Kathleen J. St. John is a principal at Nurenberg, Paris, Heller & McCarthy Co., LPA. She can be reached at 216.621.2300 or kstjohn@nphm.com.

Medical Authorizations And Your Client's Right To Privacy

by Kathleen J. St. John

What do orthopaedic injuries from an automobile accident have in common with your client's gynecological records? Nothing, you say? In most Ohio appellate districts, you'd be right; or, at least, you'd have the opportunity to prove you're right through an *in camera* inspection. However, in at least one appellate district – the Second – it has been held that defendants seeking your client's medical records have the right to have your client sign blanket medical authorizations permitting the defense to sort through your client's records to determine what's relevant and what isn't.

This article seeks to establish why the majority view in Ohio should be followed instead of the Second District's holding in *Bogart v. Blakely*[1], and what you can do to protect your client's interest in keeping irrelevant medical records confidential.

The Patient's Right To Privacy

Although at common law there was no physician-patient privilege, contemporary law recognizes the importance of keeping medical records confidential. The Ohio Public Records Act, for instance, prohibits public institutions from releasing medical records that are the subject of a public records request.[2] The federal Health Information Portability and Accountability Act of 1996 ("HIPAA") prevents health care providers from disclosing medical information except in certain circumstances.[3] The Ohio Supreme Court has recognized a tort for breach of confidentiality related to medical information[4], and has applied this tort to health care providers and third parties who disclose information without authorization to do so.[5]

Most important, for our purposes, the Ohio Revised Code codifies the patient's right to keep medical records confidential through the statutorily created physician-patient privilege. That statute, R.C. 2317.02 (B), provides that a physician "shall not testify" concerning a communication made by a patient to the physician, unless certain exceptions apply or unless the patient is deemed to have waived the privilege.[6]

The exceptions or waiver occur in a number of ways expressed in the statute.[7] As relevant here, the privilege "does not apply" and "a physician... may testify or... be compelled to testify" if "a medical claim..., an action for wrongful death, any other type of civil action, or a claim under Chapter 4123. of the Revised Code is filed by the patient, the personal representative of the patient..., or the patient's guardian or other legal representative."[8]

The waiver that occurs upon the filing of a civil action is not absolute. Rather, the statute provides that if the testimonial privilege is waived because a civil action has been filed, "a physician... may be compelled to testify or to submit to discovery under the Rules of Civil Procedure *only as to a communication* made to the physician... by the patient in question in that relation, or the physician's... advice to the patient in question, *that related causally or historically to physical or mental injuries that are relevant to issues in the... civil action*."[9]

Under Ohio law, therefore, discovery of a patient's medical records is statutorily limited to those records that are "causally or historically" related to the injuries in question in the lawsuit. The problem that arises, and that the case law attempts to resolve, is who gets to make the determination of whether a patient's medical records are "causally or historically" related to the injuries at issue in the lawsuit.

The Majority View: The Patient's Right To An In Camera Inspection

"It is axiomatic that once privileged information is disclosed, there is no way for it to be made private once again."[10] Accordingly, the overwhelming majority of Ohio appellate courts that have addressed the issue have held that, where there is a good faith dispute as to whether certain medical records are causally or historically related to the injuries at issue, the documents should be provided to the court for an *in camera* review to determine whether they are subject to discovery.[11]

The classic situation in which this issue arises is this. The defendant in, say, a motor vehicle accident action requests the plaintiff to sign one or more medical records authorizations directing the plaintiff's health care providers to release the plaintiff's records to the defendant's attorney. Sometimes the authorizations are limited in time but still request the patient's entire medical history during that restricted time period; other times the defense demands blanket medical authorizations, releasing records as to the plaintiff's entire medical history.

In these situations, three competing interests are at stake. The plaintiff has an interest in protecting her privacy, and not disclosing any records not causally or historically related to the injuries sustained in the accident. After all, the physician-patient privilege is designed "'to encourage patients to make full disclosure of their symptoms and conditions to their physicians without fear that such matters will later become public.'"[12] If orthopaedic injuries, for instance, are what are being alleged, the plaintiff has a substantial interest in keeping the details of her sexual or reproductive history private.

The plaintiff also has an interest in knowing what records have been turned over to the defense. Blanket medical authorizations deprive her of the notice to which she is entitled in discovery under the Civil Rules.

The defense, on the other hand, has an interest in obtaining full discovery. Receiving records directly from the health care providers may be thought more efficient. And, if the plaintiff is left to determine what is causally or historically related, the defense might believe relevant records will be withheld.

Finally, the trial courts have an interest in not having to conduct *in camera* inspections in each and every civil action in which a party's physical or mental health is at issue.

Good Faith Belief Standard: Plaintiff's Burden

Some Ohio appellate courts resolve these competing interests by requiring a factual basis for contending that certain records are privileged antecedent to an *in camera* inspection.[13] Under this approach, if the trial court finds there is not a good faith belief that certain records are privileged, it need not conduct an *in camera* inspection.[14]

To establish a good faith belief, the plaintiff may assert that she "examined the records in question and found nothing to suggest prior treatment that might, in any way, be related to the injuries [she] sustained [in the accident in question]."[15] Other courts have found a good faith belief to exist based simply on the fact that the discovery request was overbroad on its face. For instance, in an auto accident case where the plaintiff alleged injuries to her jaws, neck, back, arms, wrists and various other parts of her body, as well as pain and mental anguish, the Seventh District found the request for the plaintiff's OB/GYN records to be overbroad on its face, requiring the trial court to conduct an *in camera* inspection.[16]

Alternative Viewpoint 1: Plaintiff Should Have No Burden

At least one appellate judge has opined that it is unfair to place the burden on the plaintiff to establish a good faith belief that the medical records defendant seeks are privileged. In *Piatt v. Miller*, Judge Cosme, concurring that the trial court abused its discretion in ordering the plaintiff to sign a blanket medical authorization, disagreed that plaintiff should have *any* burden to articulate reasons why the requested records are privileged. Instead, the focus should be on requiring the party seeking discovery to narrowly tailor medical authorizations to seek only relevant medical records:

> Requiring requests to be carefully tailored provides a two-fold benefit. First, such requests prevent the waste of both judicial and attorney time and resources. Overbroad discovery requests automatically create discovery disputes. Plaintiff objects, which in turn, triggers the likelihood of court involvement. Discovery requests that are properly framed to solicit only relevant information would reduce the need for in camera inspections. Court involvement would only be required when a factual (*sic*) based true impasse arises concerning the discoverability of specific records.[17]

Alternative Viewpoint 2: Plaintiff Has No Burden When Authorization Is Overbroad

Other Ohio appellate courts, including the Eighth District[18], have at least implicitly recognized that the plaintiff is entitled to an *in camera* inspection whenever, from the overbreadth of the medical authorization, it appears that some of the material requested may be protected by the privilege. In such cases, any concern that the courts will be unduly burdened with *in camera* reviews is kept in check by the court's ability to subject a party to sanctions if she "unreasonably assert[s] the privilege."[19]

The Minority View: A Plaintiff May Be Required To Sign Blanket Medical Authorizations Without An In Camera Inspection

The lone Ohio appellate court that condones requiring a plaintiff to sign blanket medical authorizations without an *in camera* inspection is the Second District. Its position was set forth recently in *Bogart v. Blakely.*[20]

Bogart arose from an automobile accident in which the plaintiff alleged multiple permanent physical and mental injuries. The trial court granted a motion to compel the plaintiff to provide "full information regarding his past medical history and authorizations sufficient to obtain release of all medical records generated within the last ten years within a certain date."[21] Although the plaintiff did not officially move for an *in camera* inspection, he did argue, in opposition to the motion, that "an in camera review can be used to determine what is and what is not discoverable."[22] The trial court rejected this argument, finding that "[i]n this appellate district" the answer to the question of "whether the Plaintiff may be required to sign blank medical authorizations as have been requested during discovery" is "yes."[23]

The court of appeals agreed – or, in any event, found the trial court did not abuse its discretion in compelling the plaintiff to sign the blanket authorizations.

The court's analysis was driven by an older Ohio Supreme Court case, *State ex rel. Floyd v. Court of Common Pleas*,[24] which was based on an earlier version of the privilege statute. At the time of *Floyd*, the filing of an action did not waive the physician-patient privilege until the plaintiff took the stand to testify. Under those circumstances, and applying Civ. R. 16 and the local court rules, the Court held that requiring the plaintiff to produce his/her medical records in discovery did not result in a waiver of privilege; hence, the plaintiff could be compelled to produce the medical records in discovery because she could still raise the attorney-client privilege at trial. The Second District followed *Floyd* in *Horton v. Addy*,[25] where it upheld the trial court's order compelling plaintiff to turn over "all medical records" based on the *Floyd* distinction between producing records in discovery versus having them admitted at trial.

The Tenth District, in *Ward v. Johnson's Indus. Caterers, Inc.*, rejected the holding in *Horton*, stating that "*Horton* seemingly ignores the fact that R.C. 2317.02 (B) (2)'s protection regarding records that are causally or historically related extends to discovery, not just to testimony."[26] Despite discussing the *Ward* decision,[27] the Second District in *Bogart* continued to follow *Horton*.[28] The court believed that *Horton* best resolves the competing interests, though it was most concerned with alleviating the burden on the trial courts. Thus, the court in *Bogart* stated:

> As we noted in *Horton*, "The distinction between discovery and disclosure attempts to accommodate three competing values: the confidentiality of privileged medical information, a personal injury defendant's right to effectively prepare for trial, and minimization of judicial involvement in pretrial discovery disputes. Perhaps no better accommodation is possible, particularly when trial judges must manage increasing numbers of cases.[29]

The court in *Bogart* also rejected the plaintiff's contention that "in camera review is a necessity when the parties cannot agree on whether medical records are related causally or historically to the injuries claimed." Oddly, the court rejected this argument at least in part because the plaintiff "failed to move for an in camera inspection"[30] -- even though, earlier in the opinion, the court noted that plaintiff argued to the trial court that in camera inspections "can be used to determine what is and is not discoverable."[31] But, here again, the court's decision seems to pivot on easing the trial court's burden, for it added:

> Prior to trial, it is unreasonable and impractical to require a trial judge to attempt to determine whether a plaintiff's extensive medical history is relevant to the underlying action, and we accordingly conclude that Bogart is not entitled to in camera review.[32]

The Problem With Bogart

The problem with *Bogart* is that it tramples the plaintiff's right to protect her unrelated medical records from discovery. Why should the defendant's attorney, paralegal, legal assistant, or expert witness be permitted to ogle the plaintiff's OB/GYN records when what is alleged in the lawsuit is a neck sprain? As the late Chief Justice Moyer stated:

> *Biddle* stressed the importance

of upholding an individual's right to medical confidentiality beyond just the facts of that case. '[I]t is for the patient – not some medical practitioner, lawyer, or court – to determine what the patient's interests are with regard to confidential medical information.'**** As the Supreme Court of California has observed in discussing the related concept of a right to privacy, such a right 'is not so much one of total secrecy as it is of the right to define one's circle of intimacy – to choose who shall see beneath the quotidian mask.'**** If the right to confidentiality is to mean anything, an individual must be able to direct the disclosure of his or her own private information.[33]

As noted in *Ward*, moreover, Ohio's privilege statute protects unrelated medical records not only from disclosure at trial but also from discovery. Thus, *Bogart's* reliance on former case law interpreting a materially different version of the privilege statute does not give proper deference to the current legislative mandate or to the plaintiff's interests.

The majority view, on the other hand, gives the proper recognition to each of the competing interests. Neither of the parties' interests are harmed by having the court conduct an *in camera* inspection. And the court's interest in not being overburdened is protected as long as there is some mechanism for ensuring that it is only called on to inspect records where relevance is genuinely in dispute.

One suggestion is a "*pseudo in camera inspection process*" whereby the plaintiff would sign the authorizations releasing records to an outside vendor. The plaintiff's counsel would then examine the records, and if she believed certain of the records to be privileged, she would submit only those records for an *in camera* inspection, while the others would be released to the defendants.[34] This method alleviates the court's burden by minimizing the instances of judicial involvement, while ensuring that only those records truly in dispute are placed before the court. This method also ensures that the plaintiff is on notice of all records received by the defense.[35]

Alternatively, the defendant "should obtain pertinent medical information by deposing the medical records custodian. A deposition will allow [plaintiff's] counsel to seek a protective order or an in camera review of private and confidential information that is irrelevant to her claim."[36]

Finally, requiring defendants to narrowly tailor medical authorizations also serves to balance the parties' interests and minimize court involvement.

If a combination of these methods were used, each side would be doing its part to unburden the trial court of needless *in camera* reviews, while protecting their clients' respective rights to privacy and discovery. ■

End Notes

1. 2nd App. Dist. No. 2010 CA 13, 2010-Ohio-4526 (Sept. 24, 2010).
2. *Hageman v. Southwest General Health Center*, 119 Ohio St.3d 185, 2008-Ohio-3343, ¶9 (citing R.C. 149.43(A)(1)(a)).
3. *Hageman*, at ¶9 (citing 45 C.F.R. 164.502).
4. *Biddle v. Warren Gen. Hosp.* (1999), 86 Ohio St.3d 395, 1999-Ohio-115.
5. *Biddle, supra; Hageman, supra.*
6. R.C. 2317.02 (B) (1).
7. See R.C. 2317.02 (B)(1)(a)-(e); R.C. 2317.02(B)(2)(a)-(b); and R.C. 2151.421.
8. R.C. 2317.02 (B)(1)(a)(iii).
9. R.C. 2317.02 (B)(3)(a) (emphasis added).
10. *Neftzer v. Neftzer* (12th Dist. 2000), 140 Ohio App.3d 618, 621.
11. *See, e.g., Cargile v. Barrow* (1st Dist.), 182 Ohio App.3d 55, 2009-Ohio-371, n.5; *Nester v. Lima Memorial Hospital* (3rd Dist.), 139 Ohio App.3d 883, 2000-Ohio-1916; *Folmar v. Griffin* (5th Dist.), 166 Ohio App.3d 154, 2006-Ohio-1849, ¶25; *Piatt v. Miller*, 6th App. Dist. No. L-09-1202, 2010-Ohio-1363, ¶16; *Patterson v. Zdanski*, 7th App. Dist. No. 03 BE 1, 2003-Ohio-5464; *Wooten v. Westfield Ins. Co.* (8th Dist.), 181 Ohio App.3d 59, 2009-Ohio-494 ; *Mason v. Booker* (10th Dist.), 185 Ohio App.3d 19, 2009- Ohio-6198, ¶1; *Sweet v. Sweet*, 11th Dist. No. 2004-A-0062, 2005-Ohio-7060, ¶13; *Neftzer, supra,* (12th Dist.), 140 Ohio App.3d at 621.
12. *Piatt, supra*, 2010-Ohio-1363, ¶24 (Cosme, J., concurring) (quoting *State v. Antill* (1964), 176 Ohio St. 61, 64-65).
13. *See, e.g., Piatt, supra*, at ¶17.
14. *Patterson, supra*, 2003-Ohio-5464, ¶19; *Piatt, supra,* at ¶19.
15. *Piatt, supra*, at ¶20.
16. *Patterson, supra*, at ¶21.
17. *Piatt, supra*, at ¶28 (Cosme, J., concurring).
18. *See, e.g., Wooten, supra*, 181 Ohio App.3d 59, 2009-Ohio-494; *Miller v. Bassett*, 8th Dist. No. 86938, 2006-Ohio-3590; *Porter v. Litigation Mgt., Inc.,* 8th Dist. No. 76159, 2000 Ohio App. LEXIS 2022.
19. *Cargile, supra*, 2009-Ohio-371 at ¶12 ("unreasonably asserting the privilege may subject a party to sanctions by the trial court.")
20. 2nd Dist. No. 2010 CA 13, 2010-Ohio-4526 (Sept. 24, 2010).
21. *Id.* at ¶2.
22. *Id.*
23. *Id.* at ¶3.
24. (1978), 55 Ohio St.2d 27.
25. 2nd Dist. No. 13524, 1993 Ohio App. LEXIS 281.
26. *Ward v. Johnson's Indus. Caterers, Inc.*, 10th Dist. No. 97APE11-1531, 1998 Ohio App. LEXIS 2841, *15.
27. *Bogart* at ¶¶47-50.
28. *Horton*, in fact, has been overruled, although on other procedural grounds. See, *Horton v. Addy* (1994), 69 Ohio St.3d 181, 1994-Ohio-353.
29. *Bogart* at ¶63 (quoting *Horton* at *14).
30. *Id.* at ¶70.
31. *Id.* at ¶2.
32. *Id.* at ¶70.
33. *Hageman, supra,* 2008-Ohio-3343 at ¶13 (quoting *Biddle, supra*, 86 Ohio St.3d at 408; and *Hill v. Natl. Collegiate Athletic Assn.* (1994), 7 Cal. 4th 1, 26).
34. *See, e.g., Wooten, supra,* 181 Ohio App.3d 59, 2009-Ohio-494, ¶8.
35. At the very least, if the plaintiff is required to sign a blanket medical authorization, an addendum should be added requiring the defense to provide plaintiff with copies of all records received from plaintiff's medical care providers.
36. *Geary v. Schroering* (Ky. App. 1998), 979 S.W.2d 134, 135.