STACY & CONDER, L.L.P.
ATTORNEYS & COUNSELORS

June 26, 2002

Charles Lynde Babcock, IV, Chairman
Texas Supreme Court Advisory Committee
Jackson Walker, LLP
901 Main Street #6000
Dallas TX 75202

Justice Nathan Hecht, Supreme Court Liason to the
Supreme Court Advisory Committee
P. O. Box 12487
Austin TX 78711

Dear Mr. Babcock and Justice Hecht:

I have reviewed the letter directed to Charles Babcock from Michael Wallach dated June 26, 2002, concerning Rules 509 and 510 of the Texas Rules of Evidence. I agree with the position taken by Mr. Wallach, and would urge you to consider his comments. As an attorney handling personal injury litigation, it is my belief that the proposed amendments to these Rules would be unduly burdensome on defense counsel.

With best regards, I am

Very truly yours,

Dennis D. Conder

DDC/pan

cc: Gilbert Low, Vice-Chairman
Texas Supreme Court Advisory Committee
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August 20 , 2002

Charles Lynde Babcock, IV, Chairman
Texas Supreme Court Advisory Committee
Jackson Walker, LLP
901 Main Street #6000
Dallas TX 75202

Justice Nathan Hecht, Supreme Court Liaison to the
Supreme Court Advisory Committee
P. O. Box 12487
Austin TX 78711

RE: Rules 509 and 510 of the Texas Rules of Evidence

Dear Mr. Babcock and Justice Hecht:

It has recently been brought to my attention that your Committee is considering a recommendation to amend Rules 509 and 510 of the Texas Rules of Evidence regarding so-called "ex parte" communications between treating physicians and lawyers representing defendants in personal injury and medical malpractice litigation.

As a defense lawyer primarily engaged in medical malpractice cases in both trial and appellate courts, this issue has always been of concern to me. I have always taken the position that the rules provided for a waiver of the physician-patient privilege when relevant to a claim or defense. I have succeeded with this argument in Bexar County district courts even before our appellate courts addressed the matter. Local plaintiffs' attorneys' argument based on an alleged "fiduciary duty" to the patient have been repeatedly rejected by our courts.

Rules 509 and 510 create a privilege for communications between physician providers and their patients. Because the information generated in the course of this relationship may be of significance to the parties to litigation, the rules provide that the privilege does not apply. These exceptions, importantly, include situations where the patient has brought a claim against a physician or where the communications or records are relevant to an issue of the physical, mental, or emotional condition of a patient where any party relies on such condition as part of the party's claim or defense.

It is typical in my practice that after a plaintiff identifies treating physicians in response to discovery requests, I send subpoenas to obtain the treating physicians' records in admissible form. To date, no attorney has objected to allowing me to review the medical records. As part of the investigation/discovery process, depending upon the information obtained in the medical records, I may

or may not choose to discuss the contents of the records with the treating physician. I consider that the privilege has been waived and that, under our rules, the physician is a fact witness who is free to discuss the matter with me or to decline such an invitation and request that I schedule a deposition.

Under the current state of the law, certainly the plaintiff and his attorney have the right to discuss the plaintiff's condition and communications with the physician. Obviously, I was pleased when Texas appellate courts finally put the issue to rest when they decided *Durst v. Hill Country Mem. Hosp.*, 70 S.W. 3d 233 (Tex. App.–San Antonio 2001, no pet.); *Rios v. Texas Dept. of Mental Health & Mental Retardation,* 58 S.W. 3d 167 (Tex. App.–San Antonio 2001, no pet.); *James v. Kloos* 2002 WL 464723 (Tex. App.–Fort Worth May 28, 2002 n.p.h.); and *Hogue v. Kroger Store No. 107*, 875 S.W. 2d 477 (Tex. App.–Houston [1st Dist.] 1994, writ denied). I believe that these courts appropriately interpreted the rules when they held that no prior court order is necessary for either party to discuss these issues with the treating physician and no treating physician is required to talk with either party's representatives.

It is my understanding that your Committee is considering recommending that a court order be required before a defendant's counsel may communicate with a treating physician. I strongly believe that no such change should be made. First, as noted above, a treating physician can refuse to discuss the patient with any party's attorney outside of a deposition or court setting. Therefore, like any other witness, a physician who chooses not to communicate informally does not have to do so. By the same token, any physician who has knowledge of relevant information is like any other witness, and either side to the litigation should be able to obtain that witness's information informally if the physician is willing to share it.

Second, to require a court order for a defendant's attorney to communicate informally with a physician would put the defendant to an unfair disadvantage visa-vis the plaintiff's attorney who, presumably, could always obtain his client's permission to visit with the physician. The plaintiff's attorney could always visit with the physician in private and use that information in developing his case strategy, but the defense attorney would not have that same right. On the contrary, the defense attorney would likely have to divulge his case strategy in order to get court permission to conduct a meeting.

Further, the fact that a patient's physician may disclose relevant information to defense counsel in an informal meeting should not be a threat to the physician-patient relationship. Plaintiffs are patients first, and they seek the assistance of their physicians for the purpose of treating their conditions. As such, it can only be reasonably concluded that their first and foremost legitimate concern is doing whatever is necessary to accomplish that end. It is not reasonable to conclude that patients will be more concerned with advancing their lawsuit, and they will not communicate whatever is necessary to treat their condition. After all, in the end, their communications with their physician are subject to discovery and will be made known to the defendant in the lawsuit which the patient has chosen to bring.

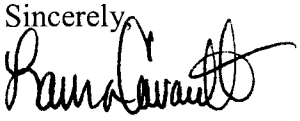
Finally, I find it disingenuous that the Plaintiffs' bar would permit defense counsel to obtain copies of medical records which are relevant to the matter in litigation but that it draws the line when defense counsel attempts to interview the witnesses who prepared the medical records. I do not see a distinction and I believe that defendants are entitled to informally interview all fact witnesses who are willing to submit to same. I have seen lawyers threaten doctors with litigation, complaints to the Board of Medical Examiners and sanctions. I believe such tactics are unprofessional and unwarranted in the face of Rules which specifically provide for waiver of the physician-patient privilege.

I believe that the Rules, as currently written and interpreted, should not be amended to require previous permission by the plaintiff or a court order to allow defense counsel the opportunity to informally communicate with a physician. To do so would place the defense at an unfair strategic disadvantage and would do nothing to enhance the physician-patient privilege. Additionally, it would

increase the cost of litigation by requiring court orders or by the taking of unnecessary depositions. Informal discovery is an integral part of the investigation and defense of all lawsuits, and defendants should not be deprived of that process in the defense of personal injury and medical malpractice litigation.

Thank you for considering my letter in your review of the issue. I am happy to further discuss the matter with you or any other committee member should you so desire.

Sincerely,



Laura A. Cavaretta

9000-093/223686

cc: Gilbert Low, Vice-Chairman
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August 20, 2002

Mr. Charles Lynde Babcock, IV, Chairman
Texas Supreme Court Advisory Committee
Jackson Walker, LLP
901 Main Street #6000
Dallas, Texas 75202

Dear Mr. Babcock:

It is my understanding that the Texas Supreme Court Advisory Committee is considering a recommendation to amend Rules 509 and 510 of the Texas Rules of Evidence regarding so-called "ex parte" communications between treating physicians and lawyers representing defendants in personal injury and medical malpractice litigation. I am in receipt of a copy of correspondence, dated June 26, 2002, from D. Michael Wallach to you in which he states the position of the Texas Association of Defense Counsel, Inc., with regard to the suggested amendment.

This will serve to advise as to the position of all attorneys of my law firm regarding the proposal. We are opposed to any changes in the rules, as currently written and interpreted, for the same reasons set forth in Mr. Wallach's letter to you of June 26, 2002, a copy of which is attached hereto for your convenience.

We appreciate your consideration of our position in this matter.

Respectfully submitted,

NELSON & NELSON

Jack O. Nelson, Jr.

JONJ/mk

cc: Justice Nathan Hecht, Supreme Court Liason to the
Supreme Court Advisory Committee
P. O. Box 12487
Austin, Texas 78711

Mr. Gilbert Low, Vice-Chairman
Texas Supreme Court Advisory Committee
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470 Orleans Street, 4th Floor
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June 26, 2002

Charles Lynde Babcock, IV, Chairman
Texas Supreme Court Advisory Committee
Jackson Walker, LLP
901 Main Street #6000
Dallas TX 75202

Dear Mr. Babcock:

I am writing this letter on behalf of the Texas Association of Defense Counsel, Inc. It has recently been brought to our attention that your Committee is considering a recommendation to amend Rules 509 and 510 of the Texas Rules of Evidence regarding so-called "ex parte" communications between treating physicians and lawyers representing defendants in personal injury and medical malpractice litigation. The purpose of this letter is to state the position of our Association regarding this matter.

Rules 509 and 510 create a privilege for communications between physicians/mental health providers (hereinafter "physicians" for ease of reference) and their patients. This privilege is a laudatory one, as the free exchange of information is important to the nature of this relationship. These rules, however, recognize that the information generated in the course of this relationship may be of significance to the parties to litigation and, under certain circumstances, the privilege should not apply. These exceptions, importantly, include situations where the patient has brought a claim against a physician or where the communications or records are relevant to an issue of the physical, mental, or emotional condition of a patient where any party relies on such condition as part of the party's claim or defense.

Under the current state of the law, certainly the plaintiff and his attorney have the right to discuss the plaintiff's condition and communications with the physician. Likewise, the defendant's attorneys have the right to discuss similar information if it is relevant to the issues in the case. *Durst v. Hill Country Mem. Hosp.* 70 S.W. 3d 233 (Tex. App.–San Antonio 2001, no pet.): *Rios v. Texas Dept. of Mental Health Health & Mental Retardation* 58 S.W. 3d 167 (Tex. App.–San Antonio 2001, no pet.): *James v. Klocs* 2002 WL 464723 (Tex. App.–Fort Worth May 28, 2002 n.p.h.): *Hogue v. Kroger Store No. 107*, 875 S.W. 2d 477 (Tex. App.–Houston [1st Dist.] 1994, writ denied). No prior court order is necessary for either party to discuss these issues with the treating physician and no treating physician is required to talk with either party's representatives.

It is our understanding that your Committee is considering recommending that a court order be required before a defendant's counsel may communicate with a treating physician. It is our position that no such change should be made. First, as noted above, no treating physician is required to communicate with any party's attorney outside of a deposition or court setting. Therefore, like any other witness, a physician who chooses not to communicate informally does not have to do so. By the same token, any physician who has knowledge of relevant information is like any other witness, and either side to the litigation should be able to obtain that witness's information informally if the physician is willing to share it.

Second, to require a court order for a defendant's attorney to communicate informally with a physician would put the defendant to an unfair disadvantage vis-a-vis the plaintiff's attorney who, presumably, could always obtain his client's permission to visit with the physician. The plaintiff's attorney could always visit with the physician in private and use that information in developing his case strategy, but the defense attorney would not have that same right. On the contrary, the defense attorney would likely have to divulge his case strategy in order to get court permission to conduct a meeting.

Further, to the extent that the court restricted such a meeting to one conducted in the presence of plaintiff's counsel, the defense attorney would be limited in his discussions for fear of disclosing potential strategies to his adversary. As a result, the defense would be placed at an unfair and unnecessary strategic disadvantage compared to plaintiff's counsel. Under the current state of affairs, both counsel are free to discuss relevant information with the physician in order to explore potential case strategies without being at risk of unfair disclosure to the other side or being equally without the benefit of the physician's knowledge other than what is contained in the physician's records.

Finally, the fact that a patient's physician may disclose relevant information to defense counsel in an informal meeting should not be a threat to the physician-patient relationship. Plaintiffs are patients first, and they seek the assistance of their physicians for the purpose of treating their conditions. As such, it can only be reasonably concluded that their first and foremost legitimate concern is doing whatever is necessary to accomplish that end. It is not reasonable to conclude that patients will be more concerned with advancing their lawsuit, and they will not communicate whatever is necessary to treat their condition. After all, in the end, their communications with their physician are subject to discovery and will be made known to the defendant in the lawsuit which the patient has chosen to bring.

The TADC believes that the Rules, as currently written and interpreted, should not be amended to require previous permission by the plaintiff or a court order to allow defense counsel the opportunity to informally communicate with a physician. To do so would place the defense at an unfair strategic disadvantage and would do nothing to enhance the physician-patient privilege. Additionally, it would increase the cost of litigation by requiring court orders or by the taking of unnecessary depositions. Informal discovery is an integral part of the investigation and defense of all lawsuits, and defendants should not be deprived of that process in the defense of personal injury and medical malpractice litigation.

Respectfully submitted,

D. Michael Wallach

mer

cc: Justice Nathan Hecht, Supreme Court Liason to the
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Personal Injury Trial Law
Texas Board of Legal Specialization

August 21, 2002

Mr. Charles Lynde Babcock, IV, Chairman
Texas Supreme Court Advisory Committee
Jackson Walker, LLP
901 Main Street #6000
Dallas TX 75202

Dear Mr. Babcock:

I am a lawyer in Texas and have been Board Certified in Personal Injury and Civil Trial Law by the Board of Legal Specialization since 1984. My practice has long included representing medical professionals.

It has recently been brought to our attention that your Committee is considering a recommendation to amend Rules 509 and 510 of the Texas Rules of Evidence regarding so-called "ex parte" communications between treating physicians and lawyers representing defendants in personal injury and medical malpractice litigation. I am very disturbed that the proposed change goes against the present Rules of Evidence and case law that has been developed over the last few years. Additional, your proposed change would also offend fundamental fairness by giving a distinct advantage to the plaintiff's bar.

Rules 509 and 510 create a privilege for communications between physicians/mental health providers (hereinafter "physicians" for ease of reference) and their patients. This privilege is a laudatory one, as the free exchange of information is important to the nature of this relationship. These rules, however, recognize that the information generated in the course of this relationship may be of significance to the parties to litigation and, under certain circumstances, the privilege should not apply. Important exceptions include situations where the **patient has chosen** to bring a claim against a physician or where the communications or records are relevant to an issue of the physical, mental, or emotional condition of a patient where any party relies on such condition as part of the party's claim or defense.

Under the current state of the law, certainly the plaintiff and his attorney have the right to discuss the plaintiff's condition and communications with the physician. Likewise, the defendant's attorneys have the right to discuss similar information if it is relevant to the issues in the case. *Durst v. Hill Country Mem. Hosp.* 70 S.W. 3d 233 (Tex. App.–San Antonio 2001, no pet.): *Rios v. Texas Dept. of Mental Health & Mental Retardation* 58 S.W. 3d 167 (Tex. App.–San Antonio 2001, no pet.): *James v. Kloos* 2002 WL 464723 (Tex. App.–Fort Worth May 28, 2002 n.p.h.): *Hogue v. Kroger Store No. 107*, 875 S.W. 2d 477 (Tex. App.–Houston [1st Dist.] 1994, writ denied). No prior court order is necessary for either party to discuss these issues with the treating physician and no treating physician is required to talk with either party's representatives.

It is my understanding that your Committee is considering recommending that a court order be required before a defendant's counsel may communicate with a treating physician. No such change should be made. First, as noted above, no treating physician is required to communicate with any party's attorney outside of a deposition or court setting. Therefore, like any other witness, a physician who chooses not to communicate informally does not have to do so. By the same token, any physician who has knowledge of relevant information is like any other witness, and either side to the litigation should be able to obtain that witness's information informally if the physician is willing to share it.

Second, to require a court order for a defendant's attorney to communicate informally with a physician would put the defendant to an unfair disadvantage vis-à-vis the plaintiff's attorney who, presumably, could always obtain his client's permission to visit with the physician. The plaintiff's attorney could always visit with the physician in private and use that information in developing his case strategy, but the defense attorney would not have that same opportunity. On the contrary, the defense attorney would likely have to divulge his case strategy in order to get court permission to conduct a meeting.

Further, to the extent that the court restricted such a meeting to one conducted in the presence of plaintiff's counsel, the defense attorney would be limited in his discussions for fear of disclosing potential strategies to his adversary. As a result, the defense would be placed at an unfair and unnecessary strategic disadvantage compared to plaintiff's counsel. Under the current state of the law, both counsel are free to discuss relevant information with the physician in order to explore potential case strategies without being at risk of unfair disclosure to the other side or being equally without the benefit of the physician's knowledge other than what is contained in the physician's records.

Finally, the fact that a patient's physician may disclose relevant information to defense counsel in an informal meeting should not be a threat to the physician-patient relationship. Plaintiffs are patients first, and they seek the assistance of their physicians for the purpose of treating their conditions. As such, it can only be reasonably concluded that their first and foremost legitimate concern is doing whatever is necessary to accomplish that end. It is not reasonable to conclude that patients will be

more concerned with advancing their lawsuit, and they will not communicate whatever is necessary to treat their condition. After all, in the end, their communications with their physician are subject to discovery and will be made known to the defendant in the lawsuit which the patient has chosen to bring.

The Rules, as currently written and interpreted, should not be amended to require previous permission by the plaintiff or a court order to allow defense counsel the opportunity to informally communicate with a physician or healthcare provider. To do so would essentially deprive the defense of the ability to talk to the physician or healthcare provider. Moreover, the defendant would be at an unfair strategic disadvantage. This rule would do nothing to enhance the physician-patient relationship. Additionally, it would increase the cost of litigation by requiring court orders or by the taking of unnecessary depositions. Informal discovery is an integral part of the investigation and defense of all lawsuits, and defendants should not be deprived of that process in the defense of personal injury and medical malpractice litigation.

Rules need to be balanced and provide access for the litigants to the truth. I urge you not to endorse this rule.

Respectfully submitted,

Cynthia Day Grimes

CDG:ccm

cc: Justice Nathan Hecht, Supreme Court Liaison to the
Supreme Court Advisory Committee
P. O. Box 12487
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August 21, 2002

Charles Lynde Babcock, IV, Chairman
Texas Supreme Court Advisory Committee
Jackson Walker, LLP
901 Main Street #6000
Dallas, TX 75202

Dear Mr. Babcock:

It has recently been brought to my attention that your Committee is considering a recommendation to amend Rules 509 and 510 of the Texas Rules of Evidence regarding so-called "ex parte" communications between treating physicians and lawyers representing defendants in personal injury and medical malpractice litigation. I do not believe it is in the best interests of the bar or bench to change the existing rules.

Rules 509 and 510 create a privilege for communications between physicians/mental health providers (hereinafter "physicians" for easy of reference) and their patients. This privilege is a laudatory one, as the free exchange of information is important to the nature of this relationship. These rules, however, recognize that the information generated in the course of this relationship may be of significance to the parties to litigation and, under certain circumstances, the privilege should not apply. These exceptions, importantly, include situations where the patient has brought a claim against a physician or where the communications or records are relevant to an issues of the physical, mental, or emotional condition of a patient where any party relies on such condition as part of the party's claim or defense.

Under the current state of law, certainly the plaintiff and his attorney have the right to discuss the plaintiff's condition and communications with the physician. Likewise, the defendant's attorneys have the right to discuss similar information if it is relevant to the issues in the case. *Durst v. Hill Country Mem. Hosp.* 70 S. W. 3d 233 (Tex. App.-San Antonio 2001, no pet.): *Rios v. Texas Dept. of Mental Health Health & Mental Retardation* 58 S. W. 3d 167 (Tex. App.-San Antonio 2001, no pet.): *James v. Kloos* 2002 WL 464723 (Tex. App.-Fort Worth May 28, 2002 n.p.h.): *Hogue v.*

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It is my understanding that your Committee is considering recommending that a court order be required before a defendant's counsel may communicate with a treating physician. It is my position that no such change should be made. First, as noted above, no treating physician is required to communicate with any party's attorney outside of a deposition or court setting. Therefore, like any other witness, a physician who chooses not to communicate informally does not have to do so. By the same token, any physician who has knowledge of relevant information is like any other witness, and either side to the litigation should be able to obtain that witness's information informally if the physician is willing to share it.

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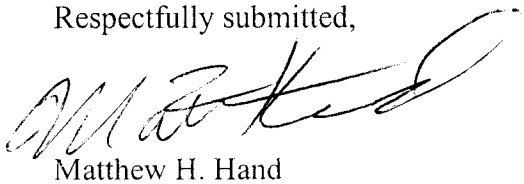
Further, to the extent that the court restricted such a meeting to one conducted in the presence of plaintiff's counsel, the defense attorney would be limited in his discussions for fear of disclosing potential strategies to his adversary. As a result, the defense would be placed at an unfair and unnecessary strategic disadvantage compared to plaintiff's counsel. Under the current state of affairs, both counsel are free to discuss relevant information with the physician in order to explore potential case strategies without being at risk of unfair disclosure to the other side or being equally without the benefit of the physician's knowledge other than what is contained in the physician's records.

Finally, the fact that a patient's physician may disclose relevant information to defense counsel in an informal meeting should not be a threat to the physician-patient relationship. Plaintiffs are patients first, and they seek the assistance of their physicians for the purpose of treating their conditions. As such, it can only be reasonably concluded that their first and foremost legitimate concern is doing whatever is necessary to treat their condition. After all, in the end, their communications with their physician are subject to discovery and will be made known to the defendant in the lawsuit which the patient has chosen to bring.

I believe that the Rules, as currently written and interpreted, should not be amended to require previous permission by the plaintiff or a court order to allow defense counsel the opportunity to informally communicate with a physician. To do so would place the defense at an unfair strategic disadvantage and would do nothing to enhance the physician-patient privilege. Additionally, it

would increase the cost of litigation by requiring court order or by the taking of unnecessary depositions. The recent rule revisions have been done to help reduce litigation costs. The proposed rule changes are in direct conflict with that goal. Informal discovery is an integral part of the investigation and defense of all lawsuits, and defendants should not be deprived of that process in the defense of personal injury and medical malpractice litigation.

Respectfully submitted,



Matthew H. Hand

jt

c: Justice Nathan Hecht, Supreme Court Liason to the
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*** Also Licensed in California

August 21, 2002

Via First Class Mail

Charles Lynde Babcock, IV, Chairman
Texas Supreme Court Advisory Committee
Jackson Walker, L.L.P.
901 Main Street, #6000
Dallas, Texas 75202

Re: Ex Parte Communications

Dear Mr. Babcock:

I understand from Michael Wallach, the current president of the Texas Association of Defense Counsel, that the Texas Supreme Court Advisory Committee is considering a recommendation regarding ex parte communications by defense lawyers and treating physicians. I will not repeat what Mike has stated in his letter to you of June 26, 2002 as I know you are already familiar with his position. What I wanted to do was let you know my perspective.

I have been doing medical malpractice defense for some 25 years and, occasionally, other forms of personal injury defense. Over those 25 years, I have seen an explosion of formal discovery despite efforts to minimize these costs in litigation. I have often felt that "informal" discovery is a significant way of lessening costs of litigation. I know that was in part the purpose of the amendments to our rules of discovery that was initiated and directed by Justice Hecht during the 1990s. To now require us to conduct all investigation of a person's underlying medical condition and subsequent medical care through formal discovery is contrary to this philosophy.

I believe current case law provides a mechanism that enables a defense attorney to conduct an investigation which provides protection to the patient and his or her treating physician. While it is obvious that any system can be abused, it should not be anticipated that a defense attorney would abuse the current system any more than we should assume that it is abused by the plaintiff's attorney. If that is the real reason for considering an amendment to Rules 509 and 510, then I would urge you to at least make it a balanced rule providing that the plaintiff's attorney likewise may not visit with his or her client's treating physicians. To do otherwise suggests a bias in favor of the plaintiff's attorney which I am confident is not what is intended.

1801 S. Mopac, Suite 300 Spyglass Point Austin, Texas 78746 (P.O. Box 2283 Austin 78768-2283) Fax: (512) 482-0342 (512) 482-0614

I also wonder why this is now being raised as a problem. During the several hundred medical malpractice cases that I have either tried or resolved by settlement or dismissal, I have never had a case where the plaintiff's attorney has complained about my actions or the actions of any co-defendant attorneys. If a problem really exists, I think it can best be handled consistent with current case law that provides a mechanism within the context of the case for sanctioning the attorney or treating physician who goes beyond relevant information in their discussions.

I would be glad to visit with anyone about this further should they desire and to give further perspective from an attorney whose legal career has encompassed this issue. Yours is not an easy task, but I urge caution in upsetting what I believe is currently a proper balance between the rights of both parties.

Respectfully,

David M. Davis

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cc: Justice Nathan Hecht
Gilbert Low

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August 22, 2002

Charles Lynde Babcock, IV, Chairman
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Gilbert Low, Vice-Chairman
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Austin, TX 78711

Gentlemen:

I understand that the plaintiffs' bar is strongly advocating a change in the rules which will preclude meeting with physicians in personal injury and wrongful death cases to discuss matters relevant to personal injury or death claims. I have represented physicians and other healthcare providers since 1978 in allegations of medical negligence. I cannot imagine the additional expense and delay that would be added to medical malpractice litigation if individuals representing health care providers accused of malpractice could only access facts pertinent to damages, causation, and issues relevant to the claim through deposition or a formal discovery process. A change in the rules which would prevent defense counsel from an ex parte meeting with a health care provider to discuss issues relevant to the lawsuit would mean that the health care provider could be accessed only by plaintiffs' attorneys. The unfairness of this is so insurmountable as to make defense of allegations of malpractice far more burdensome and expensive than at present in a system that is already burdened to the point that insurance carriers are exiting the malpractice coverage market and going belly-up at an alarming rate. This could well be the straw that breaks the camel's back.

I can accomplish in a quick ex parte meeting in terms of learning about pertinent facts and opinions what would take hours in a deposition setting. Additionally, if the ex parte meeting is eliminated, the ability for defense counsel to discuss any theory of injury or to determine through the attorney's work product whether or not a theory of causation is plausible would be entirely thwarted by plaintiffs' counsel's presence, while plaintiffs' counsel would still be able to have access to answers to their own queries in that regard. Elimination of the ability of defense counsel to meet with physicians and health care providers ex parte in personal injury cases, particularly medical malpractice, would essentially mean that subsequent and other treaters in the case become hostages of the plaintiffs' lawyers.

The idea that there could be some sort of informal meeting in which defense counsel is accompanied by plaintiffs' counsel is likewise an unworkable and unfair situation. Swearing matches about who said what would invariably result. This would give plaintiffs' attorneys access to the defense lawyer's work product while the defense lawyer would have no access to the work product of the plaintiffs' lawyer who could still have ex parte meetings with the health care providers. For example, if I wanted to ask a subsequent treating neonatologist who had seen a baby only immediately after birth in a case in which brain injury was alleged to have occurred at birth such questions as whether or not the pattern of injury on MRI and the constellation of symptoms fit with a metabolic abnormality or could have occurred before the onset of labor based upon nucleated red blood cell findings and ask whether or not the physician thought literature I had located was reliable in supporting either proposition, I would have to trot out my own work product for viewing by the plaintiffs' lawyer. My possible theories and thoughts would be on display. I would be forced to educate the plaintiffs' lawyer or display to the plaintiffs' lawyer the frailties of my potential defenses. Plaintiffs' counsel on the other hand, would still have the benefit of a private audience with the same neonatologist.

The simple ability to set up a meeting would be difficult and costly if the difficulty in scheduling depositions is any indication.

When an individual files a malpractice claim, the physician patient privilege is waived as to matters relevant to the claim. It is only reasonable and fair that lawyers for each side be able to talk to the physicians who have information relevant to the claim without the presence of opposing counsel. Pertinent to consider is that matters discussed by the defense counsel are matters relevant to the claim -- a court matter -- and in no way are determinative of the continuing treatment or invade the actual treatment decisions made by the physician with and for the patient.

I urge and request that the rules continue intact, recognizing that the physician-patient privilege is waived for matters pertinent to claims of medical negligence, personal injury and wrongful death. To do otherwise is to put such a burden on physicians and healthcare providers, their insurers and defense counsel that our Texas physicians will be denied a fair opportunity to defend themselves in the state of Texas.

Very truly yours,

Suzan Cardwell

SC/kh

RANDOLPH P. TOWER
ROBERT J. ROSENBACH
STEVEN D. BROWNE
GEORGE H. SPENCER, JR.
JANE E. BOCKUS
JAMES A. HOFFMAN
JEFF KAVY
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August 22, 2002

Charles Lynde Babcock, IV, Chairman
Texas Supreme Court Advisory Committee
Jackson Walker, LLP
901 main Street #6000
Dallas, Texas 75202

Dear Mr. Babcock:

I understand your Committee is considering a recommendation to amend Rules 509 and 510 of the Texas Rules of Evidence regarding so-called "ex parte" communications between treating physicians and lawyers representing defendants in personal injury and medical malpractice litigation.

Under the current state of the law, both plaintiff and defense attorneys have the right to discuss similar information with treating physicians if it is relevant to the issues in the case. No prior court order is necessary for either party to discuss these issues with the treating physician and no treating physician is required to talk with either party's representatives.

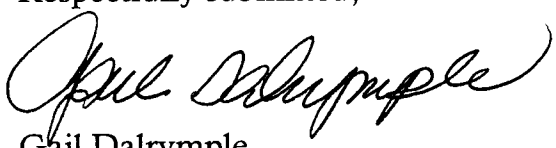
I believe this is appropriate and should not be changed. To require a court order for a defendant's attorney to communicate informally with a physician would put the defendant to an unfair disadvantage vis-à-vis the plaintiff's attorney who, presumably, could always obtain his client's permission to visit with the physician. The plaintiff's attorney could always visit with the physician in private and use that information in developing his case strategy, but the defense attorney would not have the same right. On the contrary, the defense attorney would likely have to divulge his case strategy in order to get court permission to conduct a meeting.

Further, to the extent that the court restricted such a meeting to one conducted in the presence of plaintiff's counsel, the defense attorney would be limited in his discussions for fear of disclosing potential strategies to his adversary. As a result, the defense would be placed at an unfair and unnecessary strategic disadvantage compared to plaintiff's counsel. Currently, both counsel are free to discuss relevant

information with the physician in order to explore potential case strategies without being at risk of unfair disclosure to the other side or being equally without the benefit of the physician's knowledge other than what is contained in the physician's records.

The Rules, as currently written and interpreted, should not be amended to require previous permission by the plaintiff or a court order to allow defense counsel the opportunity to informally communicate with a physician. To do so would place the defense at an unfair strategic disadvantage and would do nothing to enhance the physician-patient privilege. Additionally, it would increase the cost of litigation by requiring court orders or by the taking of unnecessary depositions. Informal discovery is an integral part of the investigation and defense of all lawsuits, and defendants should not be deprived of that process in the defense of personal injury and medical malpractice litigation.

Respectfully submitted,



Gail Dalrymple

GD:br

cc: Justice Nathan Hecht, Supreme Court Liaison to
Supreme Court Advisory Committee
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Austin, Texas 78711

Gilbert Low, Vice-Chairman
Supreme Court Advisory Committee
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August 22, 2002

Charles L. Babcock, IV, Esq.
Chairman, Texas Supreme Court Advisory Committee
Jackson Walker, LLP
901 Main Street, Suite 6000
Dallas, Texas 75202

Re: Texas Supreme Court Advisory Committee

Dear Mr. Babcock:

I understand that your committee is considering a recommendation to amend Rules 509 and 510 of the Texas Rules of Evidence. The amendment, if passed, would require defense attorneys to obtain a court order before speaking to a treating physician about a physical, mental, or emotional condition relevant to a claim in a pending suit.

I strongly disagree with the proposed amendment. Not only is it unnecessary, but it would create an unfair strategic advantage for the plaintiff's bar. Moreover, the proposed amendment runs counter to the intent of the stated objectives of the rules:

> The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.

Tex. R. Civ. P. 1. "Discovery in civil cases is founded on the principle that justice is best served when litigants may obtain information not in their possession to prosecute and defend claims . . . ." Texas Rules of Civil Procedure § 9 (explaining the 1999 Amendments to the Texas Rules of Civil Procedure).

The proposed amendment transforms what is intended to be a fair and impartial process into a biased procedure in favor of the plaintiff. A treating physician, like any other witness, has no obligation to communicate with any party or any party's attorney other than in court or by

deposition. Why allow the plaintiff's attorney unfettered access to the treating physician and put a hurdle in front of the defense attorney? A trial lawyer handling a case on behalf of the plaintiff could meet with the physician and privately outline case strategy. A disadvantaged defense attorney is prohibited from doing the same thing. In fact, in order to obtain a court order to meet with the physician, defense counsel may have to disclose defense strategy. This just does not make sense, unless the intention of the committee is to favor one party in personal injury and death litigation.

Furthermore, as a practical matter, the considered amendment will play havoc with treating physicians' calendars. Rather than being able to explain their records informally, they will likely have to be deposed. It will be more likely that the doctors will be subpoenaed. I anticipate that the "doctors' lobby" will likely want to be heard on this issue.

As you know, I handle cases on both sides of the personal injury docket. Admittedly, most of my work is on the defense side. The recommendation that is being considered would inhibit relevant information and drive up the cost of discovery. It is abundantly clear that such a recommendation is an attempt by one interest group of the bar to inhibit the discovery of relevant evidence, contrary to the expressed objective of the rules and the principle upon which discovery is founded.

In sum, the rules, as currently written and interpreted, should not be amended. If passed, the amendment would put the defense at an unfair strategic disadvantage. It would necessarily raise the cost of discovery and further alienate the treating physicians.

If I can provide you with further information or opinions, please give me a call.

Respectfully submitted,

BEIRNE, MAYNARD & PARSONS, L.L.P.

Edward J. Murphy

EJM:vjh
374814.1

cc: Gilbert Low, Esq.
Vice Chairman, Texas Supreme Court Advisory Committee
Orgain, Bell & Tucker, L.L.P.
470 Orleans Street, 4th Floor
Beaumont, Texas 77701

Justice Nathan Hecht
Supreme Court Liaison to the Supreme Court Advisory Committee
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August 22, 2002

Mr. Charles Lynde Babcock, IV
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JACKSON WALKER, LLP
901 Main Street #6000
Dallas TX 75202

Mr. Gilbert Low
Vice-Chairman
TEXAS SUPREME COURT ADVISORY COMMITTEE
ORGAIN, BELL & TUCKER, L.L.P.
470 Orleans Street, 4th Floor
Beaumont, TX 77701

Gentlemen:

I am writing on behalf of the Texas Association of Defense Counsel, Inc. It has recently been brought to our attention that your Committee is considering a recommendation to amend Rules 509 and 510 of the Texas Rules of Evidence regarding so-called "ex parte" communications between treating physicians and lawyers representing defendants in personal injury and medical malpractice litigation. The purpose of this letter is to state the position of our Association regarding this matter.

Rules 509 and 510 create a privilege for communications between physicians/mental health providers (hereinafter "physicians" for ease of reference) and their patients. This privilege is a laudatory one, as the free exchange of information is important to the nature of this relationship. These rules, however, recognize that the information generated in the course of this relationship may be of significance to the parties to litigation and, under certain circumstances, the privilege should not apply. These exceptions, importantly, include situations where the patient has brought a claim against a physician or where the communications or records are relevant to an issue of the physical, mental, or emotional condition of a patient where any party relies on such condition as part of the party's claim or defense.

Under the current state of the law, certainly the plaintiff and his attorney have the right to discuss the plaintiff's condition and communications with the physician. Likewise, the defendant's attorneys have the right to discuss similar information if it is relevant to the issues in the case. *Durst v. Hill Country Mem. Hosp.* 70 S.W.3d 233 (Tex.App.-San Antonio 2001, no pet.); *Rios v. Texas Dept. of Mental Health Health & Mental Retardation* 58 S.W.3d 167 (Tex.App.-San Antonio 2001, no pet.); *James v. Kloos* 2002 WL464723 (Tex.App.-Fort Worth May 28, 2992 n.p.h.); *Hogue v. Kroger Store No. 107*, 875 S.W.2d 477 (Tex.App.-Houston [1st Dist.] 1994, writ denied). No prior court order is necessary for either party to discuss these issues with the treating physician and no treating physician is required to talk with either party's representatives.

It is our understanding that your Committee is considering recommending that a court order be required before a defendant's counsel may communicate with a treating physician. It is our position that no such change should be made. First, as noted above, no treating physician is required to communicate with any party's attorney outside of a deposition or court setting. Therefore, like any other witness, a physician who chooses not to communicate informally does not have to do so. By the same token, any physician who has knowledge of relevant information is like any other witness, and either side to the litigation should be able to obtain that witness's information informally if the physician is willing to share it.

Second, to require a court order for a defendant's attorney to communicate informally with a physician would put the defendant to an unfair disadvantage vis-à-vis the plaintiff's attorney who, presumably, could always obtain his client's permission to visit with the physician. The plaintiff's attorney could always visit with the physician in private and use that information in developing his case strategy, but the defense attorney would not have that same right. On the contrary, the defense attorney would likely have to divulge his case strategy in order to get court permission to conduct a meeting.

Further, to the extent that the court restricted such a meeting to one conducted in the presence of plaintiff's counsel, the defense attorney would be limited in his discussions for fear of disclosing potential strategies to his adversary. As a result, the defense would be placed at an unfair and unnecessary strategic disadvantage compared to plaintiff's counsel. Under the current state of affairs, both counsel are free to discuss relevant information with the physician in order to explore potential case strategies without being at risk of unfair disclosure to the other side or being equally without the benefit of the physician's knowledge other than what is contained in the physician's records.

Finally, the fact that a patient's physician may disclose relevant information to defense counsel in an informal meeting should not be a threat to the physician-patient relationship. Plaintiffs are patients first, and they seek the assistance of their physicians for the purpose of treating their conditions. As such, it can only be reasonably concluded that their first and foremost legitimate concern is doing whatever is necessary to accomplish that end. It is not reasonable to conclude that patients will be more concerned with advancing their lawsuit, and they will not communicate whatever is necessary to treat their condition. After all, in the end, their communications with their physician are subject to discovery and will be made known to the defendant in the lawsuit, which the patient has chosen to bring.

The TADC believes that the Rules, as currently written and interpreted, should not be amended to require previous permission by the plaintiff or a court order to allow defense counsel the opportunity to informally communicate with a physician. To do so would place the defense at an unfair strategic disadvantage and would do nothing to enhance the physician-patient privilege. It provides unilateral access for Plaintiffs' attorneys to the most significant fact witnesses in a case. Additionally, it would increase the cost of litigation by requiring court orders or by the taking of unnecessary depositions. Informal discovery is an integral part of the investigation and defense of all lawsuits, and defendants should not be deprived of that process in the defense of personal injury and medical malpractice litigation.

Sincerely,

Tanya Tyer Smitherman

TTS | rnv

cc: Justice Nathan Hecht
SUPREME COURT LIAISON TO THE
SUPREME COURT ADVISORY COMMITTEE
P. O. Box 12487
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SPEAKER OF THE TEXAS HOUSE OF REPRESENTATIVES
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August 23, 2002

Mr. Charles Lynde Babcock IV
Chairman, Texas Supreme Court Advisory Committee
Jackson & Walker, L.L.P.
901 Main Street, Suite 6000
Dallas, Texas 75202

Re: Ex parte communication between Defense Counsel and plaintiff's physicians

Dear Mr. Babcock:

It has come to my attention that the Supreme Court Advisory Committee is considering whether defense counsel should be allowed to speak with treating physicians of personal injury Plaintiffs. I have practiced Medical Malpractice Defense for the last twelve (12) years and have routinely contacted treating physicians to determine their opinions on many issues, most notably whether they believe my client breached the standard of care and caused the Plaintiff's injuries. Although the San Antonio Court of Appeals has recently ruled that this is appropriate, I understand you all may be trying to change this rule.

There are a couple of points that I think need mentioning in dealing with this issue. First, the purpose of the physician/patient privilege is to protect private and sensitive medical information. Just because a plaintiff files a PI case, does not mean that all of his medical records are fair game. However, at a minimum there should be a distinction between those physicians that treat the patient solely for the injury at issue and those that have an on-going relationship with the patient both before and after the injury. I certainly see no problem with contacting the orthopedic surgeon who performed a subsequent operation to correct a problem the plaintiff believes was caused by my client. Everything the subsequent treating physician knows is related to the injury. He has no knowledge of the patient before the incident so there is no way he could ever tell me about something that is not relevant to the case. When dealing with family practitioners or OBGYNs, I'm more prudent. Although they may have treated the patient for what we would consider embarrassing medical problems before or after the incident at issue, I should still be allowed to ask them what they think about the Plaintiffs alleged claim. Frankly, I do not care what happened before or after the incident and don't discuss it with the physician because I know it will never be admissible at the courthouse. However, family practitioners often have a lot of incite as to the true cause of a patient's injury and thus have relevant testimony to offer.

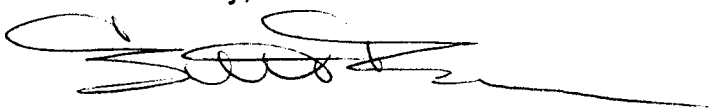
Secondly, most defense attorneys obtain complete copies of records from all physicians who have ever seen the patient. This even includes family practitioners and OBGYNs. Ninety-nine times out of a hundred the plaintiff's attorney doesn't complain about providing me all of the plaintiff's gynecological records for the proceeding thirty years. They probably do not care because they know this will not be admissible at the courthouse. Since I am provided copies of all of medical records, why should I be prohibited from speaking with the doctor? I have already seen it all in writing. There is no difference in hearing it verbally from the physician as well.

Third on my list is the fact that there are often dozens of treating physicians in complicated cases. Plaintiff's counsel is free to call any of them and find out what they think. If I am prevented from contacting all of them, how will I know if they are going to testify at trial and what they are going to tell the jury? Am I supposed to notice twenty to thirty depositions to ask the physician if he remembers this patient and if he has any thoughts on liability or damages in my case? Most of them won't offer any meaningful testimony. This will certainly add volumes of needless depositions to these cases, but I will have to depose all of them just in case Plaintiff calls one of these witnesses buried deep in the fact witness list.

In summary, I believe the rule should not be changed, but we do as the Fourth Court of Appeals has opined: Allow defense attorneys to contact treating physicians as we always have, but if somebody steps way out of line, let there be sanctions. I for one am not afraid if this is the course we choose because I know most defense attorneys are like myself and do not care about other extraneous medical information that will never be heard by a jury.

I would hope that we do not have to change our current rule of evidence and we can keep things as they are. I do not believe there is a problem so there is really no need to fix anything. If you would like to discuss this any further with me, please feel free to call on me.

Sincerely,



Brett B. Rowe

BBR/gt

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August 26, 2002

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Honorable Nathan Hecht
Texas Supreme Court
P.O. Box 12487
Austin, Texas 78711

Re: *Ex Parte* Communications Between Physicians and Attorneys

Gentlemen:

I am a member of the Committee on the Administration of the Rules of Evidence ("AREC"), and the chairman of a subcommittee which was formed in response to a request by the Supreme Court Advisory Committee ("SCAC") for AREC to study the possibility of making changes to Rule 509 of the *TRE* to deal *ex parte* communications between physicians and attorneys who don't represent the physician's patient. With Mark Sales' permission, I am writing this letter to you to let you know the status of our subcommittee's efforts and its workings.

I have received a copy of a letter which was written by the president of the Texas Association of Defense Counsel ("TADC") to its members asking TADC members to write letters to each of you urging you to reject out of hand the AREC work product on this issue. The letter to TADC membership states that the Committee is heading **"toward a recommendation"** that defense lawyers should be precluded from conducting *ex parte* communications with treating physicians and that this recommendation is a **"concerted effort by the plaintiffs' attorneys on the Committee"** to reverse existing case law on the issue. I am enclosing a copy of the letter for your information.

I have several concerns about the letter – the first being that it purports to address conclusions which neither the subcommittee (nor AREC as a whole) have yet reached. The letter also ignores the committee structures which are in place to study these types of issues and implies that a political approach to the issue – writing each of you – is preferable to studying the problem

and working towards the best solution. I am also concerned that the letter creates the impression that what the subcommittee is doing is not fair, thorough or even- handed. So, I write to you to let you know what we are doing, who the subcommittee members are and when we expect to have a report. In that regard, let me emphasize that:

1. No conclusion of any kind has been reached by the subcommittee and AREC, as a whole, has yet to hear the subcommittee's report; and

2. It is not the concerted efforts of plaintiffs' attorneys on the subcommittee – or defense lawyers for that matter – which will dictate what the subcommittee does – although both sides of the personal injury docket have a voice.

Let me provide you with the following information regarding the subcommittee and its work product:

1. The subcommittee dealing with *ex parte* communications is well balanced. The subcommittee consists of two individuals who make no apologies for being plaintiffs' lawyers – David Starnes of Beaumont and Steve Harrison of Waco. There are also two very capable lawyers on the subcommittee who make it clear that they are proud to be defense lawyers – Bruce Williams of Midland and Victor Haley of Nacogdoches. We also count one sitting trial judge – Carlos Lopez of Dallas – and one academician – Profession John Sutton of the University of Texas Law School – as members of the subcommittee. I am the chairman of the subcommittee and would not characterize myself as being a plaintiff's lawyer or a defense lawyer. I do not belong to TADC or TTLA. I represent a few plaintiffs in personal injury cases, but many more defendants, including the largest health care provider in the area in which I live – a multi-speciality medical group with 35 physicians – which has to deal on a day-to-day basis with the *ex parte* issue.

2. We've already had three meetings this month during which we attempted to master the existing law on *ex parte* communications and consider various solutions to the problem. No votes have been taken and no reports have been written. We hope to have our subcommittee report to AREC by the first week in September so it can be acted upon and forwarded to the SCAC.

3. Without providing you with too much detail, let me very briefly summarize the general state of the law on this subject. There are at least four Texas Court of Appeals cases which have allowed or at least not prohibited *ex parte* contact.[1] Of these four cases, three were reported in the last year and are "no petition" cases (at least at this point). The oldest case is a 1994 "writ denied" Houston case. On the other hand, there are three cases arising out of federal district courts in Texas, which apply Texas law on evidentiary privileges, and which find that *ex parte*

[1] The legal issue in these cases was whether it was harmful error to prohibit a plaintiff from cross-examining a treating physician regarding *ex parte* contacts with defense lawyers. Using slightly different approaches, all four courts declined to find harmful error.

communications are prohibited. Of course, this is what makes the issue something worth studying.

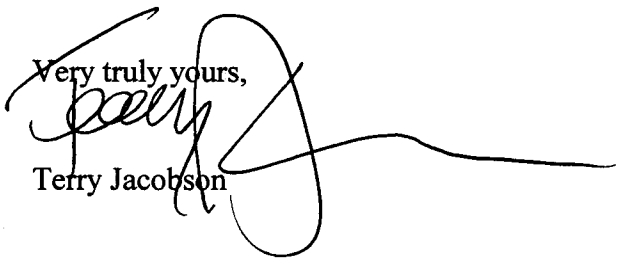
4. Finally, the Department of Health & Human Services recently (Friday, August 9th) issued new federal regulations dealing with the disclosure of protected health information. The press release from the Department of Health & Human Services which accompanied the release of the regulations, the introductory language in the Federal Register, and §§160.201-160.205 of the regulations suggest that the new regulations will preempt state law which conflicts with the regulations. Whether these regulations (we are calling them HIPAA – Health Insurance Portability and Accountability Act – regulations) are ultimately found to preempt Texas law on this issue, is an undecided question. However, before our subcommittee reports to the full AREC (which will, in turn, report to the SCAC and the Supreme Court), we think it appropriate to look carefully at the regulations. If federal law preempts state law on this issue, or if it is possible that federal law will have preemptive effect, we need to study it and you need to know about it.

5. We will meet next Thursday to discuss the HIPAA regulations and the effect, if any, they have on *ex parte* communications. I hope we will also begin preparing a report to AREC, with majority and minority positions.

In summary, the issue of whether Rule 509 should be amended to regulate *ex parte* contact, outlaw it or specifically condone it, is an important issue worthy of serious study. We (Mark Sales and I) wanted to let you know that we are seriously studying the issue, that no decisions have been made, that no constituency (plaintiffs or defendants) is controlling the decision-making process, and that whatever conclusions are reached will be sent first to AREC, then to the SCAC and the Supreme Court, so that everyone will have the benefit of the subcommittee's work.

If you have any questions or comments, please feel free to call me (or Mark Sales). Thank you for your courtesies.

Very truly yours,



Terry Jacobson

TJ:nw
Enclosure

cc: Mark Sales
Hughes & Luce, LLP
1717 Main St., Suite 2800
Dallas, Texas 75201

To: TADC Membership'
FROM: D. Michael Wallach, President
RE:EX PARTE Communications

Dear TADC Members:

The Committee on the Administration of the Rules of Evidence appears to be heading toward a recommendation to the Supreme Court that defense lawyers should be precluded from conducting "ex parte" communications with treating physicians in personal injury and wrongful death cases. Regardless of whether you are talking about medical malpractice, products liability, automobile or any other type of case, such a recommendation could lead to the implementation of a materially unjust amendment to Rule 509 of the Texas Rules of Evidence. One of our Directors, Vic Haley, and others have reported that this is the result of a concerted effort by the plaintiffs' attorneys on this committee to reverse what they consider to be an unacceptable trend in the opinions of the various courts of appeals upholding this practice.

Previously, on behalf of the TADC, I wrote the chairperson of Supreme Court Rules Advisory Committee, Charles Babcock, (and copied Justice Hecht, Supreme Court Liaison to the Committee) advising the committee of our opposition to this proposal and the reasons supporting our position. I am attaching a copy of that letter for your reference. Today, I am asking you to write to Chairman Babcock and Justice Hecht, and show a copy to Gilbert Low, Vice Chairman of the Committee, to express your opinions regarding this vital issue. For your convenience, the addresses for Mr. Babcock, Justice Hecht and Mr. Low are provided below.

Please take a few minutes out of your busy day to review these issues and to write a letter setting out your opinions. It is vitally important that this Committee and Justice Hecht hear from all of us. Thank you for your attention to this matter.

Charles Lynde Babcock, IV, Chairman
Texas Supreme Court Advisory Committee
Jackson Walker, LLP
901 Main Street #6000

Dallas TX 75202

Gilbert Low, Vice-Chairman
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SCAC Letter.pdf	**Name:** SCAC Letter.pdf **Type:** Portable Document Format (application/pdf) **Encoding:** base64

COOPER & SCULLY

August 26, 2002

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Hon. Nathan Hecht, Supreme Court Liaison
to the Texas Supreme Court Advisory Committee
P.O. Box 12487
Austin, Texas 78711

Re: ***Potential Change to Evidence Rules Involving Ex Parte Communications with Treating Physicians***

Dear Mr. Babcock, Mr. Low, and the Hon. Justice Hecht:

I am writing today to echo the sentiments and to support the arguments made by Mike Wallach in his June 26, 2002 letter to the Committee regarding a rumored change to rules 509 and 510 of the Texas Rules of Evidence regarding communications between a plaintiff's treating physician and counsel representing a defendant in a personal injury and/or medical malpractice case. The arguments strongly militate against any change to these rules that would restrict the ability of a defendant to interview a potential fact witness, who also happens to be a treating physician of the plaintiff.

Texas courts have thus far ruled in favor of the right of defendants to informally obtain information from a treating physician to the extent it is relevant to the claims raised by the plaintiff and to the extent the physician is willing. Any restriction as to defense contact would unfairly favor

the plaintiff, when all parties to litigation should have equal access to the facts and to witnesses with knowledge of relevant facts. The plaintiff, by instituting litigation, opens the door to an investigation of his or her medical condition, including those physicians who have provided medical treatment.

Requiring permission of the plaintiff or a court order prior to initiating contact would unfairly limit the fact-gathering process, would potentially invade the attorney work product privilege, would increase the cost of litigation, and, most importantly, would create an additional unnecessary burden on Texas trial courts. I urge the Committee to leave unchanged the informal discovery process embraced by Texas courts and to reject any limitations involving defense contact with a plaintiff's treating physician.

Very truly yours,

Michelle E. Robberson

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