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## AIDS: The Life and Death Conflict Between the Confidentiality of Blood Donors and the Recovery of Blood Recipients

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# AIDS: THE LIFE AND DEATH CONFLICT BETWEEN THE CONFIDENTIALITY OF BLOOD DONORS AND THE RECOVERY OF BLOOD RECIPIENTS

The emergence of the acquired immunodeficiency syndrome (AIDS)<sup>1</sup> epidemic in 1981 spawned litigation of sensitive issues relating to its spread.<sup>2</sup> The virus attacks the body's immune system, rendering

1. Congress defines AIDS as:

[A] severe collapse of the body's natural abilities to fight off infection. AIDS is the final stage of the disease believed to be caused by infection with the Human Immunodeficiency Virus (HIV). While AIDS is the most well-known and well-studied stage of illness, it is part of a spectrum of progressively more serious illnesses now believed to result from HIV. Generally, people do not die of HIV infection or the immune deficiency itself, but rather of the so-called opportunistic infections and conditions that arise as the immune system is destroyed by HIV infection.

H.R. REP. NO. 363, 101st Cong., 2d Sess., at 23 (1990).

The most common infections are a specific pneumonia (*Pneumocystis Carinii* pneumonia) and specific skin cancer (Kaposi's Sarcoma). *Id.*

2. *See, e.g.,* Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1, 909 F.2d 820, 833 (5th Cir. 1990) (finding that a licensed practical nurse was not denied equal protection when discharged for refusing to submit results of an HIV test); Weaver v. Reagen, 886 F.2d 194, 200 (8th Cir. 1989) (holding that a state could not deny Medicaid coverage of AZT to AIDS patients who were eligible for Medicaid and whose doctors had certified that AZT was a medically necessary treatment); Raytheon Co. v. Fair Employment and Hous. Comm'n, 261 Cal. Rptr. 197, 203 (Cal. Ct. App. 1989) (holding that an employer discriminated against an employee on the basis of a physical handicap in violation of the Fair Employment and Housing Act by discharging the employee solely because the employee was diagnosed as having AIDS); Wiggins v. State, 554 A.2d 356, 361-62 (Md. 1989) (noting that the wearing of gloves by guards during the prosecution of defendant who was suspected of having AIDS undermined the fairness of the fact-finding process and diluted due process principles); Life Ins. Ass'n of Mass. v. Commissioner of Ins., 530 N.E.2d 168, 172 (Mass. 1988) (finding that the Commissioner of Insurance did not

victims unable to fight infections which eventually kill them.<sup>3</sup> In July, 1982, the medical community suspected that AIDS may be transmitted through the blood stream<sup>4</sup> after observing that patients receiving blood transfusions were contracting the puzzling new disease.<sup>5</sup> At that time, institutions receiving blood donations had no specific screening procedures to detect the HIV virus.<sup>6</sup> Once the medical community confirmed that blood transfusions were one source of the spread of AIDS,<sup>7</sup> plaintiffs contracting the virus sued the blood gathering agencies under strict liability, breach of implied warranty, and negligence theories.<sup>8</sup>

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have implied authority to restrict underwriting practices of an insurance company with regard to testing prospective insureds for exposure to the AIDS virus).

3. Peter J. Nanula, Comment, *Protecting Confidentiality in the Effort to Control AIDS*, 24 HARV. J. ON LEGIS. 315, 316 (1986).

4. See generally *Kozup v. Georgetown Univ.*, 663 F. Supp. 1048 (D.D.C. 1987) for an overview of the history of the AIDS virus.

5. *Id.* at 1051. It is estimated that 200,000 people have AIDS and that approximately 1-1.5 million are infected with HIV. *AIDS Issues (Part 3): Hearings Before the Committee on Energy and Commerce of the United States House of Representatives*, 100th Cong., 1st Sess. 140 (1989). The expected mortality rate is 100%. Sharon L. Dieringer, Comment, *Blood Donation: A Gift of Life or a Death Sentence?*, 22 AKRON L. REV. 623, 623 (1989).

6. Before information on AIDS was available, blood agencies screened potential donors to avoid accepting undesirable blood. See *Belle Bonfils Memorial Blood Ctr. v. District Court*, 763 P.2d 1003, 1005 (Colo. 1988). However, donors were excluded only on the bases of medical histories of exposure to hepatitis or syphilis, history of blood disease, tuberculosis, malaria, cancer, heart problems, epilepsy, unexplained weight loss, or medication. *Id.* Potential donors were given an AIDS information sheet describing the risks of donating HIV positive blood and were then asked yes/no questions directed at their medical history. The donated blood was only tested for hepatitis B, syphilis and various antibodies, not including HIV. *Id.* at 1006.

In 1983, representatives of the American Red Cross, the Center for Disease Control, the National Institutes of Health, the Food and Drug Administration, the American Association of Blood Bankers, the National Gay Task Force, and various other blood banking and public health organizations addressed the possibility of screening out male homosexuals, but decided that the "procedure would be 'intrusive,' 'unethical,' and might institutionalize a stigma on groups already prone to prejudice and persecution." *Kozup*, 663 F. Supp. at 1051-52. Furthermore, the Workgroup questioned the effectiveness of such a procedure because potential donors might conclude that they are not at risk. *Id.* at 1052 (citing Exhibit E-3 to ARC's Motion for Summary Judgment).

7. AIDS is transmitted "only through the exchange of semen or cervical or vaginal secretions during sexual contact, from transfusions of blood products that have been contaminated with the virus, by the shared use of hypodermic needles that have been contaminated, and between an infected pregnant woman and her fetus." Richard Green, *The Transmission of AIDS*, in *AIDS AND THE LAW* 28 (Harlon L. Dalton et al. eds., 1987). It was not until 1984 that the medical community concluded that AIDS was transmitted through the blood stream. *Kozup*, 663 F. Supp. at 1052.

8. For a discussion of the various theories of recovery in AIDS-related litigation, see

Because the incubation period for AIDS is several years,<sup>9</sup> the virus has recently begun to emerge in donees who received blood prior to the use of more effective screening procedures.<sup>10</sup> Most plaintiffs assert that the blood bank's negligent screening processes proximately caused the illness and subsequent deaths of blood recipients.<sup>11</sup> In order to prevail

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generally Karen S. Lipton, *Blood Donor Services and Liability Issues Relating to Acquired Immune Deficiency Syndrome*, 7 J. LEGAL MED. 131 (1986). A plaintiff is not likely to prevail under either the theory of strict liability or implied warranty because most states have enacted statutes rendering blood donor services and hospitals liable only if the plaintiff can establish negligence. *Id.* at 135. For a discussion of negligence and strict liability theories in a law suit involving blood donations, see *Rogers v. Miles Lab., Inc.*, 802 P.2d 1346, 1347 (Wash. 1991) (holding that Washington's blood shield statute is not applicable and that the proper tort standard for manufacturers of blood and blood products is that of negligence, not strict liability as set forth in comment k of the Restatement (Second) of Torts, § 402(A) (1965)); *Kozup*, 663 F. Supp. at 1059 (noting that the furnishing of blood is more in the nature of a service than a sale of goods) (citing *Fisher v. Sibley Memorial Hosp.*, 403 A.2d 1130, 1134 (D.C. 1979)).

9. "There is thought to be a long period (up to 7 years) between exposure to [the HIV virus] and development of AIDS." Nanula, *supra* note 3, at 317. Life-table analysis suggests that AIDS will develop in about half of infected recipients. J. W. Ward et al., *The Natural History of Transfusion-Associated Infection with Human Immunodeficiency Virus. Factors Influencing the Rate of Progression to Disease*, 321 N. ENGL. J. MED. 947-52 (Oct. 5, 1989).

10. See, e.g., *Hoemke v. New York Blood Ctr.*, 912 F.2d 550, 551 (2d Cir. 1990) (recipient of transfusion in 1981 diagnosed with AIDS in 1987); *Doe v. Puget Sound Blood Ctr.*, 819 P.2d 370, 372 (Wash. 1991) (plaintiff transfused in 1984 died from AIDS-related illness in 1988); *Snyder v. Mekhjian*, 582 A.2d 307, 309 (N.J. Super. Ct. App. Div. 1990) (open heart surgery patient receiving donation in 1984 tested HIV positive in 1987 and has not yet tested positive for the AIDS virus), *aff'd*, 593 A.2d 318 (1991).

Not until 1985 did the FDA first license testing kits known as the ELISA test, which could accurately detect the HIV virus. *Belle Bonfils Memorial Blood Ctr. v. District Court*, 763 P.2d 1003, 1006 (Colo. 1988). The laboratory test has proven 98.6% effective in detecting the HIV antibody. *Kozup*, 663 F. Supp. at 1053. When the ELISA test is coupled with a second test, the Western Blot Analysis, the AIDS exposure detection rate increases to 100%. *Id.* The federal government now requires blood agencies to test all donated blood. Human Immunodeficiency Virus (HIV) Requirements, 21 C.F.R. § 610.45 (1988) states in part:

(a) *Testing requirements.* (1) Each donation of human blood or blood components intended for use in preparing a product shall be tested for antibody to HIV by a test approved for such use by FDA. . . .

11. Plaintiffs typically assert that the blood institution "knew or should have known that AIDS was transmissible through blood and should have screened donors and implemented laboratory tests to eliminate contaminated blood." *Kozup*, 663 F. Supp. at 1056. Some courts reject this line of reasoning because, at the time of transfusion, the defendant blood banks had no means to screen AIDS carriers. See, e.g., *Doe v. University of Cincinnati*, 538 N.E.2d 419, 425 (Ohio Ct. App. 1988) (rejecting plaintiff's discovery request because "the infected blood was donated prior to the time an effective

on the merits, the plaintiffs often request the donors' names and addresses through the discovery process to determine whether any of the donors have AIDS or have tested positive for the HIV virus.<sup>12</sup>

This Note analyzes the conflicts that courts face in balancing a plaintiff's right to discover a blood donor's identity under the rules of discovery against the donor's right to privacy, as well as the nation's interest in maintaining a healthy and adequate blood supply. Part I discusses a plaintiff's right to discovery under Rule 26 of the Federal Rules of Civil Procedure or comparable state procedural rules.<sup>13</sup> Part II analyzes a blood donor's constitutional right to privacy. Part III discusses the application of the physician-patient privilege to the relationship between blood banks and donors. Part IV focuses on public policy arguments regarding the national blood supply. Finally, Part V proposes possible formulas to resolve each of these conflicting interests.

## I. DISCOVERY RIGHTS UNDER RULE 26 OF THE FEDERAL RULES OF CIVIL PROCEDURE

In *Doe v. Puget Sound Blood Center*,<sup>14</sup> a plaintiff gave birth to her first child in 1984. Because of post-partum hemorrhaging, she received a blood transfusion.<sup>15</sup> In 1987, the blood center advised the plaintiff that the donor who supplied her with the blood had tested positive for the AIDS virus.<sup>16</sup> Subsequently, the plaintiff also tested positive for the disease.<sup>17</sup> Prior to the plaintiff's transfusion, the blood center had

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test for the disease had been developed"); Lipton, *supra* note 8, at 150-51 (stating that, with respect to the time period before HIV antibody testing, "a blood collecting organization adhering to the American Association of Blood Banks standards and implementing all of the screening methodologies recommended by the FDA should not be found to have breached a duty of care to prevent the transmission of . . . [AIDS] through the blood supply"). *But see Doe v. University Hosp.*, 561 N.Y.S.2d 326, 328 (N.Y. Sup. Ct. 1990) (holding that the unavailability of a screening test for AIDS prior to 1985 does not foreclose plaintiff's negligence claims arising from a 1984 transfusion).

12. See Cheryl R. Zwart, Note, *Aids: A Threat to Blood Donor Anonymity*, 66 NEB. L. REV. 863, 863 (1987). See also Snyder v. Mekhjian, 593 A.2d 318, 320-21 (N.J. 1991) (Pollock, J., concurring) (noting the stark division among states and courts regarding the rights of an AIDS-infected donee to discover the donor).

13. See Seattle Times Co. v. Rhinehart, 467 U.S. 20, 29 (1984) (noting that most states have modeled discovery provisions after Rules 26 through 37 of the Federal Rules of Civil Procedure).

14. 819 P.2d 370 (Wash. 1991).

15. *Id.* at 372.

16. *Id.*

17. *Id.*

abandoned a policy excluding gay men from donating blood. Surprisingly, the donor testified on the plaintiff's behalf at trial.<sup>18</sup> The donor, a homosexual male who had been in a long-term monogamous relationship, testified that he would not have donated blood if the center had requested that gay men refrain from donating blood, or had asked gay men not to donate if they were unsure of their partner's sexual history.<sup>19</sup> In addition, expert testimony indicated that the blood center's screening procedures were exceedingly poor.<sup>20</sup> The jury awarded nearly two million dollars to the plaintiff and her family.<sup>21</sup> Unfortunately, most persons who contract AIDS via blood transfusions do not receive the benefit of the donor's testimony or even his or her deposition. Pre-1985 transfusion AIDS cases are typically difficult for plaintiffs to win<sup>22</sup> and involve extensive battles over discovery rights.

Rule 26 of the Federal Rules of Civil Procedure affords litigants a broad opportunity to obtain relevant information.<sup>23</sup> Despite this lib-

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18. *AIDS 1-8M Verdict Stands as New Trial Denied; Donor Testified at Trial for Plaintiffs*, TOXICS L. DAILY (BNA), Jan. 10, 1991, at 12.

19. *Id.*

20. *Id.*

21. *Id.* at 10.

22. *Id.* at 11. To maintain a cause of action under a negligence theory, a plaintiff must prove the following: "(1) a duty to conform to a certain standard of conduct for the protection of others against unreasonable risk of harm; (2) breach of the duty; (3) a causal connection between the conduct and the injury; and, (4) actual loss or damage." Lipton, *supra* note 8, at 139-40.

23. Marla S. Kirsh, Note, *AIDS: Anonymity in Donation Situations—Where Public Benefit Meets Private Good*, 69 B.U. L. REV. 187, 190 (1989) (explaining the broad nature of Rule 26 and possible limitations through protective orders). Section 26(b)(1) of the Federal Rules of Civil Procedure provides that:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

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

The scope of discovery is broadly defined to facilitate the disclosure of the true facts in a controversy instead of allowing their concealment. Zwart, *supra* note 12, at 863-64 (citing *City of Edmond v. Parr*, 587 P.2d 56, 57 (Okla. 1978)). Broad discovery helps to eliminate surprise at trial, simplifies the issues and promotes the settlement of cases. *Id.* at 864 (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984)). See also *Doe v.*

eral scope of discovery, defendant blood banks faced with a request for the donor's identity typically move for protective orders pursuant to Rule 26(c).<sup>24</sup> Courts recognize that discovery matters are within their sound discretion and that they must protect the interests of the parties against possible abuse.<sup>25</sup> A judge must balance the parties' competing interests to determine if there is "good cause" to issue a protective order.<sup>26</sup> Determining "good cause" involves balancing one party's interest in discovering evidence to enhance his cause of action against the other party's, or a third person's, interest in keeping the information confidential.<sup>27</sup> In deciding whether to grant a protective order against disclosure of a donor's identity, courts must weigh the plaintiffs' interest in establishing causation and refuting claims that the virus was contracted elsewhere<sup>28</sup> against the defendants' assertions of humiliation to

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Puget Sound Blood Ctr., 819 P.2d 370, 376 (Wash. 1991) (noting that all individuals have a right to access the courts and "extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense").

24. The Federal Rules of Civil Procedure provide in part:

Upon a motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . .

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

25. FED. R. CIV. P. 26(c). "When determining the extent materials sought to be discovered may be protected, the trial court must balance the competing interests that would be served by granting or denying discovery." *Belle Bonfils Memorial Blood Ctr. v. District Court*, 763 P.2d 1003, 1010 (Colo. 1988) (citing *Bond v. District Court*, 682 P.2d 33 (Colo. 1984)). "The balancing test is accomplished by weighing the respective parties' interests in discovery of material facts against. . . a public policy interest in confidentiality." *Id.* (citing *Liedholt v. District Court*, 619 P.2d 768, 770 (Colo. 1980)).

26. See FED. R. CIV. P. 26(c). See *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545 (11th Cir. 1985). In *Farnsworth*, plaintiffs filed a products liability action against a tampon manufacturer for injuries suffered from toxic shock syndrome (TSS). *Id.* at 1546. The manufacturer sought to discover names and addresses of women who had participated in TSS research. *Id.* The Center for Disease Control, the nonparty subpoenaed for the information, filed a motion for a protective order. *Id.* The 11th Circuit conceded that "the Federal Rules of Civil Procedure strongly favor full discovery whenever possible." *Id.* at 1547. The court also acknowledged that, although ruling for a protective order requires good cause, courts have a duty to balance opposing interests in obtaining information and in keeping that information confidential. *Id.* The *Farnsworth* court held that the interest in keeping the names of participants in the TSS study confidential outweighed the discovery interests of the tampon manufacturer. *Id.* The court further noted that section 26(c) of the Federal Rules of Civil Procedure gives courts discretion to fashion protective orders as they see fit. *Id.* at 1548.

27. 758 F.2d at 1547.

28. Denise C. Andresen, Note, *AIDS-Related Litigation: The Competing Interests*

the donor and inadequacy of the blood supply.<sup>29</sup>

Courts are split on the scope of discovery in AIDS-related litigation.<sup>30</sup> Because AIDS testing procedures were not in effect during the

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*Surrounding Discovery of Blood Donors' Identities*, 19 IND. L. REV. 561, 569 (1986). *Bradway v. American Nat'l Red Cross*, 132 F.R.D. 78, 80 (N.D. Ga. 1990) (plaintiffs asserting that "donors may have relevant information as to the accuracy and/or negligence" of blood screening methods); see also *Snyder v. Mekhjian*, 593 A.2d 318, 324-25 (N.J. 1991) (Pollock, J., concurring) (noting plaintiffs' strong interest in discovery in light of the blood bank's categorical denial of negligence or causation); *Tarrant County Hosp. Dist. v. Hughes*, 734 S.W.2d 675, 680 (Tex. Ct. App. 1987) (finding that a hospital made no effort to determine whether any of its donors had AIDS and merely sought a blanket denial).

29. See, e.g., *Doe v. University of Cincinnati*, 538 N.E.2d 419, 425 (Ohio Ct. App. 1988) (explaining defendant's argument that the donor has an expectation of confidentiality and society has an interest in maintaining an adequate blood supply).

30. Some courts issue a protective order pursuant to section 26(c) of the Federal Rules of Civil Procedure. See, e.g., *Bradway v. American Nat'l Red Cross*, 132 F.R.D. 78, 80 (N.D. Ga. 1990) (finding that a protective order precluding the release of donor identities is warranted because of concern with donors' privacy rights and danger to the nation's blood supply); *Coleman v. American Red Cross*, 130 F.R.D. 360, 363 (E.D. Mich. 1990) (holding that "plaintiffs' discovery needs are outweighed by the societal interest in an adequate and safe blood supply"); *Doe v. American Red Cross Blood Serv.*, 125 F.R.D. 646, 650 (D.S.C. 1989) (holding that "society's interest in maintaining an adequate and safe supply of volunteer blood, coupled with the donor's interest in privacy, far outweighs plaintiffs interest in questioning the donor"); *Doe v. University of Cincinnati*, 538 N.E.2d 419, 425 (Ohio Ct. App. 1988) (holding that "the harm which could result from disclosure . . . when balanced under Civ. R. 26(c), [is] paramount to plaintiff's interests in pretrial discovery"); *Rasmussen v. South Florida Blood Serv.*, 500 So. 2d 533, 538 (Fla. 1987) (noting that the probative value of plaintiff's discovery needs is dubious in light of the significant harm to donors in permitting a fishing expedition).

Other courts have limited the protective order. See, e.g., *Boutte v. Blood Sys., Inc.*, 127 F.R.D. 122, 126 (W.D. La. 1989) (allowing the plaintiff to depose the donor without the donor giving his or her name, address, social security number, or any other identifying information); *Mason v. Regional Medical Ctr. of Hopkins County*, 121 F.R.D. 300, 303 (W.D. Ky. 1988) (concluding that the donor should be required to comply with discovery, but that his or her identity should be kept confidential and revealed only to limited persons); *Quintana v. United Blood Serv.*, 811 P.2d 424, 432 (Colo. Ct. App. 1991) (finding that "[i]n order to obtain sufficient information regarding screening and testing procedures, a patient is entitled to have controlled access to the donor for discovery"); *Doe v. Puget Sound Blood Ctr.*, 819 P.2d 370, 372 (Wash. 1991) (affirming the trial court's order requiring written disclosure of information including the donor's name, address, phone number, and social security number to be revealed when the donor is named as defendant); *Howell v. Spokane & Inland Empire Blood Bank*, 818 P.2d 1056, 1058-62 (Wash. 1991) (granting the plaintiff access to donor's medical records, interrogatories, and a videotape deposition with donor's face obscured, but denying disclosure of donor's identity); *Snyder v. Mekhjian*, 582 A.2d 307, 315 (N.J. Super. Ct. App. Div. 1990) (finding the patient was entitled to learn the name of the donor, under controlled discovery processes), *aff'd*, 593 A.2d 318 (N.J. 1991); *Stenger v. Lehigh Valley Hosp. Ctr.*, 563 A.2d 531, 537 (Pa. Super. Ct. 1989) (ordering the



time that the plaintiffs received the blood transfusions, plaintiffs urge that donors' depositions could reveal inadequacies in an agency's screening procedures.<sup>31</sup> In addition, the donor's identity could reveal that the donor has AIDS, is in a high risk group, or has subsequently tested positive for the HIV virus.<sup>32</sup> Such factors might indicate that

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court on remand to fashion an order permitting the plaintiffs to learn the screening procedure at the time of the donation at issue, while protecting the identity and confidentiality of the donor); *Belle Bonfils Memorial Blood Ctr. v. District Court*, 763 P.2d 1003, 1013 (Colo. 1988) (holding that a patient's interest in obtaining controlled access to a donor to discover whether screening procedures were followed outweighed the donor's interest in privacy).

One court went so far as to allow full disclosure of the donor's identity, but prohibited the plaintiffs from further contacting the donor without court approval. *See, e.g., Gulf Coast Regional Blood Ctr. v. Houston*, 745 S.W.2d 557, 558 (Tex. Ct. App. 1988) (holding that due process rights of blood donors did not protect their identities from controlled disclosure); *Tarrant County Hosp. Dist. v. Hughes*, 734 S.W.2d 675, 679 (Tex. Ct. App. 1987) (finding the plaintiff's interest in learning the identity of the donor legitimate because without the information, the plaintiff would not be able to prosecute her cause of action).

31. *See, e.g., Most v. Tulane Medical Ctr.*, 576 So. 2d 1387, 1388 (La. 1991) (finding that plaintiffs need the donor's identity in order to determine the screening process because the materials offered by the blood bank failed to indicate whether it followed procedures); *Stenger v. Lehigh Valley Hosp. Ctr.*, 563 A.2d 531, 536 (Pa. Super. Ct. 1989) (stating that the need for the information in these cases cannot be characterized as "dubious at best" because plaintiffs legitimately need to question the donors about the screening procedures to determine if procedures were adequately followed). Questions highly pertinent to the issue of negligence which are only available from the donor include:

Did the donor here have [AIDS] symptoms [when he donated blood]? Was he asked about them? Was he physically examined in this respect? Was he given the appropriate high-risk group self-screening information? Was a reasonable effort made to determine if he was in a high-risk category? Were his responses to the medical history questions accurately recorded? Were the questions adequately explained to him? Would present screening requirements, short of laboratory testing, have revealed his AIDS infection?

*Snyder v. Mekhjian*, 582 A.2d 307, 314 (N.J. Super. Ct. App. Div. 1990), *aff'd*, 593 A.2d 318 (N.J. 1991). The only method in effect before 1985 (when the serological testing of blood for HIV antibodies was implemented) was self-deferral. *See Zwart, supra* note 12, at 865-66 stating that "[b]ecause transfusion-related AIDS is not a 'thing of the past,' the issue of donor confidentiality and the right to avoid discovery is not a moot issue").

32. Samson et al., *Identification of HIV-infected Transfusion Recipients: the Utility of Crossreferencing Previous Donor Records With AIDS Case Reports*, 30 *TRANSFUSION* 214-18 (Mar-Apr 1990).

An expanded 'look-back' program has been developed, in which patients who may have been exposed to HIV through blood transfusions were identified via three triggers: the blood that they received was donated by persons who 1) have subsequently been reported to local health departments as meeting the diagnostic criteria

the donated blood was the source of plaintiffs' AIDS.<sup>33</sup>

Blood centers, on the other hand, argue vigorously that a protective order is warranted because discovery of the donors' identities would cause the donors "annoyance, embarrassment, oppression, or undue burden."<sup>34</sup> The centers assert that the donors have a more compelling interest in avoiding potentially "devastating effects on employment, insurability," and reputation.<sup>35</sup> Moreover, defendants allege a chilling effect on the availability of volunteer blood donors.<sup>36</sup> In balancing the conflicting interests of all of the parties involved, it is imperative to recognize that both sides have much at stake. Therefore, a court must carefully scrutinize each argument and fashion the most equitable resolution.<sup>37</sup>

## II. CONSTITUTIONAL RIGHT TO PRIVACY

Although not specifically enumerated in the United States Constitution, the Supreme Court has acknowledged the right to privacy.<sup>38</sup> In

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for AIDS, 2) have donated since the introduction of anti-HIV screening and tested positive, or 3) have been found to be infected during investigation of reported transfusion-associated HIV infections.

*Id.*

33. See, e.g., *Snyder*, 582 A.2d at 314 (holding that the defendants' unwillingness to admit that the donor's blood was contaminated entitled the plaintiff to seek direct proof that the donor was HIV positive at the time of transfusion).

34. FED. R. CIV. P. 26(c). See *supra* note 24 for the pertinent part of Rule 26(c).

35. Kirsh, *supra* note 23, at 193. See also *Doe v. Puget Sound Blood Ctr.*, 819 P.2d 370, 376 (Wash. 1991) (citing the petitioner's brief which asserted that disclosure of the donor's identity would "threaten family relationships, job security, employability, and ability to obtain credit, insurance and housing").

36. *South Florida Blood Serv. v. Rasmussen*, 467 So. 2d 798, 804 (Fla. Dist. Ct. App. 1985) (stating that an important means of attaining the goal of a healthy blood supply is through an all-voluntary blood donation system because donated blood is less likely to be contaminated with infectious diseases than that of paid donors). *Rasmussen v. South Florida Blood Serv.*, 500 So. 2d 533, 537-38 (Fla. 1987) (finding that the prospect of inquiry into donors' private lives would deter blood donation and add further to the unnecessary reduction in blood donors because of the baseless fear that donation can transmit the virus). *But see Puget Sound*, 819 P.2d at 378-79 (dismissing this argument as mere speculation about human conduct).

37. See, e.g., *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1548 (11th Cir. 1985) ("Rule 26(c) gives the district court discretionary power to fashion a protective order").

38. See, e.g., *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 456-62 (1977) (holding that, although the President had a legitimate expectation of privacy in personal communications, an Act allowing screening of his materials was not an unconstitutional invasion of privacy); *Whalen v. Roe*, 429 U.S. 589, 603-04 (1977) (finding that requiring

the landmark case, *Griswold v. Connecticut*,<sup>39</sup> the Supreme Court recognized a constitutional right to privacy based upon a penumbra of specific guarantees in the Bill of Rights.<sup>40</sup> The Supreme Court has specifically expressed that a constitutional right to privacy exists in marital activities, procreation, family matters, child rearing and education, and contraception.<sup>41</sup> The Supreme Court has declined to hold that the right to privacy against disclosure of confidential information is specifically enumerated in the United States Constitution.<sup>42</sup>

In *Whalen v. Roe*,<sup>43</sup> a state statute required the filing of patients' names and addresses who obtained, pursuant to a doctor's prescription, drugs which had both lawful and unlawful uses.<sup>44</sup> The physicians and patients challenged the constitutionality of the statute on the ground that the statute violated their protected "zone of privacy"<sup>45</sup> and would adversely affect their reputations if the information became public.<sup>46</sup> This threat, they argued, would make physicians hesitant to prescribe needed drugs, and patients hesitant to pursue health care.<sup>47</sup> Although the Court recognized that every individual possesses the right to pri-

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disclosure to the state of the names of patients using Schedule II drugs does not automatically amount to an impermissible invasion of privacy); *Roe v. Wade*, 410 U.S. 113, 155-56 (1973) (holding that a state prohibition of abortion must be strictly necessary to the achievement of a compelling state interest in order to override a woman's right to privacy in childbearing matters); *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965) (finding a right to privacy in marital decisions involving contraception).

39. 381 U.S. 479 (1965).

40. *Id.* at 484-85. The Court found that a Connecticut statute forbidding the use of contraceptives violated the implied constitutional right to marital privacy. *Id.* at 485.

41. Andresen, *supra* note 28, at 576 (citing *Roe v. Wade*, 410 U.S. 113, 152 (1973)).

42. Lipton, *supra* note 8, at 174.

43. 429 U.S. 589 (1977).

44. *Id.* at 591-93. The purpose of the statute was to prevent the use of stolen or revised prescriptions, to "prevent unscrupulous pharmacists from repeatedly refilling prescriptions, to prevent users from obtaining prescriptions from more than one doctor, [and] to prevent doctors from over-prescribing." *Id.* at 592.

45. *Id.* at 598. The court noted that cases involving rights to privacy contain an "individual interest in avoiding disclosure of personal matters" and an "interest in independence in making certain kinds of important decisions." *Id.* at 599-600. Even though the boundaries of the constitutional right to privacy have not been succinctly defined, its application has been limited to only protecting rights so personal that they are "fundamental" or "implicit in the concept of ordered liberty." Andresen, *supra* note 28, at 576 (quoting *Roe*, 410 U.S. at 152).

46. 429 U.S. at 600.

47. *Id.*

vacy,<sup>48</sup> this right is not absolute.<sup>49</sup> The Court held that the impact of the statute on either the patients' reputation or independence was insufficient to constitute an invasion of the right to privacy.<sup>50</sup>

Because there is no general constitutional right to privacy, protection is left to the states.<sup>51</sup> Therefore, a person's claim to privacy is subject to a balancing of interests.<sup>52</sup> The court in *Rasmussen v. South Florida Blood Serv.*<sup>53</sup> was the first to discuss privacy interests involved in the discovery of donors' identities in a transfusion-related AIDS case.<sup>54</sup> In *Rasmussen*, an accident victim received fifty-one units of blood via transfusion and died of AIDS two years later.<sup>55</sup> In an attempt to prove that the blood transfusion was the source of the AIDS, the decedent's estate sought information containing the blood donors'

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48. *Id.* at 598 n.23.

49. *Id.* at 602. The Court explained that "[r]equiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy." *Id.*

50. 429 U.S. at 603-04. The Court used a balancing test to determine whether the physicians' and patients' privacy rights were greater than the social benefit derived through the statute. *Id.* at 598-604. The Court concluded that the State had a legitimate interest in the information and the statute adequately protected against public disclosure. *Id.* at 603.

51. 53. *Id.* at 607-08 (Stewart, J., concurring)(citing *Katz v. United States*, 389 U.S. 350, 350-51).

52. Robert K. Jenner, *Identifying HIV-Infected Blood Donors: Who is 'John Donor'?*, TRIAL, June 1989 at 47, 48. Many states have enacted statutes "intended to protect the confidentiality of individual AIDS records while assuring their limited availability for essential health, scientific and other legitimate purposes." *Snyder v. Mekhjian*, 582 A.2d 307, 314 (N.J. Super. Ct. App. Div. 1990), *aff'd*, 593 A.2d 318 (N.J. 1991). Unless the statute expressly provides for disclosure, the records may be obtained only by a court order for good cause. This requires the court to "weigh the public interest and need for disclosure against the injury to the person who is the subject of the record." *Id.*

*See also* Nanula, *supra* note 3, at 346 proposing, in part:

The results of an AIDS blood test may be disclosed under a lawful court order, as follows:

a. if personally identifying information is subpoenaed, the [state department of health] shall seek and the court shall issue a protective order keeping this information confidential; and

b. the court order shall limit the use and disclosure of records, require deletion of personally identifying information, provide sanctions for misuse of records, and set forth other methods for assuring confidentiality.

*Id.*

53. 500 So. 2d 533 (Fla. 1987).

54. Jenner, *supra* note 52, at 48.

55. 500 So. 2d at 534.

names and addresses.<sup>56</sup> The Florida court denied discovery, noting that the Florida right to privacy extends protection against disclosure of information relating to all facets of an individual's life.<sup>57</sup> The Florida Supreme Court agreed with the lower court that "AIDS is the modern day equivalent of leprosy. AIDS, or a suspicion of AIDS, can lead to discrimination in employment, education, housing and even medical treatment."<sup>58</sup>

Although some courts have followed the *Rasmussen* rationale,<sup>59</sup> the impact of its holding has diminished as AIDS-related litigation has increased. More recent cases have found that the donor's interest in privacy is not fundamental and, therefore, does not warrant full protection.<sup>60</sup> Most recently, *Snyder v. Mekhjian*<sup>61</sup> followed the grow-

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56. *Id.* Plaintiff's interest was in establishing that one or more of the donors either had AIDS or was in a high risk group. *Id.* at 537.

57. *Id.* at 536-38. The court explained that "[w]e cannot ignore, therefore, the consequences of disclosure to nonparties, including the possibility that a donor's co-workers, friends, employers, and others may be queried as to the donor's sexual preferences, drug use, or general life-style." *Id.* at 537. *But see Doe v. Roe*, 267 Cal. Rptr. 564, 568 (Cal. Ct. App. 1990) (finding that "the incidental burden on a defendant in forcing him to disclose details of his sex life is not sufficient to outweigh the strong interest in preventing the spread of communicable sexual diseases").

58. 500 So. 2d at 537 (citing *South Florida Blood Serv. v. Rasmussen*, 467 So. 2d 798, 802 (Fla. Dist. Ct. App. 1985)).

59. *See, e.g., Doe v. American Red Cross Blood Servs.*, 125 F.R.D. 646, 656 (D.S.C. 1989) (finding support in *Rasmussen* to deny motions to compel discovery of blood donors' identities); *Doe v. University of Cincinnati*, 538 N.E.2d 419, 424 (Ohio Ct. App. 1988) (finding the *Rasmussen* rationale persuasive).

60. *See, e.g., Boutte v. Blood Sys., Inc.*, 127 F.R.D. 122, 125-26 (W.D. La. 1989) (finding that, although a donor has a privacy interest in remaining anonymous, the plaintiff must be able to prosecute his claim); *Mason v. Regional Medical Ctr. of Hopkins County*, 121 F.R.D. 300, 303 (W.D. Ky. 1988) (rejecting a donor's constitutional claim to privacy when the plaintiff was trying to press a claim); *Doe v. Puget Sound Blood Ctr.*, 819 P.2d 370, 376 (Wash. 1991) (declining to entertain a privacy argument similar to *Rasmussen* because the donor had died and therefore the reasons for confidentiality had disappeared); *Snyder v. Mekhjian*, 582 A.2d 307, 314-15 (N.J. Super. Ct. App. Div. 1990) (finding where litigant's discovery need cannot otherwise be met, and it is possible to accommodate that need with limited intrusion, access under court supervision is justifiable), *aff'd*, 593 A.2d 318 (N.J. 1991); *Stenger v. Lehigh Valley Hosp. Ctr.*, 563 A.2d 531, 536 (Pa. Super. Ct. 1989) (noting that restrictions guaranteeing the limited scope of questioning will protect the donor while allowing plaintiffs to pursue their legitimate claim); *Belle Bonfils Memorial Blood Ctr. v. District Court*, 763 P.2d 1003, 1013 (Colo. 1988) (finding that the plaintiffs' interests in pursuing their claim outweigh the donor's privacy interest); *Gulf Coast Regional Blood Ctr. v. Houston*, 745 S.W.2d 557, 560 (Tex. Ct. App. 1988) (holding that the defendant has not established a societal interest paramount to the plaintiff's right to discover the donor's identity); *Tarrant*

ing trend of cases allowing discovery in a limited capacity.<sup>62</sup> Noting that the plaintiff could not prove the blood center's negligence without information from the donor, the New Jersey court carefully crafted an order giving the plaintiff a reasonable discovery opportunity at the least possible cost to the donor's confidentiality interests.<sup>63</sup> The *Snyder* court ordered the lower court on remand to determine the best procedure to protect both the plaintiff's and donor's interests.<sup>64</sup> The court noted that the donor's name would not need to be supplied if the lower court allowed a veiled deposition or an anonymous questionnaire.<sup>65</sup> On appeal, the Supreme Court of New Jersey affirmed the decision based upon the reasons expressed in the appellate division opinion.<sup>66</sup>

The conflicting views between the *Rasmussen* court and the *Snyder* court illustrate the varying significance that courts place on a donor's right to privacy.<sup>67</sup> Perhaps the most compelling argument against the

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County Hosp. Dist. v. Hughes, 734 S.W.2d 675, 679 (Tex. Ct. App. 1987) (affirming the trial court's order compelling identification of blood donors).

61. 582 A.2d 307 (N.J. Super. Ct. App. Div. 1990), *aff'd*, 593 A.2d 318 (N.J. 1991).

62. See, e.g., *Boutte v. Blood Sys., Inc.*, 127 F.R.D. 122, 126 (W.D. La. 1989) (allowing the deposition of a donor, but limited identification of the donor as Donor X); *Mason v. Regional Medical Ctr. of Hopkins County*, 121 F.R.D. 300, 303 (W.D. Ky. 1988) (allowing discovery but keeping the donor's name confidential); *Doe v. Puget Sound Blood Ctr.*, 819 P.2d 370, 379 (Wash. 1991) (upholding an order requiring defendant blood center to disclose information about the donor including name and address); *Howell v. Spokane & Inland Empire Blood Bank*, 818 P.2d 1056, 1061 (Wash. 1991) (finding that an order allowing a videotaped deposition of a donor with his face obscured sufficiently accommodated both the plaintiff's discovery interest and the donor's privacy interest); *Stenger v. Lehigh Valley Hosp. Ctr.*, 563 A.2d 531, 537 (Pa. Super. Ct. 1989) (suggesting that a donor may be identified by numbers or "some other method of protecting his or her identity"); *Belle Bonfils Memorial Blood Ctr. v. District Court*, 763 P.2d 1003, 1013 (Colo. 1988) (ordering that a donor submit to a written deposition while having his identity protected).

63. 582 A.2d at 315.

64. *Id.*

65. *Id.*

66. 593 A.2d 318, 319 (N.J. 1991). The concurring opinion agreed that courts can limit discovery orders to avoid excessive intrusions into private and personal matters and that the appellate division's order adequately protected the donor. *Id.* at 325 (Pollock, J., concurring). However, the concurrence addressed the significant privacy issues involved in AIDS litigation. The judge noted that "no disease in modern history has engendered so much attention, fear, and even hysteria as AIDS." *Id.* at 323. Because AIDS victims "confront not only a deadly disease, but ostracism," human decency requires limits on discovery in civil litigation. *Id.*

67. See *Mason v. Regional Medical Ctr.*, 121 F.R.D. 300, 301 (W.D. Ky. 1988) which discusses several court decisions considering the question of blood donor privacy: While . . . *Rasmussen* extend[s] the holding of *Whalen v. Roe* to recognize a consti-

discovery of the donor's identity is the stigma that attaches to a person who either has the disease or is associated with a high risk group.<sup>68</sup> The majority of AIDS victims are either homosexuals or intravenous drug users—groups that society has historically ostracized.<sup>69</sup> The dissenting judge in the *Rasmussen* lower court opinion noted that if the donors are within a high risk group, their “right to privacy” must give way to disclosing and paying the price for the grievous harm that they may have caused.<sup>70</sup> Such an opinion promotes detailed investigations into the donor's private sexual and social behavior, and possibly further discrimination against AIDS victims.<sup>71</sup>

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tutional right of privacy against disclosure of personal matters, the United States Court of Appeals for the Sixth Circuit has not ventured quite so far. . . .

...  
 We therefore, conclude that the claim of constitutionally protected blood donor privacy . . . is a claim beyond the boundaries of the right of privacy as established by the United States Supreme Court. . . .

*Id.* at 302-03. *See also* Snyder v. Mekhjian, 593 A.2d 318, 320-21 (N.J. 1991) (Pollock, J., concurring) (listing recent cases which have divided on the issues of blood donor privacy and plaintiff discovery rights). *But see* Kirsh, *supra* note 23, at 205. “In the context of blood donor confidentiality . . . both the potential invasion into the most personal aspects of a donor's life and the donor's expectation of confidentiality should elevate the individual's interest in anonymity to that of a fundamental privacy right that should be strictly protected.” *Id.* The plaintiff's interest in compensation and society's interest in fair and effective litigation cannot override the donor's compelling interest. *Id.*

68. *See generally* *Rasmussen v. South Florida Blood Serv.*, 500 So. 2d 533 (Fla. 1987). The *Rasmussen* court stated that “[d]isclosure of donor identities in any context involving AIDS could be extremely disruptive and even devastating to the individual donor. If the requested information is released, and petitioner queries the donors' friends and fellow employees, it will be functionally impossible to prevent occasional references to AIDS.” *Id.* at 537.

69. *Id.* at 536. One author points out that “[o]nly particular classes of people, such as drug users, prostitutes and homosexuals, most of them already vulnerable to possible social stigma and even criminal penalties, have been identified as being at risk for AIDS.” Nanula, *supra* note 3, at 317. *But see Rasmussen*, 500 So. 2d at 536-37 (including hemophiliacs, heterosexual partners of AIDS victims, and blood transfusion recipients in the AIDS high risk category).

70. *South Florida Blood Serv. v. Rasmussen*, 467 So. 2d 798, 805 (Fla. Dist. Ct. App. 1985)(Schwartz, C.J., dissenting).

71. *See* Kirsh, *supra* note 23, at 201 (stating that the dissenting judge in *Rasmussen* believed that an at-risk donor is worthy of scorn regardless of knowledge of his inclusion in a high risk group at the time of donation). The author asserts that “the only effective order is one that completely protects the confidentiality of the donor.” *Id.* at 203. *See also* Snyder v. Mekhjian, 593 A.2d 318, 323 (N.J. 1991) (Pollock, J., concurring) (stating that “unrestricted discovery could lead to inquiries about such matters as the identity of the donor's sexual partners, the donor's sexual habits, and his or her use of intravenous drugs”).

However, recent courts, such as the *Snyder* court, are sensitive to both the plaintiff's right to recovery and the donor's privacy interests. Absent public disclosure, the fears expressed in *Rasmussen* are unfounded.<sup>72</sup> Moreover, blood institutions who are more interested in protecting themselves from liability than protecting a "fundamental right" of blood donors, assert the donors' right to privacy.<sup>73</sup> The true motives of the blood agencies, coupled with the courts' power to protect the donor from public exploitation, tips the scale in favor of discovery.<sup>74</sup>

### III. PHYSICIAN-PATIENT PRIVILEGE

Closely tied to a constitutional right to privacy, blood institutions argue that confidentiality is protected by the physician-patient privilege. The Code of Federal Regulations allows qualified physicians or trained, supervised assistants to collect blood.<sup>75</sup> Blood banks contend that nurses working under the supervision of a physician fall within the confines of the applicable physician-patient privilege statute; therefore, the records containing donor identities are protected.<sup>76</sup> This concept, is difficult to apply, however, because blood banks are not physicians, and donors are not patients.<sup>77</sup>

Blood institutions assert that the policies underlying the physician-

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72. Andresen, *supra* note 28, at 584. Public disclosure of the donors' identities is not necessary and discovery is subject to judicial control. *Id.*

73. *Id.* at 585. The author notes that "blood organizations may assert these rights on the pretext of protecting donors while, in reality, they are attempting to insulate themselves from liability." *Id.* See also *Doe v. Puget Sound Blood Ctr.*, 819 P.2d 370, 376 (Wash. 1991) (recognizing the blood center's necessity to establish its standing to assert the constitutional rights of the donor and the donor's family); *Pflaum v. Psychology Examining Bd.*, 331 N.W.2d 614, 616 (Wis. Ct. App. 1983) (holding that "[t]he right of privacy is limited to those personal rights that can be deemed 'fundamental,' or 'implicit in the concept of ordered liberty'").

74. The privacy argument would be more compelling if the donors were parties to the litigation. Andresen, *supra* note 28, at 586.

75. Jenner, *supra* note 52, at 51 (citing 21 C.F.R. § 640.4 (1984)). 21 C.F.R. § 640.4(a) (1991) provides that "[b]lood shall be drawn from the donor by a qualified physician or under his supervision by assistants trained in the procedure." *Id.*

76. Jenner, *supra* note 52, at 51. See also *Doe v. University of Cincinnati*, 538 N.E.2d 419, 422 (Ohio Ct. App. 1988) (refusing to extend the physician-patient privilege to a blood institution's collection of a donor's blood).

77. Zwart, *supra* note 12, at 878. "The relationship between a patient and physician is based on the patient's need for the physician's expertise. This differs from the relationship between a donor and blood bank. The donor and blood bank work together not to afford a benefit to either of them, but to a third person." *Id.*



patient privilege apply equally as well to the institutions' relationship with its donors.<sup>78</sup> The central purpose of the physician-patient privilege of confidentiality is to promote the free disclosure of information between the physician and patient and to prevent the patient from potential embarrassment and invasion of privacy resulting from a disclosure.<sup>79</sup> Blood banks contend that if donors believe that their private communications could be disclosed, donors will be deterred from honest disclosure and will lose faith in the fiduciary relationship created between blood banks and donors.<sup>80</sup>

Although the physician-patient privilege may differ according to each state's applicable statute, most statutes require proof of a physician, a patient, and a communication.<sup>81</sup> Because courts strictly con-

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78. *Id.*

79. *Id.*

80. *Id.* See also *Head v. Colloton*, 331 N.W.2d 870 (Iowa 1983). The issue before the court was whether a person who submitted to tissue typing tests for the purpose of determining suitability as a donor was a "patient" protected from public disclosure. *Id.* at 872. The court found that "[o]nce a [blood] donor is accepted . . . his person is unquestionably placed under the control of the hospital personnel operating the laboratory, and he must rely on their professional skills as in any other hospital-patient relationship." *Id.* at 876 (quoting *Smith v. Hospital Auth.*, 287 S.E.2d 99, 101-02 (Ga. Ct. App. 1981)). The court further reasoned that the hospitals' duty to protect confidentiality should not depend on whether the procedure is for that person's benefit or the benefit of someone else. *Id.* In both cases, the fiduciary relationship is the same. *Id.*

81. Jenner, *supra* note 52, at 51. See, e.g., CAL. EVID. § 994 (West 1966 & Supp. 1992) ("[T]he patient, whether or not a party, has a privilege to refuse to disclose . . . a confidential communication between patient and physician . . ."); ILL. REV. STAT. ch. 110, para. 8-802 (1989) ("[N]o physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character . . ."); IND. CODE ANN. § 34-1-14-5 (Burns Supp. 1991) ("[P]hysicians [shall not be competent witnesses] as to [matters] communicated to them . . . by patients, in the course of their professional business . . ."); MICH. COMP. LAWS ANN. § 600.2157 (West Supp. 1991) ("[A] person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician . . ."); OHIO REV. CODE ANN. § 2317.02 (B)(1) (Baldwin 1991) ("[A] physician . . . [shall not testify] concerning a communication made to him by his patient . . ."); 42 PA. CONS. STAT. ANN. § 5929 (1982) ("[N]o physician shall be allowed . . . to disclose any information which he acquired in attending the patient in a professional capacity . . ."); TEX. REV. CIV. STAT. ANN. art. 4495b § 5.08(a) (West Supp. 1988) ("[C]ommunications between one licensed to practice medicine, relative to or in connection with any professional services as a physician to a patient, is confidential and privileged and may not be disclosed . . ."). *But see* MINN. STAT. ANN. § 595.02(g) (West 1988) ("[A] registered nurse, psychologist or consulting psychologist shall not . . . be allowed to disclose any information . . . which the professional has acquired in attending the client in a professional capacity . . .").

strue physician-patient statutes, most courts have found that nurses and medical technicians do not satisfy the physician requirement.<sup>82</sup> Moreover, because a patient is generally defined as a person under medical treatment or care,<sup>83</sup> donors rarely fall within the category of "patient." In addition, courts have defined a "communication" as information concerning facts or statements necessary to enable a physician to diagnose a patient, not merely conversation.<sup>84</sup>

The weight of authority adopts the view that the physician-patient privilege does not apply to the relationship between blood banks and donors.<sup>85</sup> One court held, however, that a donor's confidentiality is protected by the physician-patient privilege. In *Krygier v. Airweld*,

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82. See, e.g., *Belle Bonfils Memorial Blood Ctr. v. District Court*, 763 P.2d 1003, 1009 (Colo. 1988) (stating that "[t]he privilege does not include communications with medical technicians"); *Doe v. University of Cincinnati*, 538 N.E.2d 419, 422 (Ohio Ct. App. 1988) (stating that the Ohio Supreme Court has refused to extend the privilege to communications made to a nurse while performing her duties unless the nurse is also a physician).

83. BLACK'S LAW DICTIONARY 1126 (6th ed. 1990). N.J. STAT. ANN. § 2A:84 - 22.1 (West 1985) defines "patient" as "a person who, for the sole purpose of securing preventive, palliative, or curative treatment . . . of his physical or mental condition, consults a physician, or submits to an examination by a physician."

84. *Jenner*, *supra* note 52, at 51. See also *Doe v. University of Cincinnati*, 538 N.E.2d 419, 423 (Ohio Ct. App. 1988) (noting that the donor is not seeking treatment and therefore his answers do not fall within the definition of "communication" for purposes of physician-patient privilege); COLO. REV. STAT. ANN. § 13-90-107 (1)(d) (West Supp. 1991) (restricting privileged information to "any information acquired in attending the patient which was necessary to enable [the physician, surgeon, or registered professional nurse] to prescribe or act for the patient").

85. See, e.g., *Doe v. Puget Sound Blood Ctr.*, 819 P.2d 370, 374 (Wash. 1991) (holding that the physician-patient privilege does not protect a blood donor's identity); *Stenger v. Lehigh Valley Hosp. Ctr.*, 563 A.2d 531, 537 (Pa. Super. 1989) (noting that a "physician" did not perform the procedure and the donor was not acting in the role of a "patient" seeking treatment by undergoing the procedures involved in drawing blood); *Belle Bonfils Memorial Blood Ctr. v. District Court*, 763 P.2d 1003, 1009 (Colo. 1988) (stating that the interviewer was not a medically trained physician, surgeon, or professional nurse and the privilege does not include communications with medical technicians); *Doe v. University of Cincinnati*, 538 N.E.2d 419, 423 (Ohio Ct. App. 1988) (finding that a blood donor was not seeking treatment for himself and that his answers were not "communication" for purposes of invoking the physician-patient privilege); *Tarrant County Hosp. Dist. v. Hughes*, 734 S.W.2d 675, 677 (Tex. Ct. App. 1987) (holding the physician-patient privilege inapplicable because "[n]othing in the record reflects that the blood donors were seen by a physician or received medical care when they donated blood"). *But see Krygier v. Airweld, Inc.*, 520 N.Y.S.2d 475, 476 (N.Y. Sup. Ct. 1987) (finding the physician-patient privilege satisfied because the person attending to the donor was "either a physician, registered nurse, licensed practical nurse or phlebotomist").

*Inc.*,<sup>86</sup> a plaintiff brought a wrongful death action arising out of a patient's exposure to AIDS-infected blood against the blood bank.<sup>87</sup> The court held that New York's codification of the physician-patient privilege applied to the relationship between a blood donor and the blood bank.<sup>88</sup> In reaching this conclusion, the court relied on the policy reasons underlying the statute.<sup>89</sup> Because the blood donor altruistically donated his or her blood, the court stated that the law should protect the privacy of the donors and prevent their exposure to embarrassment.<sup>90</sup> In addition, the *Krygier* court reasoned that society has a substantial interest in promoting the free flow of information between the blood bank and the donor to ensure proper treatment.<sup>91</sup> Although the *Krygier* court found that the physician-patient privilege applied to the relationship between a blood bank and its donors, its holding is limited to instances in which the statute provides that information acquired by registered nurses is privileged, and in which a registered nurse is active in recording donor information.<sup>92</sup>

As previously noted, most physician-patient privilege statutes apply only to information given to a licensed physician.<sup>93</sup> Unless the blood bank can either demonstrate physician involvement in the donation process or show that the applicable statute includes registered nurses, the donors' confidentiality will remain unprotected under the physi-

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86. 520 N.Y.S.2d 475 (N.Y. Sup. Ct. 1987).

87. *Id.* at 476.

88. *Id.*

89. *Id.*

90. 520 N.Y.S.2d at 476-77.

91. *Id.* at 476.

92. See Richard C. Bollow & Daryl J. Lapp, *Protecting the Confidentiality of Blood Donors' Identities in AIDS Litigation*, 37 DRAKE L. REV. 343, 347 (1987-88) (discussing theories advanced to protect blood donor's identity). The New York Statute, N.Y. CIV. PRAC. L. & R. § 4504 (a) (McKinney Supp. 1991) provides:

Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry or chiropractic shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity.

*Id.*

The *Krygier* court found that because blood is collected according to strict procedures and the person attending to the donor is "either a specially trained physician, registered nurse, licensed practical nurse or phlebotomist," the requisite physician-patient privilege is met. *Krygier*, 520 N.Y.S.2d at 476.

93. Bollow & Lapp, *supra* note 92, at 348-49. See *supra* note 81 for examples of physician-patient privilege statutes.

cian-patient privilege argument.<sup>94</sup> For example, the blood institution in *Stenger v. Lehigh Valley Hosp. Ctr.*<sup>95</sup> argued that disclosure of information acquired during blood donation would violate Pennsylvania's physician-patient privilege.<sup>96</sup> The court found the physician-patient privilege inapplicable, reasoning that although the Blood Center asserted that blood withdrawal for donation is a "medical procedure," it did not contend that a relationship existed between a physician and patient.<sup>97</sup> A physician did not perform the procedure nor was the donor seeking treatment.<sup>98</sup> Most courts are in accord with the *Stenger* rationale and have held the physician-patient privilege inapplicable in the blood bank-donor relationships.<sup>99</sup>

#### IV. POLICY ARGUMENTS FOR A SAFE AND ADEQUATE BLOOD SUPPLY

In addition to asserting the privacy rights of blood donors under both the Constitution and physician-patient privilege,<sup>100</sup> blood institutions argue that disclosure of the donors' identities will significantly diminish the amount of voluntary blood donations.<sup>101</sup> In 1985, the Subcommittee on Health and the Environment of the Committee on

94. Bollow & Lapp, *supra* note 92, at 349.

95. 563 A.2d 531 (Pa. Super. Ct. 1989).

96. *Id.* at 537. "This statutory privilege found in 42 Pa.C.S.A. § 5929 restricts a 'physician' from disclosing information acquired while attending to a 'patient.' It was designed to create a confidential atmosphere in which the patient would feel free to disclose all possible information which may be useful in rendering appropriate treatment." *Id.*

97. *Id.*

98. *Id.*

99. See *supra* note 85 for a list of cases denying the physician-patient privilege. *But see*, Lipton, *supra* note 8, at 168-69.

Although there are conceptual difficulties with application of the physician-patient privilege to blood donor records . . . the reasons for so extending the privilege do exist and should control. Indeed, the policy justifications that support application of the physician-patient privilege in the typical health care context—including the justifications of preventing embarrassment and encouraging full disclosure—apply equally well to the blood donor context . . . [T]he expectation of the donor is that confidentiality will be preserved.

*Id.*

100. See *supra* notes 38-99 and accompanying text for a discussion of these arguments.

101. See *Doe v. Puget Sound Blood Ctr.*, 819 P.2d 370, 377 (Wash. 1991) (defendant blood center asserting that volunteers will not donate absent confidentiality safeguards).

Energy and Commerce met with representatives of national blood banks to discuss the transfusion of transmitted diseases.<sup>102</sup> The blood institutions asserted that donor confidentiality ensures an adequate blood supply. The blood institutions argued that potential donors would be deterred from donating because of their fear of becoming defendants in litigation or being questioned about the most intimate details of their lives.<sup>103</sup> The blood centers also expressed a fear that the plaintiffs may wish to misuse the information to expose the source of the virus.<sup>104</sup> In addition, they argued that the threat of intrusion into a donor's privacy will compel the donor to be dishonest on the questionnaire,<sup>105</sup> thus compromising the safety of the blood supply.<sup>106</sup>

Courts have been more inclined to deny discovery based upon this argument.<sup>107</sup> For example, in *Coleman v. American Red Cross*,<sup>108</sup> a blood recipient tested positive for HIV infection after the blood service

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102. *AIDS Issues: Hearings Before the Subcommittee on Health and the Environment of the Committee on Energy and Commerce of the United States House of Representatives*, 99th Cong., 1st Sess. 177-88 (1985).

103. *Id.* at 180 (testimony of Victor Schmitt). A spokesperson for the American Association of Blood Banks discussed the possible repercussions of donor discovery:

Envision, if you will, a scenario in which a donor received a subpoena to appear for a deposition regarding his or her personal activities because this donor was one of several . . . donors whose blood was received by a patient who now has AIDS. This is not what this donor contemplated when he or she appeared, altruistically, to donate blood. If such a scenario becomes commonplace, who in our society will be willing to donate blood?

*Id.* at 179 (testimony of Dr. Joseph R. Bove, M.D.).

104. *Id.* at 181. "The fact that AIDS is most often perceived as a disease of homosexual men and IV drug abusers probably contributes to this phenomenon." *Id.*

105. *Id.* at 180.

106. *See Doe v. American Red Cross Blood Serv.*, 125 F.R.D. 646, 653 (D.S.C. 1989).

[T]he safety of the blood supply depends largely on donors' willingness to provide accurate and detailed histories of private and sometimes sensitive medical information, and some donors may be reluctant to supply accurate information out of fear that personal aspects of their lives may be disclosed to persons not connected to the donation process.

*Id.*

107. *See, e.g., Bradway v. American Nat'l Red Cross*, 132 F.R.D. 78, 80 (N.D. Ga. 1990) (holding that "plaintiffs' need for the information . . . does not outweigh defendant's concern with protecting the adequacy and safety of the blood supply"); *Coleman v. American Red Cross*, 130 F.R.D. 360, 363 (E.D. Mich. 1990) (same); *Krygier v. Airweld, Inc.*, 520 N.Y.S.2d 475, 477 (N.Y. Sup. Ct. 1987) ("[S]ociety's interest in maintaining the free flow of volunteer blood far outweigh[s] the plaintiff's right to the disclosure of all evidence material and necessary to the prosecution of her suit.").

108. 130 F.R.D. 360 (E.D. Mich. 1990).

notified her of a possible problem with the blood used in her transfusion.<sup>109</sup> At the time of donation, the blood supply community was aware of the virus and the high risk groups, as well as recommended screening procedures. However, a test detecting the HIV infection was not yet in existence.<sup>110</sup> The donor tested HIV positive in a subsequent blood donation, causing the defendant to contact the donor for additional information and notify all recipients of the donor's blood.<sup>111</sup> The plaintiffs sought the identity of the blood donor in order to prove negligence and proximate cause.<sup>112</sup>

The *Coleman* court reasoned that because the potential danger to the volunteer blood supply system outweighed the plaintiff's discovery needs, it was unnecessary to reach the question of any potential violation of the donor's constitutional rights.<sup>113</sup> The court found compelling the fact that, as a result of confusion over how AIDS is transmitted and whether AIDS can be contracted by donating blood, the number of volunteer blood donors has decreased in the last several years.<sup>114</sup> In addition, the *Coleman* court noted that the exclusion of persons who are members of groups identified as being at risk for AIDS has further reduced the available pool of donors.<sup>115</sup> The court concluded that the possibility of becoming involved in litigation, along with the potential for probing questions concerning a person's intimate life, would dampen potential donors' desire to donate blood.<sup>116</sup> Thus, the reduction in the number of volunteer donors resulting from disclosure would clearly compromise the adequacy of the national blood supply.<sup>117</sup> Moreover, the court pointed out that donors will be less candid when providing health information, thereby compromising public

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109. *Id.* at 361.

110. *Id.* See *supra* notes 4-7 and accompanying text for a historical discussion of the AIDS virus.

111. 130 F.R.D. at 361. See also *supra* note 32, for a discussion of the "look-back" program.

112. 130 F.R.D. at 361.

113. *Id.* at 362.

114. *Id.*

115. *Id.* See also *Doe v. Puget Sound Blood Ctr.*, 819 P.2d 370, 377 (Wash. 1991) (blood bank contending that "prudent, but overly inclusive measures, used to screen for AIDS and other infectious diseases, have reduced the donor base by excluding many healthy donors," (quoting Clerk's Papers, at 1995)).

116. 130 F.R.D. at 362.

117. *Id.* at 363.

safety.<sup>118</sup>

Although maintaining a safe and adequate blood supply is a real and vital societal concern, the fear of disclosure may not have such a gross effect on the nation's blood supply. In *Doe v. Puget Sound Blood Center*,<sup>119</sup> the Supreme Court of Washington expressly found that the blood institutions presented no factual support for the assertions that disclosure of donor identity would lead to fewer donations and encourage false information.<sup>120</sup> The *Puget Sound* court stated that these predictions bordered on speculation about basic human conduct in response to a limited discovery order.<sup>121</sup> Furthermore, the court indicated that the societal interest in a safe blood supply may be promoted because potential discovery would only deter high risk donors.<sup>122</sup> This fact, in conjunction with rapidly changing medical technology designed to detect false information and prevent contaminated blood from reaching the blood supply, convinced the court to affirm the discovery order.<sup>123</sup>

The fear of contracting AIDS may decrease one's willingness to donate. Because donating blood is a charitable act, however, assurances that their identities will remain confidential is not the donors' primary

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118. *Id.* See also *Laburre v. East Jefferson Gen. Hosp.*, 555 So. 2d 1381, 1384 (La. 1990) (explaining that donors may not provide accurate information if they are fearful of becoming a party to a lawsuit or subjecting their personal lives to investigation). The *Laburre* court explained that:

There is a strong possibility that questions [relating to medical history, drug use, and sexual activity which would indicate possible disease] would not be answered honestly if the donors believed that their records could be subpoenaed or the answers could be made public. It is essential that volunteer donors disclose accurately and candidly any information concerning their sexual activity, drug use, and any other activities that have been linked to the transmission of certain diseases

.....

*Id.* But see *Most v. Tulane Medical Ctr.*, 576 So. 2d 1387, 1388 (La. 1991) (distinguishing *Laburre* and holding that public policy interests do not outweigh an AIDS victim's need to discover a blood donor's identity).

119. 819 P.2d 370 (Wash. 1991).

120. *Id.* at 377-78.

121. *Id.* at 379.

122. *Id.* See also *Jenner*, *supra* note 52, at 50 (asserting that "[i]f fear of disclosure deters those in high-risk groups for AIDS from donating blood, the societal interest in a safe blood supply is promoted"). But see *Kirsh*, *supra* note 23, at 208. The author explains that "because many AIDS-carrying donors are unaware that they have the disease, the possibility of disclosing their identities will not necessarily deter them from donating blood any more than it will deter non-carriers." *Id.*

123. 819 P.2d at 379.

consideration.<sup>124</sup> Safety should be the primary concern in maintaining the blood supply. A blood supply contaminated with the AIDS virus surely cannot be labeled "adequate." Moreover, the blood industry has not pointed to any authority to confirm that blood donations would decrease if donors knew that they might be questioned later about the circumstances of their donations.<sup>125</sup> The dissent in the *Rasmussen* lower court was cognizant of the blood industry's tenuous argument.<sup>126</sup> The dissenting judge remarked that if a potential donor is not in a high risk group, the donor will unhesitatingly give blood irrespective of the outcome of these AIDS-related blood donation cases.<sup>127</sup> Discouraging high risk donors by the potential disclosure of their identity achieves the blood industry's and society's ultimate goal of keeping a safe and healthy blood supply.<sup>128</sup>

## V. FORMULAS FOR RESOLVING THE COMPETING INTERESTS

Both opponents and proponents of allowing plaintiffs to discover the identity of the blood donor in AIDS-related litigation present plausible arguments. As previously noted, however, courts have the duty of balancing competing interests and finding a viable solution.<sup>129</sup> A blood donor should not be subjected to the embarrassment and humiliation

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124. *Laburre v. East Jefferson Medical Hosp.*, 564 So. 2d 302, 302 (La. 1990) (Dennis, J., dissenting) (questioning the potential existence of a negative impact on donations due to possible disclosure). The majority opinion in *Laburre* found that fear of being called into litigation and subjected to questioning about intimate details of their personal lives would act as a disincentive to voluntary blood donations and "could drastically affect the supply of blood donations." *Laburre*, 555 So. 2d at 1384.

125. *Jenner*, *supra* note 52, at 50. See also *Stenger v. Lehigh Valley Hosp. Ctr.*, 563 A.2d 531, 537 (Pa. Super. Ct. 1989) (stating that the court cannot perceive a correlation between limited protective orders and a reduced number of blood donations).

126. *South Florida Blood Serv. v. Rasmussen*, 467 So. 2d 798, 806 (Fla. Dist. Ct. App. 1985) (Schwartz, C.J., dissenting).

127. *Id.*

128. *Id.* See *Belle Bonfils Memorial Blood Ctr. v. District Court*, 763 P.2d 1003, 1012-13 (Colo. 1988). "[S]ociety as a whole also has an interest consistent with that of [the plaintiffs]; namely, that of maintaining a safe blood supply. [Blood banks] cannot claim absolute immunity from discovery when it is in the business of providing a product capable of transmitting disease." *Id.* See also *Jenner*, *supra* note 52 at 50. "Public policy should promote safety and health. If the blood industry is permitted to escape scrutiny . . . it will continue to move slowly in conquering problems that affect its blood products. By refusing to disclose relevant information, blood banks are attempting to immunize themselves, or at least minimize their liability." *Id.*

129. *Belle Bonfils*, 763 P.2d at 1012. See also *supra* notes 23-29 and accompanying text for a discussion of the interests involved in court balancing measures.



that ensues when identified as an AIDS carrier. Likewise, the availability of an adequate and safe blood supply is a fundamental need to society.<sup>130</sup> However, opponents of discovery fail to properly emphasize a plaintiff's right to obtain compensation for contracting a disease from which the plaintiff will never recover.<sup>131</sup> No known cure is available for the AIDS virus.<sup>132</sup> No amount of money can fully compensate an AIDS victim or the family for the anguish they must endure. The ability to fairly and fully litigate their claims is the least that society can do for the victims of a contaminated blood transfusion.<sup>133</sup>

In promoting fairness, courts can tailor a limited discovery procedure to protect the rights of all parties.<sup>134</sup> For example, in *Belle Bonfils Memorial Blood Center v. District Court*,<sup>135</sup> the Supreme Court of Colorado ordered plaintiffs to submit written questions to the clerk of the district court.<sup>136</sup> The questions were to be carefully crafted so that the identity of the donor would not be revealed. The blood center's

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130. 763 P.2d at 1012.

131. Courts denying discovery have found that the plaintiff's interest is modest in comparison to the potential injury to the donor and to the nation's blood supply. *See, e.g., Doe v. American Red Cross Blood Servs.*, 125 F.R.D. 646, 657 (D.S.C. 1989) (explaining that society's interest often outweighs the interests of individuals using discovery techniques to prove claims for compensatory damages); *Doe v. University of Cincinnati*, 538 N.E.2d 419, 425 (Ohio Ct. App. 1988) (noting that the plaintiff has very little interest in discovering the donor's name when the suit is against a blood bank); *Rasmussen v. South Florida Blood Serv.*, 500 So. 2d 533, 538 (Fla. 1987) (finding the probative value of the discovery "dubious at best").

132. *See Dieringer, supra* note 5, at 623 (noting that death inevitably follows a long and agonizing illness).

133. *Snyder v. Mekhjian*, 582 A.2d 307, 315 (N.J. Super. Ct. App. Div. 1990), *aff'd*, 593 A.2d 318 (N.J. 1991).

The ultimate point of course is that plaintiff has suffered a most grievous harm which was apparently inflicted upon him by this donor, whether unwittingly or not . . . . The degree of plaintiff's injury, his right to redress from those who may have negligently failed to protect him, and his need for information which only the donor can provide if redress is to be obtained, all justify the limited disclosure we here sanction without unduly prejudicing the interests of the public and the donor's privacy rights.

*Id.*

134. *See Zwart, supra* note 12, at 886-87. The author suggests that the trial judge may view the information *in camera* to determine the probative value and discern whether the donor was responsible for plaintiff's AIDS. *Id.* If the donor's "has acted so irresponsibly so as to effectively kill another human being," the donor has no justification to exploit the right to privacy. *Id.*

135. 763 P.2d 1003 (Colo. 1988).

136. *Id.* at 1014.

attorney was to provide the name and address of the donor only to the clerk, who in turn would mail the questions to the donor.<sup>137</sup> After the donor returned the answered questions, the clerk was to delete any identifying information, thereby insuring the donor's anonymity.<sup>138</sup> The *Belle Bonfils* court determined that this was sufficient to satisfy the competing interests.<sup>139</sup>

Courts have also authorized "veiled" depositions, allowing only the attorneys and possibly the plaintiffs to question the donor under strict conditions.<sup>140</sup> For example, the donor need only be identified as "Donor X" and need not give any other information suggesting the donor's identity.<sup>141</sup> In addition, a donor who fears that these protective measures are insufficient may disguise or conceal his or her face from those present during the deposition.<sup>142</sup> If both parties are cooperative, they may also be able to suggest further limitations on the inquiry and technique to afford the plaintiff a reasonable discovery opportunity at the least possible cost to the donor's confidentiality interests.<sup>143</sup> Thus, any fear of public disclosure is abolished. Moreover, since the blood bank, not the donor, has asserted the donor's right to privacy, the donor may be willing to provide the necessary information.<sup>144</sup>

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137. *Id.*

138. *Id.*

139. 763 P.2d at 1014. *See also* Quintana v. United Blood Serv., 811 P.2d 424, 432 (Colo. Ct. App. 1991) (stating that "[i]n order to obtain sufficient information regarding a blood bank's screening and testing procedures, a patient is entitled to have controlled access to the donor for discovery, from the donor's perspective, whether screening procedures were followed"). *But see Belle Bonfils*, 763 P.2d at 1019 (Quinn, C.J., dissenting) (stating that "[a]ny discovery directed against the donor holds out the prospect for the pursuit of further leads uncovered in the course of limited discovery that could easily result in disclosing to the public at large the identity of the donor as a person infected with AIDS or HIV related illness").

140. *See, e.g.,* Boutte v. Blood Sys., Inc., 127 F.R.D. 122, 126 (W.D. La. 1989) (allowing a donor to be deposed without giving identifying information); Snyder v. Mekhjian, 582 A.2d 307, 315 (N.J. Super. Ct. App. Div. 1990) (permitting a veiled deposition with the court limiting areas of questioning and imposing conditions to insure the donors' anonymity), *aff'd*, 593 A.2d 318 (N.J. 1991); Stenger v. Lehigh Valley Hosp. Ctr., 563 A.2d 531, 537 (Pa. Super. Ct. 1989) (allowing trial court to formulate an order protecting donor's identity but permitting plaintiffs to learn of screening procedures); Gulf Coast Regional Blood Ctr. v. Houston, 745 S.W.2d 557, 561 (Tex. Ct. App. 1988) (allowing discovery but prohibiting public disclosure).

141. *Boutte*, 127 F.R.D. at 126.

142. *Id.* *See also* Howell v. Spokane & Inland Empire Blood Bank, 818 P.2d 1056, 1061 (Wash. 1991) (allowing a videotaped deposition with the donor's face obscured).

143. *Snyder*, 582 A.2d at 315.

144. *Id.* *See supra* notes 14-21 and accompanying text for a discussion of a case in

The ability to depose the blood donor under limited circumstances clearly benefits the plaintiff without causing undue hardship to the donor.<sup>145</sup> Recently, a jury in Nevada awarded one million dollars to a man who had contracted AIDS after receiving an HIV-infected blood donation.<sup>146</sup> The jury reached its decision after hearing the anonymous donor's telephone deposition.<sup>147</sup> Although the emergence of the HIV antibody test has significantly reduced AIDS-contaminated blood transfusions,<sup>148</sup> the list of plaintiffs contracting AIDS from transfusions prior to 1985 is still growing.<sup>149</sup> They are all entitled to have their day in court. In some instances, information supplied by the blood banks may be sufficient for a plaintiff to prove negligence absent direct information from the donor.<sup>150</sup> Where the blood bank is uncooperative, however, the donor's deposition may be the plaintiff's only hope of recovery.<sup>151</sup> Given the protective measures available in discovery, courts should apply more weight to plaintiffs' vital interests.

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which the donor testified on plaintiff's behalf. *See also Snyder*, 593 A.2d 318, 334 (N.J. 1991) (Garibaldi, J., dissenting) (stating that, although he disfavors disclosure, a willing witness may provide the requested information by waiving the privacy protections).

145. Because the identity of the donor remains anonymous, concerns about embarrassment or discrimination are alleviated. *See Tarrant County Hosp. Dist. v. Hughes*, 734 S.W.2d 675, 680 (Tex. Ct. App. 1987).

146. *Clark v. United Blood Serv.*, 5 AIDS Policy and Law (BNA) No. 8, 1 (May 2, 1990).

147. *Id.*

148. *See Andresen*, *supra* note 28, at 587. The author correctly asserts that although the lawsuits have just started to surface, the accuracy of the HIV test has diminished blood-borne AIDS transmissions. *Id.* Therefore, the fear that donors will stop giving blood because of the possibility of later questioning is no longer an issue. *Id.* *See also Doe v. Puget Sound Blood Ctr.*, 819 P.2d 370, 381 (Wash. 1991) (Dore, C.J., dissenting) (agreeing that the issues are not moot because they are pressing matters of important public concern and numerous blood banks will face discovery issues as the AIDS epidemic increases).

149. *Andresen*, *supra* note 28, at 587.

150. *See, e.g., Bradway v. American Nat'l Red Cross*, 132 F.R.D. 78 (N.D. Ga. 1990) (finding that adequate information is available concerning the Red Cross without disclosure of donors' identities). *But see Boutte v. Blood Systems, Inc.*, 127 F.R.D. 122, 126 (W.D. La. 1989) (stating that "the infected donor is one of only two people who knows whether the screening procedures were followed" and that the information will promote a just outcome and ensure that blood suppliers establish the highest standards of care).

151. *Snyder v. Mejhkian*, 582 A.2d 307, 315 (N.J. Super. Ct. App. Div. 1990) (finding that "[t]he degree of plaintiff's injury, his right to redress from those who may have negligently failed to protect him, and his need for information which only the donor can provide . . . all justify the limited disclosure"), *aff'd*, 593 A.2d 318 (N.J. 1991).

Although plaintiffs contend that recovery may only be achieved through discovery of the donors' names and addresses, the discovery procedures crafted by recent courts will enable plaintiffs to successfully attain their goals. In doing so, potential donors may be assured that courts will preserve donor anonymity in AIDS-related cases and, therefore, these cases should neither infringe on a donor's right to privacy nor deter donors from contributing to the nation's volunteer blood supply.

### CONCLUSION

Cases involving AIDS-related blood donations are tragic and the stakes are high. Blood services may lose significant amounts of money and plaintiffs will inevitably lose their lives. But, within the proper confines of the courts, the donor loses nothing. The plaintiff does not seek redress from the donors and, consequently, does not threaten volunteer blood donors with a lawsuit.<sup>152</sup> If the donor became a party to the action, courts should then give more weight to the interests of privacy and an adequate blood supply.<sup>153</sup> In the meantime, the scale tips in favor of the plaintiffs and they should have the opportunity to seek pertinent information from the blood donor.

Furthermore, AIDS-related cases involving blood recipients who seek the identity of blood donors will soon dissipate.<sup>154</sup> With the discovery of the HIV test and the subsequent provisions mandating the testing of all donated blood, the number of recipients contracting AIDS from blood transfusions has significantly decreased.<sup>155</sup> Therefore, court decisions allowing limited discovery are not opening a Pandora's Box, setting a precedent with devastating future effects. The unfortunate plaintiffs that required blood transfusions before the medical industry had conclusive facts about the transmission and detection of AIDS have a compelling interest in discovery from the blood donor.

*Amy L. Fisher\**

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152. *Id.*

153. See Jenner, *supra* note 52, at 52 (stating that the dangers are more obvious when the donor is named as a defendant).

154. Andresen, *supra* note 28, at 587.

155. See *supra* note 10 for a discussion of the statutory requirements for blood donations.

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