TIPS *from the Trenches*

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Ex parte Freudenberger: Context and Implications

In *Ex parte Freudenberger*, 2020 WL 3526361 (Ala. June 30, 2020), the Alabama Supreme Court issued an opinion in a medical malpractice case addressing the matter of *ex parte* communications with non-party witnesses. *Freudenberger* focused on the following language contained in a protective order that was based upon the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"):

> "No ex parte interviews will be conducted by the Defendant's counsel with the Plaintiff's prescribing and treating physicians unless and until Defendant provides Plaintiff's counsel with at least ten (10) days written notice of the time and place of the interview and the opportunity to attend."

Freudenberger was a mandamus proceeding that resulted in a plurality opinion. Certain members of the Alabama Supreme Court concluded, while expressing differing rationale, that the foregoing language in the protective order at issue was improper in the absence of a showing of particularized circumstances or "good cause" justifying the conditions imposed on *ex parte* communications.

Freudenberger was the first time the Alabama Supreme Court had issued an opinion in a medical malpractice case addressing *ex parte* communications between attorneys and non-party witnesses in over twenty years. Immediately after the *Freudenberger* opinion was released, parties filed dozens of motions in courts across the state of Alabama seeking to eliminate any mention of *ex parte* communications in protective orders that were based upon HIPAA, in particular any condition or restriction contained in protective orders attaching to a party or its counsel conducting *ex parte* communications with non-party witnesses, namely treating health care providers. Those motions cited and relied upon the *Freudenberger* decision. The purpose of this article is to clarify and explain what the *Freudenberger* decision is and what it is not, as well as its context and implications with respect to current and future litigation.

Ex parte Freudenberger is a Plurality Opinion, Not a Majority Opinion

Freudenberger resulted in a fractured plurality opinion. While enough justices concurred in the result to issue the requested writ of mandamus, no more than two justices on the Court joined in any singular opinion authored by a justice. *Freudenberger* is not a majority opinion or an opinion "of the court." A majority opinion creates binding precedent for trial courts to follow. A plurality opinion does not represent binding precedent, and at best, any precedential value a plurality opinion might carry is questionable or limited.[1] The questionable precedential value of, and any guidance offered by, a plurality opinion is further limited to the narrowest holding among the plurality opinions in the case.[2]

The Separately Authored Opinions of the Justices in *Ex parte Freudenberger*

Freudenberger's status as a plurality opinion does not mean the decision is devoid of value. Four of the nine justices on the Alabama Supreme Court felt strongly enough about various issues related to the matter of *ex parte* communications with non-party witnesses that they each authored separate opinions. Those separately authored opinions provide valuable insight as to the individual perspectives of the various members of the Court on the issue of *ex parte* communications with non-party

treating health care providers. A summary and breakdown of the four separate opinions contained in *Freudenberger* is provided below.

The Opinion of Justice Sellers

Justice Sellers is often referenced as authoring the "lead opinion" in *Freudenberger*. Justice Bolin joined Justice Sellers in that individual opinion. In his opinion, Justice Sellers discusses the standard of review in terms of a trial court's discretion in managing discovery matters and whether and under what circumstances a trial court can be said to abuse that discretion.[3] Notably, Justice Sellers begins the "Analysis" section of his opinion with the following statement, citing *Ex parte Stephens*, 676 So. 2d 1307 (Ala. 1996): "[m]andamus review is appropriate in this case because the trial court's protective order involves a disregard of the work-product privilege."[4]

Justice Sellers begins his opinion discussing how "the trial court's order allows the [plaintiffs'] counsel to peer into defense counsel's mental impressions and effectively discloses defense strategies," articulating that the basis for mandamus review in *Freudenberger*, in his opinion, is the potential infringement upon defense counsel's work product privilege. Justice Sellers then analyzes the requirements and language of HIPAA in light of the defendants' desire to conduct unrestricted *ex parte* communications with non-party treating health care providers, concluding that "the federal Privacy Rule does not negate long-standing Alabama law allowing ex parte interviews with treating physicians; rather, it merely superimposes procedural prerequisites by requiring defense counsel to obtain a valid HIPAA authorization or, in this case, a court order complying with the provisions of 45 C.F.R. § 164.512(e)."[5] Justice Sellers also states in his opinion that "[e]x parte interviews are allowed under Alabama common law and nothing in HIPAA specifically precludes them."[6] He also concludes that the Privacy Rule contained in HIPAA does not preempt or conflict with Alabama law permitting *ex parte* communications with non-party witnesses.[7]

Justice Sellers concludes his opinion by stating that "the trial court exceeded its discretion by requiring the [plaintiffs'] counsel to receive notice of, and have an opportunity to attend, ex parte interviews that defense counsel intended to conduct with … treating physicians," and noting the following:

> "… [T]he additional conditions imposed by the trial court were not justified based on the [plaintiffs'] objection that ex parte communications would violate HIPAA and the Alabama Rules of Civil Procedure. We emphasize that trial courts remain gatekeepers of discovery, and there may be special or exceptional circumstances, if good cause is shown, justifying the imposition of conditions and/or restrictions upon ex parte interviews with a litigant's treating physicians. However, in this case, the [plaintiffs] failed to demonstrate the existence of any circumstances warranting limitations on ex parte communications with … treating physicians."[8]

The Opinion of Justice Mendheim

Justice Mendheim authored his own separate opinion in which Justice Mitchell joined. Justice Mendheim states in his individual opinion that he agrees with the opinion authored by Justice Sellers to the extent it concludes that HIPAA allows the defendants to conduct *ex parte* interviews with the plaintiff patient's treating physicians, provided the defendants first obtain a HIPAA-compliant "qualified protective order."[9] Justice Mendheim then clarifies that his purpose in authoring a separate opinion is to express his view regarding the following statement contained in the opinion authored by Justice Sellers: "trial courts remain gatekeepers of discovery, and there may be special or exceptional circumstances, if good cause is shown, justifying the imposition of conditions and/or restrictions upon ex parte interviews with a litigant's treating physicians."[10]

Justice Mendheim begins his opinion discussing the broad discretion that is afforded to trial courts in managing discovery matters in their cases and noting that appellate courts only intervene in the discovery process when a trial court has clearly exceeded its discretion.[11] Justice Mendheim goes on to note the correctness of the statement in the opinion by Justice Sellers that prior to the enactment of HIPAA, Alabama law permitted *ex parte* interviews with a plaintiff's treating physicians in medical malpractice cases, but also notes that "because of the broad discretion trial courts are afforded concerning discovery, trial courts could also restrict or even prohibit such interviews if the particular circumstances warranted such measures."[12] Justice Mendheim opines that "HIPAA did not change the fact that such ex parte interviews are allowed in Alabama or a trial court's discretion in overseeing such discovery issues," explaining how the process of obtaining entry of a HIPAA-compliant protective order provides some protection "so that a plaintiff is able to offer any objections he or she has to that method if disclosure."[13]

Justice Mendheim acknowledges the fact that "[i]f a plaintiff shows a specific reason for restricting access to her or his treating physicians, such as sensitive medical history irrelevant to the lawsuit, a court may restrict ex parte interviews and disclosure of medical records."[14] He then proceeds to explain that "a plaintiff may establish a reasonable privacy concern other than just tactical litigation strategy that warrants further restrictions than those listed in 45 C.F.R. § 164.512(e)(1)(v) or that justifies prohibiting such interviews altogether," specifying that "[s]uch privacy concerns could include the involvement of a minor, an independent confidentiality issue, sexual issues, unnecessary embarrassment, and so forth."[15] Justice Mendheim also notes that, generally speaking, he believes that "clear and explicit' notice to the plaintiff's physician about the purpose of the interview and that the physician is not required to speak to defense counsel" and "affording plaintiff's counsel the opportunity to communicate with the physician, if necessary, in order to express any appropriate concerns as to the proper scope of the interview and the extent to which plaintiff continues to assert the patient-physician privilege" are examples of conditions that "could be deemed appropriate as 'standard language' in a HIPAA qualified protective order."[16]

Justice Mendheim explains in detail his resulting opinion and considerations in *Freudenberger* in the following paragraph:

> "In my opinion, the trial court's error in this case was issuing a 'blanket' prohibition on ex parte interviews by Dr. Freudenberger's lawyers of [the plaintiff patient's] medical providers without any other considerations. The trial court should have considered the specific facts and issues of the case, balanced the competing positions of the

litigants regarding ex parte interviews, and then issued an appropriate qualified protective order. The starting point for a trial court's analysis in this type of case should be that ex parte interviews are allowed, and it should then consider specific exceptions or regulations from the plaintiff that could be incorporated into the qualified protective order. If the plaintiff has presented sound reasons other than tactical litigation strategy for the exceptions or regulations, then I believe this Court should uphold the trial court's ruling as consistent with the trial court's broad authority to oversee discovery.

In sum, because HIPAA already places some restrictions on a defendant's use and dissemination of a plaintiff's medical information to safeguard the plaintiff's privacy, to warrant further restrictions the plaintiff must establish that specific circumstances exist in his or her situation that justify the additional restrictions. If a plaintiff demonstrates that such circumstances exist, trial courts maintain the discretion to place additional restrictions and regulations upon ex parte interviews with treating physicians or even to prohibit such interviews altogether. … In this case, the [plaintiffs] offered no patient-specific reason why any restrictions beyond those listed in 45 C.F.R. § 164.512(e)(1)(v) should be placed upon Dr. Freudenberger's ex parte interviews of [the plaintiff patient's] treating physicians. Accordingly, as the main opinion concluded, the trial court in this case exceeded its discretion by requiring additional restrictions without sufficient justification of privacy concerns from the [plaintiffs]. On return of the case to the trial court, I believe that the [plaintiffs] would have the opportunity to present specific arguments to the trial court consistent with the parameters discussed herein."[17]

The Opinion of Justice Shaw

Justice Shaw authored a separate opinion in which justice Bryan joined. In his individual opinion, Justice Shaw expresses his view that HIPAA does not require the specific conditions on *ex parte* communications stated in the trial court's protective order at issue in *Freudenberger* and that *ex parte* communications with non-party treating health care providers are otherwise allowed by Alabama law.[18] Justice Shaw goes on to state that he "see[s] nothing providing the trial court the discretion to restrict, with no exception or limitation, only one party's ability to conduct witness interviews in the fashion found in this case," and notes that "[a]ny concerns that ex parte interviews might be abused could be remedied by a more narrowly tailored and equitable order."[19]

The Opinion of Justice Stewart

Justice Stewart authored the fourth and final separate opinion in *Freudenberger*. In her individual opinion, Justice Stewart notes that she agrees with the opinion authored by Justice Sellers "insofar as it concludes that defense counsel's ex parte interviews of a plaintiff's treating physicians are authorized under Alabama law," and that "the defendant's right to conduct such interviews is not prohibited by HIPAA."[20] Justice Stewart then proceeds to address the competing interests and concerns of plaintiffs and defendants with respect to a plaintiff patient's medical information, noting that "[e]qually important to the right of the defendant in a medical-malpractice action to prepare a defense with work-product-privilege protection is the privacy right of the plaintiff to his or her medical information, especially medical information that is not relevant to the claims or defenses raised in the litigation," and also that "[a] party filing such a lawsuit, however, cannot be said to have consented to the disclosure and discovery of his or her entire medical history, in particular if medical information is not relevant to the lawsuit."[21]

In her opinion, Justice Stewart details her view that considerations pertaining to both the parties, including the plaintiff patient, and the treating health care provider witnesses is important and necessary. She explains that in "[b]alancing the interests of the parties and the physician witnesses," she "would reject any notion that ex parte interviews cannot be conducted without the presence of the plaintiff or the plaintiff's counsel," and likewise "would reject any notion that defense counsel's work-product privilege outweighs the plaintiff's privacy rights at all costs."[22] Justice Stewart notes that she "would adhere to this Court's long-held sentiment that trial courts are afforded broad discretion in matters concerning discovery, and a trial court's ruling on discovery matters will not be reversed unless the trial court exceeds its discretion," reasoning that "[t]he trial court is in the best position to craft, on a case-by-case basis, a protective order specific to the facts of the case setting forth the precise parameters within which ex parte interviews of treating physicians may be conducted."[23]

Justice Stewart proceeds to cite and discuss the case of *Baker v. Wellstar Health System, Inc.*, 703 S.E.2d 601 (Ga. 2010) as an instructive example of a case in which a court "developed a framework for trial courts in that state to follow" when issuing HIPAA-compliant protective orders where "the standards provided therein to be included in a protective order authorizing ex parte interviews of treating physicians provide a balanced approach that seeks to protect the interests of the parties and the witnesses."[24] Justice Stewart quotes the following passage from the *Baker* case:

> "[I]n issuing orders authorizing ex parte interviews, trial courts should state with particularity: (1) the name(s) of the health care provider(s) who may be interviewed; (2) the medical condition(s) at issue in the litigation regarding which the health care provider(s) may be interviewed; (3) the fact that the interview is at the request of the defendant, not the patient-plaintiff, and is for the purpose of assisting defense counsel in the litigation; and (4) the fact that the health care provider's participation in the interview is voluntary. *See, e.g.*, *Arons v. Jutkowitz*, 9 N.Y.3d 393, 850 N.Y.S.2d 345, 880 N.E.2d 831, 843, n. 6 (II)(B) (2007). *See also* Angela T. Burnette & D'Andrea J. Morning, *HIPAA and Ex Parte Interviews—The Beginning of the End?*, 1 J. Health & Life Sci. L. 73, 104–105 (April 2008). In addition, when issuing or modifying such orders, trial courts should consider whether the circumstances--including any evidence indicating that ex parte interviews have or are expected to stray beyond their proper bounds--warrant requiring defense counsel to provide the patient-plaintiff with prior notice of, and the opportunity to appear at, scheduled interviews or, alternatively, requiring the transcription of the interview by a court reporter at the patient-plaintiff's request. See Wayne M. Purdom, *Ga. Civil Discovery*, § 5.10

(6th ed.); Burnette, supra at 104.

> 'In sum, the use of carefully crafted orders specifying precise parameters within which ex parte interviews may be conducted will serve to enforce the privacy protections afforded under state law and advance HIPAA's purposes while at the same time preserving a mode of informal discovery that may be helpful in streamlining litigation in this State.'"[25]

Justice Stewart concludes her opinion by returning to specifically address the facts in the *Freudenberger* case. She notes that the protective order at issue in *Freudenberger* required the defendants and their counsel to provide notice of proposed *ex parte* interviews with treating health care providers to the plaintiffs' counsel and to allow the plaintiffs' counsel to attend all such interviews, but states that "[n]othing in the materials presented to this Court indicate that the proposed [interviews] would stray beyond the bounds of information relevant to the discovery of information pertinent to the claims and defenses raised by the parties in the case." [26] Justice Stewart concludes her opinion by stating that she would issue the writ of mandamus to the trial court, "but with direction to the trial court to conduct a hearing to allow the parties to present evidence in conjunction with the aforementioned parameters."[27]

The Concurrence of Justice Wise

Justice Wise concurred in the result of the *Freudenberger* decision without authoring an opinion.

The Dissent of Chief Justice Parker

Chief Justice Parker dissented without authoring an opinion in the case. It is noteworthy that due to Chief Justice Parker's dissent, *Freudenberger* was not a unanimous decision in any respect, even as to the resulting decision to issue the requested writ of mandamus.

What to Make of *Freudenberger* and the Justices' Various Opinions

Some litigants seeking to take advantage of the *Freudenberger* decision to remove all conditions related to, or any mention of, *ex parte* communications with non-party witnesses may characterize *Freudenberger* as an "8 – 1 decision," which far from accurate. While eight justices concurred in the resulting decision to issue of a writ of mandamus, multiple concurring justices expressed differing opinions as to how or why that result should have been reached, as well as what steps trial courts should take to avoid abusing their discretion or running afoul of the work product privilege in the context presented by *Freudenberger*. The task that trial courts and litigants now face is how best to reconcile the justices' separate opinions and the end result of the *Freudenberger* decision to determine whether and to what extent certain conditions or restrictions addressing *ex parte* communications in a protective order might or might not be proper under a given set of circumstances.

All four separate opinions from the justices appear to agree that, as a general proposition, Alabama common law does not prohibit *ex parte* communications or interviews with non-party treating health care providers, and HIPAA does not prohibit such contacts. They all appear to agree, and emphasize, that trial courts continue to maintain the primary position as the gatekeepers of discovery and may utilize the broad discretion afforded them to manage discovery matters. The four separate opinions also appear to agree and acknowledge that *ex parte* communications and interviews with a litigant's treating health care providers are not unlimited or unrestricted without exception, and advise that the possibility of limiting, restricting, or even prohibiting such *ex parte* contacts exists as long as the party seeking to impose conditions upon, or prohibit, *ex parte* contacts with treating health care providers makes a showing of particularized, "patient-specific" circumstances or "good cause" to the trial court supporting any requested condition or restriction.

The separate opinions in *Freudenberger* indicate that such a showing of good cause or particularized or "special" circumstances should be based upon the specific facts and considerations present in each case, and should not be premised upon strategic litigation concerns or generalized, unsupported fears that opposing parties or their counsel will abuse the discovery process or act improperly. Examples of particularized concerns or circumstances that might justify the imposition of conditions or restrictions on parties' ability to conduct *ex parte* communications with non-party treating health care providers, as articulated by some of the justices, are "privacy concerns" that "could include the involvement of a minor, an independent confidentiality issue, sexual issues, unnecessary embarrassment, and so forth," or the potential disclosure of "medical information that is not relevant to the claims or defenses raised in the litigation."[28]

Another particularized, patient-specific concern that could support a trial court's imposition of conditions or restrictions on *ex parte* communications with a litigant's treating health care providers is the potential infringement upon a privilege or potential disclosure of a patient's privileged, protected, confidential, or sensitive information. Examples of types of information that the concern of the disclosure of which could warrant imposition of such conditions or restrictions include information subject to the psychotherapist-patient privilege or work product privilege. Alabama appellate decisions cited by Justice Sellers for the proposition that "[e]x parte interviews are allowed under Alabama common law" and which are often relied upon by litigants opposing conditions or restrictions on *ex parte* contacts with treating health care providers acknowledge considerations related to an applicable privilege or potentially sensitive or embarrassing information as a legitimate basis for conditioning or restricting access to treating health care provider witnesses.[29] [30]

Once a sufficient showing of particularized, patient specific concerns or circumstances is made which meets the "good cause" threshold, litigants are then faced with the decision of how best to fashion or tailor conditions or restrictions in a protective order to the specific facts of each case. Justice Mendheim and Justice Stewart offer some specific suggestions and examples in their respective opinions in *Freudenberger*.[31] Though the conditions of providing advanced notice to opposing parties and their counsel of proposed *ex parte* communications with treating health care providers and allowing opposing parties and their counsel to attend or participate in such communications were at issue in *Freudenberger*, those two specific conditions and issues, while referenced generally by the various opining justices, were not discussed in any particular depth as to whether one condition or the other – or both conditions – was/were/would be untenable, more or less preferable, or otherwise acceptable under different circumstances. However,

a closer examination of *Freudenberger* and the justices' separate opinions may provide insight as to whether the justices on the Alabama Supreme Court might view one condition or the other as justifiable and within a trial court's discretion under certain circumstances.

As noted above, in his individual opinion Justice Sellers cites to *Ex parte Stephens*, 676 So. 2d 1307 (Ala. 1996) as support for his statement that "[m]andamus review is appropriate in this case because the trial court's protective order involves a disregard of the work-product privilege."[32] *Stephens* was an insurance fraud case in which the following language contained in a protective order entered by a trial court was challenged on mandamus as an abuse of the trial court's discretion: "(B) The parties (including their attorneys or persons acting on their behalf) shall not contact, either in person or by telephone, any person on the list without a representative of the other party being present for the duration of the contact."[33] In *Stephens*, the Alabama Supreme Court held that the trial court abused its discretion by requiring the presence of opposing parties or their counsel during *ex parte* interviews and communications with non-party witnesses, engaging in lengthy discussion as to how the presence and participation of opposing parties or their counsel during *ex parte* communications could result in the disclosure of an attorney's mental impressions or strategies, and therefore the requirement that opposing parties or their counsel be present during *ex parte* communications violated the work product privilege.[34] *Stephens* did not involve any language or condition in a protective order regarding parties and their counsel notifying opposing parties or opposing counsel of the intent to conduct *ex parte* communications.

Another case presented to the Alabama Supreme Court in *Freudenberger* and upon which the defendants in that case relied heavily in their appellate and trial court briefs was *Ex parte Howell*, 704 So. 2d 479 (Ala. 1997). Like *Stephens*, *Howell* was an insurance fraud case in which parties sought a writ of mandamus, challenging language in a protective order that placed conditions upon and restricted the parties' ability to engage in *ex parte* communications with non-party witnesses.[35] The language in the protective order at issue in *Howell* included a requirement that the plaintiffs' attorneys "were required to notify [the defendant] immediately as to the name of any policyholder who consented to be interviewed" and a requirement that "[the defendant's] representatives were allowed to attend each interview and could take notes and tape-record the interview if the policyholder consented."[36]

Relying on its previous decision in *Stephens*, the Alabama Supreme Court held in a majority opinion that the requested writ of mandamus was due to be issued, in part, because the provision in the protective order at issue in *Howell* requiring the plaintiffs to allow the defendants counsel or representatives to attend *ex parte* interviews with non-party witnesses violated the work product privilege.[37] Notably, despite the fact that the protective order in *Howell* "required [the plaintiffs' attorneys] to notify [the defendant] immediately" if a non-party witness consented to be interviewed by the plaintiffs' attorneys, the Alabama Supreme Court's decision and holding in *Howell* did not cite the notice provision as an abuse of discretion, a violation of the work product privilege, or any other type of error by the trial court.[38]

Justice Sellers' reliance upon, and the justices' consideration of, *Stephens* and *Howell* in the *Freudenberger* case seem to indicate that language in a protective order requiring or allowing opposing parties or their counsel to attend or participate in another party's *ex parte* communications or interviews with non-party witnesses (i.e. treating health care providers) possesses the potential to violate the work product privilege moreso than language which merely requires one party to provide an opposing party advanced notice of *ex parte* contacts. That makes sense given nature of the two conditions. A requirement of providing advanced notice of *ex parte* contacts to an opposing party carries with it no greater potential to infringe upon the work product privilege than the advanced notice a party is required to provide to opposing parties prior to issuing a subpoena to a non-party pursuant to Rule 45 of the Alabama Rules of Civil Procedure, whereas attending or participating in an opposing party's *ex parte* communications with non-party witnesses does present the potential for infringing upon the work product privilege, as articulated in *Stephens* and *Howell*. A condition of providing advanced notice of *ex parte* contacts to an opposing party also allows the opposing party to utilize the discovery protections afforded him/her under Rule 26(c) of the Alabama Rules of Civil Procedure to object to the proposed communication or move for a protective order if the party believes legitimate grounds exist for doing so – an avenue that has been specifically mentioned by the Alabama Supreme Court.[39] A party is deprived of his/her Rule 26 discovery protections and cannot know whether or not the need to exercise those rights might exist if the party does not know the sources from which discovery is being sought by opposing parties or opposing counsel.

Therefore, *Freudenberger* provides the impression that language requiring parties to provide advanced notice of *ex parte* communications or interviews to opposing parties is less problematic than language requiring parties to allow opposing parties and their counsel to attend or participate in *ex parte* communications. Moreover, Justice Shaw's opinion that "[a]ny concerns that ex parte interviews might be abused could be remedied by a more … equitable order" appears to indicate that language in a protective order requiring all parties, and not just one set of parties or the other (i.e. only plaintiffs or only defendants) to provide one another advanced notice of *ex parte* communications or interviews to opposing parties would be even less problematic as long as no language requiring opposing parties to attend or participate in such communications is included, and the party requesting the inclusion of any such language or condition makes the required particularized, patient-specific showing of good cause to the trial court.[40]

Where the Law Stands After *Freudenberger*

Though *Freudenberger* provides some insight as to the specific views of certain of the justices on the Alabama Supreme Court with respect to protective orders and *ex parte* communications with non-party witnesses, it does not overrule or alter existing precedent with respect to those discovery issues. *Freudenberger* did not alter or lessen the well-established authority and sound discretion of trial courts to manage discovery matters such as informal *ex parte* communications with non-party witnesses. In fact, the separately authored opinions of Justice Sellers, Justice Mendheim, and Justice Stewart acknowledge and re-emphasize that authority.[41]

For the twenty years preceding *Freudenberger*, litigants and attorneys have understood that trial courts have discretion to impose reasonable conditions

or restrictions on how parties and attorneys interact with witnesses. That rule was settled in *Ex parte Henry*, 770 So. 2d 76 (Ala. 2000), when the Alabama Supreme Court expressly overruled opinions to the contrary, including *Ex parte Hicks*, 727 So. 2d 23 (Ala. 1998) and *Ex parte Stephens*, 676 So. 2d 1307 (Ala. 1996).[42] *Henry* was an insurance fraud case that involved a trial court's discovery order regarding a defendant insurance company's policyholder information. The plaintiff sought to obtain the names and addresses of the defendant insurance company's policyholders, along with other information, and upon the plaintiff filing a motion to compel, the trial court entered an order which allowed the plaintiff to discover the names and addresses of the policyholders, but restricted the plaintiff's contact with the policyholders to a court-approved letter.[43] It was undisputed that the policyholders had potentially admissible information about the insurance company's sales practices, and the Alabama Supreme Court noted that, like private healthcare information protected by HIPAA, "[a] n insurance company's policyholder lists are confidential proprietary information to which a litigant has no right except through court-ordered discovery."[44]

The Alabama Supreme Court held in *Henry* that the trial court had not abused its discretion by entering an order that limited the plaintiff's method of contacting the non-party policyholders, and provided the following reasoning for its decision:

> "Although the trial court ordered [the defendant insurance company] to provide [the plaintiff] with the names and applications of every person in Alabama who had purchased a life insurance policy from [the defendant insurance company], through [the insurance company's agent], since 1992, it placed certain conditions on how [the plaintiff] could contact these persons. The judge ordered that [the plaintiff] submit a proposed letter for the judge to review and approve before she could contact any person whose name had been provided in response to her discovery requests. Moreover, the court ordered, the letter 'should make the recipient take the affirmative step of contacting the plaintiff's attorney if they so wish.' This limitation was not an arbitrary limitation on [the plaintiff's] right to conduct full and meaningful discovery in the manner she saw fit. Rather, the court was simply exercising the power and discretion afforded it in performing its obligation to oversee discovery matters. 'Let the trial court be the trial court, without microscopic manipulation of its discretion by this Court.' *Ex parte Howell*, 704 So. 2d 479, 483 (Ala. 1997) (Houston, J., dissenting).
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> [The plaintiff] has not shown a clear abuse of discretion that would entitle her to a writ of mandamus. The trial court's order allows her to get the names of all persons in Alabama who had purchased a life insurance policy from [the defendant insurance company], through [the insurance company's agent], since 1992, and it allows her the right to contact those persons. It was within the court's discretion to place limitations on the method [the plaintiff] used to contact those persons.
>
> We recognize that this holding conflicts with prior cases involving the question of whether a trial judge clearly abused his discretion by placing limitations on the method by which the plaintiff's attorneys could contact other policyholders. *See*, *e.g.*, *Ex parte Hicks*, [727 So. 2d 12 (Ala. 1998)]; *Ex parte Stephens*, [676 So. 2d 1307 (Ala. 1996)]. To the extent those cases conflict with today's holding, they are overruled."[45]

In *Henry*, the Alabama Supreme Court approved the practice of trial courts exercising discretion in imposing reasonable conditions or restrictions on how attorneys interact with witnesses during the course of discovery. *Henry* made it clear that a trial court may, within the permissible bounds of its discretion, manage, control, restrict, and specify the methods by which parties or their attorneys gather information during discovery, including the nature of communications with non-party witnesses. *Henry* is only referenced twice in the opinions of the justices in *Freudenberger*.[46] Nowhere in *Freudenberger* does any justice expressly or implicitly overrule *Henry* or limit its application, nor is it discussed in any detail.

The most recent Alabama appellate court decision addressing *ex parte* communications with non-party witnesses that was issued prior to *Freudenberger* was *Ex parte Alabama Gas Corp.*, 258 So. 3d 1148 (Ala. Civ. App. 2018). In *Alabama Gas Corp.*, which was a mandamus proceeding in a workers' compensation action, the Alabama Court of Civil Appeals found that a discovery dispute involving a trial court's entry of a HIPAA-compliant protective order which the defendant employer argued prohibited certain methods of discovery traditionally allowed in workers' compensation actions does not meet the criteria for extraordinary mandamus relief at set forth by *Ex parte Ocwen Fed. Bank, FSB*, 872 So. 2d 810, 813 (Ala. 2003).[47] *Alabama Gas Corp.* is not referenced or discussed in the opinions of the justices in *Freudenberger*, and no justice in *Freudenberger* expressly or implicitly overrules *Alabama gas Corp.* or limits its application.

It is obviously important to carefully examine *Freudenberger* and the justices' separate opinions to determine whether a particular decision or course of action in a case related to a protective order and non-party witness discovery may or may not run the risk of extending beyond the bounds of the trial court's discretion as the gatekeeper of discovery. However, it is also important to be mindful of the fact that while the justices' various opinions in *Freudenberger* can and should be used as a guide, *Freudenberger* as a plurality opinion, did not overrule or alter existing precedent addressing the subject of the authority of a trial court to impose reasonable conditions or restrictions on the method, manner, and ability of parties and their counsel to conduct discovery with respect to non-party witnesses and treating health care providers.

1 A plurality opinion is an opinion "agreed to by less than the majority as to the reasoning of the decision, but is agreed to by a majority as to the result, Black's Law Dictionary 1092 (6th ed. 1990)." L.B.S. v. L.M.S., 826 So. 2d 178, 185 n. 4 (Ala. Civ. App. 2002). "The principles enunciated in an opinion do not constitute binding precedent if a majority of the court concurred merely in the result but not in the opinion's reasoning on a particular issue." 21 C.J.S. Courts § 188 (Dec. 2016). The main opinion must be "joined by a majority of the Court so as to constitute a precedential decision of the Court." Ex parte Capstone Bldg. Corp., 96 So. 3d 77, 81 (Ala. 2012) (citation omitted). The Court is "not bound to apply [a] premise from [a] plurality opinion … because it is only a plurality opinion." Diversicare Leasing Corp. v. Hubbard, 189 So. 3d 24, 40 (Ala. 2015) (quoting Entrekin v. Internal Med. Assocs. of Dothan, P.A., 689 F.3d 1248, 1257 (11th Cir. 2012)). "The precedential value of the reasoning in a plurality opinion is questionable at best." Ex parte Discount Foods, Inc., 789 So. 2d 842, 845 (Ala. 2001); Ex parte Achenbach, 783 So.2d 4, 7 (Ala. 2000) ("[w]e note that the precedential value of the reasoning in a plurality opinion is questionable.") (citing 20 Am. Jur. 2d, Courts 195 (1965); City of Lakewood v. Plain Dealer

Publ'g Co., 486 U.S. 750, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988); United States v. Pink, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796 (1942) (["While it was conclusive and binding upon the parties as respects that controversy..., the lack of an agreement by the majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases."]).

See also Hosea O. Weaver and Sons, Inc. v. Balch, 142 So. 3d 479, 487 (Ala. 2013) (J. Wise concurring: "I write specially to note that, because the main opinion is a plurality opinion, it is not binding precedent."); Ex parte State ex rel. James [v. ACLU of Alabama], 711 So. 2d 952, 964 (Ala. 1998) ("[A]s a hornbook principle of practice and procedure, no appellate pronouncement becomes binding on inferior courts unless it has a concurrence of a majority of the Judges or Justices qualified to decide the cause."); J.M. v. Madison County Dept. of Human Resources, 164 So. 3d 581. 589 (Ala. Civ. App. 2013) ("[A] plurality opinion … does not constitute binding precedent.").

2 See Johnson v. Chrysler Canada Inc., 24 F. Supp. 3d 1118, 1133 (N.D. Ala. 2014) (quoting AFTG–TG, LLC v. Nuvoton Tech. Corp. (Nuvoton), 689 F.3d 1358, 1363 (Fed. Cir. 2012) (citing Marks v. U.S., 430 U.S. 188, 193 (1977))).
3 Freudenberger, 2020 WL 3526361 at *2.
4 Id. (citing Ex parte Stephens, 676 So. 2d 1307, 1310 (Ala. 1996)).
5 Freudenberger, 2020 WL 3526361 at *2-3.
6 Id. at *3 (citing Ex parte Dumas, 778 So. 2d 798, 801 (Ala. 2000); Romine v. Medicenters of America, Inc., 476 So. 2d 51, 55 (Ala. 1985); Zaden v. Elkus, 881 So. 2d 993 (Ala. 2003)).
7 Id. at *4.
8 Id.
9 Id.
10 Id.
11 Id. at *5 (citations omitted).
12 Id. (citing generally Zaden v. Elkus, 881 So. 2d 993, 999 n.7, 1011 (Ala. 2003) (describing an order in Ballew v. Eagan, CV-00-6528, in which the circuit court disallowed "any ex parte communications between defense counsel or insurance investigators and the treating physicians of the deceased patient" as the "circuit judge's exercise of discretion concerning discovery matters")) (emphasis in original).
13 Id. (citing 45 C.F.R. § 164.512(e)(1)).
14 Id. (quoting Thomas v. 1156729 Ontario Inc., 979 F. Supp. 2d 780, 784 (E.D. Mich. 2013)) (internal quotation marks and citation omitted).
15 Id. at *5.
16 Id. (citing and quoting Thomas, 979 F. Supp. 2d at 785-86 and Smith v. American Home Prods. Corp. Wyeth-Ayerst Pharm., 855 A.2d 608, 625 (N.J. Super. Ct. App. Div. 2003)) (internal quotation marks omitted).
17 Id. at *6.
18 Id. at *6.
19 Id.
20 Id.
21 Id. at *7.
22 Id.
23 Id. (citing Ex parte Wal-Mart, Inc., 809 So. 2d 818, 822 (Ala. 2001).
24 Id. at *7-8 (citing and discussing Baker v. Wellstar Health System, Inc., 703 S.E.2d 601, 605 (Ga. 2010).
25 Id. at *8 (quoting Baker, 703 S.E.2d at 605).
26 Id.
27 Id.
28 See Freudenberger, 2020 WL 3526361 at *5, *7 (J. Mendheim and J. Stewart).
29 Id. at *3 n. 7 (citing Ex parte Dumas, 778 So. 2d 798, 801 (Ala. 2000); Romine v. Medicenters of America, Inc., 476 So. 2d 51, 55 (Ala. 1985); Zaden v. Elkus, 881 So. 2d 993 (Ala. 2003).
30 See also Mull v. String, 448 So. 2d 952, 954 (Ala. 1984) ("We therefore hold that when a patient sues a defendant other than his or her physician, and the information acquired by the physician as a result of the physician-patient relationship would be legally discoverable by the defendant in that litigation, then the patient will be deemed to have waived any right to proceed against the physician for the physician's disclosure of this information to that defendant or that defendant's attorney.") (emphasis added); Romine, 476 So. 2d at 55 (stating "'[a]bsent a privilege, no party is entitled to restrict an opponent's access to a witness, however partial or important to him, by insisting upon some notion of allegiance" and "'Unless impeded by a privilege an adversary may inquire, in advance of trial, by any lawful manner to learn what any witness knows if other appropriate conditions the witness alone may impose are satisfied …'") (quoting Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128 (D.D.C. 1983)) (emphasis added); Zaden, 881 So. 2d at 1010 (quoting Romine, 476 So. 2d at 55 (quoting in turn Eli Lilly, 99 F.R.D. at 128) and citing Mull); Dumas, 778 So. 2d at 801 (citing Mull, 448 So. 2d at 954 and noting the trial court "offered several times to fashion a protective order that would protect the [plaintiffs] from disclosure of any potentially embarrassing and/or irrelevant information," but the plaintiffs refused).
31 Freudenberger, 2020 WL 3526361 at *5-8 (J. Mendheim and J. Stewart).
32 Id. at *2 (citing Ex parte Stephens, 676 So. 2d 1307, 1310 (Ala. 1996)).
33 Stephens, 676 So. 2d at 1309.
34 Id. at 1310-16.
35 Howell, 704 So. 2d at 480-81.
36 Id. at 481.
37 Id.
38 Id. at 480-82.
39 See Ex parte Dumas, 778 So. 2d 798, 801 (Ala. 2000) (noting that while a party who files a lawsuit that makes an issue of his physical condition "waives his privacy rights in favor of the public's interest in full disclosure," a party subject to disclosure "can prevent the disclosure of confidential matters not subject to discovery by securing a protective order pursuant to Rule 26(c), Ala. R. Civ. P.")
40 Freudenberger, 2020 WL 3526361 at *6 (J. Shaw).
41 Freudenberger, 2020 WL 3526361 at *4-7 (J. Sellers, J. Mendheim, and J. Stewart).
42 Ex parte Henry, 770 So. 2d 76 (Ala. 2000).
43 Id. at 79.
44 Id. at 80 (citing Ex parte Stephens, 676 So. 2d 1307, 1316 (Ala. 1996) (J. Houston dissenting); Ex parte Mobile Fixture & Equip. Co., 630 So. 2d 358 (Ala. 1993); Ex parte McTier, 414 So. 2d 460 9Ala. 1982)).
45 Id. at 80-81.
46 Freudenberger, 2020 WL 3526361 at *2, *5 (J. Sellers and J. Mendheim).
47 Ex parte Alabama Gas Corp., 258 So. 3d 1148, 1149-51 (Ala. Civ. App. 2018). Ex parte Freudenberger: Context and Implications