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Discovery of Non-Parties' Medical Records in the Face of the Physician-Patient Privilege

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COMMENTS

DISCOVERY OF NON-PARTIES' MEDICAL RECORDS IN THE FACE OF THE PHYSICIAN-PATIENT PRIVILEGE

INTRODUCTION

How would you feel if your confidential medical records were open to inspection by persons other than yourself, your physician, and those whose knowledge is necessary for your medical treatment or diagnosis? Would it make a difference if the information were redacted, such that your name and address had been removed? How much do your privacy rights in your medical records mean to you?

If you knew there was a chance that others might gain access to your medical records, would you still freely disclose embarrassing personal information about yourself to your physician in order to get the best treatment or most accurate diagnosis possible? Or would you disclose only that information you would not feel as violated about, if others got a hold of your records?

What if you were a party to a lawsuit and non-party medical records could possibly help you prosecute or defend your position; if the non-party medical records could help you mitigate damages or dispute causation, then in fairness should you not be allowed access to this information?

Although our legislature, and in some instances the judiciary, have constructed privileges to protect our privacy interests, there are times when our privacy interests may have to yield to truth and justice. This article will balance the litigant's right to the ascertainment of truth in legal proceedings against the non-party's right to privacy in their medical records. Part I of this article discusses the rationale for the physician-patient privilege, the scope of its coverage, and how it may be waived. Part II reviews the discovery process, the scope of discovery, and the trial court's power to restrict or compel discovery. Part III examines the current state of the law in dealing with situations where non-party medical records are requested during discovery. Part IV will weigh the privacy interests of nonparties against the right to know on behalf of the litigants. Part V offers a solution on how discovery of non-party medical records should be handled in the future. Part VI concludes that privacy interests of non-parties outweigh any compelling need for discovery.

I. PHYSICIAN-PATIENT PRIVILEGE

A privilege is a peculiar right or a benefit enjoyed by either an individual or a class of persons.[1] The physician-patient privilege provides individuals with the right to keep private medical information communicated with their physicians.[2]

Although not recognized at common law, the physician-patient privilege has been enacted by statute in most states.[3] There are two main policy reasons behind the physician-patient privilege. The first reason is to prevent patient humiliation, hurt feelings, and a tarnished reputation that may result from the disclosure of sensitive patient information.[4] The second reason is to encourage the patient to make a full disclosure of all information necessary for effective treatment by the physician.[5]

In California, the physician-patient privilege is held by the patient[6] and covers "confidential communications" made between a patient and physician.[7] A "confidential communication" between patient and physician includes information obtained by an examination of the patient and information transmitted between the patient and the physician.[8] All information obtained during the examination of the patient is a "confidential communication," even if it was not verbally communicated to the physician.[9] The physician-patient privilege, therefore, naturally applies to hospital and medical records that contain sensitive patient information.[10]

The physician-patient privilege gives the patient the right to prevent the disclosure of "confidential communications" and medical records.[11] In addition to the patient, the privilege may be asserted on behalf of the patient by a guardian or conservator, by a personal representative of the patient,[12] by the hospital or by the patient's physician.[13]

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1. BLACK'S LAW DICTIONARY 1197 (6th ed. 1990) [hereinafter BLACK'S].
2. *See id.* at 1126.
3. *See* 81 AM. JUR. 2D *Witnesses* § 436 (1992).
4. *See* Board of Med. Quality Assurance v. Gherardini, 156 Cal. Rptr. 55, 61 (Cal. Ct. App. 1979) (plaintiff not entitled to non-party medical records because it infringed on non-party's privacy rights).
5. *See id.*
6. *See* CAL. EVID. CODE § 993 (Deering, LEXIS through 1999 session).
7. *See id.* § 992.
8. *See id.* The statute makes it clear that information including diagnoses and advice given by the physician is also protected by the privilege. *See id.*
9. *See* Hale v. Superior Court, 34 Cal. Rptr. 2d 279, 280 (Cal. Ct. App. 1994) (examination of a paralyzed patient was a "confidential communication" even though the patient was unable to verbally communicate).
10. *See* Wanda E. Wakefield, *Physician-Patient Privilege as Extending to Patient's Medical or Hospital Records*, 10 A.L.R. 4th 552 § 1a (WESTLAW through Sept. 1999 Supp.).
11. *See* CAL. EVID. CODE § 994 (Deering, LEXIS through 1999 session).
12. *See id.*
13. *See* Wakefield, *supra* note 10, §§ 3-6.

The physician-patient privilege may also be waived. A waiver of the privilege may be express or implied.[14] An implied waiver occurs when a plaintiff brings a lawsuit and places their medical condition at issue.[15] The plaintiff will be deemed to have waived their privilege only to information that is both directly relevant to the issues raised by the litigation and essential to a fair resolution of the claim.[16] Further, the scope of the waiver must be narrowly construed in order to prevent plaintiffs being deterred from bringing legitimate lawsuits because they fear exposure of private matters.[17] Even where privileged matters are directly relevant to the issues being litigated, discovery must proceed in the least intrusive manner possible.[18]

II. THE DISCOVERY PROCESS

Discovery is a pre-trial device used to gather information necessary to prepare for trial.[19] Pertinent information may be acquired through the use of interrogatories, requests for documents, and depositions.[20]

Generally, a party may obtain discovery to any matter, not privileged, that is relevant to a claim or defense of any party to the lawsuit.[21] "The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[22] This does not mean that overbroad discovery requests will be tolerated.[23] The trial court may impose sanctions upon a party who persists in obtaining information "outside the scope of permissible discovery,"[24] or who conducts discovery in a manner "that causes unwarranted annoyance, embarrassment, or oppression."[25]

Privileged information is not only protected from admission at trial, but is also protected from discovery.[26] A party must expressly give the other side notice that the information sought is protected.[27] If necessary, the party

14. *See* WILLIAM H. ROACH & ASPEN HEALTH LAW AND COMPLIANCE CENTER, MEDICAL RECORDS AND THE LAW 245 (3rd ed. 1998).
15. *See id.*
16. *See* Davis v. Superior Court, 9 Cal. Rptr. 2d 331, 335 (Cal. Ct. App. 1992) (defendant not entitled to plaintiff's mental health records when treatment was not related to injuries suffered in the accident).
17. *See id.*
18. *See id.*
19. *See* BLACK'S, *supra* note 1, at 466.
20. *See id.*
21. *See* FED. R. CIV. P. 26(b)(1).
22. *Id.*
23. *See* 27 CAL. JUR. 3D *Discovery and Depositions* § 21 (1987 & Supp. 1999).
24. *Id.* § 301.
25. *Id.* § 303.
26. *See* 23 AM. JUR. 2D *Depositions and Discovery* § 29 (1999).
27. *See* FED. R. CIV. P. 26(b)(5).

claiming the privilege may move the court for a protective order.[28]

The trial court has the power to limit the scope of discovery if it finds the attempted discovery to be overly intrusive.[29] In cases where sensitive information is sought the court must weigh the individual's right to privacy against the litigant's need for the discovery.[30] Even if the individual's right to privacy is outweighed by the litigant's need for the disputed information, the court may limit the scope of the discovery "to the extent necessary for a fair resolution of the lawsuit."[31] The trial court's grant of a protective order may only be reversed for an abuse of discretion.[32]

In assessing whether a valid claim of privilege has been asserted the court may engage in an *in camera* inspection.[33] An *in camera* inspection allows the judge to privately view documents before ruling on their admissibility.[34] Where a plaintiff's own medical condition is at issue and they seek to limit the defendant's discovery only to relevant medical records bearing on the particular medical conditions at issue, an *in camera* review might be a valid undertaking. An *in camera* inspection, however, would be of little value when non-party medical records are being sought because everything contained in the non-party medical records is protected by the physician-patient privilege.[35]

If a party fails to comply with a discovery request, the opposing party may move the court to compel discovery.[36] Before compelling discovery, the trial court must decide whether or not the initial discovery request was appropriate.[37] Upon a finding that the discovery request was justified, the trial court may compel the discovery and possibly impose sanctions.[38]

The sanctions are not designed to be punitive; instead their goal is "to protect the interests of the party entitled to but denied discovery."[39] The trial court, in its discretion, may prohibit the disobedient party from supporting or opposing certain claims or defenses,[40] or may prohibit the introduction of certain evidence at trial.[41] If a party fails to comply with a court order, the court may hold that party in contempt[42] and either stay the action until the

28. *See* FED. R. CIV. P. 26 (c).
29. *See supra* note 23, § 47.
30. *See id.* § 48.
31. *Id.*
32. *See id.* § 52.
33. *See supra* note 26, § 29.
34. *See* BLACK'S, *supra* note 1, at 760.
35. *See supra* note 26, § 262.
36. *See supra* note 23, § 296.
37. *See id.* § 299.
38. *See id.*
39. *Id.*
40. *See id.* § 308.
41. *See id.* § 309.
42. *See id.* § 310.

court order is obeyed,[43] or dismiss the action altogether.[44] A dismissal for willful failure to obey a court order is a judgment on the merits resulting in claim preclusion.[45] If a nonparty fails to comply with a discovery order, then their only relief is to appeal to a higher court.[46]

III. WHEN NON-PARTY MEDICAL RECORDS ARE REQUESTED IN DISCOVERY

Litigants often attempt to discover the medical records of non-parties.[47] There are two major situations where access to non-party medical records is frequently attempted. The first situation involves a child who has suffered some type of cognitive, behavioral, or developmental injury as the result of the defendant's negligence.[48] In these cases, the defendant will attempt to discover medical records of the plaintiff's family members in order to dispute causation by alleging that the plaintiff had a genetic or familial propensity for the claimed injuries.[49] This type of discovery can be found in lead poisoning cases and injury at birth cases. Attempted discovery of non-party medical records may also occur in other types of cases, where learning disabilities or cognitive injuries are pursued.[50]

The second situation involves a medical malpractice action where the plaintiff alleges that the defendant physician has a pattern or history of negligence or wrongdoing. Here, the plaintiff is the one seeking access to non-party medical records in order to prove that the physician was incompetent or regularly breached the necessary standard of care.

The following subsections will take a closer look at the issues surrounding the discovery of non-party medical records in lead paint cases, injuries at birth, and medical malpractice and product liability cases.

A. Lead Paint Cases

In lead paint poisoning cases where parents have alleged that their child suffered injuries from lead exposure including learning disabilities and decreased cognitive functioning, defendants have sought to discover medical records not only belonging to the injured child but those of the

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43. *See id.* § 312.

44. *See id.* § 313.

45. *See id.* Claim preclusion or *res judicata* is a doctrine barring a subsequent action involving the same parties and the same cause of action. *See* BLACK'S *supra* note 1, at 1305.

46. *See supra* note 23, § 310.

47. *See generally* Harold L. Hirsh, *The Great Wall About Non-party Patients' Medical Records is Crumbling*, 31 MED. TRIAL TECH. Q. 434 (1985).

48. *See generally* Hope Viner Samborn, *Blame It on the Bloodline: Discovery of Nonparties' Medical and Psychiatric Records is Latest Defense Tactic in Disputing Causation*, ABA J., Sept. 1999, at 28.

49. *See id.*

50. *See id.*

mother and the siblings as well.[51]

Besides lead poisoning, there are many possible factors that may contribute to a child having learning disabilities, including genetic causes.[52] It is on this crux that many defendants rest their argument. They claim that in order to fairly assess the issue of causation in a negligence suit, genetic factors must be ruled out and in order to do so they need to examine the medical records of the child's mother and the child's siblings.[53]

Even if defendants were given access to these medical records there is only a 40-80% chance that genetics may have been a contributing factor to the child's learning disabilities and cognitive defects.[54] In light of the fact that there are many risk factors that may have contributed to the child's cognitive injuries,[55] and the fact that one can only speculate as to whether genetics had anything to with these injuries,[56] the probative value of the family's medical records would seem almost inconsequential.

It has been noted that allowing discovery of the family's medical records would raise more questions than it would answer.[57] For instance, if a sibling was shown to also suffer from a learning disability, then a determination must be made as to whether the sibling was also exposed to lead. If lead exposure could be ruled out, then a further determination must be made as to whether the sibling's injury was caused by factors totally independent of the plaintiff's injuries.[58] If, for example, the child's mother was shown to have some type of learning disability, then it must be determined whether she inherited the disability, whether the disability was caused by environmental factors, or whether the disability may have been the result of a prior injury, which could have occurred as far back as when the mother was in utero.

If these are the questions that must necessarily be answered in order to find out whether a learning disability is genetic in nature, then it would seem that the scope of discovery could be broadened indefinitely.[59] Allowing this type of discovery would not only broaden the scope of litigation beyond recognition, it would disregard our legal system's goal of quickly and efficiently resolving disputes by wasting considerable time on purely speculative issues.

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51. *See id.*

52. *See* Andon v. 302-304 Mott St. Assoc., 690 N.Y.S.2d 241, 242 (N.Y. App. Div. 1999) (mother of child injured from lead exposure was not required to undergo IQ testing because such testing is inconclusive and intrusive).

53. *See* Samborn, *supra* note 48, at 28.

54. *See* Jennifer Wriggins, *Genetics, IQ, Determinism, and Torts: The Example of Discovery in Lead Exposure Litigation*, 77 B.U. L. REV. 1025, 1048 (1997).

55. *See Andon*, 690 N.Y.S.2d at 243.

56. *See* Monica W. v. Milevoi, 685 N.Y.S.2d 231, 234 (N.Y. App. Div. 1999) (siblings medical information in lead exposure case held too speculative to be useful).

57. *See Andon*, 690 N.Y.S.2d at 244.

58. *See Monica W.*, 685 N.Y.S.2d at 234.

59. *See Andon*, 690 N.Y.S.2d at 244.

Will the discovery of non-party medical records be compelled in the future?[60] As genetic science continues to find answers to questions we did not know we had, we can only expect discovery attempts of this kind to increase.[61] In the future, these genetic answers will only increase the relevance of non-party medical records. If courts now are willing to compel non-parties to submit to IQ testing, where the relevance and probability that genetics played any role in the child's injuries is speculative at best, one can only imagine that non-party privacy rights will have to yield to the truth-seeking discovery process more in the future.[62]

B. Injury at Birth Cases

Many children are born with serious birth defects.[63] As a result, parents will bring lawsuits on behalf of their injured children against the treating physicians for negligent treatment or diagnoses.[64]

In bringing a lawsuit on behalf of their children, the representative parents are not putting their own medical conditions at issue, and therefore the physician-patient privilege as to their own medical records remains intact;[65] however, they are putting their child's medical condition at issue.[66] The plaintiff child will be deemed to have waived the physician-patient privilege to any relevant medical information.[67]

The defendant physicians, in an effort to dispute causation, will often make overbroad discovery requests.[68] They have sought the medical histories of both the mother and the father,[69] as well as those of other siblings.[70] It is their contention that the injuries may be attributed to other causes, such as environmental or gestational causes, in utero trauma,[71] and

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60. I have yet to find a lead paint case where non-party medical records were compelled. *But see* Anderson v. Seigel, 680 N.Y.S.2d 587, 588 (N.Y. App. Div. 1998) (discovery of academic and work records has been compelled, and IQ testing was required).

61. *See* Wriggins, *supra* note 54, at 1088.

62. *See id.* at 1068.

63. *See generally* Palay v. Superior Court, 22 Cal. Rptr. 2d 839, 840 (Cal. Ct. App. 1993) (cardiac abnormalities); Rubino v. Albany Med. Ctr. Hosp., 481 N.Y.S.2d 622, 623 (N.Y. Sup. Ct. 1984) (brain damage); Scharlack v. Richmond Mem'l Hosp., 477 N.Y.S.2d 184, 186 (N.Y. App. Div. 1984) (severe mental retardation and cerebral palsy); Yetman v. St. Charles Hosp., 491 N.Y.S.2d 742, 744 (N.Y. App. Div. 1985) (central nervous system damage).

64. *See generally* cases cited *supra* note 63.

65. *See* 58 N.Y. JUR. 2D *Evidence and Witnesses* § 886 (1986) (WESTLAW through April 1999 Annual Cumulative Supp.).

66. *See Rubino*, 481 N.Y.S.2d at 624.

67. *See id.*

68. *See Palay*, 22 Cal. Rptr. 2d at 842; *Scharlack*, 477 N.Y.S.2d at 186; *Rubino*, 481 N.Y.S.2d at 624.

69. *See Rubino*, 481 N.Y.S.2d at 624.

70. *See Scharlack*, 477 N.Y.S.2d at 186.

71. *See Palay*, 22 Cal. Rptr. 2d at 845.

genetics, as opposed to being the product of their own negligence.[72] Although defendant physicians often make overbroad discovery requests, they have a legitimate interest in preparing their defense.[73]

The prenatal period is an important time in the development of the unborn child. In order to determine the cause of the alleged birth defects, it is crucial that the defendant have access to medical information pertaining to the prenatal period.[74] The only source of this information is the mother's medical records.[75] The courts, recognizing this limitation, have created what is known as the "impossibility of severance" theory.[76]

The "impossibility of severance" theory is based on the notion that at the time the infant is in utero, the infant and the mother's medical histories are so intertwined that they cannot be separated.[77] Under this theory, the courts have held that while the infant is in utero, the mother's prenatal medical records are necessarily the medical records of the infant, and are therefore discoverable.[78]

In California, an appellate court has gone a step further and held that even if the prenatal medical records were not discoverable under the "impossibility of severance" theory, public policy demands their disclosure.[79] It was reasoned that the mother should not be allowed to frustrate the injured child's legitimate claims for compensation by withholding vital evidence.[80] Before allowing the discovery, however, the trial court was required to conduct an *in camera* inspection to accommodate the mothers privacy interests.[81]

The scope of the discovery is limited to the prenatal period.[82] The mother's medical records outside of that period are off limits.[83] Likewise, the father's medical records,[84] and those of other siblings,[85] are also outside the scope of discovery. However, if the mother provides information concerning prior pregnancies and miscarriages to the injured child's subsequent treating physician for the purpose of aiding in the infant's

72. *See Rubino*, 481 N.Y.S.2d at 624.
73. *See Palay*, 22 Cal. Rptr. 2d at 848.
74. *See id.*
75. *See id.*
76. *See* Yetman v. St. Charles Hosp., 491 N.Y.S.2d 742, 745 (N.Y. App. Div. 1985).
77. *See supra* note 65.
78. *See Palay*, 22 Cal. Rptr. 2d at 840; Scharlack v. Richmond Mem'l Hosp., 477 N.Y.S.2d 184, 187 (N.Y. App. Div. 1984); *Yetman*, 491 N.Y.S.2d at 745.
79. *See Palay*, 22 Cal. Rptr. 2d at 844.
80. *See id.*
81. *See id.* at 848.
82. *See supra* note 65.
83. *See* Murphy v. LoPresti, 648 N.Y.S.2d 169, 169 (N.Y. App. Div. 1996).
84. *See* Rubino v. Albany Med. Ctr. Hosp., 481 N.Y.S.2d 622, 625 (N.Y. Sup. Ct. 1984).
85. *See* Scharlack v. Richmond Mem'l Hosp., 477 N.Y.S.2d 184, 187 (N.Y. App. Div. 1984).

medical treatment and diagnosis, then she will be deemed to have waived her privilege to such information.[86]

Some courts have been more liberal in allowing limited discovery into the medical histories of family members.[87] Although not compelling the disclosure of family member's medical records, these courts have attempted to circumvent the physician-patient privilege by requiring the representative parent to testify to facts about their family's medical histories.[88]

New York's highest court compared the physician-patient privilege to that of the attorney-client privilege, and then concluded that a non-party witness may not refuse to disclose medical facts simply because they were communicated within the confines of the physician-patient relationship.[89] The court, however, failed to take into account basic differences in the privileges. The attorney-client privilege protects communications made between a client and attorney in furtherance of rendering legal services, but it does not protect underlying facts.[90] The physician-patient privilege, on the other hand, protects sensitive medical facts in order to prevent patient humiliation and embarrassment.[91]

The information a patient discloses to their physician is generally more intimate and private than that which one might tell their attorney. It is in the patient's best interests to tell their physician all the facts that might be pertinent to an accurate diagnosis, and allowing discovery of such facts would leave little for the physician-patient privilege to protect. Fortunately, not all courts have been willing to make a distinction between testimony and medical records.[92]

Instead of denying discovery, the parents may choose to waive the physician-patient privilege with respect to their own medical records and to those of their minor children;[93] however, they may not waive the privilege on behalf of children who have already reached the age of majority.[94] If the parents refuse to disclose information pertaining to themselves and their children, then they will then be precluded from using such information at

86. *See* Yetman v. St. Charles Hosp., 491 N.Y.S.2d 742, 745 (N.Y. App. Div. 1985).

87. *See* Williams v. Roosevelt Hosp., 488 N.E.2d 94 (N.Y. 1985); *Rubino*, 481 N.Y.S.2d at 622.

88. *See* cases cited *supra* note 87.

89. *See Williams*, 488 N.E.2d at 94.

90. *See* FED. R. EVID. § 501.

91. *See* Board of Med. Quality Assurance v. Gherardini, 156 Cal. Rptr. 55, 61 (Cal. Ct. App. 1979).

92. Forcing people to testify about facts contained in their medical records is essentially the same thing as requiring them to hand over their records. *See Yetman*, 491 N.Y.S.2d at 745. There is no logical reason for making a distinction between medical records and testimony concerning their content; therefore, both should enjoy the protections of the physician-patient privilege. *See id.*

93. *See* Scharlack v. Richmond Mem'l Hosp., 477 N.Y.S.2d 184, 187 (N.Y. App. Div. 1984).

94. *See id.*

trial.[95] This safeguard was created in order to prevent the plaintiff from gaining an unfair advantage at trial.[96]

C. Medical Malpractice and Products Liability Cases

In medical malpractice and product liability cases plaintiffs have sought the medical records of non-parties in order to discover relevant information that may help support their claims.[97] Generally, courts have refused to allow discovery of non-party medical records on grounds that the records are protected by the physician-patient privilege.[98] Some have held that non-party medical records are irrelevant,[99] and that discovery in medical malpractice actions should be directed toward whether the standard of care was breached rather than at non-party medical records.[100]

Other courts have allowed this type of discovery provided there are adequate safeguards to protect non-party identities.[101] For example, in *Ziegler v. Superior Court*[102] the plaintiff brought an action against a hospital for negligent supervision of a physician who unnecessarily had her undergo a pacemaker implantation.[103] The plaintiff sought to compel the hospital to disclose the medical records of other patients who had also undergone the same surgery unnecessarily.[104] This information was highly relevant because actual or constructive notice is a necessary element of a negligent supervision claim.[105] The court allowed the discovery request on condition that: (1) no names or identifying information be revealed; (2) after review by the parties, the court would seal the records; (3) no attempt would be made to identify or contact any of the patients; and (4) the communication of this information outside of the parties to the action, except as may occur at trial, was prohibited.[106] The *Ziegler* court reasoned that the limited intrusion was outweighed by the public policy of ensuring hospitals will

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95. *See id.* at 186; *Yetman*, 491 N.Y.S.2d at 745.

96. *See Scharlack*, 477 N.Y.S.2d at 186.

97. *See* 1 J.N. DEMEO & JOHN DEMEO, CALIFORNIA DEPOSITION AND DISCOVERY PRACTICE § 24.12[5] (Matthew Bender & Co. 1999).

98. *See generally* Audrey W. Collins, Annotation, *Discovery in Medical Malpractice Action, of Names and Medical Records of Other Patients to Whom Defendant has Given Treatment Similar to that Allegedly Injuring Plaintiff*, 66 A.L.R. 5th 591 (WESTLAW 1999).

99. *See* Pusateri v. Fernandez, 707 So.2d 892, 892 (Fla. Dist. Ct. App. 1998) (other patient records are irrelevant to a negligence claim for failure to timely evaluate and treat complications from surgery).

100. *See* McCann v. Foisy, 552 So.2d 341, 342 (Fla Dist. Ct. App. 1989) (plaintiff was not entitled to non-party medical information because the physician's negligence can be proved by methods other than invading the privacy of strangers).

101. *See generally* Collins, *supra* note 98.

102. 656 P.2d 1251 (Ariz. Ct. App. 1982).

103. *See id.* at 1251.

104. *See id.*

105. *See id.* at 1255.

106. *See id.* at 1254.

competently monitor their staffs.[107]

Other courts that have allowed discovery have not been quite as restrictive as the appellate court in *Ziegler*. In *Bennett v. Fieser*,[108] the parents of a newborn alleged that the defendant physician was negligent in handling the birth of their son by abandoning his mother while she was in labor.[109] The physician defended his absence on grounds that he had to attend to an emergency burn patient.[110] In order to determine whether the physician's absence was justified, the plaintiffs sought the medical records of the burn patient to assess the seriousness of the situation.[111]

The court in *Bennett* allowed the discovery of the non-party medical records on two conditions.[112] First, the patient's name and other identifying information had to be deleted before releasing the records.[113] Second, the plaintiff's were not to attempt to learn the identity of, or try to contact the patient.[114] The court required this second condition because, "providing medical records with names and identifying information removed could nonetheless provide vital clues which would assist a party in identifying the non-party patient."[115] The *Bennett* court reasoned that these conditions would adequately protect the non-party's privacy interests and would "preserve the spirit of the physician-patient privilege."[116]

Still other courts have been more reluctant in the handling of non-party medical records by refusing the disclosure of even redacted versions. In *Binder v. Superior Court*,[117] a widow brought an action on behalf of her deceased husband against his physician for failure to diagnose a lesion on the decedent's leg as a melanoma.[118] The plaintiff sought discovery of photographs the defendant previously had taken of other patient's lesions that had been diagnosed as or suspected to be melanomas.[119]

The defendant, a dermatologist, who customarily took pictures of his patient's skin lesions, refused to release the photographs on grounds that the pictures were confidential communications taken during a medical examination for diagnostic purposes, and were protected by the physician-patient privilege.[120] In response, the plaintiff argued that releasing the

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107. *See id.* at 1255.
108. 152 F.R.D. 641 (D. Kan. 1994).
109. *See id.* at 642.
110. *See id.*
111. *See id.*
112. *See id.* at 643.
113. *See id.*
114. *See id.*
115. *Id.*
116. *Id.*
117. 242 Cal. Rptr. 231 (Cal Ct. App. 1987).
118. *See id.* at 232. Melanoma is a cancerous growth of the skin. *See* TABERS CYCLOPEDIC MEDICAL DICTIONARY 1186 (17th ed. 1993) [hereinafter TABERS].
119. *See Binder*, 242 Cal. Rptr. at 232.
120. *See id.*

pictures of the lesions alone, without any individual identifying information, would not violate the physician-patient privilege.[121] In refusing to allow the discovery, the *Binder* court held that merely releasing the photographs would offend patients' sensibilities and would discourage patients from allowing their ailments to be photographed, which would defeat the policy of encouraging patients to make a full disclosure of all information necessary for effective treatment.[122]

Again, in *Parkson v. Central Dupage Hospital,*[123] a medical malpractice and product liability case for injuries allegedly caused by an investigational new drug, the plaintiffs sought to compel the defendant hospital to release the medical records of other patients who had also been treated with the drug.[124] The hospital claimed the physician-patient privilege on behalf of the non-party patients and refused to disclose their records in contempt of the trial court's orders.[125] The plaintiffs claimed that the privacy interests of the non-party patients would be adequately protected if the patients' names were excluded.[126] On appeal, the order compelling discovery was reversed so as to protect non-party expectations of privacy.[127] The *Parkson* Court reasoned that even if the names had been excluded there was still a possibility that the non-party patients' confidentiality would be breached.[128]

In cases where there is a distinct possibility that identification of the non-party patients can be made or connected to confidential medical information, courts have refused to allow discovery. In *Big Sun Healthcare Systems v. Prescott,*[129] the parents of a deceased three year old girl brought a negligence action against the defendant hospital on grounds that their daughter was improperly triaged, and this failure to provide timely and necessary emergency care was the proximate cause of her death.[130] The hospital defended on grounds that the delay was caused by patients with more urgent needs.[131] To support their claim, the plaintiffs sought the emergency room sign in log and the triage records containing names and medical histories of patients seen on the date of this incident.[132] The hospital invoked the physician-patient privilege on behalf of the non-party patients

121. *See id.* at 233.
122. *See id.* at 234.
123. 435 N.E.2d 140 (Ill. App. Ct. 1982).
124. *See id.* at 141.
125. *See id.*
126. *See id.* at 143.
127. *See id.* at 144.
128. *See id.*; *see also* Glassman v. St. Joseph Hosp., 631 N.E.2d 1186, 1198 (Ill. App. Ct. 1994) (plaintiff was unable to procure redacted medical records of non-party patients who had experienced similar surgical complications at the hands of the defendant physician).
129. 582 So.2d 756 (Fla. Dist. Ct. App. 1991).
130. *See id.* at 757. Triage is a screening process conducted in emergency rooms to determine which patients should be given priority. *See* TABERS, *supra* note 118, at 2033.
131. *See Big Sun Healthcare Systems,* 582 So.2d at 757.
132. *See id.*

and refused to disclose the requested documents.[133]

The appellate court held that the sign in log containing the patients' names was not privileged and therefore discoverable, because it did not contain medical information, and because it was left in plain view for subsequent patients to sign as well.[134] As for the triage records, which did contain medical information, the court refused to allow discovery of even a redacted version because it was possible to match the triage record against the sign in log and ascertain confidential information about the non-party patients.[135] The *Big Sun* Court noted, however, that a solution to this problem could be achieved simply by formulating interrogatories to ascertain the number of patients with more urgent health needs than the plaintiffs' child.[136]

In *Marcus v. Superior Court*,[137] the plaintiff brought a negligence action against the defendant physician to recover damages for injuries caused by certain angiographic testing.[138] In order to assess whether the physician properly conveyed the seriousness of this procedure to the plaintiff, as defendant claimed was his normal practice, the plaintiff sought discovery of the names of other patients who had undergone the same procedure at the hands of the defendant.[139] To rebut the defendant's claim of privilege on behalf of the non-party patients, the plaintiff argued that the discovery of only the names of other patients and not the medical records themselves would not violate the physician-patient privilege.[140] The appellate court denied the discovery request because releasing the names of patients who had received the exact same tests would necessarily reveal confidential medical information.[141]

D. Summary of the Current State of the Law

It is evident by reviewing the main cases where discovery of non-party medical records was attempted that the physician-patient privilege provides a high degree of protection to non-party privacy interests. Just under the surface, however, there is a feeling of uncertainty as to what the future might hold. A minority of courts have already allowed disclosure of non-party medical records provided there were adequate safeguards to protect

133. *See id.*
134. *See id.* at 758.
135. *See id.*
136. *See id.*
137. 95 Cal. Rptr. 545 (Cal. Ct. App. 1971).
138. *See id.* at 546. Angiography involves the x-raying of blood vessels after a radiopaque substance has been injected. *See* TABERS, *supra* note 118, at 105.
139. *See Marcus*, 95 Cal Rptr. at 546.
140. *See id.* at 547.
141. *See id.*

the non-party's identity.[142]

Additionally, some courts have compelled the disclosure of academic and work records, as well as required IQ testing.[143] These disclosures are not insignificant intrusions into one's privacy. If these intrusions are allowed now, then it is foreseeable that in the future, as genetic science becomes more exact, privacy rights in medical records may have to give way to discovery.[144]

Attempting to circumvent the physician-patient privilege by distinguishing between testimony and actual medical records is not the solution. The physician-patient privilege is not analogous to the attorney-client privilege and any comparison is illogical. Forcing someone to testify about the factual contents of their doctor visits is essentially the same as compelling them to disclose their medical records.[145] The physician-patient privilege was meant to protect the confidentiality of embarrassing medical facts and not just communications made between the patient and physician.[146]

IV. NON-PARTY PRIVACY INTERESTS VS. FAIRNESS TO LITIGANT

Both the federal and state governments have created zones of privacy.[147] In California, pursuing and obtaining privacy is an inalienable right protected by the state constitution.[148] Even the U.S. Supreme Court has ruled that, although implied, the right to privacy is guaranteed by the U.S. Constitution.[149]

The right to privacy gives individuals the right to be free from unwarranted and undesirable intrusion into their private lives.[150] The right to privacy, however, is not absolute and may be outweighed by a compelling opposing interest.[151] Private entities must have a legitimate or important reason before intruding into the privacy interests of others.[152] The ascertainment of truth in legal proceedings is a legitimate compelling

142. *See* Collins, *supra* note 98.

143. *See* Anderson v. Seigel, 680 N.Y.S.2d 587, 588 (N.Y. App. Div. 1998).

144. *See* Wriggins, *supra* note 54, at 1068.

145. *See* Yetman v. St. Charles Hosp., 491 N.Y.S.2d 742, 745 (N.Y. App.Div. 1985).

146. *See* Board of Med. Quality Assurance v. Gherardini, 156 Cal. Rptr. 55, 61 (Cal. Ct. App. 1979).

147. *See infra* notes 148-49.

148. *See* CAL. CONST. art. I, § 1 (West 1983 & Supp. 1999).

149. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (right to privacy is implied in the 1st, 3rd, 4th, 5th, and 9th Amendments).

150. *See* 13 CAL. JUR. 3D *Constitutional Law* § 237 (1989 & Supp. 1999).

151. *See Board of Med. Quality Assurance*, 156 Cal. Rptr. at 61.

152. *See* Pettus v. Cole, 57 Cal. Rptr. 2d 46, 71 (Cal. Ct. App. 1996) (employer has a legitimate interest in knowing whether employee was disabled by stress but obtaining detailed psychiatric information went beyond what was necessary to accomplish that goal).

reason.[153]

The zone of privacy extends to a patient's medical history.[154] When a litigant seeks non-party medical records, the court must balance the non-party's privacy interests against the need for discovery.[155] "[T]he court should consider the nature of the information sought, its inherent intrusiveness, and any specific harm that disclosure of the information might cause."[156]

The information contained in one's medical records is very intimate and personal. This medical information can be so intimate, in fact, that it is "often difficult to reveal even to the doctor."[157] Given the understandable reluctance to disclose embarrassing personal information even to a personal physician—believed to be under an obligation to keep such information private—imagine the outrage when other persons gain access to this sensitive data.

The inherent intrusiveness into one's private life that would result from compelling discovery of nonparty medical records cannot be overstated. What could be more intrusive? Having others rummage through such intimate and private information can be nothing but objectionable. Even absent embarrassing or humiliating information in those medical records, it would still be a serious intrusion to compel discovery of information previously known only to the patient but disclosed to the physician for the sole purpose of obtaining medical care.

The physician-patient privilege was created to prevent the specific harm that disclosure of private medical information may cause.[158] Allowing others access to one's sensitive medical information would likely result in humiliation, hurt feelings, embarrassment, or a tarnished reputation.[159] Additionally, allowing discovery would discourage patients from fully disclosing embarrassing information that may be necessary for effective treatment and diagnosis.[160]

Even when there is a legitimate opposing interest; the information sought must be directly relevant to the claims involved.[161] The party attempting the discovery has the burden of proving direct relevance.[162] "Discovery of constitutionally protected information . . . is more narrowly proscribed than traditional discovery" and fishing expeditions will not be

153. *See* Britt v. Superior Ct., 574 P.2d 766, 774 (Cal. 1978).
154. *See Pettus*, 57 Cal. Rptr. 2d at 72.
155. *See* Tylo v. Superior Court, 64 Cal. Rptr. 2d 731, 736 (1997).
156. Schnabel v. Superior Court, 5 Cal. 4th 704, 714 (1993).
157. *Board of Med. Quality Assurance*, 156 Cal. Rptr. at 61.
158. *See id.*
159. *See id.*
160. *See id.*
161. *See Tylo*, 64 Cal. Rptr. 2d at 736.
162. *See id.*

allowed.[163] The party attempting the discovery must make a showing greater than merely asserting that the information sought may lead to relevant information.[164]

In lead paint type cases, non-party medical records are not directly relevant to the claims involved. The defendants are merely going on a fishing expedition for other possible causes of the alleged injury. Discovery of non-party medical records in these cases should be impermissible. It is also unnecessary because the plaintiff has the burden of proving causation by a preponderance of the evidence.

With infant injury at birth claims, the mother's prenatal medical records are directly relevant. The mother and the unborn child cannot be separated during the prenatal period; therefore, the mother's medical records are necessarily those of the infants,[165] and are directly relevant *per se*.

In medical negligence cases the issue of direct relevance is more difficult. In cases where knowledge or notice is an essential element of a claim, the medical records of non-parties may very well be directly relevant, but absent such elements, others' medical records are not directly relevant and the focus of discovery should instead be directed toward whether the standard of care was breached rather than on non-party medical records.[166]

Aside from being directly relevant, there must also be no other feasible or effective means of obtaining the information.[167] Alternatives, protective measures, and safeguards should be taken into account to minimize the intrusion on privacy.[168] Discovery, if allowed, should be crafted in such a way that the parties can fairly resolve their disputes without unnecessarily infringing on the privacy rights of others.[169] The scope of the disclosure should be limited to what is absolutely necessary to accomplish the legitimate purpose that has been asserted.[170]

When balancing privacy rights against the right to a fair resolution of the issues presented in the lawsuit, certain discovery devices such as redaction of identifying information, *in camera* inspection, giving notice to the non-parties, and sealing court records after review by the parties should be taken into account. If using these discovery devices could minimize the intrusion on privacy while simultaneously permitting a fair resolution of the lawsuit, it would seem a viable solution. However, even with the use of discovery devices, privacy is still invaded. Although diminished, the

163. *Id.*

164. *See id. See also* Board of Trustees of Leland Standford Junior Univ. v. Superior Court, 174 Cal. Rptr. 160, 164 (Cal. Ct. App. 1981) (intrusion into one's privacy is not justified simply because it may lead to relevant information).

165. *See* cases cited *supra* note 78.

166. *See* McCann v. Foisy, 552 So.2d 341, 342 (Fla Dist. Ct. App. 1989).

167. *See* Pettus v. Cole, 57 Cal. Rptr. 2d 46, 71 (Cal. Ct. App. 1996).

168. *See* Rains v. Belshe, 38 Cal. Rptr. 2d 185, 195 (Cal. Ct. App. 1995).

169. *See* Schnabel v. Superior Court, 5 Cal. 4th 704, 714.

170. *See Pettus*, 57 Cal. Rptr. 2d at 73.

intrusion might still be objectionable, especially to a non-party who has no interest in the lawsuit. In addition to intrusiveness, other factors must be considered when using discovery devices.

Redacting the medical records by removing any identifying information is one available discovery device. Redacting the identifying information would presumably protect the non-party's anonymity and confidentiality. If the physician were to redact the records, the patient's anonymity would be preserved. If the physician does not have the time, however, then another pair of eyes must go through the records.[171] Some courts have stated that even with redaction, no matter how remote, there is still a possibility that identification can be made.[172] Additionally, any dissemination of private medical information, even if redacted, will breach confidentiality.[173]

In lead paint type cases, redaction of medical records would not be helpful because only family member's records are being sought to show a possible genetic cause for the injury. In these cases, the party seeking discovery must know which records belong to whom. Even if identification were unnecessary, it would not be difficult to determine identities by process of elimination, especially in a small family. Redaction would likewise serve no purpose in injury at birth cases where only the mother's prenatal records are at issue.

The only situations in which the redaction of identifying information might serve a valuable purpose are those in which the litigant attempts to show knowledge or notice of prior similar incidents in order to prove negligence. Even in those cases, disclosure of redacted medical records may be unnecessary. Information needed to fulfill the knowledge or notice elements could possibly be obtained through other means. For example, the party seeking discovery could attempt to elicit such information through interrogatories or deposition questions, instead of invading non-party medical records. Additionally, production of documents requests could be drafted to include previous complaints, litigation, or incident records.

These alternative methods would arguably tempt defendants, who are the only parties with access to such information, to be untruthful or even

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171. If others are required to go through the medical records because the physician is unable, then the patient's private medical information will be exposed to these additional persons. It could be argued that if the physician's staff were responsible for completing this task, then the patient's privacy would not be invaded. This argument, however, fails to take into account the patient's expectations. These expectations are clearly embodied in the physician-patient privilege statute, which states that the "information obtained by an examination of the patient" shall be disclosed only to those who "disclosure is reasonably necessary . . . [to accomplish] the purpose for which the physician was consulted." CAL. EVID. CODE § 992 (Deering, LEXIS through 1999 session). So, if the staffs' purpose for going through non-party medical records is to prepare for litigation, instead of for diagnoses or treatment purposes, then they are violating the patient's privacy rights.

172. *See* cases cited *supra* note 128.

173. Confidentiality is defined as the state of keeping a secret. *See* BLACK'S, *supra* note 1, at 298. By disclosing one's private medical information you necessarily break the secret or breach confidentiality.

forgetful, but this may be a price that has to be paid in order to protect non-party privacy rights.

In camera inspection and sealing court records after review by the parties are other available discovery devices. Both of these discovery tools have one common flaw; they require others to examine the contents of the medical records in question. For the non-party, inspection of their medical records, if only by the judge or the parties to the action, is still offensive. Disclosure of sensitive medical information to just one person other than the patient's physician would be sufficient to cause harm.

Although *in camera* inspection could, in theory, minimize any expected harm, it has drawbacks. *In camera* inspection would require valuable judicial time. Someone would have to label and organize the records for the judge; and if the volume of material is significant, then the judge may need the help of others in order to complete the inspection. The help that the judge may need to complete the *in camera* inspection might actually expose the confidential data to a greater number of persons than if the discovery had been allowed in the first place.

Another possible way to minimize the potential harm that disclosure of medical records may cause is to notify the non-party of the attempted discovery.[174] The party opposing the discovery would be required to give notice to the non-party so that they might have an opportunity to object to the disclosure or to seek a protective order.[175] This would give the non-party a fair opportunity to protect their privacy interests.

One downside to a notice requirement is that the party seeking discovery must rely on the honesty and diligence of the opposing party in contacting the non-parties. This problem might be overcome by having the judge supervise the process. Judicial supervision, however, would almost certainly require that the identities of the non-parties be revealed to the judge. If the judge later decides to admit redacted versions of the records, then both the non-party's anonymity and confidentiality will have been breached at least to the judge. As stated above, disclosure of medical records to even one person other than the patient's physician would not only be offensive but would be sufficient to cause harm.

V. SOLUTION

Non-party medical records should be strictly off-limits. After reviewing the cases and evaluating the litigants need for the discovery of non-party medical records, as well as the potential value and downfalls of the various

174. *See* Valley Bank of Nevada v. Superior Court, 542 P.2d 977, 980 (Cal. 1975) (litigant not entitled to non-party bank records without first giving non-party an opportunity to object); *see also* Olympic Club v. Superior Court, 282 Cal. Rptr. 1, 4 (Cal. Ct. App. 1991) (golf club required to notify non-parties of city's attempted discovery of membership information to provide an opportunity to object or to obtain a protective order).

175. *See* cases cited *supra* note 174.

discovery devices, it is clear that non-party privacy interests outweigh any fairness issues to litigants. Strictly prohibiting such discovery would substantially reduce the number of discovery disputes, it would save valuable judicial time and resources, and it would lead to a more rapid resolution of lawsuits.

In the lead paint cases, the defendants are merely going on fishing expeditions hoping they can find some other hidden causes for the injuries. This type of discovery practice does not even meet the direct relevance threshold that is required before discovery of constitutionally protected material can be allowed.[176] Allowing discovery in these cases only raises more questions then it answers.[177] It has the potential to expand the litigation beyond recognition and to confuse the issues.[178] Perhaps this is the outcome that the defendant wants in order to force a settlement or drag the case out, but it is not a legitimate compelling interest.

The defendants do have a legitimate interest in limiting their liability only to injuries for which they are responsible. It is not unfair, however, to deny them access to non-party medical records because the non-party's health is not at issue, and because it is the plaintiff, not the defendant, who has the ultimate burden of proof on the issue of causation. Additionally, the intrusion into the non-party's medical records is especially unjustified in lead paint cases because the claims of genetic causation are only speculative at best.[179] Even in the future when genetic science becomes more conclusive and presumptively the direct relevance threshold can be met, discovery of non-party medical records should still be prohibited because the inherent intrusiveness would be much greater than it is today. What could be more intrusive than having someone gain access to your genetic blueprint?

In the injury at birth cases when a suit is brought on behalf of the infant, the mother's prenatal medical records cannot be considered those of a non-party. Although the mother is in fact a non-party, under the "impossibility of severance" theory her prenatal medical records are necessarily her child's earliest medical records.[180] Discovery should be strictly limited to the period from conception to birth.[181] The mother does have legitimate privacy interests in these records but public policy demands that she should not be allowed to frustrate her child's legitimate claims.[182]

In medical malpractice cases where knowledge or notice is not an essential element of the claim, non-party medical records are not directly relevant and there is no legitimate need to seek their discovery. Any

176. *See* Tylo v. Superior Court, 64 Cal. Rptr. 2d 731, 736 (1997).

177. *See* Andon v. 302-304 Mott St. Assoc., 690 N.Y.S.2d 241, 242 (N.Y. App. Div. 1999).

178. *See id.*

179. *See* Monica W. v. Milevoi, 685 N.Y.S.2d 231, 234 (N.Y. App. Div. 1999).

180. *See* cases cited *supra* note 78.

181. *See* Murphy v. LoPresti, 648 N.Y.S.2d 169 (N.Y. App. Div. 1996).

182. *See* Palay v. Superior Court, 22 Cal. Rptr. 2d 839, 844 (Cal. Ct. App. 1993).

discovery attempt would be an unnecessary and unwarranted intrusion on the privacy rights of others.

As for the medical negligence cases where knowledge or notice must be proven, non-party medical records could very well be relevant. Assuming these records are directly relevant, the intrusion is still unwarranted in light of the fact that there are alternative methods for acquiring such information.

Although a minority of courts allows the discovery of redacted medical records, this is not a suitable alternative. Redacting the medical records is not the solution for many reasons; time and money are wasted disputing discovery and redacting records, the confidential nature of the medical records is breached, and there is a distinct possibility that the non-party's identity will be discovered.

Other alternative methods for attaining information necessary to supply the knowledge or notice elements include using interrogatories and depositions. The downside to these methods is that they require the party seeking discovery to rely on the truthfulness of the opposing party. There are some legitimate claims that will be unable to surmount the burden of establishing notice or knowledge without access to non-party records, but this is the price that must be paid in order to protect non-party privacy interests. It may seem like a steep price to pay, but at least the litigants can rest assured that their medical records will enjoy the same protection from discovery by others.

Strictly prohibiting the use of non-party medical records has many advantages. First, it is easy to enforce. Second, it is judicially economical. The courts will not have to spend time hearing motions, issuing protective orders, conducting *in camera* inspections, and handling appeals. Third, the parties would be forced to get right to the relevant issues so they can quickly and efficiently resolve their disputes instead of wasting time arguing about the scope of discovery. Finally, it would protect the privacy rights of everyone with medical records.

CONCLUSION

Privacy is a fundamental and inalienable right.[183] The right to privacy attaches to the sensitive information that is found within our medical records.[184] Besides enjoying a constitutional right to privacy, we each hold the physician-patient privilege as to our own medical records.[185] Any intrusion into this sensitive area is objectionable. When one brings a lawsuit they waive their physician-patient privilege as to their own medical records that are directly relevant to the claim;[186] however, they do not enjoy

183. *See* CAL. CONST. art. I, § 1.
184. *See* Pettus v. Cole, 57 Cal. Rptr. 2d 46, 72 (Cal. Ct. App. 1996).
185. *See* CAL. EVID. CODE § 993 (Deering, LEXIS through 1999 session).
186. *See* Davis v. Superior Court, 9 Cal. Rptr. 2d 331, 335 (Cal. Ct. App. 1992).

the freedom to waive the privilege for others. Although litigants often seek the medical records of non-parties, the need for this information and the right to the ascertainment of truth in legal proceedings are substantially outweighed by the non-party's right to privacy.

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