Medical Record Discovery:
Some Things You May Not Know

Defense counsel often wear two hats during litigation, one as the seeker of all things discoverable, the other as the protector of their clients from potential claims of physician-patient privilege or Health Insurance Portability and Accountability Act (HIPAA) violations. See 735 ILCS 5/8-802; 45 C.F.R. § 160.101 et seq. (2009) and 45 C.F.R. § 164.102 et seq. (2009). This article outlines certain exceptions that permit disclosure of otherwise privileged non-party records and additional healthcare provider data. It will also identify situations where statutory protections are inapplicable.

Obtaining Non-Party Medical Records in Birth Injury Cases

The physician-patient privilege provides, “[n]o physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient. . . .” 735 ILCS 5/8-802. As a result, the privilege may bar otherwise relevant and material information from discovery. Kunz v. S. Suburban Hosp., 326 Ill. App. 3d 951, 954-55 (1st Dist. 2001). This barrier to disclosure of pertinent records is a frequent challenge faced by defense counsel in medical malpractice lawsuits.

Counsel should be aware of certain exceptions to the physician-patient privilege, which may provide access to otherwise excluded records, including two that are particularly relevant in a medical malpractice setting. First, the physician-patient privilege does not apply in civil actions against a physician for malpractice. 735 ILCS 5/8-802 (exception number two of ten). If the plaintiff places his or her own health at issue, then the plaintiff has waived the physician-patient privilege with respect to his or her medical records regarding that issue. Reagan v. Searcy, 323 Ill. App. 3d 393, 397 (5th Dist. 2001). This waiver is a necessary concession by the plaintiff because a lawsuit could not proceed without disclosure of the medical records at issue. Second, the privilege does not apply when it is waived with the express consent of the patient. 735 ILCS 5/8-802 (exception number three).

Even in instances where a party’s medical records are disclosed via waiver, the medical records of non-parties to the lawsuit generally remain protected by the physician-patient privilege. In re D.H., v. Chicago Housing Auth., 319 Ill. App. 3d 771, 774 (1st Dist. 2001). Non-party medical records remain largely protected by the physician-patient privilege because the disclosure of those records “would neither serve a public interest nor the private interests of those non-party patients.” Parkson v. Cent. DuPage Hosp., 105 Ill. App. 3d 850, 855 (1st Dist. 1982). Non-parties have not placed their condition at issue.
However, the protection afforded to non-parties is not absolute. *Giangiulio v. Ingalls Mem’l Hosp.*, 365 Ill. App. 3d 823, 832 (1st Dist. 2006). Understanding the privilege’s parameters may provide access to valuable non-party medical records and other healthcare provider data that may otherwise appear protected.

Non-party medical records are frequently sought in birth injury cases. In these cases, the minor plaintiff’s medical records are discoverable via the medical malpractice exception to the physician-patient privilege, while potentially relevant prenatal records of the mother and siblings remain outside of this statutory exception. See 735 ILCS 5/8-802. Yet, the physician-patient privilege that would otherwise protect the non-party mother’s prenatal records may be waived if the mother places her health during her pregnancy or past pregnancies at issue. *Kunz*, 326 Ill. App. 3d at 954-55; *El-Amin v. Dempsey*, 329 Ill. App. 3d 800, 801-09 (1st Dist. 2002).

In *El-Amin v. Dempsey*, the appellate court emphasized the pragmatic nature of applying the prenatal records exception to the physician-patient privilege. The court found that “the mother’s medical records pertaining to the period when the plaintiff was in utero [were] discoverable upon the theory of impossibility of severance.” *El-Amin*, 329 Ill. App. 3d at 803 (quoting *Yetman v. St. Charles Hosp.*, 491 N.Y.S.2d 742, 298 (N.Y. App. Div. 1985)). The unique physical bond between a mother and child prior to the child’s birth compels a mother’s medical records to be simultaneously understood as the medical records of the child. *Id.*

Thus, once the plaintiff’s medical condition was placed at issue, the physician-patient privilege was waived with respect to the prenatal records of the non-party mother. *Id.* at 809.

Depending upon the medical condition at issue, defense counsel may seek disclosure of prenatal records of the mother’s past pregnancies. Unlike the prenatal records of the minor plaintiff, the prenatal records of the minor plaintiff’s siblings remain protected by the physician-patient privilege. *Kunz*, 326 Ill. App. 3d at 956. In *Kunz*, where the lawsuit was brought solely on behalf of the minor plaintiff, the court found that the physician-patient privilege was not automatically waived for the siblings of the minor plaintiff, “even when a genetic cause independent of medical malpractice may become an issue. . . .” *Id.* Nevertheless, the *Kunz* court ultimately found that when a mother places the health of her other pregnancies at issue, for example via her deposition testimony, she consequently waives her physician-patient privilege with respect to those prenatal medical records. *Id.* at 953.

The *Kunz* case provides strategic guidance to practitioners seeking non-party medical records in birth injury cases. First, these types of records should not be subpoenaed until after the mother has been deposed. A subpoena prior to the mother’s deposition would likely be quashed. Second, at the mother’s deposition, defense counsel should ask about the pregnancy at issue, as well as previous pregnancies. Depending upon the response given, this information may form the basis for showing waiver of the physician-patient privilege.

While prenatal records of the minor plaintiff, and even the minor plaintiff’s siblings may be obtained, there are limitations to this type of discovery. Specifically, the waiver does not apply to the minor plaintiff or minor plaintiff’s siblings’ medical records following their respective births. *Id.* at 958. In *Kunz*, the mother’s “deposition remark that her first two children’s current health [was] ‘excellent’ [was] insufficient to waive the privilege as to the children’s subsequent medical records.” *Id.*

The court discerned that the medical records of the siblings after their birth were unrelated to the birth injury and were therefore not discoverable. *Id.* Similarly, a mother’s own medical records beyond the gestation period remain privileged, even after her prenatal records have been found to be discoverable via waiver. *Id.* at 956.

**Limitations to Statutory Protections of Certain Healthcare Information**

While defense counsel may benefit from limitations of statutory protections and waiver, we are often on the receiving end of medical information requests that trigger our invocation of the physician-patient privilege, HIPAA, and the Medical Studies Act, to name a few. 45 C.F.R. § 160.101 *et seq.* (2009) and 45 C.F.R. §
164.102 et seq. (2009); 735 ILCS 5/8-2101. These statutes limit access to protected medical information, but the protections are not all encompassing.

Records that do not concern a physician’s diagnosis or treatment of a patient are not protected by the physician-patient privilege, and are therefore discoverable. *Tomczak v. Ingalls Mem’l Hosp.*, 359 Ill. App. 3d 448, 454 (1st Dist. 2005). In *Tomczak*, the plaintiff requested records of triage times, treatment times, and triage acuity designations. *Tomczak*, 359 Ill. App. 3d at 450. The defendants “refused, claiming that the information sought was privileged and would not reasonably lead to the discovery of relevant information.” *Id.* at 449. The court held that the physician-patient privilege “does not apply to ordinary incidents and facts which can be perceived by laymen and which are not necessary for a physician to treat his patient.” *Id.* at 453 (quoting *Gourdine v. Phelps Mem’l Hosp.*, 336 N.Y.S.2d 316, 319 (N.Y. App. Div. 1972)). The triage and treatment times, along with the triage acuity designations, were conventional occurrences. *Id.* at 454. They were not necessary medical information for the physicians to perform their professional duties and were therefore not protected by the privilege. *Id.*

The defendant also invoked the protections of HIPAA, arguing that the triage information was “protected health information” (PHI) and therefore not discoverable. *Id.* at 451. PHI is “any information received by a health care provider relating to the provision of health care to an individual that either identifies the individual, or could reasonably be used to identify the individual.” *Id.* at 456 (citing 45 C.F.R. § 160.103 (2002)). Under HIPAA, records defined as PHI may be shielded from disclosure with certain limitations. *Id.* (citing 45 C.F.R. § 164.512(e)(1)(ii) (2002)).

The *Tomczak* court found the information requested did not contain the patients’ names or medical histories from which those patients could be identified. *Id.* at 454. Accordingly, the information did not qualify as PHI and could be disclosed regardless of HIPAA regulations. *Id.* at 456.

In addition to looking at whether a patient’s identity could be discerned, courts also look to the substance of the medical information sought. The physician-patient privilege only applies to information used by the physician to treat the patient or reach a diagnosis. *Id.* at 454. For example, treatment and wait times of emergency room patients, which do not provide insight into the patients’ medical conditions, treatments, or diagnoses, are considered nonmedical information. *Id.* at 454-55. As such, this information is not barred from discovery by the physician-patient privilege. The information protected by the privilege stems from the physician’s professional capacity or character, and the protected information is only that which is necessary for the physician to act in that capacity or serve the patient. 735 ILCS 5/8-802.

An additional example where an invoked statutory protection was held inapplicable is illustrated in *Zangara v. Advocate Christ Med. Ctr.*, 2011 IL App (1st) 091911, ¶ 38, as modified on denial of reh’g (July 22, 2011). In *Zangara*, the plaintiff contracted methicillin-resistant staphylococcus aureas (MRSA) while a patient at the defendant hospital. *Zangara*, 2011 IL App (1st) 091911, ¶ 2. During litigation, the plaintiff filed a discovery request seeking a list of all patients who contracted MRSA 90 days before the plaintiff had been admitted to the defendant hospital. *Id.* ¶ 3. The defendants responded that such information was protected under the Medical Studies Act. *Id.* ¶ 11. The Medical Studies Act, as with the physician-patient privilege and HIPAA, may safeguard records sought via discovery in a medical malpractice lawsuit. The Medical Studies Act provides in relevant part that “[a]ll information [addressing] . . . a health care practitioner’s professional competence . . . used in the course of internal quality control . . . or for improving patient care . . . shall be privileged.” 735 ILCS 5/8-2101. However, protections under the Medical Studies Act are limited to records “generated specifically for the use of a peer-review committee.” *Zangara*, 2011 IL App (1st) 091911, ¶ 38 (quoting *Webb v. Mount Sinai Hosp. & Med. Ctr. of Chi., Inc.*, 347 Ill. App. 3d 817, 825 (1st Dist. 2004)).

In *Zangara*, the court found that documents that were “later used by a committee in the peer-review process” were not privileged under the Medical Studies Act because those documents were “created in the ordinary course of a hospital’s business.” *Zangara*, 2011 IL App (1st) 091911, ¶ 38. The *Zangara* court
compared the time data analyzed under the physician-patient privilege in *Tomczak* to the number of MRSA infections that may have been privileged under the Medical Studies Act. *Id.* ¶ 42 (citing *Tomczak*, 359 Ill. App. 3d at 454-55). Similar to the *Tomczak* time data information, the number of MRSA infections were considered mere incidents of fact and were not privileged under the Medical Studies Act. *Id.*

Familiarity with some of the exceptions that facilitate disclosure of otherwise privileged information will be beneficial for practitioners seeking discovery of non-party medical records. Congruently, knowledge as to the limitations of statutory protections may better prepare counsel in defending against requests for certain healthcare information.

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