STINNETT THIEBAUD & REMINGTON L.L.P.
A Limited Liability Partnership
ATTORNEYS AND COUNSELORS

CATHRYN R. PATON
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September 6, 2002

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

Re: Opposition to Recommendation to Amend Rules 509 and 510 of the Texas Rules of Civil Evidence

Dear Mr. Babcock:

I am writing this letter to express my objection to the recommendation to amend Texas Rules of Civil Evidence 509 and 510, to preclude "ex-parte" communications between treating physicians and defense attorneys in personal injury and medical malpractice cases. My understanding is that the Texas Supreme Court Advisory Committee is considering changing Rules 509 and 510 to require a court order before defense counsel can communicate with a plaintiff's treating physician.

I oppose such change, as it would provide plaintiffs' counsel unfettered access to treating physicians while placing defendant health care providers and defense counsel at an unfair disadvantage, particularly in medical malpractice cases. By filing suit, plaintiffs have affirmatively waived any physician-patient privilege, and should not be able to use the privilege as both a "sword and a shield." In addition, prior and subsequent treating health care providers are fact witnesses and as such either side to a lawsuit should be allowed to contact them if they are willing to communicate.

I further understand that the committee is considering restricting meetings with non-defendant treating health care providers to those which occur in the presence of plaintiffs' counsel. This, too, would place defendant health care providers at an unfair disadvantage as compared to plaintiffs who have brought the suit. Such requirement would provide plaintiffs' counsel with a first hand look at defense counsel's potential trial strategy, while protecting plaintiffs' counsel from the same intrusion.

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HOUSTON, TEXAS 77056-6520
TEL 713.572.3040 FAX 713.572.3050

As informal discovery is a foundational part of investigating and defending health care providers in lawsuits, I implore the committee to reject any recommendation which would hamper health care providers' attorneys from engaging in that process without undue and unfair constraints.

Very truly yours,

Cathryn R. Paton

CRP:ps

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

DAVIS & WILKERSON, P.C.
ATTORNEYS AT LAW

August 20, 2002

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

Re: Rule 509: Ex Parte communications with treating doctors

Dear Mr. Babcock:

It is my understanding that 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. I understand that this is an initiative of the Plaintiffs' bar to vitiate appellate decisions which uphold this longstanding practice. I am strongly opposed to any change in the rule that further prohibits communications with treating physicians.

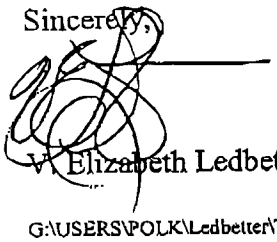
As an attorney who practices primarily on the defense side of the bar, I would urge you to carefully consider any change in the current rule which allows limited conversations with treating physicians, once a plaintiff has put his or her medical condition at issue. The current practice allows the defense bar to converse with the treating physician, not the expert retained by the plaintiff. So long as the treating physician is at liberty to communicate with either plaintiff or defense counsel without the need for formal proceedings, both sides are generally on equal footing in gathering the relevant facts needed for prosecution or defense of the case.

Protection for plaintiffs is already in place with the current rule—Courts have been careful to spell out risks if counsel goes too far in pursuing information from the treating physician. These informal conversations allowed by the plaintiffs' waiver of privilege in the filing of the lawsuit often ultimately result in judicial economy as the defense bar is able to more quickly learn the true opinions of the treating physician who can speak freely without feeling any need to "color" testimony in the presence of the former patient.

I would ask that you avoid any rule change as proposed, or at least delay any change to the rules at the request of a limited percentage of bar members who have petitioned the Advisory Committee, until such time as the greater bar can be consulted.

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

Sincerely,



V. Elizabeth Ledbetter

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

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

DAVIS & WILKERSON, P.C.
ATTORNEYS AT LAW

September 5, 2002

Xavier Rodriguez, Justice
Supreme Court Building
201 West 14th Street, Room 104
Austin, Texas 78701

Re: Rule 509 - Ex Parte communications with treating doctors

Dear Justice Rodriguez:

It is my understanding that 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. I understand that this is an initiative of the Plaintiffs' bar to vitiate appellate decisions which uphold this longstanding practice. I am strongly opposed to any change in the rule that further prohibits communications with treating physicians.

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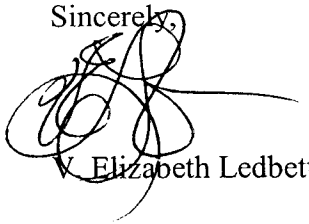

V. Elizabeth Ledbetter

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

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

DAVIS & WILKERSON, P.C.
ATTORNEYS AT LAW

September 5, 2002

Wallace Jefferson, Justice
Supreme Court Building
201 West 14th Street, Room 104
Austin, Texas 78701

Re: Rule 509 - Ex Parte communications with treating doctors

Dear Justice Jefferson:

It is my understanding that 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. I understand that this is an initiative of the Plaintiffs' bar to vitiate appellate decisions which uphold this longstanding practice. I am strongly opposed to any change in the rule that further prohibits communications with treating physicians.

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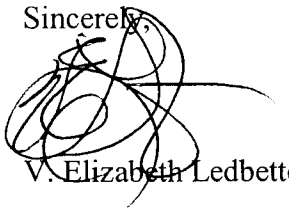

V. Elizabeth Ledbetter

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

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

DAVIS & WILKERSON, P.C.
ATTORNEYS AT LAW

September 5, 2002

Harriet O'Neill, Justice
Supreme Court Building
201 West 14th Street, Room 104
Austin, Texas 78701

Re: Rule 509 - Ex Parte communications with treating doctors

Dear Justice O'Neill:

It is my understanding that 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. I understand that this is an initiative of the Plaintiffs' bar to vitiate appellate decisions which uphold this longstanding practice. I am strongly opposed to any change in the rule that further prohibits communications with treating physicians.

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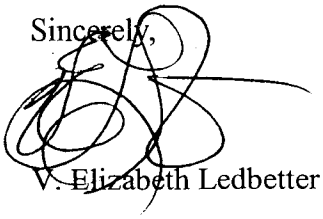

V. Elizabeth Ledbetter

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cc: Gilbert Low, Vice-Chairman
Texas Supreme Court Advisory Committee
Orgain, Bell & Tucker, L.L.P.
470 Orleans Street, 4th Floor
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Charles Lynde Babcock, IV, Chairman
Texas Supreme Court Advisory Committee
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Dallas TX 75202

DAVIS & WILKERSON, P.C.
ATTORNEYS AT LAW

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Cle + DL

September 5, 2002

Deborah G. Hankinson, Justice
Supreme Court Building
201 West 14th Street, Room 104
Austin, Texas 78701

Re: Rule 509 - Ex Parte communications with treating doctors

Dear Justice Hankinson:

It is my understanding that 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. I understand that this is an initiative of the Plaintiffs' bar to vitiate appellate decisions which uphold this longstanding practice. I am strongly opposed to any change in the rule that further prohibits communications with treating physicians.

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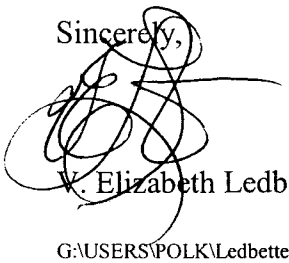

V. Elizabeth Ledbetter

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

Charles Lynde Babcock, IV, Chairman
Texas Supreme Court Advisory Committee
Jackson Walker, LLP
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DAVIS & WILKERSON, P.C.
ATTORNEYS AT LAW

9-9
Cle+D

September 5, 2002

Priscilla R. Owen, Justice
Supreme Court Building
201 West 14th Street, Room 104
Austin, Texas 78701

Re: Rule 509 - Ex Parte communications with treating doctors

Dear Justice Owen:

It is my understanding that 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. I understand that this is an initiative of the Plaintiffs' bar to vitiate appellate decisions which uphold this longstanding practice. I am strongly opposed to any change in the rule that further prohibits communications with treating physicians.

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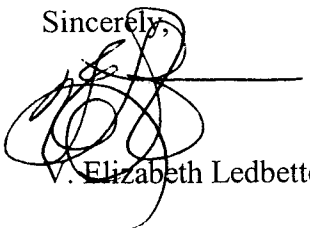

V. Elizabeth Ledbetter

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

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

DAVIS & WILKERSON, P.C.
ATTORNEYS AT LAW

9.9 Clerk DL

September 5, 2002

Craig T. Enoch, Justice
Supreme Court Building
201 West 14th Street, Room 104
Austin, Texas 78701

Re: Rule 509 - Ex Parte communications with treating doctors

Dear Justice Enoch:

It is my understanding that 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. I understand that this is an initiative of the Plaintiffs' bar to vitiate appellate decisions which uphold this longstanding practice. I am strongly opposed to any change in the rule that further prohibits communications with treating physicians.

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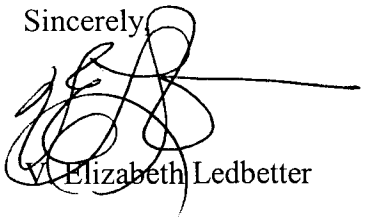

V. Elizabeth Ledbetter

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

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

DAVIS & WILKERSON, P.C.
ATTORNEYS AT LAW

September 5, 2002

Nathan L. Hecht, Justice
Supreme Court Building
201 West 14th Street, Room 104
Austin, Texas 78701

Re: Rule 509 - Ex Parte communications with treating doctors

Dear Justice Hecht:

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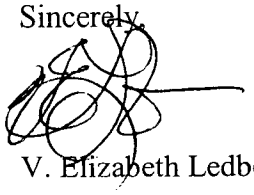

V. Elizabeth Ledbetter

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

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

DAVIS & WILKERSON, P.C.
ATTORNEYS AT LAW

September 5, 2002

Thomas R. Phillips, Chief Justice
Supreme Court Building
201 West 14th Street, Room 104
Austin, Texas 78701

Re: Rule 509 - Ex Parte communications with treating doctors

Dear Justice Phillips:

It is my understanding that 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. I understand that this is an initiative of the Plaintiffs' bar to vitiate appellate decisions which uphold this longstanding practice. I am strongly opposed to any change in the rule that further prohibits communications with treating physicians.

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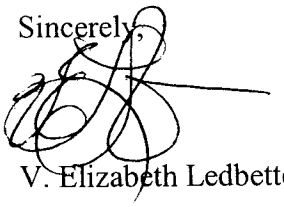

V. Elizabeth Ledbetter

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Texas Supreme Court Advisory Committee
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Dallas TX 75202

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Vic Anderson, Jr.
Board Certified–Civil Trial Law
Texas Board of Legal Specialization

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VAnderson@ShannonGracey.com

September 4, 2002

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

Dear Mr. Babcock:

I am aware that there is a movement on the part of the plaintiffs' bar to revise Rule 509 of the TEXAS RULES OF EVIDENCE to affirmatively prevent defense attorneys from speaking with physicians who have treated plaintiffs in lawsuits.

I believe that such a movement is uncalled for and improper on behalf of the Rules Committee.

I believe that the physicians should be allowed to speak with defense attorneys and defense attorneys should not be prohibited from trying to speak to them. My daughter is a physician and she has indicated to me that it is very uncomfortable being in a position where the plaintiff's attorney (and sometimes even the plaintiffs themselves) are present during discussions with defense counsel. As a result she has indicated that she is very unlikely to be totally candid with defense counsel and their questions. As a result, more often than not the physician's testimony is required to be taken, thus adding to the expense of litigation.

I am hopeful that the Rules Committee will not recommend changes to effectuate the prohibition of defense counsel being able to speak alone and candidly with treating physicians when plaintiffs have put their physical condition into dispute in a lawsuit.

Very truly yours,

Vic Anderson

Vic Anderson, Jr.

/mai

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cc: Mr. Gilbert Low
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
P. O. Box 12487
Austin, Texas 78711

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ATTORNEYS AT LAW

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TELEPHONE 512/476-4600
FAX 512/476-5382

BRADLEY K. DOUGLAS

DIRECT DIAL: 512/708-5229
INTERNET: bdouglas@w-g.com

September 3, 2002

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 communications with treating physicians

Dear Mr. Babcock:

It is my understanding that the Committee on the Administration of the Rules of Evidence is making recommendations to the Court concerning ex parte communications by defense lawyers to treating physicians in personal injury and wrongful death cases. I would respectfully urge you to resist any amendment of Rule 509 of the Texas Rules of Evidence precluding such communications.

In defending a civil action, diligent preparation requires finding out what the fact witnesses have to say. When a party places his or her medical or physical well being into issue, the party's treating physicians become important fact witnesses in evaluating the claim and determining the extent of the party's injuries. The most efficient and cost effective method of learning about a witnesses intended testimony is an ex parte informal conference with the physician. Recent attempts by Plaintiffs' counsel to prevent treating physicians from conferring with defense counsel serve only to obstruct the investigation of the truth that our judicial system promotes.

There should be no question that opposing counsel may properly engage in ex parte conferences with treating physicians of a party, who by virtue of bringing a lawsuit asserting physical or mental injury, puts his or her mental or physical condition into issue. Indeed, defense counsel may (and routinely do) subpoena and acquire Plaintiffs' medical records and take depositions of Plaintiffs' treating physicians. Recently, however, Plaintiffs' counsel have challenged ex parte conferences between opposing counsel and treating physicians as unethical and improper. This is simply not the case.

A prohibition on ex parte conferences would make discovery more difficult and costly because contacts between defense counsel and treating physicians would require either the taking of a formal deposition or obtaining prior consent from the Plaintiff.

Furthermore, meeting times would have to be coordinated with Plaintiffs' counsel. Private interviews by attorneys have been recognized as a time-honored method for conducting discovery. Informal conferences with treating physicians are favored by public policy and fundamental fairness as an effective method of pretrial preparation.

The practical effect of refusing to permit defense counsel to engage in ex parte conferences with treating physicians is that Plaintiffs' counsel would then be afforded a neutralization technique. In other words, Plaintiffs' counsel could put forth only favorable treating physicians as witnesses while insulating the unfavorable from defense counsel.

Pretrial discovery is intended to be a mechanism for the ascertainment of truth, for the purpose of promoting either a fair settlement or a fair trial. It is not a tactical gain to be used to obstruct or harass the opposing litigant, nor is it a weapon in a war of inconvenience. Requiring all contact be made by formal discovery methods would substantially increase the costs of litigation.

Taking steps to prevent witnesses from conferring with opposing counsel is an inappropriate interference with the judicial process. Even in states where physician-patient privileges are available, the privilege has never been intended to be used as a trial tactic by which a party entitled to invoke it may control to her advantage the timing and circumstances of the release of information she must inevitably see revealed at some time. This would improperly allow the party so wielding the privilege to monitor her adversary's progress in preparing her case by her presence on each occasion such information is revealed while her own preparation is under no such scrutiny. Defendants have a right to explore fully a party's medical condition at issue without opposing counsel unnecessarily intruding and exerting undue pressure on witnesses to censor their speech.

Even if, however, the condition suffered by the patient and the methods of treatment are considered confidences, they should not be within the patient's expectation of privacy once she files an action putting those very same issues into controversy. Arguably, when a patient files an action, such as a medical malpractice or personal injury claim in which she puts her physical or mental health in controversy, all confidentiality as to those matters within the scope of the lawsuit are waived. Moreover, because waiver of the privilege is inevitable at trial or through other means of discovery, the Plaintiff should not be entitled to hold closed the mouth of the physician until the commencement of formal discovery or at trial thereby rendering the Defendant ignorant of the medical facts.

In a nutshell, because a trial under our system is a public event, once a Plaintiff makes a decision to enter into litigation, this decision carries with it the recognition that any information within the knowledge of the treating physician relevant to the litigated issues will no longer be confidential. It is not human, natural or understandable to claim protection from exposure by asserting a privilege for communications to doctors at the very same time when the patient is parading before the public, the mental or physical condition for which she consulted the doctor by bringing an action for damages arising from that same condition.

Treating physicians should be permitted to engage in an ex parte conference with opposing counsel concerning matters put into controversy by the patient. Only a divulgence of an unwaived confidence should be unethical or actionable. By bringing an action putting the condition or treatment in issue, the patient has waived the right to claim a confidence exists. By making the information public, the Plaintiff cannot keep silent, under the guise of professional duty, witnesses who hold information germane to the Plaintiffs' claims.

In the spirit of fairness, professionalism and cost efficiency, I urge you not to amend Rule 509 of the Texas Rules of Evidence, or any other rules, so as to prohibit ex parte communications by defense counsel with the Plaintiffs' treating physicians.

I appreciate your consideration in the above and would be happy to answer any questions you have on this very important issue as I remain

Very truly yours,

WRIGHT & GREENHILL, P.C.

By: _____
Bradley K. Douglas

BKD/sgs

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August 30, 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 have been provided with a copy of the June 26, 2002 letter written to you by D. Michael Wallach on behalf of the Texas Association of Defense Counsel.

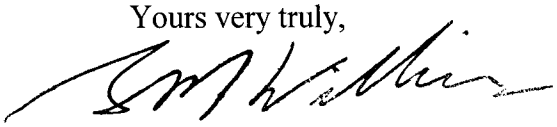
I would like to indicate that I think the proposed change to Rules 509 and 510 that would effectively reclude defense counsel from having communications with treating physicians relative to matters involved in litigation is clearly unfair to the defendants and frankly completely inefficient from an economic point of view.

The proposed change would effectively put any treating physician of a plaintiff under the control of plaintiff's counsel.

In my personal experience in handling primarily pharmaceutical and medical malpractice defense, I can think of many occasions where a short and brief conversation with a treating physician has proved that that physician does not need to be deposed and sometimes that his records do not even need to be ordered. To put the defendants behind the wall of secrecy or silence as is apparently being requested by the plaintiffs bar would be completely unfair and would simply guarantee more formal depositions of treating physicians who frankly often do not want to be bothered as it is.

Please do not hesitate to contact me if you have any questions.

Yours very truly,



Gene M. Williams
For the Firm

GMW:vlh

cc:
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Orgain, Bell & Tucker
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Justice Nathan Hecht, Supreme Court Liaison of the
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P. O. Box 12487
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August 28, 2002

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Mr. Charles Lynde Babcock, IV, Chairman
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Dallas, TX 75202

Dear Mr. Babcock:

I am writing you this letter as a member of the Texas Association of Defense Counsel, Inc. and because I have concerns about proposed amendments to Rules 509 and 510 of the Texas Rules of Evidence and how they may relate to my practice and my clients. It has recently been brought to my attention that your Committee is considering a recommendation to amend Rule 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 my position 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 conditions 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 this case. *Durst v. Hill Country Mem. Hosp.*, 70 SW3d 233 (Tex. App.- San Antonio 2001, no pet.); *Rios v. Texas Dept. of Mental Health & Mental Retardation*, 58 SW3d 167 (Tex. App. - San Antonio 2001, no pet.); *James v. Kloos*,

2002 WL464723 (Tex. App.- Fort Worth May 28, 2002 n.p.h.); *Hogue v. Kroger Store No. 107*, 875 SW2d 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. 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.

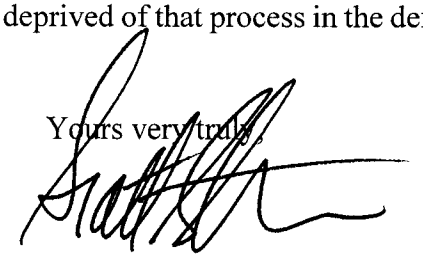
Second, to require a court order for a defendant's attorney to communicate informally with a physician would put the defendant at an unfair disadvantage vis-a-vis the plaintiff's attorney who, presumably, could always obtain his client's permission to visit with the physician. The plaintiff's attorney 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.

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.

Yours very truly,



Scott C. Skelton

SCS:ceh
160337.1

cc: Justice Nathan Hecht, Supreme Court Liaison to the
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Austin, TX 78711

Mr. Gilbert Low
Vice Chairman
Texas Supreme Court Advisory Committee
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August 28, 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 that your committee is considering a recommendation to amend Rules 509 and 510 of the Texas Rules of Civil Evidence regarding "ex parte" communications between treating physicians and attorneys for defendants in personal injury and medical malpractice litigation. I understand that the recommendation is that a court order be required before such attorneys are allowed to communicate with such physicians.

I have been practicing law now for twenty-five years, and physicians have generally been agreeable to speaking with me about their patients who are Plaintiffs in lawsuits. In my view, simple fairness requires that I be permitted this right.

I do not believe that those who seek this amendment do it out of a sense of concern for the privacy rights of the patients. I think such persons seek a tactical advantage for plaintiffs' attorneys by making it more difficult and expensive for defense attorneys to gain access to physicians. In my view, requiring a court order adds nothing to the protection already enjoyed by patients, since a statutory cause of action for unauthorized release of confidential information already exists (§159.009, Texas Occupations Code).

Additionally, to require a court order would unnecessarily clog our already overcrowded courts. In virtually every case in which I have been involved dealing with medical malpractice issues, I have found it necessary to speak with treating physicians. The court does not need to hear from me every time I deem it necessary to speak to a physician in defense of my doctor or hospital client. Obviously, the proposed amendment is a poorly disguised attempt to make certain that plaintiffs' counsel is advised of the physicians with whom defense counsel chooses to consult in preparing a defense. The notion that lawyers representing claimants are truly concerned about unauthorized disclosures to defense counsel in litigation is absurd. In my years of practice I have never seen or heard of any instance where defense counsel tried to delve into matters that would be unrelated to the litigation at hand. Ours is an honorable profession, and I think that we should assume that our members will act honorably.

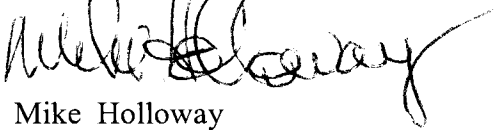
Finally, the spirit of the current rule is appropriate. If persons feel that they are aggrieved and seek to sue others for those grievances, it is only fair that their lives, <u>to the extent the information sought is relevant</u>, become an open book. The trial Judge can decide later what is and is not admissible at trial. To burden our

lawyers and Judges with hearings on requests to speak with physicians seems to only add a layer of bureaucratic hoop-jumping with no real benefit flowing therefrom.

I am hopeful that any or all of you will call me if you disagree with me or wish me to elaborate. As you might be able to tell by reading between the lines, this issue is of great importance to me.

Yours very truly,

BURFORD & RYBURN, L.L.P.



Mike Holloway

MSH:jnn

cc: Justice Nathan Hecht, Supreme Court Liaison to the
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August 28, 2002

Mr. Charles Babcock, IV, Chairman
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901 Main Street, Ste. 6000
Dallas, TX 75202-03748

Dear Mr. Babcock:

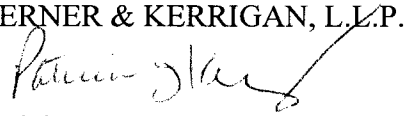
This letter is to set forth my opposition to your Committee's recommendation to amend Rules 509 and 510 of the Texas Rules of Evidence. The important privileges created by these rules are fundamental to a good patient-doctor relationship, however, these rules themselves recognize that under certain circumstances the privilege should not apply and the information should be available to all parties in litigation. There is a delicate balance between a patient's rights to privacy and the rights of litigants to full disclosure of medical information. When the patient elects to inject her/his medical condition into a courtroom, the information in the records and the doctor's knowledge pertaining to the patient constitute evidence and I oppose amending the rules to protect that information. Neither party should have limitations on their right to discover the patient's condition and communicate with the treating physician and the exceptions to the privilege are in recognition of this important information. *Hogue vs. Kroger Store No. 107*, 875 S.W.2d 477 (Tex. App. - 1st Dist. 1994) (writ denied). For doctors to be unable to speak to counsel and for hospitals to refuse to honor subpoenas for the production of records, even with an authorization, are disturbing trends which are the results of efforts to deny litigants access to important evidence. These efforts which thwart discovery are often not based on a desire to protect privacy rights but a desire to prevent the disclosure of relevant information which may diminish the value of the plaintiffs' claims by revealing prior similar problems and other factors influencing the patient's condition.

A physician with knowledge of relevant facts should be treated as any other witness with knowledge of relevant facts and be able to choose whether to speak to either parties' representative. A court order is not necessary for an attorney to meet with any other witness who has knowledge of relevant facts and no such order should be required in order for any party to meet with a treating physician.

G:\PJK miscellaneous\babcock01.wpd

Very truly yours,

WERNER & KERRIGAN, L.L.P.



Patricia J. Kerrigan

PJK/rahs

cc: Justice Nathan Hecht
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G:\PJK miscellaneous\babcock01.wpd

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August 27, 2002

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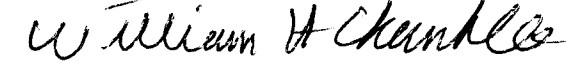
Re: The Administration of the Rules of Evidence Committee Consideration of Ex Parte Communications with Physicians

Gentlemen:

I received an email from Mr. Wallach, regarding discussions that are taking place relating to Ex Parte communications with treating physicians in personal injury and wrongful death cases.

Awhile back, I received an email from someone else regarding this identical issue and I did a response. Mr. Wallach requested that I send a response to you gentlemen regarding how I, as a practicing attorney, would feel about any limitations upon the defense counsel's ability to talk with treating physicians. I have attached a copy of a letter that I sent awhile back to someone else relating to the same issue and I would be very pleased and honored if you would take the time to read the letter. Please note that the tone of the letter is a little bit adamant and a little bit on the harsh side, but that only is because of my strong and overwhelming feelings about how wrong it would be to ever limit a defense counsel's ability to have conversations with treating physicians. Not only would it be wrong, it would be one of the more one-sided, unfair things that I have ever seen in my entire practice of law. I urge you honorable and overwhelmingly dedicated and intelligent gentlemen to make sure the playing field, in this world we call litigation, remains even.

Sincerely,



William H. Chamblee

WHC:dlg
Enclosure

cc: Justice Nathan Hecht, Supreme Court Liaison to the Supreme Court Advisory Committee
D. Michael Wallach

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August 27, 2002

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

RE: *Amendment to Texas Rules of Evidence*

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.

Rules 509 and 510 create a privilege for communications between physicians/mental health providers and their patients, subject to the exceptions. One exception is where the communications or records are relevant to an issue of physical, mental or emotional condition of a patient where any party relies on such condition as part of the party's claim or defense.

The plaintiff can allow his attorney to talk to the treating physician at any time. It is only right that defendant's counsel should be allowed to talk with the treating physician without the presence of plaintiff's counsel or requiring an order of the Court. Aren't we looking for the truth? Justice would demand that both sides be treated equally.

Yours truly,

S. Gary Werley

SGW/llp
CC: Justice Nathan Hecht
Gilbert Low

HAYNES AND BOONE, LLP

August 21, 2002

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Charles Lynde Babcock, IV , Esq.
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Re: Texas Association of Defense Counsel

Dear Mr. Babcock:

I am writing to you as a concerned member of the Texas Bar Association. I have recently learned that your Committee is considering a recommendation to amend Rules 509 and 510 of the Texas Rules of Evidence regarding "ex parte" communications in personal injury and medical malpractice litigation between treating physicians and defense counsel representing a defendant.

The exceptions under Rules 509 and 510 which allow physicians to communicate with both plaintiff and defense counsel when a patient has brought a claim against a physician or where the communications or records are relevant to an issue, both sides rely on such exceptions to provide relevant information to support their claim or defense. Under these situations, the information generated is of significance to both parties to litigation.

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 attorney 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.

My understanding is that a recommendation has been made requiring a court order before one of the litigant's or defendant's counsel may communicate with a treating physician. Any physician who has knowledge of relevant information, like any other witness, should be able to communicate that information to any party's counsel if willing.

Requiring a court order for one party's counsel to communicate with a treating physician would greatly prejudice a defendant's position and place an unfair disadvantage upon defense counsel. While plaintiff's counsel could obtain his client's permission to visit with the treating physician and use such information in the development and strategy of his/her case, the defense counsel would not be privy to the information and this amounts to unfair disclosure by not allowing both sides the benefit of the physician's knowledge. It would also force defense counsel to ultimately lay his cards on the table for plaintiff's counsel to show good cause for allowing the communication.

The Rules as currently written and interpreted, should not be amdended to require a court order or permission from plaintiff to allow informal communications between defense counsel and treating physicians. Informal discovery is an integral part of the investigation and defense of all lawsuits and precluding such would place the defense at an unfair strategic disadvantage and deprive defendants of an equal playing field in personal injury and medical malpractice litigation.

Thank you for your kind attention to this matter, I remain

Sincerely,

Earl Harcrow

EEH/kdb
cc:
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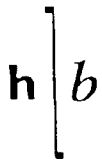

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August 20, 2002

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Mr. Gilbert Low, Vice-Chairman
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Orgain, Bell & Tucker, L.L.P.
470 Orleans Street, 4th Floor
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Gentlemen:

I have been representing the physicians at The University of Texas Medical Branch in Galveston for the past 25 years. It is my understanding that you are considering a recommendation to the Supreme Court that defense lawyers should be precluded from conducting "ex parte" communications with treating physicians. I believe this would constitute a great disservice to defendant physicians, as well as defendants in general. Plaintiffs' counsel already have a number of significant advantages in the prosecution of their lawsuits and denying the defendants access to an important fact witness in the process of discovering the basis of the litigation would give plaintiffs' counsel an unfair advantage. It has been my experience that the ability to communicate with treating physicians, without the necessity of incurring the additional discovery expense of filing motions with the court or taking unnecessary depositions, has allowed us to resolve meritorious cases much earlier in the litigation process, and at much less expense than would be contemplated by your rule change. I doubt that you are considering placing similar restrictions on the plaintiffs' bar in their access to treating physicians and, therefore, disagree with your recommendation that defense counsel should be restricted in their access to the underlying facts of the litigation.

I am sure that you have received multiple communications setting out the other good reasons why *ex parte* communications with treating physicians should not be restricted, and rather than reiterating those, I simply ask that you strongly consider .mine and other counsel's opposition to your recommendation.

Thanking you in advance for your cooperation, I remain

Yours truly,

SRLJR/sg
cc:

Justice Nathan Hecht
Supreme Court Liaison to the
Supreme Court Advisory Committee
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August 20, 2002

Mr. Charles Lynde Babcock, IV, Chairman
Texas Supreme Court Advisory Committee
Jackson & Walker, L.L.P.
901 Main Street, #6000
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Dear Mr. Babcock:

I am writing this letter because of information I received 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 my position 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 & Mental Retardation*, 58 S.W.3d (Tex.App. –San Antonio 2001, no pet.): *James v. Kloos*, 2002 WL-464723(Tex.App.–ForthWorth, 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 a 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 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.

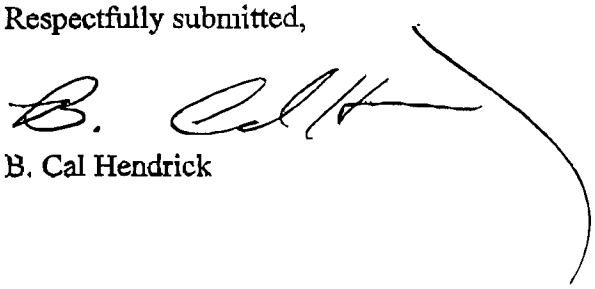
Further, to the extent that the court restricted such a meeting to one conducted in the presence of plaintiff's counsel, the defense attorney would be limited in his discussions for fear of disclosing potential strategies to his adversary. As a result, the defense would be placed at an unfair and unnecessary strategic disadvantage compared to plaintiff's counsel. 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 those conditions. As such, it can only be reasonably concluded that their first and foremost legitimate concern is doing whatever 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.

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.

Respectfully submitted,



B. Cal Hendrick

BCH:jr

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

Mr. Gilbert Low, Vice-Chairman
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August 20, 2002

Mr. Charles Lynde Babcock
TEXAS SUPREME COURT ADVISORY COMMITTEE
Jackson Walker, L.L.P.
901 Main Street #6000
Dallas, TX 75202

Dear Mr. Babcock:

I write this letter on behalf of myself to express my concern over proposals that the Supreme Court Advisory Committee may consider limiting communications between treating physicians and lawyers representing the parties their patients are suing. I have practiced for over 20 years in the Rio Grand Valley, primarily on the defense side. I received Mr. Michael Wallach's letter to you of June 26, 2002, and I write to support his comments.

First, the requirement to obtain a court order before one may contact a treating physician may send a message to treating physicians that providing accurate, adverse information to defense counsel will get doctors sued. If physicians are informed they must have a court order to talk to counsel for the party whom their patients have sued, they may conclude that telling the truth to the patient's adversary will only get them sued as well.

Next, there are "innocent" reasons that defense counsel contact health care providers' offices. Counsel are frequently encouraged to use written authorizations to obtain medical records in order to keep the cost of litigation down. As often as not, defense counsel receives incomplete records and must contact the doctor or hospital's offices in order to obtain complete copies. This may require some discussion of what treatment is or is not involved. Cautious health care providers may tell counsel they want a court order before providing even medical records. This may require a trip to the courthouse to get an order just to talk to the medical records custodian and to explain what records are involved.

Finally, there are interstate/international aspects to this. Many people along the border will seek treatment in Mexico for their injuries. It is not unusual to expect people on other parts of the state to seek health care treatment in Louisiana, Oklahoma, etc. Mexico and sister U.S. states may not have the same rules about confidentiality as does Texas. A lawyer may well be able to confer with

the health care provider without breaching any rules of confidentiality. It makes no sense to require Texas lawyers to obtain court orders in order to confer with health care providers in other states or nations.

This proposal will substantially increase the cost of litigation by requiring court orders or taking unnecessary depositions. It will frustrate the purpose of the recent discovery changes to reduce the cost and burden of discovery.

Sincerely yours,

ADAMS & GRAHAM, L.L.P.

ROGER W. HUGHES

RWH:fmg

cc:

Justice Nathan Hecht, Supreme Court Liason
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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

Dear Mr. Babcock:

It is my understanding that your Committee is considering a recommendation to amend Rules 509 and 510 of the Texas Rules of Evidence which deal with "ex parte" communications between treating physicians and lawyers representing defendants in personal injury and medical malpractice litigation. As a personal injury defense attorney, I wish to state my opposition to the proposed amendment which, as I understand it, would require a court order before a defendant's counsel may communicate with a treating physician.

I believe no such change should be made. A physician, who chooses not to communicate informally, does not have to do so. The physician is not required to communicate with any party's attorney outside of a deposition or court setting. An amendment requiring a court order for defendant's counsel to communicate with a treating physician would be unfair to the defense and would increase the cost of litigation. Defendants should not be deprived of the informal discovery process in the defense of personal injury or medical malpractice litigation.

Sincerely yours,

Monte J. English

MJE:sd

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

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 St., #6000
Dallas, TX 75202

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

Dear Mr. Babcock:

Recently, I received a copy of and reviewed a letter written to you on June 26, 2002 by D. Michael Wallach concerning some proposed amendments to 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 medical malpractice cases. I thought his letter set forth in some detail the position that I would take as a practicing attorney, who primarily does defense work. He has cited the applicable cases that probably would be overruled by a change in the rule which precludes such contact by defense counsel. The purpose of my letter is to support the letter he wrote and also to emphasize to reverse the current policy, as set forth in the applicable cases, would be inappropriate because it would result in a distinct advantage to the Plaintiff's side of the case. Before the recent cases on this matter, which allowed such contact by defense counsel, the Plaintiff's attorney's had a distinct advantage because they could talk to the treating doctor at any time without the presence of defense counsel. This greatly handicapped defense counsel, particularly at the time of the doctor's deposition testimony and/or trial testimony. The philosophy of the rules of discovery has always been to avoid "trial by ambush". Allowing both sides to have full disclosure from the doctor of his position on issues relating to the injury in question is in accordance with that philosophy, whereas a change that precluded one side from such information would be the antithesis of that philosophy.

I appreciate your careful consideration of this matter and hope that the current state of the law will remain intact.

Very truly yours,

CLEMENS & SPENCER

David Stephenson

DS/lh

cc: Mr. Gilbert Low, Vice-Chairman
Texas Supreme Court Advisory Committee
Orgain, Bell & Tucker, LLP
470 Orleans St, 4th Flr.
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Justice Nathan Hecht, Supreme Court Liason to the
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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, TX 75202

Dear Mr. Babcock:

I am writing to express my concern regarding the recommendation to amend Rules 509 and 510 of the Texas Rules of Evidence to limit so called "ex parte" communications between treating physicians and lawyers representing defendants in personal injury and medical malpractice cases.

The limits proposed on defense counsels' abilities to communicate with treating physicians would grant a significant and unnecessary advantage to plaintiffs in medical malpractice and personal injury litigation. Arguments allowing defendants to contact treating physicians informally would somehow damage the physician-patient relationship are specious. Patients know that when they bring suit based on physical injury, their medical health becomes (rightfully) discoverable. In short, the proposed amendments give plaintiffs both a sword and a shield while defendants are left virtually defenseless.

If the amendments were adopted, the already crowded court dockets would be further choked with defense motions to interview treating physicians. Another possible unintended consequence would be that defense lawyers would choose to formally depose physicians in lieu of informal meetings or telephone conversations. Either or both of these results would build additional and unnecessary costs into our already costly system.

The proposed amendments to Rules 509 and 510 should be rejected. Such unequal treatment of litigants should not be contemplated in our Rules of Evidence. Rejection of the proposed amendments will also serve the important interest of judicial efficiency and reduction of costs.

Thank you for your kind attention.

Respectfully submitted,

Andrew D. Keetch

ADK/sb

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

I:\AKEETCH\MISCL\Babcock.08-19-02

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Civil Trial Law

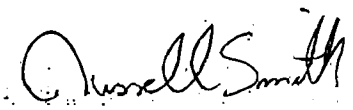
August 20, 2002

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 a member of the Texas Association of Defense Counsel and have read the letter written to you by D. Michael Wallach and certainly agree with the position of the TADC and the reasons to justify same set forth therein concerning recommendations to potentially amend Rules 509 and 510 regarding ex parte communications between treating physicians and lawyers representing defendants. Since information from a treating physician is not protected or subject to a court order for disclosure when that information is relevant to a patient's claims in a lawsuit, then there really is no reason to amend these rules. After all, under that scenario, the treating physician is actually a non-retained expert witness with relevant knowledge and should be treated no different than an ordinary witness. If the current rules are amended as proposed, then soon other amendments will be proposed to regulate contact with ordinary fact witnesses, as long as one side makes contact with or identifies them first.

Sincerely,



Russell R. Smith

cc:
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Supreme Court Liason to the
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August 20, 2002

Charles Lynde Babcock, IV, Chairman,
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Justice Nathan Hecht, Supreme Court Liaison
to the Supreme Court Advisory Committee
P. O. Box 12487
Austin TX 78711

Gentlemen:

I understand 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 endorse the comments made by Mike Wallach on behalf of the Texas Association of Defense Counsel in recent correspondence addressed to each of you.

The Rules, as currently written and interpreted, should not be amended to require permission by the plaintiff or a court to allow defense counsel the opportunity to informally communicate with a physician. Such an amendment would:

- place the defendant in a competitive disadvantage; and
- increase costs of litigation.

Thank you for your consideration.

Very truly yours,

Greg W. Curry

GWC/ls

cc: Gilbert Low, Vice-Chairman
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August 19, 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 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 that I oppose such recommendation and why.

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. 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-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.

I believe that the Rules, as currently written and interpreted, should not be amended.

Very truly yours,

Frank Finn

c: Justice Nathan Hecht, Supreme Court Liason to the
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August 19, 2002

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

RE: EX PARTE COMMUNICATIONS

Dear Mr. Babcock:

I write this letter to express my strong opposition to an effort being made to prevent civil litigation defense attorneys from having "ex parte" contacts with treating physicians in the pretrial and discovery phases of civil lawsuits. As a member of the TADC I have received communications from that group indicating that you are chairing the Supreme Court Advisory Committee considering such a proposal.

Although the TADC has asked its members to contact you regarding this issue, please know that I write this letter of my own accord. I do not usually follow the TADC or other groups' recommendations to send letters and correspondence to influence committee members or legislators, but this issue of contact with treating physicians is vital to the continued health of our civil justice system, the physicians who practice in Texas, and the insurers who insure them.

By way of brief background, I am a Texas practitioner, licensed in Texas since 1988. My practice involves almost exclusively the defense of physicians in medical malpractice cases, and has since the early 90's. During that time I have defended hundreds of physicians, hospitals, and nursing homes in medical negligence cases.

As a routine matter of my investigation and preparation of cases over the years I interview the witnesses. It was taught to me in law school and reinforced in every seminar I have ever attended that the good lawyer is the prepared lawyer, the one who knows what the witnesses will say. I have found that to be true in my preparation of auto accident, product liability, state and municipal liability, premises liability, and medical malpractice cases.

In medical malpractice cases particulary, it is important that the defense lawyer be able to speak with the treating physicians of the patient suing his client. It is essential that we be able to find out what the physician's opinions may be regarding the defendant's care of the patient and explore the physician's treatment of the patient. It is almost a constant in the cases I defend that (1) the patient claims under oath that the treating physician is critical of my client, when in fact he is not, and (2) the patient has been untruthful, either with me about his medical history, in an effort to hide unsavory facts, or with the treating physician about the care rendered by my client. It has also been true more often than not that the treating physician has some knowledge or perspective on the case not reflected in his notes, but which is important in evaluating the case for settlement or defense.

If I am not allowed to meet informally with the physician to discuss these matters with him, then I am deprived of the primary investigation needed to defend the case.

The counter arguments I have heard advanced include that the physician's notes should be sufficient, that matters not recorded in the chart should not be disclosed, and that defense lawyers will "overreach" and influence the witnesses' opinions. I disagree that disallowing defense lawyers pretrial contact with treating physicians is a solution for those rare problems. Quite simply, these potential problems are just as likely, if not more likely, to originate with the plaintiff lawyer's contact with the physician as with defense lawyers' contact. I have in the past year defended a case in which the plaintiff lawyer apparently met with the treater and "intimated" that his best chance of getting paid for his outstanding medical bill was if the plaintiff received a nice judgment or settlement. Plaintiff lawyers have given treaters misleading accounts of the facts of the case, or incomplete copies of records or other evidence, resulting in the coloring of their opinions and understanding of the facts. Simply put, barring defense lawyers from contacting physicians without barring the plaintiff lawyers identically forces us to enter the ring blindfolded. It could allow a frivolous case to proceed due to misunderstanding and misinformation which could have been corrected by an informal meeting. Although these instances are obviously rare, I recently had such an experience which I must share with you.

I was called to represent a physician recently in a med mal case. Suit had been filed, and the plaintiff counsel had attached to the petition an affidavit of a subsequent treater of the plaintiff, in which she was highly critical of the care rendered by my client to the plaintiff. This is unusual; rarely does such an item accompany the petition. It was apparently attached in fulfillment of the article 4590i 180-day report requirement.

After meeting with my client, reviewing the records, and analyzing the criticisms in the affidavit, it became apparent that the factual understanding upon which the criticisms were based was significantly and absolutely flawed (not just a difference of opinion, but flat out wrong). Apparently, this subsequent treater had been told incorrect facts about my client by others, including the plaintiff, and the facts were never investigated by the sub treater; rather, she advised the plaintiff to sue. Naturally, the plaintiff counsel contacted her (ex parte!) and he drafted an affidavit for her signature, incorporating the incorrect facts, apparently not investigating them himself, either. The treater then executed the affidavit, calling my client's actions negligence and "reprehensible".

I was able to contact counsel for the subsequent treater and through counsel advise the sub treater of the real facts, providing objective documentation to support same. Ultimately, the sub treater executed a second affidavit, withdrawing the first one. The plaintiff counsel unsuccessfully

moved for sanctions against me, complaining of the "ex parte" contact. He then withdrew from the case, after much complaining about my "underhanded" tactic. The plaintiff became pro se, and her frivolous case was dismissed by summary judgment last week.

The point to this story is that if I had been deprived of the ability to investigate this by contacting the sub-treater we would have had to proceed through discovery and possibly trial of a frivolous case, with our only remedy being the impeachment of the treater's unfounded opinions. It was not her fault that she was given bad information by the plaintiff; it was not her fault that the plaintiff counsel did not give her corrected factual information. It was only through my informal contact that we were able to undo the damage before the whole thing snowballed.

In conclusion, I must trust that you and the other members of the committee are experienced enough to see the dangers in allowing only one side of civil lawsuits access to treating physicians. A rule that prohibits the defense only from having the ability to informally investigate lawsuits gives a tremendous and unfair advantage to the other side, leaving cases wide open to partisan manipulation of the witnesses. Misguided attempts to appear fair by nominally prohibiting both sides from contacting physicians will be easily circumvented by plaintiffs' counsels though their clients, the plaintiffs themselves, contacting the physicians in their stead.

As with so much we do as lawyers, the solution comes down to personal integrity and professionalism. Lawyers should be left to exercise their own judgment as to which witness should be contacted and what should be discussed. Defense counsel need to be able to thoroughly explore the plaintiff's undisclosed drug addiction or marital problems with the treater when relevant to the case, just as plaintiff's counsel can explore such problems relating to the defendant physician when relevant. Courts should use the existing rules to prohibit unduly invasive, irrelevant inquiries in formal discovery and before the jury.

I ask that you please consider what I have written in making your recommendations to the committee and the Supreme Court. Thank you for your attention.

Sincerely,

William Sharp

cc: Gilbert Low, Vice-Chairman
Texas Supreme Court Advisory Committee
Orgain, Bell & Tucker, L.L.P.
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August 19, 2002

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Texas Supreme Court Advisory Committee
Orgain, Bell & Tucker, L.L.P.
470 Orleans Street, 4th Floor
Beaumont, TX 77701

Re: Ex Parte Physician Contacts under Tex. R. Evid. 509 and 510

Gentlemen:

I am (primarily) a civil defense attorney and wish to express my opposition to any action by your committee to expand the physician/health professional-patent privileges of the Texas Rules of Evidence, Rules 509 and 510. The current rules adequately and efficiently protect patient confidential communications. I understand your committee is considering expanding the privileges by removing or limiting the exceptions contained in Rules 509(e)(1 and 4) and 510(c)(1 and 5), which provide exceptions to the privileges in civil lawsuits.

Changing the Rules to limit *ex parte* contact between a defendant's counsel and the medical service provider for the plaintiff in a civil suit will not better protect the patient's confidential communications to her or his medical professional, but it will limit discovery in these lawsuits. This goes against the very scope of such discovery ("any matter that is not privileged and is relevant to the subject matter of the pending action ... ." Tex. R. Civ. P. 192.3(a)).

The proposed change will take us back to the not-too-distant past, when defense attorneys could not obtain medical records without an authorization from the plaintiff. The authorization was often delayed until a court ordered plaintiff to provide one through a motion to compel. Further, the provided authorization was often limited to the information the plaintiff wanted the defense counsel to see and did not allow discovery of pre-existing medical conditions. This procedure greatly delayed discovery and made it much more expensive, which is exactly what the January 1, 1999 discovery rule changes were supposed to eliminate or reduce.

Right now, I can get the medical records relevant to my cases easily, cheaply and without delay through a third party discovery request under Tex. R. Civ. P. 205. I do not have to wait on an authorization from the plaintiff or his counsel, yet they have the opportunity to oppose the request because they get advanced notice under the rules. Any change modifying the exceptions to Evidence Rules 509 and 510, and medical service providers will require an authorization from the patient before providing records.

There is no argument that patient confidentiality is reduced by disclosure of information to defense counsel, because defense counsel could obtain the information and records even if *ex parte* contact were not allowed. Defense counsel could obtain the records with a limited authorization from the plaintiff (often obtained through a motion to compel), followed by a deposition of the medical service provider, then a motion to compel production of and expanded authorization or the additional medical records that were withheld through the limited authorization in the first place. The only change will be to delay cases, inhibit discovery, and increase costs. This is a giant step backwards.

I have never had a physician or other medical service provider give me any confidential information about their patient through informal contacts or discussions. The current rules of civil procedure or evidence do not require a medical service provider to give any confidential information to an opposing counsel, except through formal discovery with notice to the patient's counsel. Even if the medical service provider gave me informal information, the exceptions to privileges limit the disclosure to "relevant" information, which is obviously subject to discovery.

I urge you and your committee to continue the Supreme Court's emphasis on open discovery and reduced litigation costs by keeping the current Rules of Evidence 509 and 510 as they are. Thank you for your service to the Bar and for your consideration of this letter.

Sincerely,

WALKER, KEELING & CARROLL, L.L.P.

Terry M. Carroll, Jr.

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

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August 19, 2002

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

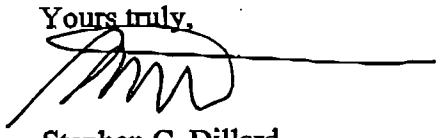
Dear Mr. Babcock:

I understand that the Supreme Court Advisory Committee is considering an amendment to Rules 509 and 510 of the Texas Rules of Evidence dealing with so-called "*ex-parte*" communications between defense lawyers and treating physicians in personal injury cases. I believe that the proposed change is inappropriate and should not be implemented.

When a personal injury or medical malpractice case is filed, the plaintiff puts his physical or mental condition at issue, making it relevant. The goal of our civil justice system is getting to the truth. Informal discovery is an important and less expensive part of that process. Imposing one-sided restrictions on getting to the truth increases the cost of litigation and is a step in the wrong direction. Moreover, it would do nothing to further the physician-patient privilege, since the information is ultimately discoverable in any event.

The committee should leave this matter to the courts and not impose a one-sided rule. However, if the committee is determined to implement a rule change, it would only be fair to impose the same rule on both counsel, instead of just the defendant.

Yours truly,



Stephen C. Dillard

SCD/cr

c: Hon. Nathan Hecht
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c: Buddy Low, Vice-Chairman
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August 19, 2002

Charles Lynde Babcock, IV, Chairman
Texas Supreme Court Advisory Committee
Jackson Walker, LLP
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Re: Potential changes to Rules 509 & 510

Dear Mr. Babcock:

I have received a copy of a letter to your office from D. Michael Wallach on behalf of the TADC dated June 26, 2002, in regard to potential changes of the rules as to defense counsel's right to visit informally with the plaintiff's treating physicians in certain tort cases. I would be proud to regurgitate the well reasoned position of Mr. Wallach, but I am sure you know such arguments by heart. Suffice it to say that I firmly agree with the position that if a plaintiff's physician is willing to speak (formally or informally) with a defense counsel, we ought not allow our apparent desire to make discovery and trial preparation any more tedious and expensive that it already is by forcing a judge to sanction such conversations.

In closing, let me assure you that we, in the Bar, do appreciate you spending your time and immeasurable talents working on these committees and I do apologize for taking any more of your time.

Sincerely,

J.T. Morgan

JTM/sc

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June 27, 2002

Via Facsimile
Ms. Katrina Knight
P.O. Drawer 631668
Nacodoches, TX 75963-1668

Re: The Administration of the Rules of Evidence Committee Consideration of Ex Parte Communications with Physicians

Dear Ms. Knight:

I am in receipt of your e-mail dated June 19, 2002 addressed to Sue Mills and Jill McLain at TMLT regarding the Rules of Evidence Committee and the prohibition that the Plaintiffs' Bar is seeking to place upon defense counsel in speaking to subsequent treating physicians.

In advance, I would ask that you please forgive the harsh tone of this letter and some of the harsh words that I will utilize in trying to express my complete dissatisfaction and utter amazement that anybody would seriously and honestly consider placing a prohibition on defense to speak with subsequent treating physicians.

Some people would argue that law is a lot like politics. There are people on different sides of an issue who are arguing for some personal agenda without regard to truth or honesty. The law should be, it is not often, but it should be about truth.

There is absolutely no legitimate argument that can ever be made that defense counsel should be barred from having a conference with a subsequent treating physician. The Plaintiffs' Bar is only attempting to do this in an effort to stifle and to gain an overwhelming unfair advantage against the defendants. An unfair advantage comes in a number of ways, mainly:

1. The Plaintiff's attorney works to push, motivate and encourage a subsequent treating physician to offer depositions and/or trial testimony that will have a negative impact on the defense. The defense counsel, being permitted no access to a subsequent treating physician, does not have the opportunity to tell the other side of the story before the deposition or trial testimony begins. There is no truth in this approach. It is only an effort by the Plaintiffs' Bar to gain an unfair advantage.

2. The Plaintiffs' Bar desires to prevent the Defendant from learning and/or discovering that in fact subsequent treating physicians will be supportive on causation, damages, or standard of care. Maybe the Plaintiffs' Bar doesn't intend

> to utilize a subsequent treating physician because they know the subsequent treating physician is going to be harmful to their case. By preventing Ex Parte conferences, the Plaintiffs' Bar effectively hides the truth from everybody involved with regard to damages, liability, or causation.

I started practicing law in 1985 and I have yet to see a single, solitary, detrimental effect occur in either the physician-patient relationship, truth or justice in the courtroom, truth or justice in settlement negotiations, or any negative effect in any aspect whatsoever arising out of allowing the defense counsel to have an opportunity to have conferences with subsequent treating physicians. There has not been a stifling of patient communication with physicians.

Everybody ought to call it what it is and quit pretending that it is something that it is not. There is nothing that needs to be protected, there is no abuse that is going on, there is no chilling effect in physician-patient communication, and there is absolutely no indication that all of the defense attorneys are somehow really "getting to" subsequent treating physicians and getting them to say something that is not otherwise absolutely true. The truth should come out and the truth should prevail, especially when there is litigation. The truth should come out and the truth should prevail especially when the rights of a defendant are being challenged in court. The truth should come out and the truth should prevail especially when it is being said that some defendant's negligent conduct harmed another living human being. The truth should come out and the truth should prevail especially when the defendant is being asked to give up two weeks, four weeks, or six weeks of his or her time being sued for allegedly causing the death of another human being, or allegedly causing quadriplegia, or allegedly causing some hard injury or damage. **THE TRUTH SHOULD COME OUT** . . . and any attempt by the Plaintiffs' Bar or anyone else to prohibit or to in any way restrict defense counsel's ability to freely discuss the damages, the medical treatment, the causation, or the issues of negligence with any treating physician of the Plaintiff is nothing but a farce instituted by Plaintiffs' counsel in an effort to prevent the truth from ever being discovered or learned.

The overwhelming right in our society to sue anyone, anytime, for anything, and to hire your experts and argue whatever you may desire is a very substantial right. This right is protected vigorously by all Plaintiffs' attorneys and courts. That is okay, and our open courts are healthy. However, the great right to sue in our society, to sue anyone, anytime, for anything, should come with some costs. One cost should be that the Defendant can talk with physicians about the issues related to the defense of the case.

People need to quit pretending that this is something that it is not. Somebody should be fighting and they should be fighting strenuously, intelligently, and persuasively. It would be an overwhelming injustice for this to ever occur. The Plaintiffs' Bar would laugh under their breath at the fact that they were able to get this through or to pull this over in the eyes of justice.

I encourage you, I cry for you, to step forward and to be an advocate, not for the Defense Bar and not for the Plaintiffs' lawyer, an advocate for allowing truth to prevail.

I will help and offer any and all assistance you may need.

Sincerely,

William H. Chamblee

WHC:dlg
cc: Ms. Sue Mills, Texas Medical Liability Trust ***(Via Facsimile)***
Ms. Jill McLain, Texas Medical Liability Trust ***(Via Facsimile)***