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Ethics of Redacting Medical Records
(Plaintiff's Perspective)

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THE ETHICS OF REDACTING MEDICAL RECORDS

"If disclosure were required, the privilege would be meaningless
to the patient who holds a legitimate interest in it."
In re Anderson, 973 S.W.2d 410 (Tex. App. – Eastland, 1998)

I. Scope of this Article:

This article reviews Federal and Texas statutes, rules of procedure and rules of evidence related to protection/redaction and disclosure of personal medical and health information. While not a treatise on privileges in general, concepts of privilege and privacy are foundational to a discussion on redacting and dealing with protected information. Rule 1.05 Texas Rules of Disciplinary Conduct forbids an attorney from knowingly revealing confidential information of a client or former client. On May 11, 2017, the American Bar Association issued Formal Opinion 477 updating its 1999 opinion on the confidentiality of unencrypted email. This ethics opinion does not relate directly to the issue of redacting medical records but notes a lawyer's duty to minimize the inadvertent disclosure of confidential information.

II. Federal Law:

A. Federal statute: Health Insurance Portability and Accountability Act of 1996 (HIPAA), in pertinent parts codified as 32 USCA Sec. 1320d through 1320d-8, and supporting regulation: Title 45 CFR Parts 160 and in Part 164 Subparts A and E, known as the "Privacy Rules." The 115 page ***simplified*** version of the Privacy Rules can be found at http://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/administrative/combined/hipaa-simplification-201303.pdf

HIPAA requires that health information which is personally or individually identifiable [45 CFR 160.003] must be protected by covered entities. Disclosure is allowed if required by law [45CFR 164.512]; whenever a court orders the disclosure [45CFR 164.512(e)(1)(i)]; or in response to a "subpoena, discovery request, or other lawful process" if appropriate notice is given or if reasonable efforts to obtain a protective order are available [45CFR 164.512(e)(1)(ii)(A) and (B)]. The court order should limit the disclosure to "only the protected health information expressly authorized by such order." [45CFR 164.512(e)(1)(i)] The rules discussing notice and protective orders provide explicit requirements for the protective order, including a prohibition on re-disclosure and a return or destruction of all records, including copies, at the end of the litigation [45CFR 164.512(e)(1)(v)(A) and (B)].

The Health Information Technology for Economic and Clinical Act (HITECH), effective February 2009, increased the privacy requirements and applied HIPAA to business associates of the health care providers even if there is no business associate contract between them. Those business associates include law firms which provide the services such as: handling and security privacy compliance; fraud, abuse or false claims defense; professional license defense; risk management and due diligence for providers; representing medical professionals or covered entities in claims regarding diagnosis, treatment, or health benefits. Excluded transactions include representing someone who is not a covered entity; handling the prosecution or defense of worker's compensation claims, social security benefits claims or employment law claims.

While HITECH and HIPAA do not require redaction of medical records to protect those medical conditions which are not at issue in litigation, federal law has clearly expanded the protection of medical records and recognized the legitimate privacy interests of patients in safeguarding their personally identifiable health information.

Congress allows states to otherwise regulate medical privacy, privilege and redaction. HIPAA pre-empts state laws which are less stringent than HIPAA, but allows state laws to be more stringent than the Privacy Rules found within 45 CFR 160 and 164 [45CFR 160.203].

Protecting *privacy* as to medical records does not equate to creating a federal doctor-patient *privilege*, however. Although the states are allowed to create rules offering greater privacy protections than HIPAA, those more stringent state rules, and state common laws creating a state-law doctor-patient privilege, do not impose that state-law medical privilege in cases dealing with federal legislation. There is no doctor-patient privilege under the federal rules of evidence, except as to the psychotherapist and patient, but in civil cases in which state law "supplies the rule of decision" the federal courts will look to the state law privilege. This distinction is explained in *Northwestern Memorial Hospital v. Ashcroft*:

> [T]he HIPAA regulations do not impose state evidentiary privileges on suits to enforce federal law. Illinois is free to enforce its more stringent medical-records privilege (there is no comparable federal privilege) in suits in state court to enforce state law… The enforcement of federal law might be hamstrung if state-law privileges more stringent than any federal privilege regarding medical records were applicable to all federal cases. … [W]e think it improbable that HHS intended to open such a can of worms when it set forth a procedure for disclosure of medical records in litigation--intended, that is, to be regulating, actually or potentially (depending on other statutory provisions regulating subpoenas), the litigation of federal employment discrimination cases, social security disability cases, ERISA cases, Medicare and Medicaid fraud cases, Food and Drug Administration cases, and the numerous other classes of federal cases in which medical records, whether or the parties or of nonparties, would not be privileged under federal evidence law. … All that 45 C.F.R. § 164.512(e) should be understood to do, therefore, is to create a procedure for obtaining authority to use medical records in litigation. Whether the records are actually admissible in evidence will depend among other things on whether they are privileged. And the evidentiary privileges that are applicable to federal-question suits are given not by state law but by federal law, Fed. R. Evid. 501, which does not recognize a physician-patient (or hospital-patient) privilege. Rule 501 in terms makes federal common law the source of any privileges in federal-question suits unless an Act of Congress provides otherwise. We do not think HIPAA is rightly understood as an Act of Congress that creates a privilege. *Northwestern Memorial Hospital v. Ashcroft*, 362 F.3d 923; 2004 U.S. App. LEXIS 5724 (7th Cir. 2004).

B. <u>Federal medical privileges and FRE 501</u>:

FRE 501 provides:

> Rule 501. Privilege in General
> The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

There is no federal physician-patient privilege. Texas Rule of Evidence 509 provides for a state law physician-patient privilege. There is federal a psychotherapist-patient privilege, supplied in *Jaffree v. Redmond*, 518 U.S. 1, 8-9 (1996), which held that "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501. … [T]he federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy." The federal psychotherapist-patient privilege corresponds to the existing state law mental health privilege found in TRE 510. See also *Stevenson v. Stanley-Bostitch, Inc*., 201 F.R.D. 551, 557-8 (N.D. Ga. 2001) for the holding that the privilege extends to psychotherapist-patient records but not to general medical records.

See O'Connor's *Federal Rules, Civil Trials 2016*, pp. 530-532 for a discussion of the psychotherapist-patient privilege and court orders under FRCP 35 for the examination of a patient's physical or mental medical condition.

C. Federal Rule Civil Procedure 5.2 Privacy Protection for Filings Made with the Court.

FRCP 5.2 provides (emphasis mine):

Rule 5.2. Privacy Protection For Filings Made with the Court

(a) REDACTED FILINGS. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's **social-security number**, **taxpayer-identification number**, or **birth date**, the name of an individual known to be a **minor**, or a **financial-account number**, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

(b) EXEMPTIONS FROM THE REDACTION REQUIREMENT. The redaction requirement does not apply to the following:

(1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 5.2(c) or (d); and

(6) a pro se filing in an action brought under 28 U.S.C. §§2241, 2254, or 2255.

Section (c) relates to electronic access to files, and then the rule continues regarding protection of personal identifiable information:

> (d) FILINGS MADE UNDER SEAL. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.
> (e) PROTECTIVE ORDERS. For good cause, the court may by order in a case:
> (1) require **redaction** of additional information; or
> (2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.
> (f) OPTION FOR ADDITIONAL UNREDACTED FILING UNDER SEAL. A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.
> (g) OPTION FOR FILING A REFERENCE LIST. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.
> (h) WAIVER OF PROTECTION OF IDENTIFIERS. A person waives the protection of Rule 5.2(a) as to the person's own information by filing it without redaction and not under seal.

While FRCP 5.2 does not specifically require the redaction of personally identifiable medical information, redaction would be consistent with HIPAA protections and state laws protecting privileged information. Committee notes from 2007, when FRCP 5.2 was promulgated, suggest that FRCP 5.2 sets minimum standards and greater redaction may be appropriate:

> The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107–347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." …
>
> While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to **any part of an account number** or **social security number**. It may also be necessary to protect information not covered by the redaction requirement—such as **driver's license numbers** and **alien registration numbers**—in a particular case. In such cases, protection may be sought under subdivision (d) or (e). Moreover, the Rule does not affect the protection available under other rules, such as Civil Rules 16 and 26(c), or under other sources of protective authority. …
>
> Subdivision (e) provides that the court can by order in a particular case for good cause require more extensive redaction than otherwise required by the Rule. Nothing in this subdivision is intended to affect the limitations on sealing that are otherwise applicable to the court. …
>
> **Trial exhibits** are subject to the redaction requirements of Rule 5.2 if filed with the court or filed as part of an appeal or for other reasons.
>
> Committee Notes on Rules - 2007

III. State Law regarding privacy, redaction and privilege.

A. Tex. Health & Safety Code, Chapter 181, Medical Records Privacy

This statute, originally passed as HB 300 and amended in 2015, is the Texas equivalent to HIPAA. As anticipated by HIPAA, Texas lawmakers imposed more stringent privacy protections on medical records. Ch. 181 identifies a broader array of covered entities than are identified by HIPAA, arguably including attorneys:

> (2) "Covered entity" means any person who:
>
> (A) for commercial, financial, or professional gain, monetary fees, or dues, or on a cooperative, nonprofit, or pro bono basis, engages, in whole or in part, and with real or constructive knowledge, in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information. The term includes a business associate, health care payer, governmental unit, information or computer management entity, school, health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site;
>
> (B) comes into possession of protected health information;
>
> (C) obtains or stores protected health information under this chapter; or
>
> (D) is an employee, agent, or contractor of a person described by Paragraph (A), (B), or (C) insofar as the employee, agent, or contractor creates, receives, obtains, maintains, uses, or transmits protected health information.
>
> (2-a) "Disclose" means to release, transfer, provide access to, or otherwise divulge information outside the entity holding the information.
>
> Tex. Health & Safety Code Sec. 181.001(b)(2)-(2-a)

While the statute does not expressly name lawyers as covered entities, if we obtain, analyze, use or transmit medical records for financial or professional gain, and then disclose those records (to insurance carriers, to judges and juries) then attorneys are subject to Chapter 181. The exclusions found in federal law (representing someone who is not a covered entity; handling the prosecution or defense of worker's compensation claims, social security benefits claims or employment law claims) are not contained within state law, so law firms can be excluded from the business associates definition of HIPAA/HITECH but still be subject to the privacy requirements, and penalties, of Texas Health & Safety Code Ch. 181.

Covered entities must comply with both the federal law (HIPAA) and state law (Chapter 181). Enforcement is vested with the Office of the Attorney General which may seek injunctive relief and fines of up to $5,000; up to $25,000; up to $250,000, or up to $1.5 million per year, depending on whether the violation was negligent, knowing, for financial gain, or part of a pattern or practice; see Sec. 181.201. The OAG can also seek the probation or revocation of the professional license of the offender; see Sec. 181.202. Memorial Hermann Hospital was fined $2,400,000 after disclosing a patient's name to the news media in 2015; *Houston Chronicle* May 10, 2017.

While Tex. Health & Safety Code, Chapter 181 does not require redaction of medical records to protect, as privileged, those medical conditions which are not at issue in litigation, state law has clearly expanded the protection of medical records and recognized the legitimate privacy interests of patients in safeguarding their personally identifiable health information.

B. Tex. Rule Civ. Proc. 21c.

Effective January 1, 2014, attorneys are required to redact certain information from records filed with state courts:

> RULE 21c. PRIVACY PROTECTION FOR FILED DOCUMENTS.
> (a) Sensitive Data Defined. Sensitive data consists of:
>
> (1) a **social securit**y or other **taxpayer-identification number**, except for the last **three** digits or characters;
>
> (2) numbers of **bank accounts** and other **financial accounts**, including **credit cards**, except for the last three digits or characters; and
>
> (3) **identification numbers** on driver's licenses, passports, and other similar government issued personal identification cards, except for the last **three** digits or characters.
>
> (b) Filing of Documents Containing Sensitive Data Prohibited. Unless the inclusion of unredacted sensitive data is specifically required by a statute, court rule, or administrative regulation, an electronic or paper document, except for wills and documents sealed pursuant to Rule 76a, containing sensitive data may not be filed with a court unless the sensitive data is redacted.
> (c) Redaction of Sensitive Data; Retention Requirement. Sensitive data must be redacted by using the letter "X" in place of each omitted digit or character or by removing the sensitive data in a manner indicating that the data has been redacted. The filing party must retain an unredacted version of the filed document during the pendency of the case and any related appellate proceedings filed within six months of the date the judgment is signed.
> (d) Notice to Clerk. If a document must contain **unredacted** sensitive data, the filing party must notify the clerk by:
>
> (1) designating the document as containing sensitive data when the document is electronically filed; or
>
> (2) if the document is not electronically filed, by including, on the upper left-hand side of the first page, the phrase: "NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA."
>
> (e) Non-Conforming Documents. The court may strike any document containing sensitive data in violation of this rule and require a redacted substitute document to be filed. The substitute document must be deemed filed on the same day as the document that was struck.
> (f) Restriction on Remote Access. If a clerk is notified that a document contains unredacted sensitive data or strikes a document that contains sensitive data, the document must not be made available on the internet to anyone other than the parties and their attorneys, except through a public access terminal located in the courthouse.
>
> Comment to 2013 Change: Rule 21c is added to provide privacy protection for documents filed in civil cases.

Rule 21c. is similar to FRCP 5.2 but limits SSNs and EINs to the last three digits, not four, and requires redaction of driver's license and identification numbers instead of leaving those redactions optional.

C. Miscellaneous rules for governmental bodies.

Governmental bodies are required to redact certain private information before releasing records under the open records acts. See, for example, Open Records Decision No. 673 (2001); 2014 Public Information Handbook, pages 35-38; Public Information Act, Tex. Gv. Code Ann. Sec. 552.024, 552.130, 552.136, 552.138 and 552.1175. Social Security Numbers of living persons may be redacted by governmental bodies pursuant to Tex. Gv. Code Ann. Sec. 552.147(b), and upon request by an individual or his representative, clerks "shall redact … all but the last four digits of the individual's social security number from information maintained in the clerk's official public records, including electronically stored information maintained by or under the control of the clerk."

With the proliferation of search tools such as Acurint which provide all *but* the last four numbers of a social security number, one wonders how much protection is offered by allowing the last three or four numbers to be made public.

D. Texas Rules of Evidence 509, the physician-patient privilege.

Texas Rule of Evidence 509 was restyled by the Texas Supreme Court effective April 1, 2015. The portions most pertinent to this presentation are Rule 509(a) through (e), as follows:

> Rule 509. Physician-Patient Privilege
> (a) Definitions. In this rule:
> (1) A "patient" is a person who consults or is seen by a physician for medical care.
> (2) A "physician" is a person licensed, or who the patient reasonably believes is licensed, to practice medicine in any state or nation.
> (3) A communication is "confidential" if not intended to be disclosed to third persons other than those:
> (A) present to further the patient's interest in the consultation, examination, or interview;
> (B) reasonably necessary to transmit the communication; or
> (C) participating in the diagnosis and treatment under the physician's direction, including members of the patient's family.
> (b) Limited Privilege in a Criminal Case. There is no physician-patient privilege in a criminal case. But a confidential communication is not admissible in a criminal case if made:
> (1) to a person involved in the treatment of or examination for alcohol or drug abuse; and (2) by a person being treated voluntarily or being examined for admission to treatment for alcohol or drug abuse.
> (c) General Rule in a Civil Case. In a civil case, a patient has a privilege to refuse to disclose and to prevent any other person from disclosing:
> (1) a confidential communication between a physician and the patient that relates to or was made in connection with any professional services the physician rendered the patient; and
> (2) a record of the patient's identity, diagnosis, evaluation, or treatment created or maintained by a physician.
> (d) Who May Claim in a Civil Case. The privilege may be claimed by:
> (1) the patient; or
> (2) the patient's representative on the patient's behalf. The physician may claim the privilege on the patient's behalf—and is presumed to have authority to do so.

(e) Exceptions in a Civil Case. This privilege does not apply:

(1) Proceeding Against Physician. If the communication or record is relevant to a physician's claim or defense in:

(A) a proceeding the patient brings against a physician; or

(B) a license revocation proceeding in which the patient is a complaining witness.

(2) Consent. If the patient or a person authorized to act on the patient's behalf consents in writing to the release of any privileged information, as provided in subdivision (f).

(3) Action to Collect. In an action to collect a claim for medical services rendered to the patient.

(4) Party Relies on Patient's Condition. If any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition.

E. Texas Rules of Evidence 510, the mental health patient privilege.

Texas Rule of Evidence 510 was restyled by the Texas Supreme Court effective April 1, 2015. The portions most pertinent to this presentation are Rule 510(a) through (e), as follows:

Rule 510. Mental Health Information Privilege in Civil Cases

(a) Definitions. In this rule:

(1) A "professional" is a person:

(A) authorized to practice medicine in any state or nation;

(B) licensed or certified by the State of Texas in the diagnosis, evaluation, or treatment of any mental or emotional disorder;

(C) involved in the treatment or examination of drug abusers; or

(D) who the patient reasonably believes to be a professional under this rule.

(2) A "patient" is a person who:

(A) consults or is interviewed by a professional for diagnosis, evaluation, or treatment of any mental or emotional condition or disorder, including alcoholism and drug addiction; or

(B) is being treated voluntarily or being examined for admission to voluntary treatment for drug abuse.

(3) A "patient's representative" is:

(A) any person who has the patient's written consent;

(B) the parent of a minor patient;

(C) the guardian of a patient who has been adjudicated incompetent to manage personal affairs; or

(D) the personal representative of a deceased patient.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those:

(A) present to further the patient's interest in the diagnosis, examination, evaluation, or treatment;

(B) reasonably necessary to transmit the communication; or

(C) participating in the diagnosis, examination, evaluation, or treatment under the professional's direction, including members of the patient's family.

(b) General Rule; Disclosure.

(1) In a civil case, a patient has a privilege to refuse to disclose and to prevent any other person from disclosing:

(A) a confidential communication between the patient and a professional; and

(B) a record of the patient's identity, diagnosis, evaluation, or treatment that is created or maintained by a professional.

(2) In a civil case, any person—other than a patient's representative acting on the patient's behalf—who receives information privileged under this rule may disclose the information only to the extent consistent with the purposes for which it was obtained.

(c) Who May Claim. The privilege may be claimed by:

(1) the patient; or

(2) the patient's representative on the patient's behalf. The professional may claim the privilege on the patient's behalf—and is presumed to have authority to do so.

(d) Exceptions. This privilege does not apply:

(1) Proceeding Against Professional. If the communication or record is relevant to a professional's claim or defense in:

(A) a proceeding the patient brings against a professional; or

(B) a license revocation proceeding in which the patient is a complaining witness.

(2) Written Waiver. If the patient or a person authorized to act on the patient's behalf waives the privilege in writing.

(3) Action to Collect. In an action to collect a claim for mental or emotional health services rendered to the patient.

(4) Communication Made in Court-Ordered Examination. To a communication the patient made to a professional during a court-ordered examination relating to the patient's mental or emotional condition or disorder if:

(A) the patient made the communication after being informed that it would not be privileged;

(B) the communication is offered to prove an issue involving the patient's mental or emotional health; and

(C) the court imposes appropriate safeguards against unauthorized disclosure.

(5) Party Relies on Patient's Condition. If any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition.

(6) Abuse or Neglect of "Institution" Resident. In a proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of a resident of an "institution" as defined in Tex. Health & Safety Code § 242.002.

IV. Texas Rules of Professional Conduct, Statutes and OAG opinions:

Texas Rules of Professional Conduct Rule 1.05 mandates that lawyers keep certain information confidential. Two types of information – privileged information and unprivileged client information -- are "confidential." Rule 1.05 defines "privileged information" as that which is protected by the lawyer-client privilege. TRPC Rule 1.05 does not sweep the medical privilege into the definition of privileged information:

(a) Confidential information includes both privileged information and unprivileged client information. Privileged information refers to the information of a client protected by the lawyer-client privilege of Rule 5.03 of the Texas Rules of Evidence or of Rule 5.03 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 5.01 of the Federal Rules of Evidence for United States Courts and Magistrates.

> Unprivileged client information means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

In my mind, "privileged information" ought to be defined as "information of a client protected by ANY privilege, including TRE 5.03, TRE 5.09, TRE 5.10, etc." While Rule 1.05 does not explicitly reference medical privileges into its text, the second half of the definition of confidential information includes it even though the rule makes it sound like the rule is excludes any information outside of TRE 5.03 and FRE 5.01: "Unprivileged client information means all information relating to a client or furnished by the client, other than privileged information…"

Because the lawyer acquires medical records by virtue of his or her representation of the client, I would argue that **privileged** medical records are within the definition of **unprivileged** information. That argument is admittedly convoluted. But Rule 1.05 should be interpreted as saying "medical records, although privileged by TRE 509, TRE 5.10, FRE 5.09 and FRE 5.10, are considered "other than privileged information" but are still "confidential" because they relate to a client and were acquired during the course of or by reason of the representation." What an awkward way of saying you cannot reveal information that is privileged or confidential.

<u>Miscellaneous examples of information made confidential by statute include</u> …

> Medical records that a physician creates or maintains regarding the identity, diagnosis, evaluation, or treatment of a patient. See Occ. Code § 159.002(b); *Abbott v. Tex. State Bd. of Pharmacy*, 391 S.W.3d 253, 258 (Tex. App.—Austin 2012, 318 no pet.) (Medical Practice Act does not provide patient general right of access to medical records from governmental body responding to request for information under Public Information Act); Open Records Decision No. 681 at 16–17 (2004).
>
> Certain information relating to the provision of emergency medical services; Health & Safety Code § 773.091; see Open Records Decision No. 681 at 17–18 (2004)
>
> Communications between a patient and a mental health professional and records of the identity, diagnosis, or treatment of a mental health patient created or maintained by a mental health professional; Health & Safety Code § 611.002
>
> Section 552.101 also incorporates the confidentiality provisions of federal statutes and regulations. In Open Records Decision No. 641 (1996), the attorney general ruled that information collected under the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq., from an applicant or employee concerning that individual's medical condition and medical history is confidential under section 552.101 of the Government Code, in conjunction with provisions of the Americans with Disabilities Act. This type of information must be collected and maintained separately from other information and may be released only as provided by the Americans with Disabilities Act. In Open Records Decision No. 681 (2004), the attorney general addressed whether the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and the related Privacy Rule adopted by the United States Department of Health and Human Services make information confidential for the purpose of section 552.101. The attorney general determined that when a governmental body that is a "covered entity" subject to the Privacy Rule, receives a request for "protected health information" from a member of the public, it must evaluate

the disclosure under the Act rather than the Privacy Rule. The decision also determined that the Privacy Rule does not make information confidential for purposes of section 552.101 of the Government Code. In *Abbott v. Tex. Dep't of Mental Health & Mental Retardation*, the Third Court of Appeals agreed with the attorney general's analysis of the interplay of the Act and the Privacy Rule.

2016 Public Information Handbook • Office of the Attorney General, page 72-74, found at https://www.texasattorneygeneral.gov/files/og/publicinfo_hb.pdf

V. TRCP and case law relating to the discoverability of medical records, relevance, inferential rebuttal issues, necessity for redaction and limits on disclosure.

Generally, privileged matters are not discoverable; "records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed." *In re Anderson*, 973 S.W.2d 410 (Tex. App. – Eastland, 1998); *West v. Salido,* 563 S.W.2d 240 (Tex. 1978), and mandamus is the proper remedy if the trial court orders the disclosure – even of the identity of patients -- of privileged records, *In Re Anderson*. "If disclosure were required, the privilege would be meaningless to the patient who holds a legitimate interest in it. See *Jampole v. Touchy*…" *Id* at 412.

Even in the interest of broad discovery directed at seeking the truth, no privilege should be ignored. *Mutter v. Wood,* 744 S.W.2d 600 (Tex. 1988). Discovery is available for any matter that is not privileged **and** is relevant to the subject matter of the pending action. TRCP 192.3(a).

Privileged medical records and mental health records are protected from disclosure, in state court and in federal civil cases in which the state law "supplies the rule of decision" (FRE 501), unless the litigation exceptions of TRE 509(c) and 510(b) apply.

In re CSX, 124 SW3d 149 (Tex 2003) holds discovery "requests must be reasonably tailored to include only relevant matters."

A. What is relevance and how relevant does it have to be?

Broad relevance is not enough to waive the physician-patient privilege. The litigation waiver to the privilege applies only to a party's records that relate in a significant way to a party's claim or defense. *R.K. v. Ramirez,* 887 S.W.2d 836 (Tex. 1994). The information on the condition sought must be central to a claim or defense, not merely an evidentiary or intermediate issue of fact. "The privacy of the physician/patient relationship should not be subject to a casual breach by every litigant in single-minded pursuant of the last scrap of evidence which may marginally contribute to victory in the litigation." *Ramirez, supra.* Simply because a condition may be "relevant" to a claim or defense does not mean the party relies upon the condition as a part of the claim or defense. Relevance being defined so broadly would mean that virtually any defendant could plead some defense so broadly as to make any condition of a patient arguably relevant to the claim, and the privilege would cease to exist. *R.K., supra* at 842. The medical condition contained in the medical records must be of legal consequence to a party's claim in order to be discoverable. *Ramirez, supra* @ 842-3. In applying the litigation exception "relevance alone cannot be tested because such a test would ignore the fundamental purpose of evidentiary privileges, which is to preclude discovery and admission of relevant evidence under prescribed circumstances." *In re Christus*

Health Southeast Texas, 167 S.W.3d 596 (Tex. App. – Beaumont 2005), dealing with overly broad requests to produce logs of telephone calls and social media postings.

Texas Courts have addressed this balancing test repeatedly. Even if medical records could be useful for impeachment or if the information contained therein could be used to test the credibility of a witness, such information is not discoverable under the patient/litigant exception to the physician/patient privilege. *See In Re Leatherwood*, 1998 WL 800341 (Tex.App.–San Antonio 1998, no pet.)(not designated for publication)(permitting discovery of medical records to attack a witness's credibility would have a chilling effect on an injured party's decision to seek relief which is not the intended result of the patient litigation exception.) Defensive claims that a plaintiff's damages and injuries were caused by pre-existing conditions may not involve the resolution of ultimate issues of fact that have legal significance standing alone. *In re Nance*, 143 S.W.3d 506 (Tex. App. – Austin 2004, but see *JLG Trucking LLC v. Lauren R. Garza*, No. 13-0978, (Tex. April 24, 2015)). Therefore, records which are not related – in a significant way -- to the underlying suit are not relevant, remain privileged, and should not be disclosed.

B. Relevance requires more than an inferential rebuttal issue.

What level of relevance is sufficient to trigger the litigation exception to the privilege? More than just a little. In *In re Pennington*, No. 02-08-00233-CV, 2008 WL 2780660 at 4 (Tex. App. – Fort Worth July 16, 2008, orig. proceeding) (mem. op.), the plaintiff had pleaded for ordinary mental anguish and her physical medicine records revealed prescriptions for anti-depressants before the wreck that injured her. "The fact that a plaintiff has had past mental problems is distinct from the mental anguish associated with a personal injury or loss; a tortfeasor takes a plaintiff as he finds her. [cites omitted] Defensive claims that a plaintiff's damages and injuries were caused by the pre-existing condition do not involve the resolution of ultimate issues of fact that have legal significance standing alone. [cite omitted] Indeed, these types of defensive assertions are in the nature of inferential rebuttal claims and, thus, are not sufficient to put a plaintiff's mental condition at issue so as to make medical records about that condition discoverable."

In re Nance, 143 S.W.3d 506 (Tex. App. – Austin 2004) repeated the inferential rebuttal analysis when a hospital and doctor were sued after a routine gall bladder surgery resulted in internal bleeding and death. The decedent's mental health records were sought, objections were lodged, the records were produced in camera, and the court ordered the released to the defendants, who argued that maybe the decedent regularly drank too much, got pancreatitis, and caused post-operative bleeding. And, the defendants continued, her mental health and alcohol use was relevant to the wrongful death beneficiaries' claims for mental anguish, loss of consortium, and loss of pecuniary services. The court emphasized: "As a matter of law, there is no adequate remedy at law for a decision denying a privilege. *In re Monsanto Co.*, 998 S.W.2d 917, 922 (Tex. App – Waco 1999, orig. proceeding)," id at 510, and then discussed what it means to be relevant enough to waive the privilege:

> Whether a plaintiff's condition is "part" of a claim is determined from the pleadings, without reference to the evidence that is clearly privileged. To be a "part" of a claim or defense, the condition itself must be a fact that alone carries legal significance under the substantive law. ("Because relevance is defined so broadly, virtually any litigant could plead some claim or defense to which a patient's condition could arguably be relevant and the privilege would cease to exist. We reject this alternative as well."). To illustrate the

> "part" of concept, the supreme court cited the example of an alligator that a testator is found incompetent. Such a mental condition, if found, would be a factual determination to which legal consequences attach: the testator's will would no longer be valid. "In other words," the supreme court explained, "information communicated to a doctor … may be relevant to the merits of an action, but in order to fall within the litigation exception to the privilege, the condition itself must be of legal consequence to the party's claim or defense." [Cite omitted.]"As a general rule," the supreme court explained, "a mental condition will be 'part' of a claim or defense if the pleadings indicate that the jury must make a factual determination concerning the condition itself." It also observed that "[c]ommunications and records should not be subject to discovery if the condition is merely an evidentiary or intermediate issue of fact, rather than an 'ultimate' issue of a claim or defense, or if the condition is merely tangential to a claim rather than 'central' to it.
>
> *In re Nance*, 143 S.W.3d 506, 511-512 (Tex. App. – Austin 2004)

So if Ms. Nance was a heavy drinker whose alcohol use made her more susceptible to post-surgical bleeding, isn't that enough to make her condition "part" of the lawsuit's causation defense? And if she was a heavy drinker, which may have interfered with family relationships and earning capacity, isn't that enough to make her condition "part" of the lawsuit's damages defense? No. "[W]hether Ms. Nance was an alcoholic or a heavy drinker is, at most, an intermediate issue of fact regarding the claims for emotional and pecuniary loss by her family, and [for] the defensive theory that a pre-existing condition caused her death." Id at 512. Pleading a "pre-existing condition as an alternative and affirmative defense" does not make it central; instead, "that defensive theory is in the nature of an inferential rebuttal, not an ultimate issue of fact that alone has legal significance. [*R.K. v. Ramirez*] at 843; see also Tex. R. Civ. P. 277. We hold that the records in question, if protected by the physician-patient privilege, are not discoverable under the patient-litigant exception to that privilege."

So what the heck is an inferential rebuttal issue?

Footnote 7 to *In re Nance* and Tex. R. Civ. P. 277 explain: "An inferential rebuttal issue disproves the existence of an essential element submitted in another issue or question. *Select Ins. Co. v. Boucher*, 561 S.W.2d 474, 477 (Tex. 1978). It presents a contrary or inconsistent theory from the claim relied upon for recover. *Id*. Inferential rebuttal issues attempt to disprove a claim by establishing the truth of a positive factual theory that is inconsistent with some factual element of the ground of recovery. *Id*. 'Inferential rebuttal questions shall not be submitted in the charge.' Tex. R. Civ. P. 277."

Allegations of routine "mental anguish or emotional distress will not, standing alone, make a plaintiff's mental or emotional condition a part of the plaintiff's claim. The allegations in [Plaintiff's] petition that he suffered 'emotional shock' is not a sufficient basis to make his mental or emotional condition an issue on which the jury will be required to make a factual determination. Therefore, [Plaintiff's] communications … are protected by the physician-patient privilege." In re Toyota Motor Corp., 191 S.W.3d 498, 502 (Tex. App. – Waco 2006, orig. proceeding).

C. <u>Redaction is not only permitted, it is required</u>.

Colleagues – including but not at all limited to opposing counsel -- have debated whether it is unprofessional, unethical and sanctionable for plaintiff's counsel to alter the client's medical

records by redacting them prior to sending them to opposing counsel. Of course it is unprofessional, unethical, and sanctionable to hide relevant evidence and to redact information that is not privileged and is relevant.

But an attorney would never suggest that it is unprofessional, unethical and sanctionable to withhold his or her notes of client meetings, correspondence between the attorney and client, or other documents protected by the attorney-client privilege. An attorney who seeks, from the opposing party, an award of attorney's fees (in a breach of contract dispute, for example) must show the court his or her attorney client contract and contemporaneous billing records, but the fact that attorney's fees are in issue does not require the attorney to hand over documents protected by the attorney-client privilege. Attorney billing records may, of course, be redacted to preserve client confidences. In fact, they must be. So why is it so difficult to see that medical records deserve the same redaction protections? Just as redaction of highly relevant medical information is unethical, it is equally unethical to hand over a stack of unredacted medical records containing past medical histories, medical histories of family members who are not party to the suit, mental health histories, unrelated medications, and records of consultants and referral doctors and imaging studies for conditions unrelated to the litigation, or records so old and remote as to be irrelevant.

Case law is actually full of exhortations to redact medical records. The opinions suggest that the trial judge is tasked with this burden; I suggest that the work more appropriately falls to the person most familiar with the file and issues: the legal representative of the patient, with the judge serving as the check and balance for the protection of all parties.

In re Nance agrees that redaction of medical records and limiting disclosure of the relevant portions are appropriate and required by law. "Any disclosure should be no broader than necessary and it is a trial court's obligation to oversee and safeguard the records to ensure unnecessary matters are not disclosed. See *R.K.* 887 S.W.2d at 843. In *Davis*, the supreme court said that if the communication 'goes beyond issues dealing with the affirmative relief sought, the trial court should redact any part of the privileged communication that does not relate to the affirmative relief sought.' *Davis*, 856 S.W.2d at 163 n. 10. The irrelevant portions of the records, should be redacted, deleted, or otherwise protected by the trial court. *R.K.* 887 S.W.2d at 844; *M.A.W. v. Hall*, 921 S.W.2d at 915. Thus, with respect to any records the trial court finds to be discoverable, it should limit disclosure of any privileged matters contained therein, such as through redaction. In these defendants' response to the Nances' motion to quash, they state that were 'willing to enter into a confidentiality order' limiting the use of the records to only that necessary for the defense of the litigation. Such a measure might ***also*** be ordered by the court as a means of avoiding unnecessary disclosure." *In re Nance*, at 514. The appellate court ordered the Nance trial court to protect privileged records from disclosure and, "as to any documents the court finds not to be protected by the physician-patient privilege, permit disclosure to the extent necessary while protecting any privileged information contained in those documents by redaction or other protective measures." *Id* at 514-15.

In *M.A.W. v. Hall*, 921 S.W.2d 911 (Tex. App. [14 Dist.], 1996), a medical doctor was sued for malpractice under allegations "he may have been under the influence of controlled substances and/or alcohol at the time he provided medical care to [plaintiff.]" His psychiatric records were sought via a deposition on written questions, and the defendant doctor filed a motion to quash the deposition to protect his psychiatric records. The records were produced in camera. The parties signed a confidentiality agreement at the request of the judge and then the judge released several

of the records, and denied the motion to quash. The defendant sought mandamus, arguing that despite the protections outlined in the confidentiality agreement, some of the unredacted records should not have been released to the plaintiff. The court considered the similarities between the instant case and *R.K., M.D., v. Ramirez,* 887 S.W.2d 836 (Tex. 1994) and held:

> Privileged medical records may be discovered if the party seeking the records meets the exception described in *R.K., M.D., v. Ramirez,* 887 S.W.2d 836 (Tex. 1994). Exceptions to the medical and mental health privileges apply when "(1) the records sought to be discovered are relevant to the condition at issue, and (2) the condition is relied upon as a part of a party's claim or defense, meaning that the condition itself is a fact that carries some legal significance." Id at 843. Both parts of the test must be met, and, even then, the judge must perform an in camera inspection to properly balance competing interests. Id. the Trial court must ensure that production is no broader than necessary. Id. Thus, even if a condition is part of the party's claim or defense, the records should be disclosed only to the extent necessary to provide evidence relevant to the condition alleged. Id. Furthermore, the records disclosed must be closely related in time and scope to the claims made to prevent unnecessary invasion into private affairs. Id. When a document contains information meeting this standard, any other information in the document not meeting this standard must be redacted or otherwise protected. Id.
>
> [After finding that records related to substance abuse were relevant and should be produced, the court continued:]
>
> The portion of the records unrelated to any substance abuse, however, is irrelevant to any claim by the plaintiffs. Therefore, the exception does not apply and this portion of the records remains privileged.
>
> [The appeals court was not persuaded that the redaction of only a portion of the records and the requirement of a confidentiality agreement were sufficient to protect the privacy interest in the privileged records.]
>
> [O]ur reading of Ramirez leads us to believe that the protective order in this case, which limits disclosure to certain people but does not order redaction or deletion, does not sufficiently protect the highly sensitive privileged information. If information is privileged, and no exception exists, it is not discoverable. Thus, the trial court abused its discretion in disseminating these documents without redacting or deleting the portions that are irrelevant to plaintiffs' claims.
>
> *M.A.W. v. Hall*, 921 S.W.2d 911, 914-917, (Tex. App. [14 Dist.], 1996)

The appeals court ordered Judge Hall to quash the deposition on written questions, to retrieve all copies of the unredacted records, to redact all entries unrelated to substance abuse, to prohibit the use of any information unrelated to substance abuse in all proceedings, and to "order all parties, attorneys, and experts who viewed the unredacted records to disregard and not to testify, disclose or comment on any information unrelated to relator's substance abuse." *Hall* at 917.

D. Don't waive the privilege by failing to assert it timely.

The failure to timely assert the privilege may waive it. After a business dispute erupted into litigation with claims for mental anguish damages, discovery of mental health records was conducted. The defense subpoenaed mental health records, the plaintiff objected, the court ordered production without apparent limitations, and no mandamus was sought. During depositions a year and a half later, plaintiff's counsel instructed the therapist not to answer certain questions, and the parties returned to court for a ruling. The court discussed whether the plaintiff waived the privilege by failing to seek mandamus when the original discovery order was issued: "Mandamus is an extraordinary remedy, and "its issuance is largely controlled by equitable principles." *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993) (orig. proceeding)). *In re Whipple,* 373 S.W.3d 119 at 122-123 (Tex.App.–San Antonio 2012, no pet.) and then discussed the heightened point at which the mental health condition has been put into issue such that the litigation waived the privilege:

> "The plaintiff must assert a mental injury that exceeds the common emotional reaction to an injury or loss." *Coates v. Whittington*, 758 S.W.2d 749, 753 (Tex. 1988) (orig. proceeding). "The fact that a plaintiff has had past mental problems is distinct from the mental anguish associated with a personal injury or loss; a tortfeasor takes a plaintiff as he finds her." *In re Pennington*, No. 02-08-00233-CV, 2008 WL 2780660 at 4 (Tex. App. – Fort Worth July 16, 2008, orig. proceeding) (mem. op.); *In re Nance,* 143 S.W.3d 506, 512 (Tex. App. – Austin 2004, orig. proceeding); *In re Doe,* 22 S.W.3d 601, 606 (Tex.App. – Austin 2000, orig. proceeding). *In re Whipple,* 373 S.W.3d 119 at 123-124 (Tex.App.–San Antonio 2012, no pet.)

E. <u>The necessity – or not – of an in camera inspection</u>.

If the trial court concludes that a party's medical or mental condition is a part of a claim or defense, and thus subject to the exception to privilege, upon request, it generally must conduct an *in camera* inspection of the documents to be produced to ensure that only information fitting the narrow exception to the privilege is produced. *R.K., supra at 843*; *In re Nance*, 143 S.W.3d 506 (Tex. App. – Austin 2004).

The lack of connection between the medical records and the claim or defense may be so obvious, however, that an in camera inspection is not required, such as when a premises liability defendant subpoenas the mammogram results and gynecological records from a female personal injury plaintiff who alleges a fractured wrist from a trip and fall. In fact, legendary discovery speaker Paul Gold writes, in "*Rooting for Acorns" Texas Scope of Discovery Review – 2013*:

> It seems like no matter what injury is alleged, if the plaintiff is a woman of child-bearing age, the defense always asks for the plaintiff's OB/Gyn records, even such records have no conceivable relationship to the claims of injury for which the plaintiff is seeking damages. … the question is begged why OB/Gyn records seem to be on all defendants' things-to-get list, even when no obstetric or gynecological claims are in issue. Perhaps it is because women often form close bonds with these physicians and are candid about information that a defendant might find useful (extra-marital sex, affairs, sexual diseases, complaints of depression, etc.), if not for the legitimate purpose of aiding in the resolution of the case, perhaps for the questionable purpose of embarrassment and intimidation.

Then Mr. Gold discusses *In re Drews***,** Not Reported in S.W.3d, 2012 WL 4854716 (Tex.App.-Texarkana), and the discoverability of gynecological records during medical malpractice litigation alleging a botched ankle surgery. After the trial court conducted an in camera inspection and ordered unrestricted production of gynecological records, the appeals court conducted its own in camera inspection and returned the case to the trial court, schooling the trial court that the defendant's arguable claim of relevance (essentially that pregnancy made the plaintiff waddle so she may have had gait problems before surgery, plus maybe she was a drug abuser which could be relevant to her ability to heal after surgery) was not sufficient to waive the privilege and that it should "tak[e] care to ensure any production of documents 'is no broader than necessary, considering the competing interests at stake.'" *R.K.*, 887 S.W.2d 843. *In re Drews* at *2.

Is an in camera inspection always required before enforcing the privilege? No, according to *In re Anderson,* 973 S.W.2d 410 (Tex. App. – Eastland, 1998). A doctor who was sued for sexual assault of a patient was asked to divulge the identity of other patients who had complained against him. The real party in interest objected to having her identity disclosed. Although the doctor and his attorney filed affidavits, apparently records had not been produced by the time of the appeal. The court noted: "it is apparent from the nature of the discovery requests that the privileged information is being sought. …there are certain circumstances in which the discovery objects, standing alone, constitute sufficient proof of the privilege. … One can look at the subject matter of the discovery sought, even in the absence of any other evidence, and discern that the identity of patients is sought; that information was created and maintained by a physician and remains confidential, privileged, and exempted from discovery." *Anderson* at 412.

The trial court's refusal to order an in camera inspection before refusing to order a plaintiff to sign an authorization for mental health records was upheld in *Pennington*. "[W]e have already determined from the face of the pleadings that the [litigation] exception does not apply; thus, an in camera inspection would have been unnecessary. Additionally, there is no indication that Pennington was in possession of these documents. … And the information she was required to produce directly – the names and addresses of her mental health care providers – would not have assisted the trial court in determining whether all or only part of the records are within the exception to the privilege." Id. Although the court left open the option to seek additional records if the plaintiff's mental anguish claim exceeded ordinary mental anguish, it held that "[t]he facts alleged in the current live pleadings do not rise to the level of 'legal significance' required by Ramirez. See Doe, 22 S.W.3rd at 610 (As discovery continues in this case, an in camera inspection may be appropriate to determine whether some mental health records should be released."). Id, footnote 2.

The Texas Supreme Court affirmed a trial court's refusal to conduct an in camera inspection of tax returns: "When a party seeks to exclude documents from discovery and the basis for objection is undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional or property rights, rather than a specific immunity or exemption, it is not necessary for the court to conduct an inspection of the individual documents before ruling on the objection." *Hoffman v. Fifth Circuit Court of Appeals*, 756 S.W.2d 723 (Tex. 1988).

F. <u>Protecting privileged medical records is not discretionary</u>.

The "trial court has no 'discretion' in determining what the law is or applying the law to the facts. *Walker* [*v. Packer*] 827 S.W.2d at 840. The trial court abuses its discretion when it clearly fails to

analyze or apply the law to the facts. *Id*." *In re Natividad Arriola*, 159 S.W.3d 670, Tex. App. Corpus Christi – Edinburg 2004). In a case with sexual abuse allegations similar to *In re Anderson*, in which plaintiffs also sought the disclosure of the identities of other patients who might have been abused, the court came to the opposite conclusion as *Anderson* and ordered the disclosure of the identities of patients because these patients were nursing home residents and the allegations of abuse triggered numerous statutory exemptions, including Sec. 242.002 of the Texas Health & Safety Code and because the discovery "goes to the heart of a party's case."

If information is privileged and no exception exists, it is not discoverable. *M.A.W. v. Hall,* 921 S.W.2d 911, 916 (Tex.App.–Houston [14 Dist.] 1996, no pet.) (holding a protective order which limits disclosure to certain people, but does not order redaction or deletion, does not sufficiently protect highly sensitive, privileged information.) If portions of the record are discoverable but other portions are not, then the unrelated portion must be redacted before the records are disclosed.

A court order requiring release of medical records must be drawn narrowly so it protects the disclosure of privileged records and information not relevant to the underlying suit. The production of privileged information must be no broader than is necessary. *R. K., supra* at 843, 844. The court order should limit the disclosure to "only the protected health information expressly authorized by such order." [45CFR 164.512(e)(1)(i)] The rules discussing notice and protective orders provide explicit requirements for the protective order, including a prohibition on re-disclosure and a return or destruction of all records, including copies, at the end of the litigation [45CFR 164.512(e)(1)(v)(A) and (B)].

G. Billing records are protected by the same TRE 509 and 510 privileges.

Billing records, with diagnosis codes and procedure codes, disclose a lot about a person's medical history. Plaintiff Joan Jarvis was bitten on the hand by a dog and sued the dog's owner for her injuries. The dog owner claimed that the billed amount for Jarvis' two hand surgeries was excessive and propounded depositions on written questions to her health insurer and the records custodians for her surgeons and surgical centers. Of course, the dog owner sought "the entire billing record file" and "the entire medical records file." Held: The medical billing records for unrelated procedures are privileged because billing records "record the identity, diagnosis, evaluation, or treatment of Jarvis" and because billing records are covered by HIPAA. *In re Jarvis*, No. 14-13-00224-CV (Tex. App. – Houston [14th Dist.] August 30, 2013).

H. Whose burden is it?

The party claiming that material or information is not responsive to written discovery must assert the privilege, s*ee* TRCP 193.3, and show the court that the matters sought are privileged. It may be possible to look at the subject matter of the discovery sought, even in the absence of other evidence, and determine that the information is privileged and exempt from discovery; *In re Anderson, supra.* But see *In re United Services Auto Ass'n*., 76 S.W.3d 112 (Tex. App. San Antonio - 2002) which placed the burden on the party seeking discovery to establish that the litigation-exception applied: "Because the protection of privacy is fundamental and of constitutional import, discovery must be scrupulously limited to what is material and relevant to the cause of action at issue. *Maresca v. Marks*, 362 S.W.2d 299, 301 (Tex. 1962); *El Centro del Barrio, Inc. v. Barlow*, 894 S.W.2d 775,779-80 (Tex. App. San Antonio – 1994, orig. proceeding). … When a party has properly objected to a request for production based on privacy rights, it is the

burden of the party seeking production to show the information sought is material, relevant, and necessary. *El Centro del Barrio, Inc.*, 894 S.W.2d at 779.

The Texas Supreme Court held that "health care claimants, who are entitled to unrestricted access to their health information and to the non-party health care providers, are in the best position to identify what information they consider privileged. Because the Regians [claimants] did not make the requisite showing of specific and demonstrable injury, we hold that the trial court abused its discretion in issuing the protective order." *In re Collins*, 286 S.W.3d 911 (Tex. 2009). Perhaps the fact that Dr. Collins was defending a medical malpractice lawsuit, in which plaintiffs are required by Tex. Civ. Prac. & Rem. Code Sec. 74.052(b) to sign a medical authorization, justifies the court's requirement that a party show that demonstrable injury from a loss of their state law privileges.

No discovery device can be used to go on a fishing expedition. *Kmart Corp. v. Sanderson,* 937 S.W.2d 429 (Tex. 1996) and *National Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458, 461 (Tex. 1993). Even if a medical condition is put into issue by a party, that condition does not waive the privilege as to portions of the medical condition not put in issue by the party. Seeking medical records or privileged information beyond the scope of the claim or defense is fishing and not allowed under the Tex. R. Civ. P. 196.1. *Dillard Dept. Stores, Inc. v. Hall*, 909 S.W. 2d 491, 492 (Tex. 1995).

The Texas Supreme Court has recently confirmed that no party may propound overly broad requests to conduct "an impermissible fishing expedition" and that the "trial court abused its discretion in ordering the [party] to produce evidence related" to claims other than the narrow claim at hand and "we conditionally grant mandamus relief and order the trial court to withdraw its order compelling discovery." *In Re National Lloyds Insurance Company*, Relator, No. 13-0761 (Tex. 10/31/2014). The court set strict boundaries on discovery:

> "National Lloyds objected to the requests as overbroad, unduly burdensome, and seeking information that was neither relevant nor calculated to lead to the discovery of admissible evidence.… **A discovery order that compels production beyond the rules of procedure is an abuse of discretion for which mandamus is the proper remedy**. In re Deere & Co., 299 S.W.3d 819, 820 (Tex.2009) (per curiam); Texaco, Inc. v. Sanderson, 898 S.W.2d 813, 815 (Tex.1995) (per curiam). The Texas Rules of Civil Procedure provide for discovery of "any matter that is not privileged and is relevant to the subject matter of the pending action." TEX. R. CIV. P. 192.3(a). The phrase "relevant to the subject matter" is to be broadly construed. Ford Motor Co. v. Castillo, 279 S.W.3d 656, 664 (Tex.2009). It is no ground for objection "that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Tex. R. Civ. P. 192.3(a).
>
> However, even these liberal bounds have limits, and **discovery requests must not be overbroad**. See, e.g., In re Allstate Cnty. Mut. Ins. Co., 227 S.W.3d 667, 669–70 (Tex.2007) (per curiam); In re CSX Corp., 124 S.W.3d 149, 153 (Tex.2003) (per curiam). A request "is not overbroad merely because [it] may call for some information of doubtful relevance" so long as it is "reasonably tailored to include **only** matters relevant to the case." Sanderson, 898 S.W.2d at 815. Significantly, whether a request for discovery is overbroad is distinct from whether it is burdensome or harassing. Allstate, 227 S.W.3d at 670. We

have held that "**[o]verbroad requests for irrelevant information are improper whether they are burdensome or not**." Id. [emphasis mine]

In Re National Lloyds Insurance Company did not involve documents protected by common law medical or mental health privileges or documents protected by HIPAA or Chapter 181 of the Texas Health & Safety Code. One would expect that courts would resolve discovery and disclosure disputes related to privileged records with the same scrutiny and protection.

A court may order (or the parties can agree to) discovery methods other than those provided in the discovery rules. See TRCP 191.1 & cmt. 1. *In re Home State County Mutual*, No. 12-06-00144-CV (Tex. App. – Tyler 2006) (not published). A discovery order is improper if it compromises a person's privileges or mandates the disclosure of privileged information that exceeds the scope of discovery. *In re Fort Worth Children's Hosp., 100 S.W.3d at 587*; *In re Dolezal, 970 S.W.2d 650, 651 (Tex. App.--Corpus Christi 1998, orig. proceeding)* If a trial court erroneously grants discovery of privileged documents remedy by appeal is ineffective because, one revealed, the privileged documents cannot be protected, and mandamus will be the appropriate remedy. *In re Pennington*, No. 02-08-00233-CV, 2008 WL 2780660 at 4, (Lexis 5359). (Tex. App. – Fort Worth July 16, 2008, orig. proceeding) (mem. op.)

VI. Medical Records in employment and personnel files.

42 U.S.C. § 12112(d), provides that medical records related to employment-required medical examinations are must be kept confidential:

> **(3)EMPLOYMENT ENTRANCE EXAMINATION** A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—
>
> **… (B)**information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—
>
> (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
>
> **(ii)** first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
>
> **(iii)** government officials investigating compliance with this chapter shall be provided relevant information on request; and
>
> **(C)** the results of such examination are used only in accordance with this subchapter.
>
> 42 U.S.C. § 12112(d); see also 29 C.F.R. § 1630.14(b)

Medical records related to the Family Medical Leave Act must be kept confidential:

(g) Records and documents relating to certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files. If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA shall be maintained in accordance with the confidentiality requirements of Title II of GINA (*see* 29 CFR 1635.9), which permit such information to be disclosed consistent with the requirements of FMLA. If the ADA, as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements (*see* 29 CFR 1630.14(c)(1)), except that:

(1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;

(2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and

(3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

(h) Special rules regarding recordkeeping apply to employers of airline flight crew employees. *See* § 825.803.

29 .F.R. § 825.500(g) and (h)

VII. Employment and personnel files.

Personnel records of governmental employees have long been afforded protection under the Texas Open Records Act and the Federal Freedom of Information Act. Each, respectively quoted below, prohibits the disclosure of personnel records:

Texas Open Records Act:

> "§ 552.102. EXCEPTION: PERSONNEL INFORMATION.
> (a) Information is excepted from the requirements of Section 552.021 if it is information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy…"

Federal Freedom of Information Act:

> "5 U.S.C. § 552 (b) (6)
>
> personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;"

The 2016 Texas Public Information Handbook promulgated by the Texas Attorney General is found at https://www.texasattorneygeneral.gov/files/og/publicinfo_hb.pdf and relates to the privacy of governmental employees.
The Texas Open Records Act's only exception to the release of personnel records of government employees is that they may be released directly to the employee or their designated personal representative.

Section 552.102 excepts from disclosure information in personnel files if the disclosure of the information would constitute a clearly unwarranted invasion of personal privacy. 1. The test for an invasion of privacy is the same as that articulated in *Industrial Foundation of the South v. the Texas Industrial Accident Board*; *Hubert v. HartHanks Texas Newspaper, Inc.*, 652 S.W.2d 546, 550 (Tex.App.-Austin 1983, writ ref'd). Retirement records are personnel records. *Calvert v. Employees Retirement System of Texas*, 648 S.W.2d 418, 420 (Tex. App.-Austin 1983, writ ref'd n.r.e.) Sections 552.024 and 552.117 except from disclosure the home address and home telephone number, the social security number, and information identifying the family members of governmental officials and employees, if the government official or employee has indicated such desire to the main personnel officer of the governmental unit. If the official or employee fails to make such election, the information is public information. However, the home address and home telephone number, the social security number, and information identifying the family members of peace officers and prosecutors (including municipal attorneys whose jurisdiction include any criminal law or child protective services matters) is always excepted from disclosure.

Information covered by this exception does not necessarily need to be in the employee's personnel file to be covered by this exception. The litmus test is whether the information bears on the qualifications for employment, terms of employment, separation from employment, or anything else bearing on the employment relationship.

The discoverability of personnel files of private employees is not governed by the Open Records Act. The courts apply traditional relevancy standards in discovery disputes.

In Title VII cases, "liberal civil discovery rules give plaintiffs broad access to document their claims." (*Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 657, 109 S.Ct. 2115, 2125, 104 L.Ed.2d 733 (1989) but discovery of other employees' personnel files should be limited to employees who are similarly situated to the plaintiff. (See, e.g., *Ardrey v. United Parcel Service*, 798 F.2d 679, 682 (4th Cir. 1986), cert. denied, 480 U.S. 934 107 S.Ct. 1575, 94 L.Ed.2d 766 (1987).)

When the material within the personnel files is directly relevant to the litigation, then discovery of personnel files is allowed; "in Title VII litigation, in which plaintiffs are similarly required to demonstrate pretext, courts have customarily allowed a wide discovery of personnel files. All or some parts of these personnel files could be central to the plaintiffs' effort to prove pretext." See *Coughlin v. Lee*, 946 F.2d 1152, at 1159 (5th Cir. 1991). Also see *Wilson,* 149 F.R.D. at 555 (*Coughlin* analysis applies to age discrimination cases).

The court employed an expansive definition of "personnel file" in *In Re La Vernia Nursing Homes*, 12 S.W.3rd 566 at 571 (Tex. App. - San Antonio, 2002). The nursing home divided the personnel file into separate files and then handed over only the file labeled "personnel file." The court declined to adopt that fiction: [4] We hold "the personnel file" means every record kept on the employee in question. The entire file may not be kept in the same location and not every document in the file may be discoverable. However, in considering the proper response to a request for production, the trial court properly found Country Care should not be able to effectively hide a portion of the personnel file or employment record by simply naming it something else. If Country Care had revealed the existence of the documents and made the proper objection, the question of privilege would have been properly and timely before the trial court.

A litigant who wanted to shield her employment file from discovery was required to "'show particular, specific and demonstrable injury by facts sufficient to justify a protective order'" even though the subpoena attached to the deposition on written questions sought records from her personnel file including "physical examination reports, medical records, … insurance records, benefits, injury reports, [and] workers' compensation records" all of which should be protected by TRE 509 and possibly TRE 510.

VIII. Practical application of federal or state statutes and common law to protect medical records pre-litigation, in discovery, and in trial.
A. Pre-litigation demand letters.

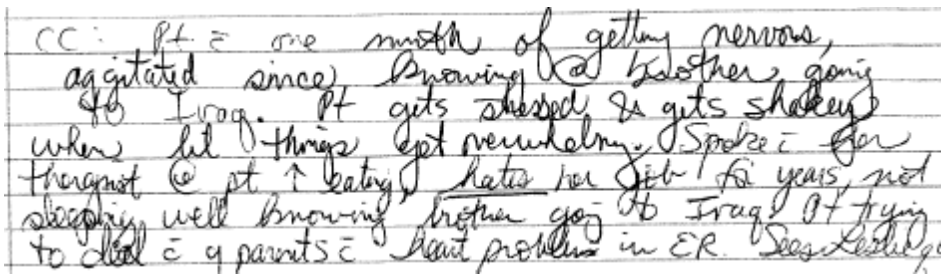
The old days: In personal injury cases, clients and plaintiff's attorneys routinely gave medical authorizations to insurance carriers and defense counsel, or handed over the client's unredacted medical records, or allowed the opposing counsel to send a notice of intent to take the deposition on written questions, with a subpoena duces tecum, of medical records custodians. Both sides agreed that the unrelated medical conditions would be subject to a pre-trial motion in limine minutes before trial began. Given that most cases settled before trial, this method saved the attorneys a lot of work at the expense of the party's privacy. If the case did not settle, then the lawyers distributed bottles of white-out to harried paralegals who frantically dabbed over the most embarrassing or sensitive lines of medical records and hoped the white-out dried in time to make photocopies for the jurors.

If you are thinking "wait, we're still handing the opposing counsel a medical authorization, or stacks of records, and not objecting to the depositions on written questions" then reconsider.

We prove up records and bills by affidavit and we include those affidavits, medical records, and bills in the demand letter. We use Adobe Acrobat Professional version 9 software to electronically redact medical records and bills to preserve the privacy interests of the client. The software allows redacted portions of the records to be replaced either with a blank white section or a heavy rectangle box; I prefer to less obtrusive white-out redaction because the black box calls undue attention to the omitted materials, inviting skeptical jurors to wonder what material was omitted.

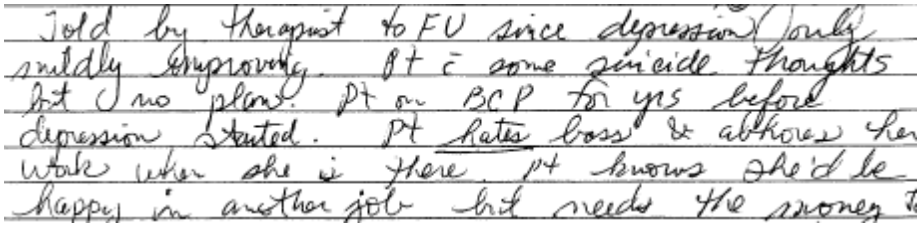
We redact:

- social security numbers;
- cellular telephone numbers;
- family histories, including medical conditions of grandparents, parents, brothers, sisters, and children; for example, this section of the record of a client with a neck strain resulting from a collision was redacted:



- unrelated mental health histories, including this section of the record of a client with a neck strain resulting from a collision was redacted:

- unrelated issues related to job (as long as lost earnings not an issue); this section of the record of a client with a neck strain resulting from a collision was redacted:



- unrelated social histories, such as alcohol, marijuana, sexual history should be redacted, in addition to conditions too remote in time to be relevant; the before and after version are shown below:

HISTORY OF PRESENT ILLNESS
The patient complains of a motor vehicle accident. It just occurred. It was both a front end and a rear end collision. Low back pain and neck pain. No weakness. No numbness. She had a seat belt. The airbag was not deployed.

PAST HISTORY
Medical
Positive for seizures apparently when she was a teenager. She has had none in the last 10 years. No diabetes, high blood pressure, heart problems, or other problems.

Social
Occasionally drinks. Does not smoke. Last menstrual period was approximately 3 weeks ago. She says that she has not been currently sexually active and is not pregnant.

After marking the document for redaction, save it in a "redacted medical records file folder" with the redaction marks still visible to show the court if an in camera inspection is required:

HISTORY OF PRESENT ILLNESS
The patient complains of a motor vehicle accident. It just occurred. It was both a front end and a rear end collision. Low back pain and neck pain. No weakness. No numbness. She had a seat belt. The airbag was not deployed.

PAST HISTORY
Medical
Positive for seizures apparently when she was a teenager. She has had none in the last 10 years. No diabetes, high blood pressure, heart problems, or other problems.

Social
Occasionally drinks. Does not smoke. Last menstrual period was approximately 3 weeks ago. She says that she has not been currently sexually active and is not pregnant.

The records given to the opposing counsel, after applying the redactions, would show only:

HISTORY OF PRESENT ILLNESS
The patient complains of a motor vehicle accident. It just occurred. It was both a front end and a rear end collision. Low back pain and neck pain. No weakness. No numbness. She had a seat belt. The airbag was not deployed.

PAST HISTORY
Medical

No diabetes, high blood pressure, heart problems, or other problems.

Social

- unrelated conditions, whether routine and benign, or whether sensitive or embarrassing, such as what medications they are allergic to, or what other conditions they have suffered from, including examples: seasonal airborne allergies, hysterectomy, takes Viagra, has breast implants, three pregnancies and one abortion, eczema, sexual abuse as teen, broken toes if not caused by the incident made the basis of the suit, used to smoke 3 packs a day cigarettes, and on and on and on.

Medical records are privileged. If these conditions are not central to the claim or defense made the basis of litigation, then the privilege is not waived and the records should not be disclosed. They should be redacted before they are exchanged with opposing counsel and the court.

Redacting records before we send a pre-litigation demand letter enables us to protect a client's legitimate privacy interest.

We redact the client's health insurance plan name and policy number so the liability adjuster cannot negotiate the outstanding owed balances with providers or negotiate the subrogation interest behind our client's back. The medical expense and subrogation interest are derivative of our client's claims, and the client has hired our firm to negotiate those expenses and interests on the client's behalf, and to pass the benefit of any reduction in medical bills or subrogation interests to the client as a benefit of our representation.

While the redaction process is somewhat time-consuming, our paralegals outline the proposed redactions as records arrive in the office. The attorney reviews the proposed redactions (Adobe outlines them in a red box so they are visible before the redactions are applied), revises them as appropriate, and then applies the redactions. After applying the redactions, the attorney confirms that the unrelated material has been removed and saves the document with a new name to avoid overwriting the original. Redaction of the medical records by the paralegals and attorneys also ensures that the clients' legal representatives actually read and analyze the medical records.

The original medical record, without any alteration or redaction, is always preserved to facilitate an *in camera* inspection in case questions arise as to the propriety of the redactions.

B. <u>In litigation</u>:

If the case does not settle, we file our 18.001 affidavits, and serve the affidavits with properly redacted records, immediately after the defense attorney files his or her answer or at least when we answer the initial paper discovery on behalf of our client.

If the claim is not resolved and suit is filed, we send the same redacted records promptly in response to discovery and when we file and serve our 18.001 affidavits. When opposing counsel takes our clients' depositions, the clients do not risk being cross-examined over irrelevant and possibly embarrassing medical conditions.

The defense attorney often issues a deposition on written questions to the plaintiff's medical care providers, auto insurer, health insurer, employer, and other custodians of records, seeking medical and employment records. The deposition notice is typically accompanied by a subpoena duces tecum, asking the custodian to attach certain medical and business records to the deposition response. If opposing counsel sends a deposition on written questions with a subpoena for the records, we object, file a motion to quash, and seek an agreed or court-issued protective order.

We ask that the request for the medical and billing records (originals and copies) be narrowly re-drawn to encompass a reasonable time period; to include only medical providers who are likely to have relevant records; and to seek only those records directly related to the condition at issue in the litigation. We then ask that the records gathered by the copy service be sent first to our office so we have an opportunity to redact the privileged records, and we promise to send all relevant records (including both the newly redacted "court original" set and ordering-party redacted copy of all related records) with a privilege log to opposing counsel.

While we prepare a bare-bones privilege log for opposing counsel, we also prepare an annotated privilege log to provide to the court, in camera, if opposing counsel requests that the court inspect the records. If a hearing is necessary, we hand the court a cd with the electronic records, containing both the set of original unredacted records exactly as we obtained them and the redacted version as we provided them to opposing counsel, along with both privilege logs.

IX. **CONCLUSION**:

Attorneys who give medical authorizations to opposing counsel, who fail to object to and narrow the depositions on written questions and subpoena duces tecum, and who have waited until the trial of a case to redact unrelated medical information from records, are failing to protect the legitimate privacy interests of their clients and are needlessly waiving the clients state law privileges. Ethical obligations to our clients require attorneys to stay current as the Federal and Texas statutes, rules of procedure and rules of evidence related to protection/redaction and disclosure of personal medical and health information change.

Greater protection and redaction of medical records, personnel records, and personal identification information during the presentation and defense of claims, both pre-litigation and during litigation, should be the norm from the time the file is opened and should not be relegated to last-minute pre-trial redactions.

APPENDIX

CAUSE NO. _____

MOM, Individually and as next friend of XXXXX XXXXX,	§	**IN THE DISTRICT COURT**
	§	
Plaintiffs,	§	
	§	**TARRANT COUNTY, TEXAS**
vs.	§	
	§	
BIG BAD WOLF,	§	
	§	
Defendant.	§	**____th JUDICIAL DISTRICT**

PLAINTIFFS' OBJECTIONS, MOTION TO QUASH AND MOTION FOR PROTECTIVE ORDER REGARDING MEDICAL and SCHOOL RECORDS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Plaintiffs and file these Objections to Defendant's Deposition on Written Questions to the following medical and school records custodians:

[identify the medical providers, schools, etc. from which records were subpoenaed]

1. Relief Sought: Plaintiff asks the court to quash the depositions to the medical and school records custodians until such time as the subpoena duces tecum is modified to limit the production of medical records to those records relating only to the injuries of Plaintiff Xxxxx Xxxxx alleged in the instant lawsuit.

2. Scope of the Objection: Plaintiffs do not object to the form of the specific written questions posed to the medical care providers. Plaintiffs **do** object to the scope of the documents sought in the subpoena duces tecum. The subpoenas are directed to medical care providers who treated the minor Plaintiff for the injuries sustained when she was molested by Defendant and who may have also treated the minor Plaintiff at other times for other conditions unrelated to the injuries from the sexual assaults, and directed to schools (including school-based clinic) for educational records which enjoy additional privacy protections.

3. The records must be reasonably related: 3.1. Tex. Rules Civ. Proc. Request for Disclosure 194.2(j) provides:

(j) In a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills ***that are reasonably related to the injuries or damages asserted…***

The subpoena duces tecum is overly broad because it does not seek only records which relate to the medical treatment rendered for the injuries sustained in the sexual assaults.

4. The objectionable subpoena duces tecum: The subpoena duces tecum directed to medical care providers instructs them to turn over:

Type of Records: **The entire medical record file, radiology reports, pathology reports, litigation files, insurance records, opinions and reports, records from any other doctors, office notes, progress notes, patient information sheets and questionnaires, correspondence, consultations, hospital records, physical therapy records, skilled nurses notes, emergency room records, telephone messages, doctors' liens, letters of protection, archived and stored documents, electronic data record keeping, computer databases, backup files, deleted email and voicemail messages pertaining to the examination and/or treatment of** [the minor child by name and DOB].

4.1. Allowing unfettered access to unredacted medical records, especially sensitive records, without a protected order violates the Health Insurance Portability and Accountability Act of 1996 (hereinafter HIPAA), in pertinent parts codified as 32 USCA Sec. 1320d through 1320d-8, and supporting regulation: Title 45 CFR Parts 160 and in Part 164 Subparts A and E, known as the "Privacy Rules."

4.2. HIPAA requires that health information which is personally or individually identifiable [45 CFR 160.003] must be protected by covered entities. Disclosure is allowed if required by law [45CFR 164.512]; whenever a court orders the disclosure [45CFR 164.512(e)(1)(i)]; or in response to a "subpoena, discovery request, or other lawful process" *if appropriate notice is given or if reasonable efforts to obtain a protective order are available* [45CFR 164.512(e)(1)(ii)(A) and (B)]. The court order should limit the disclosure to "only the protected health information expressly authorized by such order." [45CFR 164.512(e)(1)(i)] The

rules discussing notice and protective orders provide explicit requirements for the protective order, including a prohibition on re-disclosure and a return or destruction of all records, including copies, at the end of the litigation [45CFR 164.512(e)(1)(v)(A) and (B)].

4.3. Congress allows states to otherwise regulate medical privacy, privilege and redaction. HIPAA pre-empts state laws which are less stringent than HIPAA, but allows state laws to be more stringent than the Privacy Rules found within 45 CFR 160 and 164 [45CFR 160.203]

5. Compelling Plaintiff to give Defendant Unfettered Access Violates State Law:

5.1. Tex. Health & Safety Code, Chapter 181, is the Texas medical records privacy equivalent of HIPAA.

> (2) "Covered entity" means any person who:
> (A) for commercial, financial, or professional gain, monetary fees, or dues, or on a cooperative, nonprofit, or pro bono basis, engages, in whole or in part, and with real or constructive knowledge, in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information. The term includes a business associate, health care payer, governmental unit, information or computer management entity, school, health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site;
> (B) comes into possession of protected health information;
> (C) obtains or stores protected health information under this chapter; or
> (D) is an employee, agent, or contractor of a person described by Paragraph (A), (B), or (C) insofar as the employee, agent, or contractor creates, receives, obtains, maintains, uses, or transmits protected health information.
> (2-a) "Disclose" means to release, transfer, provide access to, or otherwise divulge information outside the entity holding the information.
>
> Tex. Health & Safety Code Sec. 181.001(b)(2)-(2-a)

5.2. Texas law is more stringent than HIPAA in that Chapter 181 clearly applies to attorneys, including both plaintiff's counsel and defense counsel as covered entities because both law firms will be using Mr. McCarthy's records for monetary or professional gain as we collect, analyze, use and disclose the records. Covered entities must comply with both the federal law (HIPAA) and state law (Chapter 181), each of which establishes privacy requirements.

6. Texas Rule of Evidence 509. the Physician-Patient Privilege and Texas Rule of Evidence 510, the Mental Health Patient Privilege:

6.1. In addition to the *privacy interests* created by federal and state law, TRE 509 and TRE 510 create *privileges*. Each rule allows patients to refuse to disclose privileged information:

> (c) General Rule in a Civil Case. In a civil case, a patient has a privilege to refuse to disclose and to prevent any other person from disclosing:
>
> (1) a confidential communication between a physician and the patient that relates to or was made in connection with any professional services the physician rendered the patient; and
>
> (2) a record of the patient's identity, diagnosis, evaluation, or treatment created or maintained by a physician.
>
> Rule 509

And

> (b) General Rule; Disclosure.
>
> (1) In a civil case, a patient has a privilege to refuse to disclose and to prevent any other person from disclosing:
>
> (A) a confidential communication between the patient and a professional; and
>
> (B) a record of the patient's identity, diagnosis, evaluation, or treatment that is created or maintained by a professional.
>
> Rule 510

6.2. Each rule, of course, contains a narrow litigation exception to the privilege:

> (e) Exceptions in a Civil Case. This privilege does not apply:
>
> (4) Party Relies on Patient's Condition. If any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition.
>
> Rule 509

And

> (d) Exceptions. This privilege does not apply:
>
> (5) Party Relies on Patient's Condition. If any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition.
>
> Rule 510

6.3. TRCP 194.2(j) requirement that the disclosed records be "reasonably related to the injuries or damages asserted" appears equivalent to TRE 509 and TRE 510's litigation exception requiring relevance to the condition relied upon by the party.

7. Case Law Defines "Relies On" and "Relevant":

7.1. Generally, medical records are privileged and not discoverable: "records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed." *In re Anderson,* 973 S.W.2d 410 (Tex. App. – Eastland, 1998); *West v. Salido,* 563 S.W.2d 240 (Tex. 1978). Mandamus is the proper remedy if the trial court orders the disclosure – even of the identity of patients -- of privileged records, *In Re Anderson* . "If disclosure were required, the privilege would be meaningless to the patient who holds a legitimate interest in it. See *Jampole v. Touchy*…" *Id* at 412.

7.2. Even in the interest of discovery directed at seeking the truth, no privilege should be ignored. *Mutter v. Wood,* 744 S.W.2d 600 (Tex. 1988). Discovery is available for any matter that is not privileged **and** is relevant to the subject matter of the pending action. TRCP 192.3(a). *In re CSX*, 124 SW 3d 149 (Tex 2003) holds discovery "requests must be reasonably tailored to include only relevant matters." Defendant's medical authorization is not reasonably tailored.

7.3. Broad relevance or potential relevance is not enough to waive the physician-patient privilege. The litigation waiver to the privilege applies only to a party's records that relate **in a significant way** to a party's claim or defense. *R.K. v. Ramirez,* 887 S.W.2d 836 (Tex. 1994). The information on the condition sought must be central to a claim or defense, not merely an evidentiary or intermediate issue of fact. "The privacy of the physician/patient relationship should not be subject to a casual breach by every litigant in single-minded pursuant of the last scrap of evidence which may marginally contribute to victory in the litigation." *Ramirez, supra*. Simply because a condition may be "relevant" to a claim or defense does not mean the party relies upon the condition as a part of the claim or defense. Relevance being defined so broadly would mean that virtually any defendant could plead some defense so broadly as to make any condition of a patient arguably relevant to the claim, and the privilege would cease to exist.

R.K., supra at 842. The medical condition contained in the medical records must be of legal consequence to a party's claim in order to be discoverable. *Ramirez, supra* @ 842-3. In applying the litigation exception "relevance alone cannot be tested because such a test would ignore the fundamental purpose of evidentiary privileges, which is to preclude discovery and admission of relevant evidence under prescribed circumstances." *In re Christus Health Southeast Texas,* 167 S.W.3d 596 (Tex. App. – Beaumont 2005), dealing with overly broad requests to produce logs of telephone calls and social media postings.

7.4. Texas courts have repeatedly addressed this balancing test. Even if medical records could be useful for impeachment or if the information contained therein could be used to test the credibility of a witnesses, those uses, standing alone, do not make the information discoverable under the patient-litigant exception to the physician-patient privilege. *See In Re Leatherwood*, 1998 WL 800341 (Tex.App.–San Antonio 1998, no pet.) (not designated for publication) in which the court held that permitting discovery of medical records to attack a witness's credibility would have a chilling effect on an injured party's decision to seek relief which is not the intended result of the patient litigation exception:

> The ultimate issue in this case is whether Patel sexually assaulted R.A.D. Issues of witness credibility are evidentiary or intermediate issues, even if the witness is an outcry witness. If we took the position of Patel and Comfort Inn to its logical extreme, mental health records would be discoverable in every case for every witness whose credibility is at issue. Our reading of the requirements set forth in *R.K. v. Ramirez* does not support this position. Permitting discovery of medical records to attack a witness's credibility would have a chilling effect on an injured party's decision to seek relief, which is not the intended result of the patient-litigant exception. Leatherwood's credibility and any effect her alleged condition would have on R.A.D. are tangential to the claim that R.A.D. was assaulted and suffered damages as a result. Therefore, Leatherwood's medical records are not discoverable under the patient-litigant exception to the patient-physician privilege.
>
> *In re Leatherwood*, No. 04-98-00814-CV, 1998 WL 800341, *2 (Tex. App.—San Antonio Nov. 18, 1998, orig. proc.).

7.5. Even defensive claims that a plaintiff's damages and injuries were caused by pre-existing conditions may not involve the resolution of ultimate issues of fact that have legal significance standing alone. *In re Nance,* 143 S.W.3d 506 (Tex. App. – Austin 2004. Therefore,

records which are not related – in a significant way -- to the underlying suit are not relevant, remain privileged, and should not be disclosed.

7.6. The court also protected mental health records from disclosure in two employment law disputes where the plaintiff sought mental anguish damages, noting the "tremendous potential for abuse that exists when a defendant has unfettered access to a plaintiff's medical records." *Burrell v. Crown Central Petroleum, Inc*, 177 F.R.D. 376, 380, 383-84 (E.D. Tex. 1997) and *In re Whipple* 373 S.W.3d 119 (Tex. App. - San Antonio 2012).

8. Relevance Requires more than an Inferential Rebuttal Issue:

8.1. The minor Plaintiff's alleged damages including "anxiety, depression and fear … and mental suffering." Similar allegations in cases involve rape and assault have not waived the mental health privilege.

8.2. Allegations of "mental anguish or emotional distress will not, standing alone, make a plaintiff's mental or emotional condition a part of the plaintiff's claim. The allegations in [Plaintiff's] petition that he suffered 'emotional shock' is not a sufficient basis to make his mental or emotional condition an issue on which the jury will be required to make a factual determination. Therefore, [Plaintiff's] communications … are protected by the physician-patient privilege." *In re Toyota Motor Corp.*, 191 S.W.3d 498, 502 (Tex. App. – Waco 2006, orig. proceeding).

8.3. A routine mental anguish claim "will not, standing alone, make a plaintiff's mental or emotional condition a part of the plaintiff's claim." Thus, "[a] routine allegation of mental anguish or emotional distress does not place the party's mental condition in controversy. The party must assert mental injury that exceeds the common emotional reaction to an injury or loss." *In re Williams*, No. 10-08-00364-CV, 2009 WL 540961,*5 (Tex. App.—Waco Mar. 4, 2009, orig. proc.) (granting mandamus to correct trial court's order for production of mental health

records). Plaintiffs in the instant case have pleaded more than routine mental anguish but that does not destroy the medical records or mental health records privilege.

8.4. Mental health records did not lose their privilege and were not discoverable even when mental anguish damages (for trouble sleeping, being uneasy around men, especially those who looked like the rapist, for being anxious when touched) were sought after a rape, in *In re Doe,* 22 S.W.3d 601 (Tex. App.—Austin 2000) (orig. proc.). Even the specific testimony of the plaintiff regarding her mental anguish did not transform her claim from being a garden variety mental anguish claim (where the privileged is not waived) to a central part of the claim for mental injury sufficient to waive the privilege. The Third Court continued in *Doe*: "To hold otherwise would suggest that every time a plaintiff raises a claim for past and future mental anguish damages her mental condition would be in issue and thereby all mental health records would be discoverable. This proposition is contrary to the express holding of the Texas Supreme Court in [*Coates v. Whittington*]."

8.5. A plaintiff's mental anguish claim which included testimony of psychiatric treatment, past depression, and stress such as troubled sleep, nightmares, anxiety attacks, emotional breakdowns, difficulty breathing, and heart palpitations were not sufficient to make the plaintiff's mental condition part of a claim or defense in *In re Chambers,* No. 03-02-00180-CV, 2002 WL 1378132, *1-5 (Tex. App.—Austin 2002, orig. proc.).

9. Defendant has not filed pleadings making Plaintiff's medical conditions relevant to, much less central to, his defense:

9.1. Defendant has not pleaded any affirmative defenses and is not relying on its pleadings as part of it defense of Plaintiffs' suit.

9.2. **More than just relevance is required to trigger the litigation exception to the privilege.** In *In re Pennington*, No. 02-08-00233-CV, 2008 WL 2780660 at 4 (Tex. App. – Fort Worth July 16, 2008, orig. proceeding) (mem. op.), the plaintiff pleaded for ordinary mental

anguish and her physical medicine records revealed prescriptions for anti-depressants before the wreck that injured her: "The fact that a plaintiff has had past mental problems is distinct from the mental anguish associated with a personal injury or loss; a tortfeasor takes a plaintiff as he finds her. [cites omitted] Defensive claims that a plaintiff's damages and injuries were caused by the pre-existing condition do not involve the resolution of ultimate issues of fact that have legal significance standing alone. [cite omitted] Indeed, these types of defensive assertions are in the nature of inferential rebuttal claims and, thus, are not sufficient to put a plaintiff's mental condition at issue so as to make medical records about that condition discoverable." *In re Pennington*.

9.3. *In re Nance*, 143 S.W.3d 506 (Tex. App. – Austin 2004) repeated the inferential rebuttal analysis when a hospital and doctor were sued after a routine gall bladder surgery resulted in internal bleeding and death. The decedent's mental health records were sought, objections were lodged, the records were produced in camera, and the court ordered the released to the defendants, who argued that the decedent regularly drank too much and might have pancreatitis, which could have caused post-operative bleeding. And, the defendants continued, her mental health and alcohol use were relevant to the wrongful death beneficiaries' claims for mental anguish, loss of consortium, and loss of pecuniary services. The court emphasized that those possible defenses did not trigger the litigation exception: "As a matter of law, there is no adequate remedy at law for a decision denying a privilege. *In re Monsanto Co.*, 998 S.W.2d 917, 922 (Tex. App – Waco 1999, orig. proceeding)," *id* at 510, and then discussed what it means to be relevant enough to waive the privilege:

> Whether a plaintiff's condition is "part" of a claim is determined **from the pleadings**, without reference to the evidence that is clearly privileged. To be a "part" of a claim or defense, the condition itself must be a fact that alone carries legal significance under the substantive law. ("Because relevance is defined so broadly, virtually any litigant could plead some claim or defense to which a patient's condition could arguably be relevant and the privilege would cease to exist. We reject this alternative as well."). To illustrate the "part" of concept, the supreme court cited the example of an allegation that a testator

> is incompetent. Such a mental condition, if found, would be a factual determination to which legal consequences attach: the testator's will would no longer be valid. *Id*. at 842-43."In other words," the supreme court explained, "information communicated to a doctor … may be relevant to the merits of an action, but in order to fall within the litigation exception to the privilege, the condition itself must be of legal consequence to the party's claim or defense." [Cite omitted.] "As a general rule," the supreme court explained, " a mental condition will be 'part' of a claim or defense if the pleadings indicate that the jury must make a factual determination concerning the condition itself." *Id*. It also observed that "[c]ommunications and records should not be subject to discovery if the condition is merely an evidentiary or intermediate issue of fact, rather than an 'ultimate' issue of a claim or defense, or if the condition is merely tangential to a claim rather than 'central' to it. *Id*. at 842.
>
> *In re Nance*, 143 S.W.3d 506, 511-512 (Tex. App. – Austin 2004)

9.4. The allegation that Ms. Nance was a heavy drinker whose alcohol use made her more susceptible to post-surgical bleeding was not enough to make her condition "part" of the lawsuit's causation defense. And being a heavy drinker, which may have interfered with family relationships and earning capacity, was not enough to make her condition "part" of the lawsuit's damages defense. "[W]hether Ms. Nance was an alcoholic or a heavy drinker is, at most, an intermediate issue of fact regarding the claims for emotional and pecuniary loss by her family, and [for] the defensive theory that a pre-existing condition caused her death." Id at 512. Pleading a "pre-existing condition as an alternative and affirmative defense" does not make it central; instead, "that defensive theory is in the nature of an inferential rebuttal, not an ultimate issue of fact that alone has legal significance. [*R.K. v. Ramirez*] at 843; see also Tex. R. Civ. P. 277. We hold that the records in question, if protected by the physician-patient privilege, are not discoverable under the patient-litigant exception to that privilege."

9.5. Footnote 7 to *In re Nance* and Tex. R. Civ. P. 277 explain: "An inferential rebuttal issue disproves the existence of an essential element submitted in another issue or question. *Select Ins. Co. v. Boucher*, 561 S.W.2d 474, 477 (Tex. 1978). It presents a contrary or inconsistent theory from the claim relied upon for recovery. *Id*. Inferential rebuttal issues attempt to disprove a claim by establishing the truth of a positive factual theory that is inconsistent with

some factual element of the ground of recovery. *Id*. 'Inferential rebuttal questions shall not be submitted in the charge.' Tex. R. Civ. P. 277."

10. The request is, on its face, overbroad.

10.1. The Subpoena Duces Tecum has no subject matter limitations, no physician limitations, and no time limitations.

10.2. *The subpoena duces tecum is overly broad because it has no subject matter limitations*: Plaintiffs have alleged injuries arising from repeated sexual assaults and unwanted harmful contact. The minor child's colds, flu, and other medical conditions are irrelevant to the damages in this case.

10.3. *The subpoena duces tecum is overly broad because it has no physician limitations:* The subpoena duces tecum has been sent to providers who are part of physician networks with multiple disciplines and practice areas. No type of health care provider or medical condition is excluded. Many of those records will be unrelated to the injuries suffered in the sexual assaults by Defendant. These records should therefore be beyond the scope of discovery.

10.4. *The subpoena duces tecum is overly broad because it has no temporal limitations*: Defendant are apparently seeking the minor Plaintiff's medical records since birth, as there is no time limitation on the subpoena. Seeking medical records from birth is intrusive and overbroad on its face. The depositions are overbroad because they have no temporal limitation and Plaintiffs object to Defendant obtaining records from physicians or other health care providers without narrowing the scope, including time, of the records.

11. *Plaintiff's school records are protected*

11.1. The Family Educational Rights and Privacy Act (FERPA) requires that Defendant obtain consent for the release of personally identifiable information from education records; see, 20 U.S.C. § 1232g; 34 C.F.R § 99.30. Plaintiffs have provided school records to Defendant and do not consent to the unfettered release of school records.

12. Fishing is not allowed

12.1. Fishing through records is not allowed under the TRCP 196.1. In *KMart Corp. v. Sanderson*, the court held that no discovery device can be used as a fishing expedition. See also *Dillard Dept. Stores, Inc. v. Hall*, 909 S.W. 2d 491, 492 (Tex. 1995) and *In re Alford Chevrolet-Geo*, 977 S.W.2d 173, 181 (Tex. 1999).

12.2. Ordering medical records from every medical specialty who may have communicated with the DWQ doctors in the last 13 years is a fishing expedition.

12.3. Ordering medical records for every medical condition which may have ever been treated in the past 13 years is a fishing expedition.

13. Relief Proposed

13. Plaintiff proposes that Defendant be required to instruct Legal Services copy service not to proceed with the subpoena until a hearing or agreement can be had, that the Defendant withdraw the defective subpoena duces tecum to each medical care provider and school., that Defendant be required to fashion a fair and valid subpoena duces tecum, directing the providers to give to Legal Services copy service only the court original and defense copy of the medical and school records.

Plaintiffs propose that all the medical and school records gathered by the Legal Services copy service first be provided to Plaintiffs' attorneys, that the Plaintiffs' attorney have up to 15 business days to review the records and redact the unrelated privileged information, that the records not in dispute would be given to the Defendant with a privilege log, and that the records

in dispute would be sub mitted under seal to the Court upon request by Defendant, as under th e procedure set out in *Ramirez* and Rule 193.4, TRCP.

In the event a hearing is required, and in the event the Cou rt agrees that this discov ery issue is suc h well estab lished law that sanc tions or other equitable relief is appropriate, then Plaintiffs may ask for such equitable relief as the Court deems appropriate.

JUDGE, KOSTURA & PUTMAN, P.C.
2901 Bee Cave Road, Box L
Austin, Texas 78746
Telephone (512) 328-9099
Telecopier (512) 328-4132

By: _____
JUDY KOSTURA
State Bar No. 11692200
Email: jkostura@jkplaw.com

ATTORNEYS FOR PLAINTIFFS

Certificate of Service

I certify that the foregoing docum ent was served on Defenda nt's counsel of record by facsim ile and email on this the 18th day of November, 2016:

[identify counsel]

And to Legal Services copy service via facsimile to and email to info@legalrecordsservice.com.

Certificate of Conference

I certify that the m otion to com pel was provide d to defense counsel by facsim ile and e mail on the 12th day of Dece mber, 2016 in advance of a filing with the court. Plaintiffs and Defendant conferred and will confer on the merits of this motion Decem ber 12, 2016. A reasonable effort is being made to reso lve this dispu te without th e necessity of court in tervention and if that effort fails then it will be p resented to the Court for determ ination. Movin g counsel is contacting opposing counsel by email to seek an agreeable date for hearing and to see if any of the issues in this motion may be resolved in advance of the hearing.

Ptf's objections to DOWQ by defense to
Ptf's health ins, auto ins, and employer.

CAUSE NO. _____

PAUL PAYNE and WIFE PAYNE, Individually and as Next Friends of DAUGHTER 1 and DAUGHTER 2 PAYNE Plaintiffs	§	IN THE DISTRICT COURT OF
VS.	§	TRAVIS COUNTY, TEXAS
BAD TRUCK DRIVER, TRUCKING EXCAVATION, INC., and TRUCKING TRANSPORTATION, INC., Defendants	§	__ JUDICIAL DISTRICT

PLAINTIFFS' OBJECTIONS, MOTION TO QUASH AND MOTION FOR PROTECTIVE ORDER

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Plaintiffs and file their Objections to Defendants' Deposition on Written Questions to BIG HEALTH INS. Life Insurance Company, AUTO Insurance Company, Administrative Systems, Inc., Disability Management Services, Hotel Corporation (personnel) and Hotel Corporation (payroll).

1. Relief Sought: Plaintiffs ask the court to quash the depositions until such time as the subpoena duces tecum is modified to limit the production of records to those records relating only to the injuries of Plaintiff Paul Payne alleged in the instant lawsuit or to the issues directly relating to those injuries.

2. Scope of the Objection: Plaintiffs do not object to the form of the specific written questions posed to the deponents. Plaintiff **does** object to the scope of the information sought by Defendants in the subpoena duces tecum. Defendants are seeking (in the first 4 subpoenas): "The entire insurance file, including but not limited to, claims, reports, policies and medical records and any other documents or items to which the witness may have access." The

request is overly broad on its face. The fifth subpoena includes all of those matters plus more. Only the sixth subpoena appears not to be overly broad.

a. The first subpoena is directed to BIG HEALTH INS., Paul Payne's health insurer, which has likely paid claims related to other conditions or injuries of Plaintiff Paul Payne over years. No particular type of medical record or information is identified and the subpoena is not restricted to the treatment of those physicians or health care providers who are treating the injuries made the basis of this suit. The subpoena is not limited to any practice area, any body part, nor limited in time. Plaintiff has obtained treatment unrelated to the injuries sustained in the collision made the basis of this suit from various physicians and health care providers over the years. The subpoena duces tecum is overly broad because it does not seek only records which relate to the medical treatment rendered for the injuries sustained in the collision. The request for "any other documents or items to which the witness may have access" is not specific enough to apprise Plaintiff of the type of document sought and is overly broad.

b. The second subpoena is directed to AUTO, Paul Payne's motor vehicle liability insurer. The scope of this subpoena is unlimited and would extend to any claim for property damage, hail damage, damage to a vehicle while it was not occupied, damage to a vehicle while occupied by someone other than Paul Payne, etc. The subpoena is not limited to claims involving a bodily injury to Paul Payne similar to those injuries sustained in the collision made the basis of this suit. The request for "any other documents or items to which the witness may have access" is not specific enough to apprise Plaintiff of the type of document sought and is overly broad.

c. The third subpoena is directed to Administrative Systems, Inc. It is similarly broad in scope and is not limited to the production of documents involving a bodily injury to Paul Payne similar to those injuries sustained in the collision made the basis of this suit. The request for "any other documents or items to which the witness may have access" is not specific enough to apprise Plaintiff of the type of document sought and is overly broad.

d. The fourth subpoena is directed to Disability Management Services. It is similarly broad in scope and not limited to the production of documents involving a bodily injury to Paul Payne similar to those injuries sustained in the collision made the basis of this suit. The request for "any other documents or items to which the witness may have access" is not specific enough to apprise Plaintiff of the type of document sought and is overly broad.

e. The fifth subpoena is directed to Hotel Corporation. Paul Payne has been employed with the Hotel located at ____ Road, Austin, Texas since [date he began 21 years ago]. Since that time he has held several positions including general maintenance, laundry mechanic, laundry manager, kitchen mechanic, and he is presently a HVAC mechanic (on medical leave) for the Hotel. The subpoena is overly broad in scope and is seeks the production of personnel documents related to Paul Payne's employment with Hotel Corporation for the past 21 years. It seeks medical records of every kind and nature and is not limited to medical records for conditions similar to those injuries sustained in the collision made the basis of this suit. To the extent that there are workers' compensation records, disability records, medical records, or other documents for conditions unrelated to the injuries made the basis of this suit, they are irrelevant and should be protected from disclosure.

f. The sixth subpoena is directed to th e Hotel Corporation, seeking payroll records. Plaintiff Paul Payne's payroll records are relevant to this lawsuit and Plaintiffs do not object to providing those. Plainti ffs do request that those records be gathered, sent to the offi ce of Plain tiffs' attorney, and that Plaintiffs' attorney be given an opport unity to confirm that no privileged or irrelevant records are co ntained within the documents provided in response to the sixth subpoena.

3. The objectionable subpoena duces tecum: The subpoena duces tecum directed to the first 5 records custodians instructs them to turn over:

> "The entire insurance file, including but not limited to, claims, reports, policies and medical records and any other documents or items to which the witness may have access."

The fifth subpoena duces tecum requests:

> "Any and all personnel records, including but not limited to, application for employment, workers' compensation records, verification of employment, medical records, disability records, notes and all records in the possession, custody or control of said witness."

4. Basis for the Objections:

a. **The Doctor-Patient Privilege attaches to the medical records found within the files**.

Plaintiffs object to providing to Defendants any m edical record s not relevant to Plaintiff Paul Payne's physical, m ental or emotional co ndition upon which Plaintiffs rely as part of their claim for dam ages in this case. D iscovery req uests should be tailored narrowly to seek only those item s relevant to the caus e of action in dispute. *In re CSX*, 124 S.W.3d 149 (Tex 2003) says "requests m ust be reasonably tailored to include only relevant m atters." Records not relevant to the injuries and/or damages claim ed by Plaintiff in this case are protected by the physician-patient privilege; see Rule 509(c) and 509(e)4 of the Texas Rules of Evidence. Texas courts have refused to destro y the privilege when the Defenda nts discovery attem pts go beyond

related medical records. See *R.K. v. Ramirez*, 887 S.W.2d 836, 842 (Tex. 1994); *Hogue v. Kroger Store*, 875 S.W. 2d 477, 480 (Tex. App.-Houston[1st District] 1994, writ denied); *Groves v. Gabriel*, 874 S.W.2d 660, 661 (Tex. 1994); *Midkiff v. Shaver*, 788 S.W.2d 399; and *Mutter v. Wood*, 744 S.W.2d 600, 601 (Tex. 1988).

For medical records to be discoverable in a dispute, they must be relevant to the condition at issue. Only disclosure of the "medical records and bills that are reasonably related to the injuries or damages asserted..." should be disclosed under Rule 194.2 TRCP. Texas Courts have addressed this issue repeatedly when defense counsel goes on fishing expeditions to rifle through people's private lives and medical records. "The privacy of the physician/patient relationship should not be subject to a casual breach by every litigant in single-minded pursuant of the last scrap of evidence which may marginally contribute to victory in the litigation." *Ramirez, supra.* The medical condition contained in the medical records must be of legal consequence to a party's claim in order to be discoverable. *Ramirez, supra* @ 842-3. Where there is a dispute about the legal relevance of information in the privileged medical records, the trial court must, on request, perform an in camera inspection of the documents produced to assure that the proper balancing of interest occurs before production is ordered. *Ramirez, supra* @ 843.

b. **The request is, on its face, overbroad**.

The Subpoena Duces Tecum has no subject matter limitations, no physician limitations, and no time limitations.

The subpoena duces tecum is overly broad because it has no subject matter limitations: Plaintiff Paul Payne's injuries are, of course, relevant to the lawsuit. However, to the extent that BIG HEALTH INS., Hotel, AUTO, Administrative Systems, or Disability Management Services records contain the records of health care providers for conditions unrelated to the injuries caused by the collision with Defendants, the subpoenas duces tecum are over-broad. The depositions are overbroad because they are not limited to the body parts injured in the collision

or to the issue of the lost income or lost earning capacity of Paul Payne. Plaintiffs object to Defendants obtaining records from health care providers who treated conditions unrelated to this collision. Plaintiff Paul Payne does not waive his patient-doctor privilege with respect to those medical records.

The subpoena duces tecum is overly broad because it has no physician limitations: The subpoena duces tecum is directed to BIG HEALTH INS., Hotel, AUTO, Administrative Systems, and Disability Management Services. No doctor is excluded. No type of medical record is excluded. Many of those records will be unrelated to the injuries suffered in the collision with Defendant Winters. These records should therefore be beyond the scope of discovery.

The subpoena duces tecum is overly broad because it has no temporal limitations: Defendants are seeking Plaintiff Payne's medical records without reference to the timing of the records. Mr. Payne is 43 years old. Seeking up to 43 years worth of medical records is intrusive and overbroad on its face. He has been employed with the Hotel for 21 years, and all of the 21 years of records are being requested.

Some of the records sought would include treatment, conditions, or issues so old that they are not relevant to the acute injuries suffered by Plaintiff Paul Payne. The depositions are overbroad because they have no temporal limitation and Plaintiffs object to Defendants obtaining records from physicians or other health care providers who treated those body parts injured in the collision, or work records, more than 5 years before the collision made the basis of this suit. Those records are likely to be so remote as to be irrelevant.

c. Fishing is not allowed:

Fishing through records is not allowed under the TRCP 196.1. In *KMart Corp. v. Sanderson*, the court held that no discovery device can be used as a fishing expedition. See

also *Dillard Dept. Stor es, Inc. v. Hall* , 909 S .W. 2d 491, 492 (Tex. 1995) and *In re Alford Chevrolet-Geo*, 977 S.W.2d 173, 181 (Tex. 1999). XIII.

Ordering medical records from BIG HEALTH INS. and AUTO and the Hotel and other deponents without limitation is a fishing expedition.

Ordering medical records from up to 43 years of life is a fishing expedition.

Ordering employment records for 21 years is a fishing expedition.

d. Federal Law Supports the Privilege

On April 14, 2003, the Health Insu rance Portability and Accountabi lity Act of 1996 took effect. This federal law recognized the private nature of medical records and i mposed tighter restrictions on the dissemination of Protected Health Information:

Subtitle 1, Medical Record s, Chapter 181, Medi cal Records Privacy, Subchapter A, General Provisions:

(5) "Protected Health Information" means individually identifiable health information … that:

(A) relates to:

i. the past, present, or future physical or mental health or condition of an individual;
ii. the provision of health care to an individual; or
iii. the past, present, or future paym ent for the provision of health care to an individual…

Paul Payne's medical records enjoy federal protection which should not be violated absent a compelling need by the Defendants.

5. Relief sought by Plaintiffs:

Plaintiffs propose that Defenda nts be required to withdraw the defective subpoena duces tecum to each deponent and be req uired to fa shion a fair and valid subpoena du ces tecum , directing to give to Legal Docu ment Services, Inc., only those medical records which post-date the collision, or which predate the collis ion and pertain to th e body parts injured in the collision, from only those medical care providers who treated the types of conditions made the basis of this suit, p lus on ly those m edical reco rds which pre -date the co llision by n o more than 5 years and

which pertain to the body parts injured in the collision.

Plaintiffs propose that all the medical, insurance, disability and employment personnel records gathered by the Legal Document Services, Inc., first be provided to Plaintiffs' attorney, that the records not in dispute would be given to the Defendants, and that the records in dispute would be submitted under seal to the Court, as under the procedure set out in *Ramirez*[1] and Rule 193.4, TRCP.

In the event a hearing is required, then Plaintiffs ask for such equitable relief as the Court deems appropriate.

By: _____

JUDY KOSTURA
STATE BAR NO. 11692200
jkostura@jkplaw.com

CERTIFICATE OF SERVICE

By my signature above, I hereby certify that, on this the 27th day of July, 2006, this instrument has been forwarded via facsimile to:

Defendants' attorney

Legal Document Services, Inc.,

CERTIFICATE OF CONFERENCE

Plaintiffs' counsel is sending the Motion to opposing counsel so that opposing counsel has an opportunity to review the motion and the materials cited herein before counsel confer.

[1] *R. K. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994).

If this motion proceeds to a hearing, then, in accordance with Rule 166b (7), the parties will have attempted, but will have failed in their efforts to resolve the discovery dispute without the necessity of Court intervention.

JUDGE, KOSTURA & PUTMAN, P.C.
ATTORNEYS AT LAW

THE COMMISSIONERS HOUSE AT HERITAGE SQUARE
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ATTORNEYS AT LAW
*JOHN JUDGE
JUDY KOSTURA
STAN M. PUTMAN, JR.

LEGAL ASSISTANTS
COURTNEY LEWIS
KARIN MURPHY
MICHELLE CRUZ
APRIL ALLEN

If you file objections and a motion for protective order in response to a DOWQ notice, send a letter to the records service so they do not deliver records before resolution of the privilege dispute

Date

Records Copy Service
Obtaining records pursuant to
Deposition on Written Questions
With subpoena duces tecum

Via fax to _____ and
Via email to
records@defendantscopyservice.com

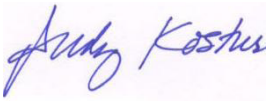
Re: Paul Payne v. Defendants

Dear Records Copy Service:

We received Defendants' notice of intent to take deposition by written questions concerning Paul Payne's medical and billing records. I have also filed a Motion to Quash and Motion for Protective Order, with a proposed Order, with the Court. A copy is enclosed for your reference.

Please do not deliver any records to defense counsel pending an agreement or hearing and Order. Please contact my office if you have any questions. I will update you on any agreement or hearing.

Sincerely,



JUDY KOSTURA

JK:jcr

Enclosures: Motion and Order

cc: Defense attorney
Paul Payne

Send the Rule 11 agreement or Court Order
To the Records Gathering Service

JUDGE, KOSTURA & PUTMAN, P.C.
ATTORNEYS AT LAW

THE COMMISSIONERS HOUSE AT HERITAGE SQUARE
2901 BEE CAVE ROAD, BOX L • AUSTIN, TEXAS 78746
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STAN M. PUTMAN, JR.

LEGAL ASSISTANTS
COURTNEY LEWIS
KARIN MURPHY
MICHELLE CRUZ
APRIL ALLEN

date

Letter to Records Gathering Service
To inform them to send all records
Sought under DOWQ
To Plaintiff's Counsel for redaction

Via facsimile to _____

Re: Paula Payne v. Defendants
Your ref. no. 123456

Dear Records Gathering Service:

Enclosed is a copy of the signed Rule 11 agreement governing Ms. Payne's records from [list of providers]. Please note that all records are to come to our office for review and for us to transfer them to Defendants' attorney or an in camera inspection by the judge if there is a dispute. Records Gathering Service is not authorized to retain any records or transfer any of these records to the Defendants' attorney.

Your assistance in this matter is appreciated.

Sincerely,

JUDY KOSTURA

JK:jcr

Enclosure: Signed Rule 11 governing Paula Payne's DOWQ records from Providers

cc: Defense attorney via facsimile

Paula Payne

CAUSE NO. D-1-GN-_____

PAUL PAYNE, Plaintiff	§ § §	IN THE DISTRICT COURT OF
VS.	§ §	TRAVIS COUNTY, TEXAS
JOHN DRIVER and HIS EMPLOYER CO., Defendants	§ §	___ JUDICIAL DISTRICT

AGREED ORDER on MEDICAL RECORDS DOWQ

On this day the Court considered the Plaintiff's Motion to Quash Discovery and Motion for Protective Order. Plaintiff and Defendant appeared through their respective attorneys of record and announced that they have agreed to the entry of this order, and therefore:

It is ORDERED that all originals and copies of any medical and billing records gathered by the COPY SERVICE, including but not limited to Defendants' Deposition on Written Questions to Austin Radiological Association; Austin Travis County EMS; University Medical Center at Brackenridge; Medical Care of Austin, P.A./PCP, M.D.; Austin Brain and Spine/ Surgeon, M.D.; Costco Optical Department; and Dentist, DDS, be provided directly to Plaintiff's attorneys, Judge, Kostura & Putman, P.C.; that the medical records include records on or after May 31, 2008 to allow the defendant access to relevant medical records for five years prior to the date of injury; that the billing records include records on or after the date of injury of May 31, 2013; that Plaintiff's attorneys be given 15 business days to review the records; that Plaintiff's counsel will retain unredacted original records in the same condition as delivered to counsel by COPY SERVICE; that the records not in dispute, including records as redacted, will be given by Plaintiff's attorney to the Defendant along with a Privilege Log showing the page number of each item redacted, the type of information redacted and the basis for the redaction. Plaintiff is ordered to provide to Defendants all records related to injuries and damages made the basis of this suit and to withhold only those records which Plaintiff believes to be unrelated to the medical conditions or damages alleged in this suit. Defendant shall review the medical records and Privilege Log provided by Plaintiff's attorneys and determine whether a hearing is

needed for the production of any records not produced by Plaintiff. Plaintiff will, if a hearing is needed, submit the original unredacted records (in electronic format) in dispute under seal to the Court, along with the redacted copies (in electronic format), as under the procedure set out in *Ramirez*[1] and Rule 193.4, TRCP. It is Ordered that the terms and conditions of this agreement shall apply to any and all future requests for Depositions on Written Questions and Discovery Subpoenas made by Defendants related to Plaintiff's medical and billing records.

Ordered this _____ day of November, 2013.

_____
JUDGE PRESIDING

APPROVED:

JUDGE, KOSTURA & PUTMAN, P.C.
THE COMMISSIONERS HOUSE AT HERITAGE SQUARE
2901 Bee Cave Road, Box L
Austin, Texas 78746
(512) 328-9099
Telecopier No. (512) 328-4132
ATTORNEYS FOR PLAINTIFF

By: _____
Judy Kostura
State Bar No. 11692200
jkostura@jkplaw.com

and:

DEFENSE ATTORNEY

CAUSE NO. D-1-GN-_____

PAULA PAYNE, Plaintiff	§ § §	IN THE DISTRICT COURT OF
VS.	§ §	TRAVIS COUNTY, TEXAS
JOHN DRIVER and HIS EMPLOYER CO., Defendants	§ §	___ JUDICIAL DISTRICT

Defendant Attorney's Privilege Log for Austin Radiological Assn. Medical and Billing Records Obtained on March 13, 2012

Page No.	Information redacted	Claim of Privilege
Medical Records:		
3	Unrelated imaging report	Protected health information, TRE 509
4	Unrelated imaging report	Protected health information, TRE 509
10	Unrelated imaging report	Protected health information, TRE 509
11	Unrelated imaging report	Protected health information, TRE 509
12	Unrelated imaging report	Protected health information, TRE 509
Billing Records:		
1	Social Security Number	Privacy
2	Unrelated imaging	Protected health information, TRE 509
3	Unrelated imaging	Protected health information, TRE 509

CAUSE NO. D-1-GN-_____

PAULA PAYNE, Plaintiff	§ § §	IN THE DISTRICT COURT OF
VS.	§ §	TRAVIS COUNTY, TEXAS
JOHN DRIVER and HIS EMPLOYER CO., Defendants	§ §	___ JUDICIAL DISTRICT

Court's Annotated Privilege Log for Austin Radiological Assn. Medical and Billing Records Obtained on March 13, 2012

Page No.	Unrelated Imaging Report	Claim of Privilege
Medical Records:		
3	chest x-ray for bronchitis	Protected health information, TRE 509
4	screening mammogram	Protected health information, TRE 509
10	upper GI for epigastric pain	Protected health information, TRE 509
11	screening mammogram	Protected health information, TRE 509
12	abdominal u/s, pain & bloating	Protected health information, TRE 509
Billing Records:		
1	Social Security Number	Privacy
2	mammogram, abd. u/s, upper GI	Protected health information, TRE 509
3	mammogram, chest x-ray	Protected health information, TRE 509

CAUSE NO. D-1-GN-_____

PAULA PAYNE, Plaintiff	§ § §	IN THE DISTRICT COURT OF
VS.	§ §	TRAVIS COUNTY, TEXAS
JOHN DRIVER and HIS EMPLOYER CO., Defendants	§ §	___ JUDICIAL DISTRICT

DEFENSE Privilege Log for Updated Pain Care Physicians Records

Page No.	Unrelated Info redacted	Claim of Privilege
3	Unrelated Med Condition	Protected health information and TRE 509(c)
8	Past Medical History:	Protected health information and TRE 509(c)
8	Social history:	Protected health information and TRE 509(c), privacy; TRE 403 more prejudicial than probative
9, 11	Allergies to Rx:	Protected health information and TRE 509(c)
12	Unrelated medications:	Protected health information and TRE 509(c)
19	Health insurance plan no.	Collateral Source, Local Standing Motion in Limine

CAUSE NO. D-1-GN-_____

PAULA PAYNE, Plaintiff	§ § §	IN THE DISTRICT COURT OF
VS.	§ §	TRAVIS COUNTY, TEXAS
JOHN DRIVER and HIS EMPLOYER CO., Defendants	§ §	___ JUDICIAL DISTRICT

COURT Privilege Log for Updated Pain Care Physicians Records

Page No.	Unrelated Info redacted	Claim of Privilege
3	current pneumonia	Protected health information and TRE 509(c)
8	Past Medical History: gastric ulcer; brain aneurysm past Surgical History: cholecystectomy, tonsillectomy, adenoidectomy, brain aneurysm repair, rotator cuff repair, renal benign tumor excision	Protected health information and TRE 509(c)
8	Social history: tobacco use; alcohol use: wine	Protected health information and TRE 509(c), privacy; TRE 403 more prejudicial than probative
9, 11	Allergies: Erythromycin, aspirin, amoxicillin, flagyl, ibuprofen Keflex, NSAIDS, codeine sulfate, latex, ethaline diamine	Protected health information and TRE 509(c)
12	Unrelated medication Crestor, Premarin, Trilipix, topical compound cream, Xanax, Plavix, Zolpidem, blood thinners	Protected health information and TRE 509(c)
19	Health insurance plan no.	Collateral Source, Local Standing Motion in Limine