge or concede that HMC, UWMC and the entire University of Washington

Medical system has been routinely obtaining and utilizing *ex parte* communications with institutional nonparty treating physicians without the courts, patient and public knowledge?

Implicit in defendant's argument is the presumption that litigation defense counsel must be the same attorney providing legal advice for the QI committee. Such duel representation presents conflict, which can easily be rectified by restricting the roles of counsel. In Sherman v. State, supra, the Attorney General's office had no difficulty in providing separate legal counsel for individual physicians. The litigation defense attorney: (1) should not be privy to non-discoverable information restricted to the QI committee; (2) should not have *ex parte* access to QI fact witnesses; and (3) should not provide or be privy to legal advice regarding possible sanctions for negligent conduct of one or more health care providers and then defend the same institutional employees in the related medical negligence claim. Access to otherwise privileged information through a common attorney may disqualify testimony of the nonparty physician. See Baylaender v. Method, 230 Ill.App.3d 610, 594 N.E.2d 1317 (1992), review denied, 146 Ill.2d 622, 602 N.E.2d 446 (1992). In Baylaender, the court found that it is absolutely impossible to adequately protect and insulate attorney-client confidences when the same attorney engaged to represent the institutional defendant had previously

represented an individual nonparty treating physician. Id at 1326. Under these circumstances, the prudent course of action is to refrain from imposing QI obligation upon the same attorney later charged with defense of subsequent medical negligence action. The attorney originally assigned as personal counsel to a nonparty treating physician cannot later represent the corporate defendant or other named parties.

Appropriately constituted QI committees can function and have functioned for years without any judicially created exception to Loudon and Smith premised upon a mandated quality improvement program. Aolani Glover respectfully submits that RCW 70.41.200 neither specifically allows nor legitimately contemplates reliance upon *ex parte* communication. Instead, the quality improvement argument is a timely disguised attempt to gain *ex parte* access to nonparty treating physicians and such conduct is specifically prohibited under Loudon and Smith.

H. OTHER COURTS HAVE BARRED *EX PARTE* COMMUNICATIONS WITH NONPARTY TREATING PHYSICIANS

Illinois decisional law is illustrative. Two years prior to our Loudon decision, Illinois held that *ex parte* conferences between defense counsel and plaintiff's treating physicians are prohibited and against public policy. Petrillo v. Syntex Laboratories, Inc., 148 Ill.App.3d 581, 499 N.E.2d 952 (1986), cert, denied 483 U.S. 1007, 107 S.Ct. 3232 (1987). Petrillo was a

product liability action. Id. In Ritter v. Rush-Presbyterian-St. Luke's Medical Center, 177 Ill.App.3d 313, 532 N.E.2d. 327 (1988), the court held Petrillo applicable to a hospital employee treating physician who treated the patient after she was left unattended and fell from a gurney in the hospital's radiology department. In Testin v. Dreyer Medical Clinic, 238 Ill.App.3d 883, 605 N.E. 2d. 1070 (1992) vacated and dismissed on other grounds, 162 Ill.2d 205, 642 N.E.2d 1264 (1994), the Illinois Appellate Court applied Petrillo and Ritter in precluding the medical corporation's attorney from having *ex parte* communications with nonparty treating physicians at the medical corporation. Practicing under a corporate form does not affect the physician-patient privilege, and therefore, *ex parte* communication between the plaintiff's treating physician and its defendant-employer medical corporation, is prohibited. Testin, 605 N.E.2d at 1077.

In Morgan v. County of Cook, 252 Ill.App.3d 947, 625 N.E.2d 136 (1993), the Illinois court confirmed the Petrillo, Ritter and Testin prohibition of *ex parte* contact with a nonparty treating defendant. In Morgan, the patient sued orthopedic residents and the Cook County Hospital for delayed surgery and treatment of a fractured femur. The attending orthopedic surgeon, Dr. Hall, was named in the complaint but never formally served. The patient argued that defense counsel for the hospital could not engage in *ex parte* communications with Dr. Hall

because he was technically not a party to the litigation. On appeal, the court noted that Dr. Hall was a named defendant up until the eve of trial and only dismissed from the suit because plaintiff was unable to properly serve him with process. It is also Dr. Hall's decision regarding the plaintiff's care and treatment during his twenty-one day stay at the hospital, which were at issue, for which plaintiff was attempting to hold Cook County vicariously liable. Morgan, 625 N.E.2d at 142. The Morgan court stated:

> We do not believe, in such a situation where the plaintiff's physician's alleged negligent treatment is reported to be the cause of plaintiff's injuries, that the confidentiality of any medical information the physician may have learned during this allegedly negligent treatment of plaintiff outweighs the defendant's right to effectively defend itself to unfettered communication "with the physician for whose conduct the hospital is allegedly liable." Ritter, 532 N.E.2d at 330.

Morgan, 625 N.E.2d at 142.

In Morgan, the Illinois Court affirmed the viability of Petrillo, Ritter and Testin but clarified the fact that Petrillo and Ritter must not and cannot infringe upon hospital's or institution's "targeted" health care providers who where specifically involved in the alleged negligence. In the present case, the negligence is confined to the HMC Emergency

Department and the actions of Dr. Dean, Dr. Fishbein, Dr. Verrier and Dr. Murray at UWMC are not targeted health care providers.

Recently, in Aylward v. Settecase, 409 Ill.App.3d 831, 948 N.E. 2d 769 (2011), the Illinois court again specifically held that the medical clinic defense counsel could not engage in *ex parte* communications with the patient's physicians employed by the physician group. In Aylward, the patient sued his primary care physician and his employer, Midwest Physicians Group Limited, LTD. (MPG) alleging the failure to timely diagnose lung cancer. During discovery, MPG sought permission to communicate *ex parte* with various members of it's staff who were involved in plaintiff's medical treatment while he was a patient at MPG, but who were not named as defendan3ts in plaintiff's lawsuit. The trial court ultimately prohibited MPG from engaging in *ex parte* communication. Aylward, 948 N.E. 2d 769-770. On appeal, MPG argued that Petrillo, Ritter, Testin and Morgan should not preclude *ex parte* communication with nonparty treating physician within the physician group because of the *possibility* that these employee physicians, whose actions are not currently the basis the liability against MPG, may be the basis for liability against MPG in the future. Aylward, 948 N.E.2d at 771. The Aylward court rejected the notion that the possibility that nonparty employee physicians might be included in the litigation at a later point in

time was not sufficient to abandon the existing case law prohibiting *ex parte* contact with treating physicians-including nonparty treating physicians within the same medical corporation. The Alyward court stated:

> ... Petrillo, Ritter, Testin and Morgan all expressly prohibit a defendant, such as MPG from engaging in ex parte communications with a plaintiff's treating physician whose actions are not a potential basis for the hospital's liability.

Aylward, 948 N.E.2d at 774.

Illinois law is also helpful in resolving policy priorities in the setting of a hospital sharing confidential information in a jurisdiction with an unambiguous prohibition against *ex parte* communication with treating physicians. Burger v. Lutheran General Hospital, 198 Ill.2d 21, 759 N.E.2d 533 (2001) recognized that under the then existing Hospital Licensing Act, when a patient seeks care in an integrated health system, any legitimate expectation of privacy is limited to the institution rather than the individual provider and In re Medical Malpractice Cases Pending in the Law Div., 337 Ill.App.3d 1016, 787 N.E.2d 237 (2003), that intrahospital communication regarding the care and treatment rendered to a patient between employees and agents of the hospital, including members of its medical staff, legal staff and risk management. See Appellants Opening Brief pp. 18, 34. At issue in Burger and In re Medical

Malpractice Cases Pending in the Law Division was the constitutionality of the Illinois Hospital Licensing Act, including §6.17(e).[16] Burger held that the Hospital Licensing Act did not violate the separation of powers doctrine, did not unreasonably violate the patients right to privacy and did not constitute impermissible special legislation. Burger, 759 N.E.2d 533, Burger did not overrule Petrillo, but rather held that the privacy interest annunciated in Petrillo did not render the hospital licensing act unconstitutional on privacy grounds. [We continue to adhere to the belief that "the rational of the Petrillo court is sound." Best, 179 Ill.2d at 458, 228 Ill.Dec. 636, 689 N.E.2d 1057]. Burger, 759 N.E. at 554.

The In re Medical Malpractice Cases Pending in Law Division held that while the then existing Hospital Licensing Act § 6.17(e) did permit *ex parte* communication between hospital's counsel and hospital employees, the statute "in no sense diminishes the power of the circuit court to regulate the discovery process during litigation and to enter protective orders when, under the particular circumstances of any given case, justice may so require." Id. at 244. The issue of Illinois lawsuit prohibition of *ex parte* communication with hospital staff physicians was

[16] 210 ILCS 85/6.17(e), The hospital's medical staff members and the hospital's agents and employees may communicate, at any time and in any fashion, with legal counsel for the hospital concerning the patient medical record privacy and retention requirements of this Section and any care or treatment they provided or assisted in providing to any patient within the scope of their employment or affiliation with the hospital.

conclusively resolved in 2004, with an amendment to §6.17(e) of the Hospital Licensing Act providing that after a complaint is served on the hospital, on its agents or employees, the hospital's medical staff who are not alleged to be negligent "may not communicate with legal counsel for the hospital or with risk management of the hospital concerning the claim except with the patient's consent and discovery authorized by the court of civil procedure or the supreme court rules." 210 ILCS 85-6.17(e-5) (effective 11/2004). Thus, in Illinois, its version of Loudon and Smith remain fundamental public policy and unquestionably extend to multispecialty medical corporations and hospitals.

In Keefe v. Bernard, supra, the Iowa Supreme Court also considered *ex parte* communications with defense counsel for the clinic defendant. Defense counsel Rouwenhorst met with Dr. Sneller and made a memorandum of the *ex parte* meeting. The existence of the *ex parte* meeting was disclosed in pretrial discovery and during Dr. Sneller's deposition, attorney Rouwenhorst directed Dr. Sneller not to answer questions to discovery of matters discussed with the defense attorney. Id. at 667. In a discovery motion to compel production of the memorandum, the trial court granted a motion to compel finding *inter alia* that the document was not protected from discovery as an attorney-client communication. Id. at 667.

Iowa law differs from Loudon and Smith in that informal "consults" with treating physicians are allowed after waiver of the physician-patient privilege *but* also requires defense counsel to provide notice of the consultation and allow plaintiff's counsel to be present. Id. at 668; Iowa Code § 622.10 (3)(e). Mr. Rouwenhorst did neither. On appeal, the defense counsel contended that the statutory notice to plaintiff's counsel was not required because he is the personal attorney for Dr. Sneller, and in the alternative, he is the attorney for the clinic and the attorney-client privilege extends to the employee, Dr. Sneller. Id. at 669. The Iowa Supreme Court rejected these arguments. With regards to the personal attorney claim, the court noted that Dr. Sneller's care had not been implicated in the suit and that a review of the memorandum did not reflect any legal advise sought by Dr. Sneller. The court stated:

> There has been no showing, however, that the memorandum at issue was prepared pursuant to an attorney-client consultation between Rouwenhorst and Dr. Sneller personally. Based on *in camera* review, the memorandum does not reflect legal advice sought by Dr. Sneller. Instead, it demonstrates an investigation by Rouwenhorst into the hospital's liability for Dr. Bernard's actions. The memorandum is, therefore, not protected by Dr. Sneller's personal attorney-client privilege. Rouwenhorst cannot claim each witness as his client to prevent factual discovery. *See* Samaritans Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870, 880-81 (1993) (holding hospital's attorney could not "silence the employees by shielding their communications in the cloak of the [personal] attorney-

> client privilege" where the employees were interviewed regarding what they witnessed and not their own actions and the employees did not perceive a need for legal advice).

Keefe at 670.

These jurisdictions support propositions that *ex parte* communication with a treating physician is improper and that the mere fact that the nonparty treating physician is also an employee of a defendant hospital or institution does not override the prohibition of *ex parte* contact.

I. THE GRANTING OF THE PROTECTIVE ORDER PLACES TREATING PHYSICIANS IN A CONFLICT OF INTEREST SITUATION

The protective order sought ignores the conflict situation presented to physicians if defense counsel were allowed to have *ex parte* contact with treating physicians. Aolani Glover continues to receive cardiology specialty care, hospitalizations and out patient care at UWMC and a neighborhood clinic. Aolani Glover has not had any care, either inpatient or outpatient, at HMC other than her April 2-5, 2008 care. Aolani's current care providers may be required to confer with defense counsel anytime Aolani seeks needed medical care. There is a fiduciary duty between the physician and patient. Hunter v. Brown, 4 Wn.App. 899, 484 P.2d 1162 (1971) ["The physician-patient relationship is of a fiduciary character"]. While the fiduciary physician-patient relationship does not prohibit a physician from giving

potentially adverse testimony against his/her patients, the physician in his testimony must not become an advocate or partisan in the legal proceeding. Carson v. Fine, 123 Wn2d 206, 218, 267 P.2d 610 (1994).

In San Roman v. Children's Heart Center, 352 Ill. Dec. 357, 954 N.E.2d 217 (2010) modified upon denial of rehearing (2011), the minor child was referred to a heart specialist who was a retained consulting expert for the defendant in the underlying medical negligence action. This heart specialist performed a cardiac catheterization procedure without informing the parents of his role as a consulting expert. Over the plaintiff's objection, the defense expert and subsequent treating physician was allowed to testify at trial. Id at 219-21. On appeal, the defense verdict reversed and the expert was barred from testifying at retrial. Id at 228. The court stated:

> Our concern has been that because Lock was both Luis' new doctor and a defense expert trial witness, the trial started with the plaintiffs at an insurmountable disadvantage. The uninformed patient was not permitted to weigh the pros and cons of beginning treatment with a defense expert witness and he did not give informed consent to the formation of a dual relationship. We did not find that Lock's conduct was proper or improper. We cited the Petrillo line of authority only for the proposition that his dual relationship was unusual and contrary to his patient's interests. Ultimately, it is irrelevant to this court how Lock's unusual, dual affiliation came about and it makes no difference whether he deliberately or inadvertently accepted Luis as a new patient.

San Roman, 954 N.E.2d at 219. The risk of prejudice and harm to the patient

is too great and the treating physician must not be placed in this untenable position.

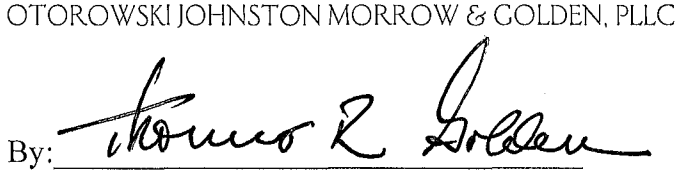
The San Ramon decision illustrates the spectrum of conflicts where a nonparty treating physician is also a CR 26(b)(5)(B) witness and conflicting duties. The prohibition against *ex parte* communication with defense counsel without any exceptions precluded this dual relationship.

CONCLUSION

Aolani Glover is not seeking an extension of Loudon and Smith. Conversely, Harborview Medical Center, Lulu Gizaw PA-C and the entire University of Washington medical system are urging a substantial retreat from Loudon and Smith which, with the consolidation of medical care under institutions and corporations, renders the prohibition against *ex parte* communication meaningless with extreme prejudice to the patient.

Respectfully submitted,

OTOROWSKI JOHNSTON MORROW & GOLDEN, PLLC

By: 

Thomas R. Golden, WSBA #11040
Attorney for Respondent Aolani Glover

V. CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that she is now, and at all times material hereto, was a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to, or interested in, the above-entitled action, and competent to be a witness herein. I caused to be served on the 12th day of December, 2011, a copy of the pleading entitled: Respondents Opening Brief to:

Michael Madden Bennett Bigelow & Leedom, P.S. 1700 Seventh Avenue, Suite 1900 Seattle, WA 98101 Email: mmadden@bbllaw.com	☐ Legal Messenger ☑ Hand Delivered ☐ Facsimile ☑ First Class Mail ☐ Email

Counsel for Petitioners

James L. Holman Attorney at Law The Holman Building 4041 Ruston Way, Suite 101 Tacoma, WA 98402 Email: jlholman@jameslholman.com	☐ Legal Messenger ☐ Hand Delivered ☐ Facsimile ☑ First Class Mail ☐ Email

Participant for Linked Case #670131-I
Co-Counsel for Petitioner

Mary H. Spillane Williams Kastner & Gibbs 2 Union Square - #4100 Seattle, WA 9811-3926 Email: mspillane@williamskastner.com	☐ Legal Messenger ☐ Hand Delivered ☐ Facsimile ☑ First Class Mail ☐ Email

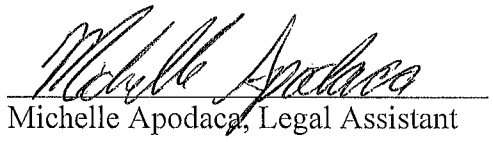
Participant for Linked Case #670131-I
Counsel for Respondent

John C. Graffe
Johnson Graffe Keay Moniz & Wick
925 Fourth Avenue, Suite 2300
Seattle, WA 98104
Email: johng@jgkmw.com

- ☐ Legal Messenger
- ☐ Hand Delivered
- ☐ Facsimile
- ☑ First Class Mail
- ☐ Email

Participant for Linked Case #670131-I
Counsel for Respondent

Signed at Bainbridge Island, Washington this 12th day of December, 2011.



Michelle Apodaca, Legal Assistant