IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,413

RUDOLPH ACOSTA, M.D.,

Petitioner,

vs.

NANCY RICHTER and GARY RICHTER,

Respondents.

_____/

ON PETITION FOR DISCRETIONARY REVIEW OF AN ORDER OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS IN SUPPORT OF THE RESPONDENTS' POSITION

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TABLE OF CONTENTS

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
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I
STATEMENT OF THE CASE AND FACTS

The relevant facts are stated in the district court's opinion, *Richter v. Acosta,* 19 *Florida Law Weekly* D1817 (August 24, 1994). In addition, the Academy adopts in its entirety the factual statement of Respondents Nancy and Gary Richter.

II
ISSUES PRESENTED

A. WHETHER THE TRIAL COURT'S ORDER, ALLOWING DEFENSE COUNSEL IN A MEDICAL-MALPRACTICE CASE TO CONDUCT AN EX PARTE CONFERENCE WITH NON-PARTY TREATING PHYSICIANS, VIOLATED § 455.241(2), FLA. STAT. (1993).

B. IF THE EX PARTE INTERVIEW DOES VIOLATE § 455.241(2), IS THE STATUTE AN UNCONSTITUTIONAL INFRINGEMENT BY THE LEGISLATURE ON THE SUPREME COURT'S INHERENT RULEMAKING AUTHORITY, OR OF THE DEFENDANT'S FIRST AMENDMENT RIGHTS.

C. WHETHER THE PRIVILEGE CREATED BY THE STATUTE CAN AND SHOULD BE NARROWLY CONSTRUED, IN A MANNER CONSISTENT WITH SEVERAL POLICY ARGUMENTS ADVANCED BY DR. ACOSTA.

III
SUMMARY OF THE ARGUMENT

In *Johnson v. Mt. Sinai Medical Center,* 615 So. 2d 257, 258 (Fla. 3d DCA 1993), the court held that although § 455.241(2) prohibits an ex parte interview by defense counsel with a plaintiff's treating physician--a holding echoed by every other district court to address the question--the statute does not prohibit a "one-way interview between defense counsel and the subject physicians in which the physicians essentially remain silent and the defense counsel do all the talking." In the instant case, the district court disagreed with that conclusion, thus creating inter-district conflict, on the ground that the statute forbids any type of ex parte encounter in which "the patient's attorney cannot be present to protect against disclosure of

privileged information," and thus that the statute forbids a "one way interview between defense counsel and the physicians in which the doctors basically were required to remain silent and the defense counsel were to do the talking." 19 *Florida Law Weekly* at D1817. It is this inter-district conflict, on the narrow question of whether the statute permits such a one way interview, which invoked this Court's jurisdiction.[1/]

From this perspective, it is curious at the least that Petitioner Dr. Acosta, in his brief, has offered no discussion of the propriety of a one way interview under § 455.241(2), and no attempt to defend the district court's reasoning in the *Johnson* case. To the contrary, Dr. Acosta has raised three general arguments on which there is no inter-district conflict, because the district courts unanimously have rejected his position.[2/]

Dr. Acosta argues first that § 455.241(2) should be construed to forbid ex parte interviews between defense counsel and treating physicians in all litigation except medical malpractice cases. In those cases only, Dr. Acosta argues, the statute should be construed to permit such ex parte interviews, whether or not the treating physician in question himself is the defendant or the target in the case. This is a construction of the statute which no district court has ever considered entertaining. Indeed, *Johnson* itself was a medical malpractice case, in which the court clearly recognized that the statute prohibited an ex parte interview of treating

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[1/] The Third District Court of Appeal is in the process of revisiting the wisdom of its decision in *Johnson*, in three cases consolidated for en banc consideration under the style of *Giron v. Noy,* Case Nos. 94-1675, 94-1493, and 94-1428. If a district court should overrule *Johnson*, that would remove the conflict which occasioned this Court's review in the instant case.

[2/] Because Dr. Acosta has chosen not to defend the district court's decision in *Johnson*, no argument in support of that decision is properly before this Court. *See Dober v. Worrell,* 401 So. 2d 1322 (Fla. 1981); *Gifford v. Galaxie Homes of Tampa, Inc.*, 204 So. 2d 1 (Fla. 1967); *Gulf Heating & Refrigeration Co. v. Iowa Mutual Ins. Co.*, 193 So. 2d 4 (Fla. 1967). And because the three arguments advanced by Dr. Acosta in his brief do not implicate the inter-circuit conflict which occasioned this Court's jurisdiction, those arguments arguably are not properly here as well.

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physicians who were not themselves the defendants or the targets. Moreover, this Court has approved a district court decision to the same effect, in *Rojas v. Ryder Truck Rental,* 641 So. 2d 855, 858 (Fla. 1994), *approving Franklin v. Nationwide Mutual Fire Ins. Co.,* 566 So. 2d 529, 534 (Fla. 1st DCA), *review dismissed,* 574 So. 2d 142 (Fla. 1990). As we will demonstrate, the language of § 455.241(2), its legislative history, its underlying purposes, and plain common sense forestall Dr. Acosta's suggestion that for some unexplained reason, the statute created a privilege against ex parte communication in all types of cases except medical malpractice cases. As this Court and every district court have held, the statute prohibits such an ex parte interview in every type of case, including medical malpractice cases, unless the physician himself is a defendant or a target.

Dr. Acosta argues second that this interpretation of the statute, if correct, renders the statute unconstitutional as violative of this Court's rulemaking authority, and also of a defendant's and a treating physician's first amendment rights. Both points are wrong. The statute embraces a clear substantive objective in regulating the method by which a defendant may interview a treating physician, because it forbids an ex parte method which is likely to result in the disclosure of privileged and irrelevant information--information which would not be disclosed in a proceeding in which the plaintiff's counsel is present. The statute, therefore, regulates the content of information obtained in the interview, and therefore is substantive. And its prohibition does not run afoul of any first amendment consideration, because it regulates only the time, place and manner by which the proper, relevant information is obtained, and it does so in pursuit of a legitimate and valid governmental objective. There is no constitutional infirmity.

Third and finally, Dr. Acosta has raised a handful of policy arguments which he ostensibly advances in support of a narrow construction of the statute (a construction which no district court has adopted), but which in reality constitute nothing more than policy arguments

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which are appropriate only in a legislative body--not in this Court. All of Dr. Acosta's policy arguments--to the effect that the statute gives plaintiffs an unfair advantage over defendants; or that the statute should be construed to permit an ex parte interview if the treating physician "volunteers" for such an interview; or that the interview should be considered appropriate if it discusses only the quality of the patient's care--all of them are foreclosed by the plain language of the statute. In that context, these arguments constitute nothing more than a challenge to the underlying wisdom of the statute, which belongs in the legislature--not in this Court.

The bottom line is that Dr. Acosta has offered no challenge to the district court's decision on the one, narrow point on which it conflicts with the decision of another district court; and Dr. Acosta has offered a series of challenges to the statute which have been rejected by every district court, and which are inconsistent with its plain language and its underlying purpose. The district court's decision in the instant case should be approved.

IV
ARGUMENT

A. AS THE DISTRICT COURT HELD, THE TRIAL COURT'S ORDER DID VIOLATE §455.241(2), FLA. STAT. (1993).

Dr. Acosta's discussion of the statutory and decisional history of this subject prior to the 1988 amendment to § 455.241(2) (brief at 7-9) is interesting but largely irrelevant. Of course we acknowledge, and of course the Florida Legislature was aware, that before the time of the amendment Florida did not recognize a doctor/patient privilege. A defendant (in any kind of case--not just a medical malpractice case) therefore was free to consult ex parte with the plaintiff's treating physician. Such consultation with fact witnesses was not precluded by Rule 1.280(b)(3), Fla. R. App. Civ. P., which applies only to expert witnesses. And § 455.241(2) protected the confidentiality of a patient's medical records only if the patient was not involved in litigation (any type of litigation) which placed those records at issue.

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It is against this backdrop that the 1988 amendment to § 455.241(2) was enacted; and the question posed by Dr. Acosta is whether the 1988 amendment created a privilege against ex parte communication with treating physicians in all cases *except* medical malpractice cases, or whether it created such a privilege in every type of case, unless the treating doctor himself is a defendant or potential defendant in a medical malpractice case. Dr. Acosta's position is that he had the right to interview Mrs. Richter's treating physician ex parte because this is a medical malpractice case--even though a defendant is forbidden by the statute to do so in every other kind of case. The plaintiffs' position is that the statute forbids all ex parte interviews in all types of cases, unless the treating physician himself is a defendant or potential defendant in a medical malpractice case.

1. Dr. Acosta's Construction of the Statute Already Has Been Rejected by this Court. In *Rojas v. Ryder Truck Rental,* 641 So. 2d 855, 858 (Fla. 1994), this Court approved the decision in *Franklin v. Nationwide Mutual Fire Ins. Co.,* 566 So. 2d 529, 534 (Fla. 1st DCA), *review dismissed,* 574 So. 2d 142 (Fla. 1990). As Dr. Acosta has pointed out (brief at 12 n.6), *Franklin* was not a medical malpractice case. Nevertheless, in the course of holding that the statute forbid the trial court to compel the plaintiff to authorize an ex parte conference between the defendant and the treating doctors, the court in *Franklin* interpreted the statute in a manner directly inconsistent with the construction advanced by Dr. Acosta in the instant case. The *Franklin* court stated without qualification that in the absence of written authorization from the patient, or a formal discovery vehicle like a deposition or an evidentiary hearing, the statute permits ex parte contact with the plaintiff's treating physician only "in a medical negligence action, when a health care provider is or reasonably expects to be named as a defendant . . . ." As the court in *Franklin* put it: "In other words, in all cases other than those where the health care provider is a defendant, unless the plaintiff voluntarily provides a written authorization to the defendant, the defendant's discovery of the privileged matter can be compelled only through

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the subpoena power of the court with proper notice and accordance with the discovery provisions of the rules of civil procedure."

That declaration could not be more clear, and it is positively inconsistent with the construction of the statute advanced here by Dr. Acosta. As we have noted, the *Franklin* decision was approved by this Court in *Rojas v. Ryder Truck Rental,* 641 So. 2d 855, 858 (Fla. 1994). In approving *Franklin*, this Court therefore already has endorsed the construction of the statute adopted by every district court to address the issue, and has rejected the construction advanced here by Dr. Acosta.

2. *Dr. Acosta's Construction of the Statute is Inconsistent with Its Legislative History.* Dr. Acosta has offered no reference to the legislative history of the 1988 amendment, other than the unsupported assertion (for which Dr. Acosta has provided no citation or supporting authority) that the amendment resulted from "intense lobbying efforts on the part of the Plaintiff's Personal Injury Bar," and set off a "fire storm of controversy . . ." (brief at 9). We ask the Court to contrast these ad hominems with the following 1988 report from the Senate Judiciary Committee:

> B. Effect of Proposed Changes:
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> * * * *
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> The bill amends .455.241, F.S., to specify that, in addition to medical records, the medical condition of a patient may not be disclosed to any person other than the patient, the patient's legal representative, or other health care providers involved in the treatment of the patient, except upon written consent of the patient. Further, the bill specifies that information disclosed to a health care practitioner by a patient is confidential and may be disclosed only to other health care providers involved in the care of the patient or by written authorization of the patient or by subpoena. In addition, this information may be disclosed by a health care provider to his attorney if the provider expects to be named as a defendant in a negligence case.

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Senate Staff Analysis and Economic Impact Statement, CS/SB 1076, Senate Judiciary--Civil Committee, May 19, 1988, *quoted in Franklin v. Nationwide Mutual Fire Ins. Co.*, 566 So. 2d 529, 532 (Fla. 1st DCA), *review dismissed,* 574 So. 2d 142 (Fla. 1990). We emphasize the final sentence of the above-quoted passage from the Senate Report: "[T]his information may be disclosed by a health care provider to his attorney if the provider expects to be named as a defendant in a negligence case." That language could not be more clear. It is positively inconsistent with Dr. Acosta's construction of the statute.

3. *Dr. Acosta's Construction of the Statute Makes No Sense.* It is axiomatic that a statute should not be construed to achieve an absurd result.[3/] Dr. Acosta's position is that the legislature created a privilege against ex parte contract with a treating physician in every type of litigation except one--medical malpractice litigation. In those cases, and those cases only, according to Dr. Acosta, the legislature intended to abolish all plaintiffs' rights of confidentiality in their medical records, and thus to permit ex party inquiry, whether or not the health-care provider in question is in fact the defendant or potential defendant in the case. In every other kind of litigation, according to Dr. Acosta--in car crashes, product liability cases, workers'-compensation cases--cases in which the plaintiff's medical condition is just as important as it is in the medical malpractice cases, the legislature forbid such ex parte interviews.

That position is non-sensical. There is no rationality to it. There is no policy objective which could possibly explain it. If ex parte interviews with treating physicians are inappropriate in product liability cases, or in car crash cases, they are just as inappropriate in medical malpractice cases. There is no relevant difference. The only distinction which makes any sense is the distinction which every district court to address the issue has made--the distinction between cases (all types of case, including medical malpractice cases) in which the treating physician

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[3/] *See Neu v. Miami Herald Publishing Co.*, 462 So. 2d 821 (Fla. 1985); *City of St. Petersburg v. Siebold,* 48 So. 2d 291 (Fla. 1950).

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himself is not a target, in which event the patient's privacy is protected against ex parte invasion; and cases in which the treating physician himself is a defendant or target (which could only be medical malpractice cases), in which event he obviously should have the right to discuss all matters of relevance with his own counsel. That construction of the statute makes perfect sense. Dr. Acosta's construction of the statute is nonsense.

4. None of Dr. Acosta's Arguments Support His Construction of the Statute. Dr. Acosta has raised three arguments in support of his construction of the statute. First (brief at 10-11), Dr. Acosta argues that if the legislature intended only to except from the privilege cases in which the doctor himself is a target or defendant, it would have been unnecessary to amend the statute at all, because "[o]bviously" a doctor has the right to "discuss his own care and treatment of the patient/plaintiff with his own counsel." But although that may be "obvious" to Dr. Acosta, if the language in question had not been included in the statute, it could have been argued that the new statutory privilege--perhaps only because of sloppy draftsmanship--had the effect of precluding discussions between a doctor and his own counsel, because the legislature had not specifically enacted such an exception. It is equally reasonable to conclude that the language in question was included in the statute to ensure that a litigant's right to consult with his own counsel had not been superseded by the privacy privilege.

Second (brief at 11), Dr. Acosta argues that if the legislature had intended to except only those cases in which the doctor is himself a defendant or a target, the statute would have said not that the privilege is inapplicable when "a" health care provider is the target; it would have said instead that the privilege is inapplicable whenever "the" health care provider is a target. Dr. Acosta submits that only the word "the" could refer to the particular provider in question, while the word "a" refers to any and all health care providers. But Dr. Acosta has forgotten that the legislature used the word "a" throughout § 455.241(2). It says that the medical condition of "a" patient cannot be disclosed except in certain circumstances. It says that when "a" health

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care provider is a target or a defendant, the information disclosed to "a" health provider by "a" patient can only be disclosed to "other" health care providers--and so on. In the context of the language used by the legislature, there is no ambiguity. The statute uses the same language in describing the privilege ("information disclosed to a health care practitioner" cannot be divulged) as it uses in describing the exception (when "a health care provider is or reasonably expects to be named"). Given that formulation, there is no question that the legislature intended the privilege to extend to all cases except those in which a health care provider himself is a target.

Third (brief at 11-12), Dr. Acosta argues that his interpretation of the statute is the only interpretation which can reconcile its language with the language of § 766.106, Fla. Stat. (1993), which compels health care providers on notice of claims against them to conduct a good faith investigation of the case. To fulfill that statutory obligation, Dr. Acosta argues, the target doctor has no choice but to interview other treating physicians during the presuit process. And because § 766.106 necessarily contemplates such ex parte contact, Dr. Acosta insists that the legislature could not have intended to forbid such ex parte contact in its amendment to § 455.241(2). As Dr. Acosta points out, two or more statutes should be harmonized if at all possible.

The problem with this argument is its assumption--for which Dr. Acosta has offered no authority--that the pre-suit exchange of information contemplated in Chapter 766 necessarily gives the parties unbridled access to all data relevant to the plaintiff's potential claim. As the Court is aware, the exact opposite is true. There are a number of areas in which access to relevant information during the pre-suit investigation is prohibited. For example, § 766.101(5) prohibits access to any information disclosed during the Medical Review Committee's

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investigation of the incident in question.[4/] Moreover, § 766.106(5) protects against pre-suit discovery of any work product developed during the pre-suit investigation, reflecting a balance by the legislature between the need for exchanging information during the pre-suit, and the need to protect the parties' internal development of that investigation. *See also* § 766.205(4). *See Healthtrust, Inc.--The Hospital Company v. Saunders,* 20 *Florida Law Weekly* D513 (Fla. 4th DCA Feb. 23, 1995); *Grimshaw v. Schwegel,* 572 So. 2d 12, 13 (Fla. 2d DCA 1990).

In this context--the context of a number of statutory exceptions to the discovery permitted in the pre-suit period--there is no inherent inconsistency between the necessity of a pre-suit investigation under Chapter 766, and the privilege created by § 455.241(2). To the contrary, § 455.241(2) embraces a balance of competing considerations analogous to the balance reflected in Chapter 766. The privilege created in § 455.241(2) reflects the recognition that "[c]omplete trust between doctor and patient . . . is essential to the successful treatment of the patient's condition." *Wenninger v. Muesing,* 240 N.W. 2d 333, 337 (Minn. 1976). Clearly the prospective revelation of matters discussed between doctor and patient in private ex parte interviews with defense counsel could have a chilling effect on the doctor/patient relationship, and hinder the patient's treatment. *See Petrillo v. Syntex Laboratories, Inc.,* 499 N.E. 2d 952, 968 (Ill. Ct. App. 1986), *appeal denied,* 505 N.E. 2d 361 (Ill.), *cert. denied,* 483 U.S. 1007, 107 S. Ct. 3232, 97 L. Ed. 2d 738 (1987); *Loudon v. Mhyre,* 756 P. 2d 138, 141 (Wash. 1988); *Kitzmiller v. Henning,* 437 S.E. 2d 452, 455 (W. Va. 1993).[5/] The fundamental purpose of

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[4/] *See Cruger v. Love,* 599 So. 2d 111 (Fla. 1992); *Boca Raton Community Hospital v. Jones,* 584 So. 2d 220 (Fla. 4th DCA 1991); *Tarpon Springs General Hospital v. Hudak,* 556 So. 2d 831 (Fla. 2d DCA 1990); *David J. Burton, D.M.D., P.A. v. Becker,* 516 So. 2d 283 (Fla. 2d DCA 1987).

[5/] The confidentiality of the doctor/patient relationship is deeply rooted, reflecting a general public understanding that physicians will protect the confidences of their patients. *See Horner v. Rowan Companies, Inc.,* 153 F.R.D. 597, 601 (S.D. Tex. 1994); *Harlan v. Lewis,* 141 F.R.D. 107 (E.D. Ark. 1992), *aff'd,* 982 F. 2d 1255 (8th Cir.), *cert. denied,* _____ U.S.

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the privilege is to enable the patient to secure complete and appropriate medical treatment by encouraging candid communication between doctor and patient free of the inhibition engendered by the prospect of ex parte disclosure. *See State ex rel. Woytus v. Ryan,* 776 S.W. 2d 389 (Mo. 1989). This objective is said to outweigh a defendant's asserted need for such information. *See Horner v. Rowan Companies, Inc.,* 153 F.R.D. 597 (S.D. Tex. 1994). As the court put it in *Cua v. Morrison,* 626 N.E. 2d 581, 586 (Ind. Ct. App. 1983), *opinion adopted,* 636 N.E. 2d 1248 (Ind. 1984): "The protection of that confidential relationship is worth some inconveniences to the legal process." This is the same type of balance made under Chapter 766, which is entirely consistent with the balance struck by § 455.241(2).

Moreover, there is especially no conflict between the two statutes in light of the recognition--emphasized by Dr. Acosta himself elsewhere in his brief (pp. 14-17)--that § 455.241(2) regulates the methodology of discovery, forbidding ex parte interviews and all of the potential dangers which they create, but permitting proper discovery through other channels. Those channels are no less available in the pre-suit period of investigation under Chapter 766 than they are after a lawsuit has been filed. For example, if the investigating physician really needs access to a given health care provider, he has the option to file a pre-suit bill of discovery, and take that doctor's deposition. *See Adventist Health System/Sunbelt, Inc. v. Hedgewood,* 569 So. 2d 1295, 1296-97 (Fla. 5th DCA 1990). Nothing in § 455.241(2) would prevent a deposition of the treating physician under those circumstances. For this reason too, there is no conflict between the investigation required by Chapter 766 on the one hand, and the interpretation of § 455.241(2) which has been adopted by every Florida court, on the other.

None of the arguments advanced by Dr. Acosta forestall that conclusion. Without question, the statute exempts from the privilege only those physicians who themselves are

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_____, 114 S. Ct. 94, 126 L. Ed. 2d 61 (1993); *Duquette v. Superior Court of County of Maricopa,* 778 P. 2d 634 (Ariz. Ct. App. 1989).

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defendants or potential defendants in medical malpractice cases.

B. THE STATUTE DOES NOT CONSTITUTE AN UNCONSTITUTIONAL INFRINGEMENT BY THE LEGISLATURE ON THE SUPREME COURT'S INHERENT RULEMAKING AUTHORITY, AND DOES NOT VIOLATE THE DEFENDANT'S FIRST AMENDMENT RIGHTS.

Dr. Acosta argues that for two reasons, the statute's prohibition of ex parte interviews with treating physicians, remanding litigants to more formal discovery procedures which are subject to judicial supervision, is unconstitutional. First, Dr. Acosta asserts that the statute is purely procedural in scope and effect, because it relates exclusively to the method of obtaining evidence, but not to the evidence itself. As Dr. Acosta puts it (brief at 16), "the statute really does not protect anything from discovery. It simply controls the way that discovery is conducted."

But Dr. Acosta has simply missed the purpose and effect of the statute. If the statute did nothing more than to assure that the same substantive information would be obtained by the litigants in one manner, but not in another, there might be some merit to his argument. The whole point of this statute, however, is that the ex parte interview threatens the revelation of *different information*--information which would *not* otherwise be obtained in a deposition in which the other party is present. As the court put it in *Kirkland v. Middleton,* 639 So. 2d 1002, 1004 (Fla. 5th DCA), *review denied,* 645 So. 2d 453 (Fla. 1994): "Were unsupervised *ex parte* interviews allowed, medical malpractice plaintiffs could not object and act to protect against inadvertent disclosures of privileged information, nor could they effectively prove that improper disclosure actually took place." There is a *substantive* difference between ex parte interviews and bipartisan interviews. Ex parte interviews, by their very nature, are likely to produce substantive information which is different from the information which the opposing party would allow to be produced, subject to ultimate supervision by the trial court, in a bipartisan

proceeding. As the court put it in *Franklin v. Nationwide Mutual Fire Ins. Co.*, 566 So. 2d 529, 533 (Fla. 1st DCA), *review dismissed,* 574 So. 2d 142 (Fla. 1990): "So long as the court supervises and enforces discovery from third persons in accordance with the rules through the compelled production of documents or deposition testimony through use of its subpoena power, it retains control of the process and can readily prevent any abuse thereof." However, "[t]his simply is not the case . . . when the court directs a party to authorize the other party to obtain discovery *outside* the provisions of the discovery rules without notice or any filing with the court, that is to say, through unnanounced informal interviews." *Id.* Or as the district court put it in the instant case, 19 *Florida Law Weekly* at D1817, in an ex parte interview "the patient's attorney cannot be present to protect against disclosure of privileged information."[6/]

Dr. Acosta's second argument--in a single sentence citing no authority (brief at 14)--is that the statutory privilege infringes upon defendant physicians' and upon treating physicians' first amendment rights of speech and association, by forbidding them to speak ex parte to defense attorneys. As Dr. Acosta himself has emphasized, however (*see* brief at 14-16), to the extent that the statute implicates information which is relevant to the lawsuit and thus is discoverable, it simply remands defendants (and the treating physicians) to a different methodology of discovery; it does not prohibit disclosure altogether. It therefore merely regulates the time, place and manner of communication, which is permissible in support of a

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[6/] If the Court has any doubt as to whether an ex parte interview creates the occasion for improper conduct, we ask the Court to review the facts outlined in the following decisions: *Horner v. Rowan Companies, Inc.*, 153 F.R.D. 597, 601-02 (S.D. Tex. 1994); *Manion v. N.P.W. Medical Center of Northeast Pennsylvania, Inc.*, 676 F. Supp. 585, 594-95 (M.D. Pa. 1987); *Miles v. Farrell,* 549 F. Supp. 82, 84 & n.3 (N.D. Ill. 1982); *Hammonds v. Aetna Casualty & Surety Co.*, 243 F. Supp. 793, 803-05 (N.D. Ohio 1965); *Crist v. Moffatt,* 389 S.E. 2d 41 (N.C. 1990). In any event, the policy judgment here is for the legislature. If the legislature could reasonably conclude that the ex parte process threatens the revelation of substantive information which would not be revealed in normal bipartisan discovery procedures, then the statute has a substantive purpose, and survives constitutional scrutiny.

valid governmental objective.[7/] And to the extent that the statute operates to forbid the disclosure of privileged information which is not relevant to the lawsuit--information which would not be subject to disclosure through normal channels of discovery--the statute's privacy objective obviously outweighs any asserted right to discover irrelevant private information about a patient's physical condition. Dr. Acosta has cited no authority to the contrary.

C. THE PRIVILEGE CREATED BY THE STATUTE CANNOT BE NARROWLY CONSTRUED, CONSISTENT WITH ITS LANGUAGE, IN A MANNER CONSISTENT WITH THE VARIOUS POLICY ARGUMENTS ADVANCED BY DR. ACOSTA.

In the final section of his brief (pp. 17-23), Dr. Acosta has advanced a series of policy arguments for the ostensible purpose of advocating a narrow construction of the statute. However, all of those arguments are inconsistent with the statute's language. They invite only a debate about the underlying wisdom of § 455.241(2)--a matter which is not the appropriate province of this Court, but rather of the legislature.

First (brief at 15-16), Dr. Acosta argues that the statutory privilege should not extend so far as to give the plaintiff an unfair advantage over the defendant, by assertedly permitting the plaintiff to monitor the defendant's investigation of the case, without giving the defendant a corresponding right. Dr. Acosta cites for this proposition *Doe v. Eli Lilly & Co.*, 99 F.R.D. 126, 128-29 (D.D.C. 1983), holding that the statutory "privilege was never intended . . . to be used as a trial tactic by which a party entitled to invoke it may control to his advantage the timing and circumstances of the release of information he must inevitably see revealed at some time"; that the privilege should not enable "the party so wielding the privilege to monitor his

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[7/] *See McGuire v. State,* 489 So. 2d 729 (Fla. 1986); *State v. Elder,* 382 So. 2d 687 (Fla. 1980); *Weidner v. State,* 380 So. 2d 1286 (Fla. 1980); *City of Miami v. Sternbenz,* 203 So. 2d 4 (Fla. 1967); *Smith v. Ervin,* 64 So. 2d 166 (Fla. 1953); *State v. Ucciferri,* 61 So. 2d 374 (Fla. 1952); *State ex rel Nicholas v. Headley,* 48 So. 2d 80 (Fla. 1950); *Local Union No. 519 v. Robertson,* 44 So. 2d 899 (Fla. 1950).

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adversary's progress in preparing his case by his presence on each occasion such information is revealed while his own preparation is under no such scrutiny"; and that "it would be an abuse of the privilege to allow it to be used in such a manner which has no relation to the purpose for which it exists."

Of course we disagree with the underlying policy judgments, because the very basis for a privilege is its recognition that the privacy or the relationship protected outweighs what would otherwise be an entitlement to discovery, and outweighs any attendant disadvantage which that may cause in the litigation process. But the more fundamental response, as the court recognized in *Franklin v. Nationwide Mutual Fire Ins. Co.,* 566 So. 2d 529, 534 (Fla. 1st DCA), *review dismissed,* 574 So. 2d 142 (Fla. 1990), is that the *Eli Lilly* court's conception of the "better practice" "is simply not sufficient reason for a trial court to fashion unauthorized rules of discovery", amounting to "unauthorized rule making beyond its authority." Moreover, the statute in *Eli Lilly* "did not involve a clear statutory privilege such as section 455.241 . . . ." *Id.* The *Eli Lilly* policy argument is simply and flatly inconsistent with the Florida Statute's language, and thus is appropriately addressed only to the legislature.

Second (brief at 18 n.9), Dr. Acosta argues that the statute should be construed to permit a "voluntary" conversation between defense counsel and the treating physician; and Dr. Acosta submits that this Court did not hold otherwise in *Rojas v. Ryder Truck Rental,* 641 So. 2d 855, 858 (Fla. 1994), in which this Court approved the *Franklin* decision, because *Franklin* concerned only the validity of the trial court's order instructing the plaintiff to authorize the interview with his physician. It did not address the question of voluntary disclosure by the doctor. But even if the *Franklin* decision, approved in *Rojas*, does not address this precise question, the statutory language certainly does; it says without qualification that the privilege belongs to the patient--not the doctor--and that only the patient's authorization can permit the inquiry (unless the doctor is himself the defendant or target, or the inquiry is undertaken in a formal deposition or evidentiary

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hearing). The statutory language, therefore, is positively inconsistent with Dr. Acosta's suggestion that the statute should not be enforced to preclude a "voluntary" conversation between defense counsel and the treating doctor. And as the Court is aware, the legislature had good reason to locate the privilege with the patient and not the doctor. The patient is represented by counsel; the doctor is not. And "[p]hysicians unfamiliar with legal proceedings may be unaware of their right to refuse to participate in such interviews." *Harlan v. Lewis,* 141 F.R.D. 107, 111 (E.D. Ark. 1992), *aff'd,* 982 F. 2d 1255 (8th Cir. 1993), *cert. denied,* _____ U.S. _____, 114 S. Ct. 94, 126 L. Ed. 2d 61 (1993).[8/] In any event, the policy decision is for the legislature--not the courts. Dr. Acosta's argument has been raised in the wrong forum.

Third (brief at 20), Dr. Acosta argues that the prohibition against an ex parte interview should forbid only a discussion of the patient's current condition, but not a discussion of the quality of the plaintiff's care and treatment by the defendant--a subject which the plaintiff has placed at issue by filing his lawsuit. Again, however, Dr. Acosta's proposal is foreclosed by the language of the statute, which forbids disclosure of both the "medical condition of a patient," and of any "information disclosed to a health care practitioner by a patient in the course of the care and treatment of such patient . . . ." By its plain language, the statute protects against ex parte disclosure of all "information" imparted to the health care provider in the course of treatment--which certainly encompasses any report to the treating physician about the quality of care provided by other doctors; and it also forbids discussion of the patient's "medical

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[8/] *Accord, Manion v. N.P.W. Medical Center of Northeast Pennsylvania, Inc.,* 676 F. Supp. 585, 594-95 (M.D. Pa. 1987) ("[T]he doctor, who typically is not represented by his personal counsel at the meeting, is unaware that he may become subject to suit by revealing the plaintiff/patient's confidences which are not pertinent to the pending litigation"); *Duquette v. Superior Court,* 778 P. 2d 634, 641 (Ariz. Ct. App. 1989) ("A physician may lack an understanding of the legal distinction between an informal method of discovery such as an *ex parte* interview, and formal methods of discovery such as deposition and interrogatories, and may therefore feel compelled to participate in the *ex parte* interview").

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condition"--a subject which necessarily implicates the quality of care the patient has received. Of course, the statute permits the defendant to acquire all of this information through a deposition or hearing. It forbids only ex parte inquiry about the patient's "medical condition," and about any "information disclosed to a health care provider," in the recognition that to permit such discussion ex parte is to invite encroachment by the interview into areas which are not relevant to the lawsuit and are privileged.

We can debate the wisdom of that legislative judgment. We can debate Dr. Acosta's proposal that the statute should have been written to permit inquiry about the quality of the plaintiff's treatment. But any such debate would be inappropriate in this forum, which is not a legislative forum. Dr. Acosta's argument is inconsistent with the statute itself, and thus offers no basis for disapproval of the district court's decision.

Fourth (brief at 21), Dr. Acosta has devoted two pages to a recapitulation and expansion of the policy conclusions reached by the court in *Doe v. Eli Lilly & Co.*, 99 F.R.D. 126, 128 (D.D.C. 1983), to the effect that the privilege in question gives the plaintiff an unfair advantage over the defendant. Dr. Acosta argues that the statute gives the plaintiff an unfair advantage by forcing the defendant to obtain information from the treating doctor by deposition or not at all, thus depriving the defendant of the opportunity to informally review the doctor's prospective testimony before deciding whether to put him on the record. In effect, according to Dr. Acosta, the defendant's choice is either not to contact the doctor at all (in which case he may be accused of negligence for failing to investigate what might be a favorable witness) or to contact the doctor only on the record (in which case he may be eliciting testimony harmful to his client). Essentially, Dr. Acosta argues, the statute invades the defendant's work-product privilege, by

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forcing him to conduct his investigation on the record rather than off the record.[9/]

What is the purpose of this argument? It is offered not in support of any construction of the statute, but rather as a frontal attack on the statute--as unwise or unfair. It is a legislative argument. Of course, the argument has no validity. It rests on the fanciful assumption that if the defendant were permitted an ex parte interview with the plaintiff's treating physician, somehow the treating physician's recollection of the events in question could be kept secret--out of the lawsuit--if the defendant decided not to further pursue the treating doctor's testimony. That assumption is simply false. It is a fact--in every medical malpractice case--that the treating physician is going to be deposed, and will probably end up testifying. The statute is concerned here with the method by which that testimony is elicited; it is designed to prevent the ex parte intrusion into matters which are not relevant to the lawsuit and are privileged. In the process, it hardly takes away what would otherwise have been a defendant's right to keep the identity of this witness a secret. This is the treating physician. He is going to be a witness, one way or another. The policy argument, therefore, is illusory.

And beyond that, policy arguments are for the legislature--not the courts. The statute says what it says. If what it says is unfair to one side or the other, Dr. Acosta should fight for repeal or amendment. His policy arguments have no business in this forum.

V
CONCLUSION

It is respectfully submitted that the decision of the district court should be approved.

[9/] Dr. Acosta cites by analogy this Court's decision in *Bolin v. State,* 642 So. 2d 540, 541 (Fla. 1994), holding that a criminal defendant should not be held to have waived the assertion of spousal immunity by taking his ex-wife's deposition, since defense counsel could be accused of being ineffective if he did not take the deposition.

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VI
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 16th day of March, 1995, to: PHILIP PARISH, ESQ., Stephens, Lynn, et al., 2 Datran Center, PH 2, 9130 So. Dadeland Blvd., Miami, Florida 33156; KENNETH S. SPIEGELMAN, ESQ., Grover, Weinstein, Stauber & Friedman, P.A., 777 Arthur Godfrey Rd., 2d Floor, Miami Beach, Florida 33140; C. HOWARD HUNTER, ESQ., 201 E. Kennedy Blvd., Suite 1950, Tampa, Florida 33602; and to DAVID ENNIS, ESQ., Controy, Simberg & Lewis, 3440 Hollywood Blvd., 2d Floor, Hollywood, Florida 33021.

Respectfully submitted,

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