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BALANCING PRIVACY AND PROOF: DISCOVERY OF NONPARTY MEDICAL RECORDS

RACHEL E. BROWN*

INTRODUCTION

What if your private medical records are being viewed by persons other than yourself or your physician in a lawsuit in which you are not a party and have zero involvement? Certainly, you would be shocked by the invasion of your privacy. Now, consider instead, that you are a party to that lawsuit and the discovery of nonparty medical records is necessary to prove your claim or defend yourself in court. Would you want the opportunity to discover the nonparty medical records in order to secure a just outcome for yourself?

Courts are frequently faced with the dilemma of whether nonparty medical records should be discoverable in civil litigation. The Federal Rules of Civil Procedure (hereinafter "FRCP")[1] , provide that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense…."[2] On one hand, litigants' due process rights and the judicial system's pursuit of the truth weighs heavily in favor of allowing discovery of relevant nonparty medical records. All litigants deserve full and complete discovery in order to have a meaningful opportunity to present their cases and obtain just outcomes in court. On the other hand, nonparty privacy interests weigh heavily against allowing discovery of relevant nonparty medical records. Medical records are protected by strict federal and state laws governing privacy.

There is no clear answer among the courts as to which interest(s) should prevail.

Many courts have held that nonparty medical records are discoverable only upon a sufficient showing that the records are relevant to the issue in dispute and

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1. I will reference the FRCP throughout this paper because most states pattern their respective rules of civil procedure after the federal rules. *See* Mark A. Rothstein, *Preventing the Discovery of Plaintiff Genetic Profiles by Defendants Seeking to Limit Damages in Personal Injury Litigation*, 71 IND. L. J. 877, 901 (1996).

2. FED. R. CIV. P. 26(b)(1).

identifying information is redacted.[3] Other courts, citing nonparty privacy rights, block all discovery of nonparty medical records even where nonparty identities are protected.[4]

This paper surveys this issue and offers a solution on how courts should handle requests for discovery of nonparty medical records. Part I of this paper discusses nonparty privacy interest in the confidentiality of their medical records. Part II considers litigants' due process rights and the judicial system's pursuit of the truth. Part III briefly addresses the limited impact of the federal HIPAA regulations on the discovery of nonparty medical records. Part IV briefly describes the inadequacy of redaction and protective orders, used by the courts to maintain nonparty privacy rights without denying discovery of relevant nonparty medical records altogether. Finally, Part V recommends that discovery of nonparty medical records should be permitted only upon a heightened showing of "good cause," which requires much more than mere relevance. This stricter standard, coupled with the use of procedural safeguards, will help weed out speculative discovery requests and reconcile the competing interests described in Part I and Part II.

I. ARGUMENTS AGAINST THE DISCOVERY OF NONPARTY MEDICAL RECORDS

Privacy protections for medical records arise from a number of sources. The United States Constitution protects an individual's interest in avoiding the disclosure of personal matters, including medical records.[5] Most jurisdictions recognize a physician-patient privilege, or similar statutory restriction, that protects medical records from discovery in litigation. These privacy protections and the potential negative ramifications of disclosure militate against the discovery of nonparty medical records.

A. Medical Records Are Protected by the Constitutional Right to Privacy

Nonparties have constitutional privacy interests in preventing disclosure of their medical records. Even though the United States Constitution does not

3. *See, e.g.*, Terre Haute Reg'l Hosp., Inc. v. Trueblood, 600 N.E.2d 1358, 1362 (Ind. 1992) (holding that "where adequate safeguards exist to protect the identity and confidentiality of the nonparty patient, the trial court may allow the discovery of the nonparty patient medical records…."); State *ex rel.* Wilfong v. Schaeperkoetter, 933 S.W.2d 407, 410 (Mo. 1996) (en banc) (holding that discovery of nonparty medical records may be ordered "if they were relevant to the medical malpractice claim and adequate safeguards were provided to protect the non-parties as much as possible."); Cmty. Hosp. Ass'n v. Dist. Court, 570 P.2d 243, 244 (Colo. 1977) (en banc) (holding that the medical records of 140 patients were held discoverable after names, addresses, occupation and marital status was removed).

4. *See* Mary Crossley, *Infected Judgment: Legal Responses to Physician Bias*, 48 VILL. L. REV. 195, 259–60 (2003); Ekstrom v. Temple, 553 N.E.2d 424, 430 (Ill. App. Ct. 1990) (plaintiff not entitled to records of nonparty patients, with identification information deleted, due to physician-patient privilege); *In re*: Columbia Valley Reg'l Med. Ctr., 41 S.W.3d 797, 800 (Tex. App. 2001) (en banc) (holding that redaction of identifying information did not defeat privilege).

5. *See, infra* notes 43–50 and accompanying text.

explicitly mention a right of privacy, privacy is one of the fundamental rights it guarantees for all citizens.[6]

The existence of the right to privacy in one's medical records can be traced to *Whalen v. Roe*,[7] where the Supreme Court considered whether New York's statutory data collection scheme of personal patient health information violated the patients' constitutional right to privacy.[8] Although upholding the statute as constitutional,[9] the Supreme Court specifically recognized that the right to privacy protects "the individual interest in avoiding disclosure of personal matters."[10] The Supreme Court described this privacy interest as "a genuine concern that the information will become publicly known and that it will adversely affect [patients'] reputations."[11] A majority of the federal circuit courts have interpreted the individual interest in avoiding disclosure of personal matters espoused in *Whalen* as a constitutional right to informational privacy.[12] Medical records fall within the ambit of this informational privacy right.[13]

State constitutions with provisions similar to the United States Constitution imply a right to privacy in one's medical records.[14] Several states have explicit provisions relating to the right to privacy.[15]

6. *See* Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 475 (1991) ("Privacy [is] . . . among the most fundamental rights that we have as citizens of this country.").

7. 429 U.S. 589 (1977). For a more in-depth analysis of *Whalen v. Roe*, *see* Jessica C. Wilson, Note, *Protecting Privacy Absent a Constitutional Right: A Plausible Solution to Safeguarding Medical Records*, 85 WASH. U. L. REV. 653, 657–60 (2007).

8. *See Whalen*, 429 U.S. at 591.

9. *Id.* at 603–04.

10. *Id.* at 599. The *Whalen* Court also recognized a second kind of interest that the right of privacy protects: the right to make personal decisions. *Id.* at 599–600.

11. *Id.* at 600.

12. Daniel M. Nickels, Note, *Casting the Discovery Net Too Wide: Defense Attempts to Disclose Nonparty Medical Records in a Civil Action*, 34 IND. L. REV 479, 497 (2001); For a more extensive discussion of the treatment of informational privacy rights since *Whalen*, *see* Francis S. Chlapowski, *The Constitutional Protection of Informational Privacy*, 71 B.U. L. REV. 133 (1991).

13. *See, e.g.*, United States v. Westinghouse Electric Corp., 638 F.2d 570, 577 (3rd Cir. 1980) (stating that "[t]here can be no question that . . . medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection"); Doe v. Md. Bd. Of Social Work Examiners, 862 A.2d 996, 1008 (Md. 2004) (stating that "medical records fall within" the right to privacy guaranteed by the U.S. Constitution).

14. *See* Joy L. Pritts, *Altered States: State Health Privacy Laws and the Impact of the Federal Health Privacy Rule*, 2 YALE J. HEALTH POL'Y L. & ETHICS 325, 330 (2001); *see, e.g.*, King v. State, 535 S.E.2d 492, 495 (Ga. 2000) (finding that medical records were protected by the constitutional right of privacy under both the federal and Georgia constitutions).

15. *See* Pritts, *supra* note 14 at 330; *see, e.g.*, CAL. CONST. ART. I, § 1. ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.").

Ultimately, state and federal constitutional provisions provide nonparty medical records limited protection from disclosure.[16] A constitutional right, whether federal or state, is limited to state action.[17] Therefore, the constitutional right to privacy does not effectively protect nonparty medical records from discovery in civil tort actions between private litigants. And although the protection afforded by the right to privacy is not absolute,[18] a party seeking discovery of nonparty medical records must overcome a high level of scrutiny.[19] Courts often find that individual privacy interests in medical records are outweighed by the state's interest in disclosure.[20]

B. Medical Records Are Protected by the Physician-Patient Privilege

State physician-patient privilege laws embody the main source of protection for the privacy of nonparty medical records.[21] Nearly all American jurisdictions have recognized the physician-patient privilege or similar restrictions on disclosure through statute or case law.[22] The *Black's Law Dictionary* defines the physician-patient privilege as "[a] patient's right to exclude from discovery and evidence in a legal proceeding any confidential communication between the patient and a physician for the purpose of diagnosis or treatment, unless the patient consents to the disclosure."[23] The privilege generally extends to medical records to the extent that they contain confidential communications between patients and their physicians.[24]

1. Purpose of the Physician-Patient Privilege

In creating the physician-patient privilege, state courts and legislatures recognized that society's interest in preserving the confidential nature of the physician-patient relationship.[25] The privilege encourages full and frank communication between patients and physicians in order to make known to the physician all information necessary for treatment and diagnosis, no matter how

16. *Id.* at 330.

17. *Id.*

18. Scott R. White, Comment, *Discovery of Non-Parties' Medical Records in the Face of the Physician-Patient Privilege*, 36 CAL. W. L. REV. 523, 536 (2000).

19. *Id.* at 536.

20. *See* Pritts, *supra* note 14 at 330.

21. *See* Nickels, *supra* note 12, at 483–84. Federal law does not recognize a physician-patient privilege. *Id.*

22. *See* Joseph S. Goode, *Perspectives on Patient Confidentiality in the Age of AIDS*, 44 SYRACUSE L. REV. 967, 984 (1993); White, *supra* note 18, at 524. The exact scope of the physician-patient privilege varies by state.

23. *Physician-Patient Privilege*, BLACK'S LAW DICTIONARY (10th ed. 2014).

24. *See* White, *supra* note 18, at 524.

25. *See* Nickels, *supra* note 12, at 484; *see, e.g.*, Johnson v. Trujillo, 977 P.2d 152, 157 (Colo. 1999) (en banc) (noting that the sacrifice of relevant evidence "is warranted by the social importance of interests and relationships that the privileges seek to protect.").

embarrassing or humiliating.[26] Without assurance that their communications will remain completely confidential, patients will be less forthcoming with sensitive information necessary for effective medical treatment.[27] Some patients may even delay treatment or avoid it altogether.

Additionally, the physician-patient privilege allows the public "to rely upon the expectation that physicians will not reveal their confidences."[28] Nonparties should not have to fear the disclosure of medical information provided to their physician in confidence. Indeed, there is a heightened sense of the need to protect the intimate and sensitive personal information in one's medical records.[29] Disclosure of private medical information can adversely impact a person's social and economic well-being.[30] "Modern medical records not only contain diagnoses and treatment related data, but also contain personal information such as employment history, financial history, lifestyle choices, and HIV status."[31] If this confidential information gets into the wrong hands, nonparties may suffer negative consequences, such as embarrassment, social stigmas, limited job opportunities and lack of insurability.[32]

2. Privileged Medical Records Are Expressly Outside the Scope of Discovery

The scope of discovery under Rule 26(b) expressly exempts from its reach all privileged information.[33] When a plaintiff in a personal injury suit places his or her own medical condition(s) at issue,the physician-patient privilege is impliedly waived with regards to the plaintiff's relevant medical records.[34] The waiver is automatic because the plaintiff's interest in confidentiality is outweighed by the defendant's interest in determining the validity of the plaintiff's claim.[35]

26. *See* Nickels, *supra* note 12, at 484.

27. *See* White, *supra* note 18, at 537; Chari J. Young, Note, *Telemedicine: Patient Privacy Rights of Electronic Medical Records*, 66 UMKC L. REV. 921, 930 (1998).

28. *See* Nickels, *supra* note 12, at 484–85.

29. *Id.* at 479.

30. *Id.* at 486.

31. Roger E. Harris, *The Need to Know versus the Right to Know: Privacy of Patient Medical Data in an Information-Based Society*, 30 SUFFOLK U. L. REV. 1183, 1185 (1997).

32. *See* Jennifer L. Klocke, *Prescription Records for Sale: Privacy and Free Speech Issues Arising from the Sale of De-Identified Medical Data*, 44 IDAHO L. REV. 511, 519 (2008); Young, *supra* note 27, at 928.

33. *See* FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any *nonprivileged* matter that is relevant to any party's claim or defense . . . .") (emphasis added).

34. *See* White, *supra* note 18, at 525. A plaintiff acting in a representative capacity for the purpose of litigation does not waive the physician-patient privilege with respect to his or her own medical histories. *See* Nickels, *supra* note 12, at 485; s*ee, e.g.*, Murphy v. LoPresti, 648 N.Y.S.2d 169, 169 (N.Y. App. Div. 1996) (mother who brought birth injury case on behalf of child did not waive her own physician-patient privilege with respect to records outside of her pregnancy).

35. *See* Rothstein, *supra* note 1, at 896.

Nonparties have not made this implied waiver of their physician-patient privilege. Therefore, nonparty medical records are not discoverable absent consent by the nonparty or those entitled to do so in the nonparty's behalf.[36] Even if nonparty medical records are highly relevant and necessary to a claim, nonparty waiver of the physician-patient privilege is necessary for discovery.[37] As one court explained:

> [I]t is inherent in the very nature of an evidentiary privilege that it presents an obstacle to discovery and it is precisely in those situations where confidential information is sought in advancing a legal claim that such privilege is intended to operate. Were we to carve out an exception to the privilege whenever it inhibited the fact-finding process, it would quickly become eviscerated.[38]

This is true even when the nonparty medical records belong to a close relative of the plaintiff. The mere fact that a plaintiff has commenced an action does not subject all the plaintiff's relatives to the "long arm" reach of the law authorizing discovery of their medical records.[39] For example, in *Dierickx v. Cottage Hospital Corporation*,[40] the plaintiffs brought an action on behalf of their daughter who suffered central nervous system damage due to the alleged negligence of the defendant physician during delivery. The defendant sought to discover the nonparty medical records of the plaintiffs' two other children in order to show that a genetic disorder caused the harm.[41] The Michigan Court of Appeals rejected the defendant's argument that not permitting disclosure was tantamount to "conceal[ing] evidence likely to establish the truth."[42] Instead, the court held that "although the requested [nonparty] medical records may be relevant to defendants' theory of a genetically transmitted defect, the records are privileged and not subject to discovery."[43] It reasoned that the health of the two

36. *See* Wanda Ellen Wakefield, Annotation, *Physician-Patient Privilege as Extending to Patient's Medical or Hospital Records*, 10 A.L.R.4th 552 (2018).

37. *See, e.g.*, Parkson v. Central DuPage Hospital, 435 N.E.2d 140, 143 (Ill. App. Ct. 1982) ("Although the Illinois statute on the physician-patient privilege exempts civil malpractice actions, we believe that that exception should be limited to only allow the disclosure of the records of the patient who is bringing the malpractice action. A broadening of that exception to allow the disclosure of communications involving patients who are not parties to the litigation would neither serve a public interest nor the private interests of those nonparty patients.").

38. Monica W. v. Milevoi, 685 N.Y.S.2d 231, 233 (N.Y. App. Div. 1999).

39. *See, e.g.*, *id.* (finding that a lead paint case brought on behalf of child did not constitute waiver of the parents' and siblings' physician-patient privilege); Kunz v. S. Suburban Hosp., 761 N.E.2d 1243, 1247–48 (Ill. App. Ct. 2001) (holding that "filing a medical malpractice lawsuit on behalf of a child, even when a genetic cause independent of medical malpractice may become an issue, does not thereby waive the physician-patient privilege in favor of the child's siblings").

40. 393 N.W.2d 564 (Mich. Ct. App. 1986).

41. *Id.* at 565.

42. *Id.* at 567.

43. *Id.*

younger children had not been placed in controversy and therefore, their personal physician-patient privilege had not been waived.[44]

C. Impermissible and Inefficient Expansion of the Scope of Discovery

In general, tort discovery focuses on the plaintiff because the plaintiff's condition is at issue.[45] Permitting the discovery of nonparty medical records is a significant departure from this "plaintiff-centered" view. [46] Expanding discovery to include nonparty medical records has the potential to dramatically broaden the scope of discovery in some cases.[47] For example, in a toxic tort case involving minor plaintiff, a common question is whether the defendant's product caused the plaintiff's mental and intellectual development.[48] What if it is revealed that the plaintiff's mother has a low-IQ? Jennifer Wriggens, author of "Genetics, IQ, Determinism, and Torts: The Example of Discovery in Lead Exposure Litigation," explained how this scenario creates more questions than answers:

> A low-IQ mother might have been deprived of oxygen at birth, exposed to lead, or a myriad of other factors. Should she be x-rayed for an early lead exposure? Should her birth records be obtained? Are the father's IQ, prenatal, perinatal, head injury, and lead exposure histories relevant? Should the grandparents histories be examined, as well? There is no logical end to the litigation inquiry once individual boundaries are crossed.[49]

Thus, a clear line that disallows discovery of nonparty medical records would help prevent arbitrary, inconsistent decisions that improperly broaden the scope of litigation and disregard nonparty privacy interests. As Supreme Court Justice Blackman stated, "[l]aw . . . must resolve disputes finally and quickly . . . . [The] Rules of Evidence [are] designed not for the exhaustive search for cosmic under-standing but for the particularized resolution of legal disputes."[50]

44. *Id.* at 566.

45. *See* Jennifer Wriggens, *Genetics, IQ, Determinism, and Torts: The Example of Discovery in Lead Exposure Litigation*, 77 B.U. L. REV. 1025, 1055 (1997).

46. *Id.* at 1058.

47. *Id.* at 1060; White, *supra* note 18, at 528 ("It has been noted that allowing discovery of the family's medical records would raise more questions than it would answers.").

48. Ronald L. Hack & Jane E. Schilmoeller, *Production of Non-Parties' Medical and Other Privileged or Private Records*, 54 J. MO. B. 123, 126 (1998).

49. Wriggens, *supra* note 45, at 1060–61.

50. Daubert v. Merrell Dow Pharms. Inc., 509 U.S. 579, 597 (1993).

II. ARGUMENTS IN FAVOR OF NONPARTY MEDICAL RECORDS BEING DISCOVERABLE

Nonparty medical records can be highly relevant sources of information in litigation. In certain cases, discovery of relevant nonparty medical is necessary to support a litigant's theory of liability or defense. Prohibiting the discovery of relevant nonparty medical records would result in great injustice to the parties seeking disclosure, infringing on litigants' due process rights and the judicial system's pursuit of the truth. Privacy surrounding medical records is certainly an important value; however, it must be balanced against these competing interests.

A. Litigants' Due Process Rights and the Judicial System's Pursuit of the Truth

The U.S. Constitution provides that "[no] state shall … deprive any person of life, liberty, or property, without due process of law."[51] In the context of civil litigation, due process requires that all litigants have a meaningful opportunity to present or defend their case.[52] This includes litigants' ability to investigate and construct alternative theories of liability and defense.[53] This due process right is complemented by the judicial system's pursuit of the truth in legal proceedings.[54] Broadly speaking, the ultimate objective of every judicial inquiry is to ascertain the truth.[55] Relatedly, the FRCP aim to secure a *just* determination of every action.[56]

Litigants must have full and adequate disclosure of all relevant facts in order to have a meaningful opportunity to present and defend their cases. The FRCP establish a broad scope of discovery,[57] and discovery requests are liberally

51. U.S. CONST. amend. XIV, § 1.

52. *See* Goldberg v. Kelly, 397 U.S. 254, 267 (1970) ("The fundamental requisite of due process of law is the opportunity to be heard …. [at] a meaningful time and in a *meaningful manner*.") (emphasis added) (internal quotations omitted); Lindsey v. Normet, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense.") (internal quotations omitted).

53. *See* Nickels, *supra* note 12, at 481.

54. *See* Robert S. Summers, *Formal Legal Truth and Substantive Truth in Judicial Fact-Finding – The Justified Divergence in Some Particular Cases*, 18 LAW AND PHIL. J. 497, 497 (1999).

55. *See* State v. Randall, 431 S.W.2d 107, 110 (Mo. 1968) (en banc) ("The ultimate object of every judicial inquiry is to get at the truth. Therefore no rule of law standing in the way of getting at the truth should be loosely or mechanically applied.").

56. *See* FED. R. CIV. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts . . . . They should be construed, administered, and employed by the court and the parties to secure the *just*, speedy, and inexpensive determination of every action and proceeding.") (emphasis added).

57. *See* FED. R. CIV. P. 26(b)(1).

granted by the courts.[58] A party may be permitted to discover relevant evidence that would be inadmissible at trial, so long as it may lead to the discovery of admissible evidence.[59] The Supreme Court discussed the oft-quoted rationale for the broad discovery standard in an early case:

> We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.[60]

Complete discovery may require assembling all relevant evidence from parties and nonparties alike.[61] The FRCP specifically contemplate discovery from nonparties. For example, under FRCP 45 litigants may use subpoenas to obtain evidence, such as medical records, from nonparty witnesses.[62]

Although liberal discovery may place burdens on nonparties, it ultimately increases the likelihood that cases will be decided on the merits.[63] Liberal discovery also furthers just adjudication between the immediate parties to the litigation.[64]

B. Exemplifying the Need for Discovery of Relevant Nonparty Medical Records

In certain cases, nonparty medical records go further in illustrating a theory of liability or defense than any other piece of evidence.[65] The following subsections describe several categories of cases where litigants often seek access to nonparty medical records during discovery. The circumstances in these cases present the strongest need for discovery of relevant nonparty medical records despite infringing nonparty privacy interests. Courts ultimately make determinations based on the circumstances of each individual case.[66]

58. *See* Hickman v. Taylor, 329 U.S. 495, 506–07 (1947).

59. FED. R. CIV. P. 26(b)(1).

60. *Hickman*, 329 U.S. at 507. However, the Court cautioned that discovery has "ultimate and necessary boundaries" that include inquiries into irrelevant or privileged matters or those conducted in bad faith. *Id.* at 507–08.

61. *See* Nickels, *supra* note 12, at 483.

62. *See* FED. R. CIV. P. 34(c) ("As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection."); FED. R. CIV. P. 45 (allowing discovery from a nonparty through the issuance of a subpoena duces tecum).

63. Charles H. Rabon, Jr., *Evening the Odds in Civil Litigation: A Proposed Methodology for Using Adverse Inferences When Nonparty Witnesses Invoke the Fifth Amendment*, 42 VAND. L. REV. 507, 512 (1989).

64. *See* Rabon, Jr., *supra* note 63, at 513.

65. *See* Hack & Schilmoeller, *supra* note 48, at 126.

66. *Id.*

1. Negligence Claims Involving Children

In cases alleging cognitive, behavioral and/or developmental harm to a child, defendants may seek to prove that the child's harm was caused by social, environmental, or genetic factors rather than any negligence by the defendant.[67] These claims typically involve lead paint poisoning, medical malpractice, or medical products liability.[68]

The medical histories of the injured child's parents and siblings can contain critical information regarding causation. Consider a medical malpractice action brought by the plaintiffs of behalf of their first-born daughter, alleging that she failed to develop normally and had suffered central nervous system damage as a result of the defendants' negligence.[69] During discovery, the child's mother testified that her third-born daughter, a nonparty, began exhibiting similar neurological abnormalities shortly after birth and had been hospitalized multiple times before she was six months old.[70] What if it is revealed that third-born daughter's treating physicians suspect a genetic disorder was the cause of her medical problems?[71] Discovery of the third-born daughter's medical records is necessary in order to fully explore whether the first-born daughter's harm was caused by a genetic disorder rather than the defendants' alleged negligence.[72] Without access to these nonparty medical records, defendants are significantly disadvantaged and at risk to be held liable for harm they did not cause.

In these types of cases, nonparty medical records are vital sources of relevant information regarding the true cause of harm. Child psychologists and pediatric neurologists recognize that to determine whether a causal relationship exists between a defendant's alleged negligence and a child's harm, experts must account for additional factors, such as social, environmental, and genetic factors.[73] Without such material, defendants cannot present a meaningful defense and the trier of fact will be left with only a partial answer to the question of causation.[74]

For example, *Parker v. Housing Authority of Baltimore City*,[75] involved a toxic torts action brought against an apartment complex in which it was alleged that the minor plaintiff suffered brain injuries from exposure to lead-based

67. *See* Melissa E. Rosenthal, *Liberal Discovery of Nonparty Records: In Defense of the Defense*, 7 CARDOZO WOMEN'S L. J. 59, 68 (2000).

68. *See* Hope Viner Samborn, *Blame It on the Bloodline: Discovery of Nonparties' Medical and Psychiatric Records Is Latest Defense Tactic in Disputing Causation*, 85 A.B.A. J. 28, 28 (1999).

69. *See Dierickx*, 393 N.W.2d at 565.

70. *See id.*

71. *See id.*

72. Ultimately, the *Dierickx* court refused to allow production of the sister's medical records. *See*, *supra* notes 43–44 and accompanying text.

73. *See* Hack & Schilmoeller, *supra* note 48, at 126; *See* Rosenthal, *supra* note 67, at 68.

74. *See* Hack & Schilmoeller, *supra* note 48, at 126.

75. 742 A.2d 522 (Md. Ct. Spec. App. 1999).

paint.[76] The Maryland Court of Special Appeals recognized that discovery of a neuropsychologist's report regarding the minor plaintiff's mother, a nonparty, was of "fundamental importance" to properly determine the cause of the minor plaintiff's cognitive injuries.[77] In doing so, the Court highlighted a portion of the neuropsychologist's affidavit, which stated:

The need for an evaluation of [the plaintiff's mother] is based upon the body of scientific evidence which establishes a genetic relationship between parental and child IQs in the area of intellectual development . . . [A] significant component of intellectual development is determined by hereditary rather than environmental factors.[78]

Thus, because genetic factors likely impacted the plaintiff's cognitive abilities, the nonparty mother's neuropsychology report was discoverable in order to determine the true cause of the plaintiff's harm.

2. Birth Injury Claims

Birth injury claims are a specific type of medical malpractice claim in which harm to a minor child is alleged to have resulted from a healthcare provider's negligent prenatal care and/or delivery. In birth injury cases, most courts hold that a nonparty mother's medical records for the time period when the child was in utero because there can be no severance of the infant's prenatal history from the nonparty mother's medical history.[79] Courts recognize that the prenatal period, an important time in the development of an unborn child, is highly relevant in determining the true cause of a child's harm and the only source of such information is the mother's medical records.[80]

The "impossibility of severance" theory limits discovery to the mother's prenatal medical records.[81] However, nonparty medical records can also be highly relevant to causation in birth injury claims for the same reasons set forth in the previous section.[82]

76. *See id.* at 523.

77. *See id.* at 524. In *Parker*, the Housing Authority sought to compel the plaintiff's mother, a nonparty, to submit to a mental examination. *Id.* at 523. The compulsory medical examination of a nonparty is beyond the scope of this paper. However, the court's opinion about the "fundamental importance" of such an examination to the true cause of the plaintiff's harm is relevant to this paper.

78. *Id.* at 524.

79. *See* Nickels, *supra* note 12, at 485; *see, e.g.*, Payal v. Super. Ct. of L.A., 22 Cal. Rptr. 2d 839, 840 (Cal. Ct. App. 1993) (holding that the mother's prenatal records relating to the child were discoverable because the child's medical records were inseparable from those of mother during the time the child was in utero). The mother is a nonparty even when acting as a plaintiff in a representative capacity for the injured child. *See*, *supra* note 34.

80. *See* White, *supra* note 18, at 530.

81. *Id.* at 530.

82. *See, e.g.*, Vincent v. Connaught Lab., Inc., 131 F.R.D. 156, 158–59 (E.D. Mo. 1990) (permitting discovery of the pregnancy and birth records of the plaintiff's mother concerning her five children who were born before the brain damaged infant-plaintiff).

3. Medical Malpractice Claims and Nonparty Patients

Plaintiffs also seek discovery of relevant nonparty medical records to investigate and support their negligence claims.[83] In certain situations, medical records of a healthcare provider's nonparty patients are highly relevant regarding breach in the standard of care and causation.[84] For example, consider a medical malpractice action against a physician for negligently abandoning the plaintiff while she was in labor, causing harm to her minor child.[85] During the defendant's deposition, she testified that the plaintiff was left for only a short period of time to attend to a burn patient in the emergency room.[86] The emergency room medical records of the nonparty burn patient are necessary to determine the condition of the burn patient and whether the defendant's absence during the plaintiff's labor was justified.[87]

In *Amente v. Newman*,[88] the plaintiff filed a medical malpractice action alleging that her physician's failure to use the proper type of delivery bed during plaintiff's high-risk pregnancy resulted in injury to her newborn child.[89] The plaintiff, who weighed over 300 pounds, alleged that the defendant negligently opted to use a regular delivery bed rather than a drop-down delivery bed.[90] Therefore, the plaintiff sound discovery of the medical records for all the defendant's "markedly obese" patients that gave birth over a specific two year time period.[91] The *Amente* court ordered disclosure,[92] finding that the nonparty medical records were relevant to show that the defendant had notice that failure to use the drop-down delivery bed was a deficient method for "markedly obese" patients.[93] Further, if the nonparty medical records revealed that the defendant used drop-down delivery beds with his other "markedly obese" patients and that no injuries occurred to their infants, such evidence might be relevant to causation.[94]

Nonparty medical records are also highly relevant to a plaintiff's claim against a hospital for its negligent supervision or retention of a medical staff member whose negligence caused harm to the plaintiff. Medicals records of the

83. *See* White, *supra* note 18, at 527.

84. *See* Hack & Schilmoeller, *supra* note 48, at 126.

85. *See* Bennett v. Fieser, 152 F.R.D. 641, 642 (D. Kan. 1994).

86. *Id.*

87. *See id.* The *Bennett* court ordered disclosure on the condition that: (1) identifying information be removed and (2) no attempt be made to contact or learn the identities of the nonparties. *Id.* at 644.

88. 653 So.2d 1030 (Fla. 1995).

89. *Id.* at 1031.

90. *Id.*

91. *Id.*

92. Specifically, the Supreme Court of Florida upheld the trial court's order that the redacted records be produced. *Id.* at 1031, 1033.

93. *Id.* at 1032–33.

94. *Id.*

staff member's nonparty patients are peculiarly appropriate tools for determining whether the hospital had sufficient prior information to be put on notice regarding a staff member's negligence. For example, in *Ziegler v. Superior Court,*[95] the plaintiff brought a negligent supervision action against a hospital whose physician performed unnecessarily pacemaker implantation surgery on the plaintiff.[96] To show that the hospital had notice of the physician's incompetence, the plaintiff sought to discover the medical records of nonparty patients who undergone pacemaker implantations by the allegedly negligent physician.[97] The *Ziegler* court ordered disclosure, reasoning that the nonparty medical records were relevant and that refusing disclosure would result in an injustice to the plaintiff.[98]

III. THE MINIMAL IMPACT OF HIPAA

Privacy rights with respect to medical information, particularly medical records, are protected by the Health Insurance Portability and Accountability Act of 1996, commonly referred to as "HIPAA."[99] Congress authorized the United States Department of Health and Human Services to promulgate regulations, collectively known as the HIPAA Privacy Rule, establishing strict privacy protections for healthcare information.[100] HIPAA's Privacy Rule governs "protected health information" (PHI),[101] which is broadly defined and includes many different types of information, including medical and hospital records.[102] The Privacy Rule sets national standards that place limits and conditions on the use and disclosure of medical records. In general, compliance with HIPAA

95. 656 P.2d 1251 (Ariz. Ct. App. 1982).

96. *Id.* at 1252.

97. *Id.*

98. *Id.* at 1255. *Id.* at 394. Specifically, the court ordered disclosure of the nonparty medical records on the condition that: (1) identifying information be removed; (2) the records be sealed by the court after review by the parties; (3) no attempt be made to contact or learn the identities of the nonparties; and (4) information may only be communicated to the parties, except as may occur at trial. *Id.* at 1254.

99. *See* Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1938 (1996).

100. *See* Nw. Mem'l Hosp. v. Ashcroft, 362 F.3d 923, 924 (7th Cir. 2004). The Privacy Rule is located at 45 C.F.R. Parts 160 and Subparts A and E of 164. *The HIPAA Privacy Rule*, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, https://www.hhs.gov/hipaa/for-professionals/privacy/index.html (last updated April 16, 2015).

101. *See* 45 C.F.R. § 164.302 (2017).

102. *Id.* § 160.103 (defining PHI as individually identifiable health information maintained in or transmitted in any form or media except as otherwise provided by the rule); *id.* (defining individually identifiable health information as information, including demographic data, that relates to the individual's past, present or future physical or mental health or condition, the provision of health care to the individual, or the past, present, or future payment for the provision of health care to the individual, and that identifies the individual or for which there is a reasonable basis to believe can be used to identify the individual).

requires parties seeking discovery of nonparty medical records to obtain the nonparty's written consent.[103]

This protection from disclosure is thwarted, however, by an exception that allows for the proper disclosure of medical records in civil litigation *without* the patient's prior written authorization. This occurs either by court order, or through a formal discovery request, such as a subpoena.[104] Where a court order is used, only the information "expressly authorized" by the order can be disclosed.[105] Where a discovery request is used, the party seeking the information must give the nonparty notice of the request, and the court time to resolve any objections and issue an order memorializing its decision in a protective order.[106] Therefore, HIPAA ultimately puts the decision of whether discovery of nonparty medical records is permissible back in the hands of the courts.

Additionally, the Privacy Rule sets no restrictions on the disclosure of de-identified health information because it is no longer considered protected health information.[107] De-identified health information is defined as information that neither identifies nor provides a reasonable basis to identify an individual.[108] The Privacy Rule provides de-identification standards and implementation specifications.[109] However, as further explained in Part IV, *infra*, redacting identifying information is often an ineffective means of maintaining nonparty privacy rights.

Nevertheless, while HIPAA places few barriers to discovery of nonparty medical records, it still gives effect to state law that offers greater privacy protections for medical records. The Privacy Rule does not preempt state privacy law that is "more stringent" than HIPAA.[110] A state privacy law is "more stringent" when the state law "prohibits or restricts a use or disclosure in circumstances under which such use or disclosure otherwise would be permitted" under HIPAA.[111] For example, some courts have found the physician-patient privilege more stringent than HIPAA because the privilege prohibits use or disclosure of health information when such use or disclosure would be allowed under HIPAA.[112] Similarly, where state law contained no exception for the

103. *See id.* § 164.502(a) (prohibiting the use or disclosure of patient health information without the patient's written consent except as specifically authorized by the rules).

104. *See id.* § 164.512(e)(1)(i)–(ii).

105. *See id.* § 164.512(e)(1)(i).

106. *See id.* § 164.512(e)(1)(ii)(A)–(B) (setting forth requirement of notice or protective order).

107. *See id.* § 164.502(d)(2).

108. *See id.* §164.514(a).

109. *See id.* §164.514(b).

110. *See id.* § 160.203(b).

111. *Id.* § 160.202(1).

112. *See, e.g.*, Grove v. Ne. Ohio Nephrology Assocs., 844 N.E.2d 400, 407 (Ohio Ct. App. 2005) (finding privacy protections provided by the Ohio physician-patient privilege statute more stringent than HIPAA).

disclosure of an individual's private health information without a written authorization, state law was deemed to provide more privacy protection for medical information than HIPAA.[113]

IV. TRADITIONAL SAFEGUARDS

Courts have traditionally employ procedural safeguards, such as redaction and protective orders, to maintain nonparty privacy rights without denying discovery of relevant nonparty medical records altogether, which can compromise litigants' due process rights and the judicial system's search for the truth. Many courts have allowed discovery of relevant nonparty medical records over privacy objections when safeguards, such as redaction, were in place to protect nonparty identities.[114] However, safeguards do not always adequately protect nonparty privacy rights. Even with the utilization of safeguards, nonparty privacy rights are still invaded. Such personal facts, once disclosed, can never be rendered completely private again.

This section addresses common procedural safeguards courts use and briefly explains the inadequacies of each. As further explained in Part V, *infra*, these safeguards are best utilized as an added layer of protection for nonparty privacy rights once the "good cause" need for discovery is sufficiently established.

A. Redaction

Redaction is not always an adequate solution because it only protects nonparty identities in limited circumstances, without any guarantee of nonparty anonymity.[115] Redaction is ineffective when the identity of the nonparty is known to the litigants. As previously explained, discovery of nonparty medical records is often sought when litigants know the identity of the nonparty, such as siblings or parents of the plaintiff. In these cases, redaction provides no privacy protection.

Additionally, redaction is ineffective when there is a distinct possibility that nonparty identification can be made despite the deletion of identifying information from the nonparty's medical records.[116] For example, redaction was

113. *See, e.g.*, Isidore Steiner, D.P.M., P.C. v. Bonanni, 807 N.W.2d 902, 906 (Mich. Ct. App. 2011) (finding that state law was more stringent because "the language of HIPAA allows for permissive disclosure, whereas Michigan law generally prohibits disclosure.")

114. *See supra* note 3 and accompanying text. Other courts have gone farther, expressly stating that redaction of identifying information removes the privileged status of confidential communications in medical records. *See, e.g.*, Wipf v. Altstiel, 888 N.W.2d 790, 794 (S.D. 2016) (reasoning that "anonymous, non-identifying information is not protected by the physician-patient privilege because there is *no patient* once the information is redacted.").

115. *See generally* 45 C.F.R. § 164.514(a) (providing the standards for de-dentification of protected health information under the HIPAA Privacy Rule).

116. *See* White, *supra* note 18, at 534.

deemed ineffective in a medical malpractice case where the plaintiff sought discovery of redacted patient triage records because comparison of the redacted triage records with the patient entries on the sign-in logs, previously disclosed to the plaintiff during discovery, would indicate to whom the triage records pertain.[117]

Redaction is only practical for protecting nonparty privacy when litigants seek the medical records of numerous unknown nonparties. Even then, redaction is still not a reliable means of privacy protection because it does not guarantee anonymity.[118] Modern advancements in technology allow for the subsequent "re-identification" of a large volume of de-identified aggregate patient information at an ever-increasing rate.[119] Moreover, little room exists for error. To the extent redaction fails, the nonparty's privacy will become permanently compromised.

Finally, nonparties reasonably expect that the medical information they share with their physicians will remain private. Simply redacting identifying information from nonparty medical records does not alleviate this expectation.[120] The case of *Binder v. Superior Court*[121] illustrates this concern. In *Binder*, the plaintiff brought a wrongful death action against the defendant physician for his negligent failure to diagnose the decedent's lesion as cancerous.[122] Plaintiff sought production of any photographs in defendant's possession showing a lesion suspected or diagnosed as melanoma.[123] The defendant argued disclosure was improper based on the physician-patient privilege.[124] The plaintiff argued that disclosing the photographs alone, without any identifying information, did not violate the physician-patient privilege.[125] The *Binder* court rejected this argument, explaining:

117. Big Sun Healthcare Sys. v. Prescott, 582 So.2d 756, 758 (Fla. Dist. Ct. App. 1991). Triage records are considered part of a patient's medical records because they contain information such as symptoms and past medical history. *Id.*

118. *See* Klocke, *supra* note 32 at 518–21 (discussing the privacy concerns surrounding the use of patient de-identified prescription data); *see, e.g., Parkson*, 435 N.E.2d at 144 ("Whether the patients' identities would remain confidential by the exclusion of their names and identifying numbers is questionable at best. . . . The patients' admit and discharge summaries arguably contain histories of the patients' prior and present medical conditions, information that in the cumulative can make the possibility of recognition very high.").

119. Klocke, *supra* note 32, at 520; *see id.* at 521 ("The rise of patient-level data aggregation combined with the increased sophistication of re identification techniques has left patients more exposed to privacy threats than ever before.").

120. *See, e.g.*, Roe v. Planned Parenthood, 219 N.E.2d 61, 79 (Ohio 2009) (stating that "[r]edaction is merely a tool that a court may use to safeguard the personal, identifying information within confidential records that have become subject to disclosure either by waiver or by an exception.").

121. 242 Cal. Rptr. 231 (Cal. Ct. App. 1987).

122. *Id.* at 232.

123. *Id.*

124. *Id.*

125. *Id.* at 233.

> [D]isclosure of the subject photographs would subvert both objectives of the physician-patient privilege. First, it would undoubtedly shock and humiliate present and former patients of defendant to learn that pictures of their bodies and ailments would be turned over to strangers. Furthermore, it is probable the patients' sensibilities would be offended whether or not their identities are disclosed together with the photographs.[126]

B. Protective Orders

The protection of privacy is implicit in the language of FRCP 26(c), which governs protective orders.[127] Rule 26(c) provides that upon motion by "[a] party or any person from whom discovery is sought . . . [t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ."[128] Courts use protective orders to define precise limits on the use of discoverable nonparty medical records, such as who should have access to the records and for what purpose(s) they may be used.[129]

Despite these benefits, protective orders are not sufficient to protect nonparty privacy interests because the party seeking a protective order bears the burden of proving the necessity of the order.[130] Nonparties have the greatest interest in seeking a protective order to prevent or limit discovery of their medical records. However, nonparties are at a disadvantage because they are unlikely to be represented by counsel. This leaves "unsuspecting third parties [forced] to retain counsel to fend off demands for private medical documents."[131]

Alternatively, the litigant opposing discovery or the healthcare provider in possession of the nonparty medical records may seek a protective order. In that case, the nonparty must trust that the moving litigant or healthcare provider, each with self-serving, independent goals for litigation, will adequately protect the nonparty's privacy interests. Placing nonparties in this position is patently unfair.

126. *Id.; see, e.g.*, *Ashcroft*, 362 F.3d at 929 ("Even if there were no possibility that a patient's identity might be learned from a redacted medical record, there would be an invasion of privacy. Imagine if nude pictures of a woman, uploaded to the Internet without her consent though without identifying her by name, were downloaded in a foreign country by people who will never meet her. She would still feel that her privacy had been invaded. The revelation of the intimate details contained in the record of a late-term abortion may inflict a similar wound.").

127. *See* Seattle Times Co. v. Rhinehart, 104 S.Ct. 2199, 35 n.21 (1984) ("Although the Rule contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule.") (internal quotations omitted).

128. FED. R. CIV. P. 26(c)(1).

129. *See* Miller, *supra* note 6, at 495.

130. *See* Rothstein, *supra* note 1, at 902.

131. *In re* N.Y. Cty. DES Litig., 570 N.Y.S.2d 804, 806 (N.Y. App. Div. 1991).

V. THE "GOOD CAUSE" STANDARD

Discovery of nonparty medical records should be permitted, but only upon a heightened showing of "good cause" similar to the requirement imposed by FRCP 35 for compelled physical and mental examinations of parties.[132] Once the "good cause" burden is met by the party seeking discovery, courts should utilize safeguards, such as redaction, to further protect nonparty privacy interests as much as possible.

Because a compelled medical examination is the most intrusive form of medical discovery,[133] Rule 35 utilizes a "good cause" standard to provide additional protection for litigants.[134] This "good cause" requirement is a stricter burden than the standard relevance showing required under the general scope of discovery.[135] In *Schlagenhauf v. Holder*,[136] the Supreme Court considered the meaning of "good cause":

> The specific requirement of good cause would be meaningless if good cause could be sufficiently established by merely showing that the desired materials are relevant, for the relevancy standard has already been imposed by Rule 26 (b). Thus, by adding the words '. . . good cause . . . ,' the Rules indicate that there must be greater showing of need under [Rules 35] than under the other discovery rules.[137]

The Supreme Court further explained that the "good cause" requirement is "not met by mere conclusory allegations of the pleadings – nor by mere relevance to the case…."[138]

Borrowing this "good cause" standard and applying it in the context of discovery of nonparty medical records strikes the necessary balance between the competing interests discussed, *supra*, in Part I and Part II. The added "good cause" sets a high bar for discovery of nonparty medical records, recognizing that nonparties have a strong interest in maintaining the confidentiality of their medical records. This interest cannot be outweighed unless discovery of nonparty medical records is necessary to allow litigants a meaningful opportunity to present or defend their case. This need is satisfied by a "good cause" showing. Therefore, where "good cause" is shown, litigants' due process and the judicial system's pursuit of the truth must be recognized.

132. FRCP 35 provides that a court may order a mental or physical examination of a party whose mental or physical condition is "in controversy," upon a showing of "good cause." *See* FED. R. CIV. P. 35(a).

133. *See* Rothstein, *supra* note 1, at 889.

134. *See* FED. R. CIV. P. 35(a).

135. Compare FED. R. CIV. P. 35(a)(1) (rule for compelled physical and mental examinations), *with* FED. R. CIV. P. 26(b) (rule for general scope of discovery).

136. 379 U.S. 104 (1964).

137. *Id.* at 118 (internal quotations omitted).

138. *Id.*

Litigants seeking discovery of nonparty medical records must produce sufficient information to adequately demonstrate "good cause" for the records to be disclosed, even where nonparty identifying information is redacted. Mere fishing expeditions based on general assertions of relevance cannot meet the "good cause" burden. The movant must show that discovery of the nonparty medical records will adduce specific facts relevant to the cause of action and necessary to the case.[139] The "good cause" showing may be made by affidavits or other evidentiary support.[140] In some cases, an evidentiary hearing may be necessary.[141] Additionally, courts should examine the "ability of the movant to obtain the desired information by other means…."[142] Movants must show that there is no other method to acquire the information sought to be gained by discovering nonparty medical records.[143]

In conjunction with the "good cause" requirement, courts should utilize traditional safeguards, such as redaction and protective orders, to further safeguard nonparty privacy interests. As explained in Part IV, *supra*, safeguards alone are often ineffective. However, once "good cause" for discovery is established, traditional safeguards provide further assurance that nonparty privacy interests are being given the utmost consideration and protection despite the compelling need for disclosure.

CONCLUSION

Courts faced with the dilemma of whether nonparty medical records should be discoverable in civil litigation have reached differing conclusions. Intrusions into the privacy of nonparty medical records are objectionable. Moving forward, courts should utilize the "good cause" standard, coupled with procedural safeguards, to determine on a case-by-case basis whether nonparty medical records should be discoverable. This heightened standard better serves the privacy interests of nonparties while facilitating litigants' due process rights and the truth-finding process.

139. *See* Womack v. Stevens Transp., Inc., 205 F.R.D. 445, 447 (E.D. Pa. 2001) (describing Rule 35's good cause requirement).

140. *Schlagenhauf*, 379 U.S. at 119.

141. *Id.*

142. *Id.* at 118.

143. *See, e.g.*, *Womack*, 205 F.R.D. at 447.