IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI, ex rel. BOBBIE JEAN PROCTOR and VINCENT PROCTOR,	)	
Relators,	)	
v.	)	Case No. SC90610
HON. EDITH MESSINA,	)	
Respondent.	)	

Original Petition in Prohibition/Alternative Petition in Mandamus
(On Transfer From the Court of Appeals)

Brief of American College of Radiology, Missouri Radiological Society, Missouri Dental Association, Missouri Health Care Association, and Delmar Gardens North Operating, LLC as *Amici Curiae* in Support of Respondent

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INTEREST OF THE AMICI

This brief is submitted on behalf of the American College of Radiology (ACR), the Missouri Radiological Society (MRS), the Missouri Dental Association (MDA), the Missouri Health Care Association (MHCA), and Delmar Gardens North Operating, LLC (Delmar Gardens). Counsel for Relators and Respondent have both consented to the filing of this brief. Rule 84.05(f).

The American College of Radiology, with more than 34,000 members, is the principal organization of radiologists, radiation oncologists, medical physicists, interventional radiologists, and nuclear medicine physicians in the United States. ACR is a nonprofit, professional society whose primary purposes are to advance the science of radiology, improve radiologic services to the patient, study the socioeconomic aspects of the practice of radiology, and encourage continuing education for radiologists, radiation oncologists, medical physicists, and persons practicing in allied professional fields. ACR represents its members' interests before federal and state legislatures, agencies, and courts, including their interests concerning the civil litigation process and regulatory compliance.

The Missouri Radiological Society is an association of Missouri radiologists, medical residents, and fellows headquartered in Jefferson City, Missouri. MRS has approximately 400 members. Its purposes, as defined in its bylaws, include promoting the practice of radiology, advocating for the health of human beings, and promoting high professional standards. MRS represents its members' interests with respect to various matters, including those relating to the civil litigation process and regulatory compliance.

The Missouri Dental Association is an organization of approximately 2,200 individual dentists and dental students. MDA is committed to providing the highest quality of care to the public and serves as a resource for advocacy, education, communication, information, and fellowship. MDA is headquartered in Jefferson City, Missouri. MDA represents its members' interests concerning the civil litigation process and regulatory compliance.

The Missouri Health Care Association is an association of long-term care facilities, headquartered in Jefferson City, Missouri. MHCA is the largest long-term care trade association in Missouri and represents over 300 long-term care facilities. MHCA assists its members in government and regulatory affairs, convention and education seminars, and through management of a host of programs and services critical to success in the field.

Delmar Gardens North Operating, LLC operates a skilled nursing facility in Florissant, Missouri. As a health care provider, Delmar Gardens is involved in the civil litigation system both as a defendant and as an advocate for its residents. *See, e.g., State ex rel. Delmar Gardens North Operating, LLC v. Gaertner*, 239 S.W.3d 608 (Mo. banc 2007) (facility sought and obtained a restraining order against a family member of a resident who was suspected of misconduct toward another resident). As such, Delmar Gardens is interested in the civil litigation process and the obligations of health care providers under HIPAA.

Resolution of this case greatly interests the amici. As health care providers and their representatives, the Court's decision will impact their "covered entity" obligations

under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and their ability to obtain relevant, material information from fact witnesses. The Court of Appeals opinion creates an unlevel playing field based on a misreading of HIPAA. It fails to account for the complexity of the federal and state laws regulating the exchange of health information and the different contexts in which those issues arise. Orders like the one issued by the Respondent judge establish a process in which the parties and third-party fact witnesses may address the scope of the patient's waiver of confidentiality and may request other terms to protect patient information (*e.g.*, prohibiting redisclosure of protected health information). If this Court were to find that such orders were not authorized as the Court of Appeals did, health care providers would be forced to make those decisions without guidance from the court, creating a less transparent process and leading to collateral disputes about the scope of the waiver and the proper interpretation of the complex requirements of HIPAA. The amici are submitting this brief to address the HIPAA issues in greater detail and to emphasize the unlevel playing field that would result if the Court of Appeals' position were adopted.

STATEMENT OF FACTS

Relator Bobbie Jean Proctor has alleged that she was personally injured by the defendant health care providers. *Petition in Prohibition/Alternative Petition in Mandamus* ¶ 1 (Aug. 6, 2009) (*Petition*). Relator Vincent Proctor is her husband and has alleged loss of consortium. *Id*. The underlying personal injury action is pending in the Circuit Court of Jackson County. *Id*., ¶ *1*, *Ex. A*.

At the request of the defendant health care providers, Respondent trial judge Edith L. Messina entered an order which notifies health care providers who have treated the plaintiff that they are authorized, but not required, to discuss her medical condition with attorneys for the defendants:

> You are further notified that, pursuant to federal and state law, counsel for the defendants are hereby authorized to talk with Bobbie Jean Proctor's treating physicians or other health care providers, without counsel or the parties, including the plaintiff, being present or participating, provided the health care provider consents to the interview. This is based on the Court's finding that the plaintiff has made a claim for personal injuries, and in filing this lawsuit has waived any privilege existing between the patient and health care provider. This Order does not require you to meet or speak with any attorney in this proceeding. You have the right to

> decline an attorney's request to speak or meet with you informally. *Petition, Ex. H*.

The Respondent judge's order further limited disclosure to medical records pertaining to the plaintiff's care from 1994 forward. *Id*. It contained additional provisions to safeguard the confidentiality of protected health information. Namely, the parties are prohibited from using or disclosing protected health information for any purpose other than the litigation. *Id.* They also agreed to either destroy the protected health information or return it to the covered entity at the end of the litigation. *Id.*

ARGUMENT

I. The Respondent trial judge properly entered an order notifying the parties and fact witnesses of the conditions on which relevant, non-privileged information could be disclosed in connection with the lawsuit.

The issue is whether one party in litigation may control the terms on which other parties have access to relevant, non-privileged information when the fact witnesses who possess that information also happen to be health care providers. In interpreting Missouri law and HIPAA, courts have rejected attempts to use confidentiality provisions as a sword and a shield. In Missouri, since at least 1968, courts have held that a litigant who puts his or her medical condition at issue waives the physician-patient privilege. *State ex rel. McNutt v. Keet*, 432 S.W.2d 597, 601-02 (Mo. banc 1968). "[T]he Missouri courts have made it abidingly clear that a patient should not be allowed to use the medical privilege strategically to exclude unfavorable evidence while at the same time admitting favorable evidence." *Brandt v. Med. Defense Assocs.*, 856 S.W.2d 667, 672 (Mo. banc 1993) (*Brandt II*). Likewise, in interpreting HIPAA, federal courts have held that it does not create a new evidentiary privilege and that the provisions regarding litigation disclosures are "purely procedural." *Northwestern Memorial Hosp. v. Ashcroft*, 362 F.3d 923, 925-26 (7th Cir. 2004).

The trial judge's order maintains a level playing field and complies with the letter and spirit of state and federal law. It notifies third party fact witnesses of the conditions under which they are authorized to disclose information under Missouri law. Consistent with federal law, the order was entered pursuant to a process by which the parties had

notice and an opportunity to object to the scope of the waiver and related issues. *See Suggestions in Opposition to Relators' Petition in Prohibition/Alternative Petition in Mandamus*, Transcript of Proceedings, Ex. 1 (Aug. 17, 2009). The order is lawful and proper and should not be displaced.

A. Under Missouri law, plaintiffs waive privilege and relinquish the ability to require fact witnesses to maintain confidentiality when they publicly put their health at issue in a lawsuit.

The Missouri rules regarding waiver of the physician patient privilege are well-established. By filing a lawsuit, the patient waives the privilege. *McNutt*, 432 S.W.2d at 601. Once a waiver occurs, the information is no longer private. *Brandt II*, 856 S.W.2d at 672. Moreover, the patient relinquishes the right to hold a health care provider to its obligation of confidentiality. *Id.* The plaintiff cannot use the privilege as a shield and a sword. *Id.* Plaintiffs would have an unfair strategic advantage if they could publicly disclose their treatment and medical conditions in seeking relief, but prevent defendants from discussing that same information with fact witnesses. *Id*.

In medical malpractice litigation, "[t]he treating physician is first and foremost a fact witness, as opposed to an expert witness." *Id.* at 673. Once the privilege has been waived, defendants can interview health care providers the same as they could any other fact witness. *Id.* Plaintiffs cannot prevent their health care providers from discussing their treatment once the privilege has been waived. *State ex rel. Jones v. Syler*, 936 S.W.2d 805, 809 (Mo. banc 1997).

At the same time, Missouri does not require plaintiffs to execute authorizations allowing ex parte access to their medical information by defendants. *State ex rel. Woytus v. Ryan*, 776 S.W.2d 389, 395 (Mo. banc 1989). Rather, health care providers are permitted but not required to discuss the underlying facts once a waiver occurs. *Brandt II*, 865 S.W.2d at 674-75. The scope of the waiver is determined by the conditions that the plaintiffs have put at issue through their pleadings. *Jones*, 936 S.W.2d at 807-08; *State ex rel. Stecher v. Dowd*, 912 S.W.2d 462, 464 (Mo. banc 1995). The scope of the waiver should include time limits and should specifically identify the health care providers to which it applies. *Id.*

Respondent's order is consistent with this Missouri case law. It defines the scope of the waiver, is directed to the plaintiff's health care providers, and is limited in time. *Petition, Ex. H*. It notifies the health care providers that they are permitted, but not required, to discuss those issues with the defendants. *Id*. It does not require the plaintiff to execute an authorization and does not require health care providers to discuss her treatment with them. *Id*. The order provides additional safeguards by preventing defendants from using the protected health information for any other purpose and by requiring them to destroy or return any confidential protected health information at the end of the lawsuit. *Id*.

B. The trial judge's order provided plaintiff with an opportunity to challenge the scope of the waiver.

Sections 261 and 264 of HIPAA directed the Secretary of the United States Department of Health and Senior Services to promulgate regulations governing use of

"protected health information" (*i.e.*, certain types of individually identifiable health information). Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, §§ 261, 264, 110 Stat. 1936, 2924, 2936-37 (1996). The Secretary then adopted a set of privacy standards that "covered entities" (*i.e.*, most health care providers and health plans) must follow in the use and disclosure of protected health information. 45 C.F.R. parts 160 and 164. The HIPAA privacy regulations recognized the need to balance patient privacy against other economic and societal interests.

At the most basic level, health care providers must be able to use and disclose protected health information to provide basic health services. Thus, disclosures for treatment, payment, and health care operation activities are permitted without patient authorization. 45 C.F.R. § 164.506(c). The privacy rules also allow disclosures that have been authorized by an individual. 45 C.F.R. § 164.508. Additional exceptions are provided for other disclosures that are:

- Required by law;
- For public health activities;
- To protect victims of abuse, neglect, or domestic violence;
- For health oversight activities;
- For law enforcement purposes;
- For decedents and organ donors;
- For research;
- For specialized government functions; and
- For workers' compensation.

45 C.F.R. § 164.512.

As these provisions show, each situation must be addressed individually. Disclosures are permitted when they are for the purpose of treatment, payment, or health care operation activities, when authorized by the individual, or if authorized by a court order in the litigation.

1. Treatment, payment, and health care operations

HIPAA covered entities can use or disclose protected health information for their own treatment, payment, or health care operation activities. 45 C.F.R. § 164.506(c)(1) ("A covered entity may use or disclose protected health information for its own treatment, payment, or health care operations."). For those uses, patient authorization is only required in very limited circumstances such as for the use or disclosure of psychotherapy notes or when used for marketing purposes. 45 C.F.R. §§ 164.502(a)(1)(ii), 164.506(a).

"Health care operations" is specifically defined to include "conducting or arranging for medical review, *legal services*, and auditing functions, including fraud and abuse detection and compliance programs." 45 C.F.R. § 164.501 (emphasis added). Thus, a disclosure or use by a covered entity to conduct or arrange for its own legal services is always permitted under HIPAA. Originally, the Secretary proposed to allow disclosures and uses in "compiling and analyzing information in anticipation of or for use in a civil or criminal legal proceeding." Department of Health and Human Services, *Standards for Privacy of Individually Identifiable Health Information*, Final Rule, 65 Fed. Reg. 82462, 82490-91 (Dec. 28, 2000). But in the final rule that language was deemed

too narrow. It was replaced "with a broader reference to conducting or arranging for 'legal services'." *Id*. Since the original narrower formulation specifically allowed covered entities to compile information in anticipation of civil litigation, the broader formulation also covers that activity.

Since providers can always use protected health information that they possess for their own legal services, a health care provider may use information to defend itself in civil litigation even if the information was originally obtained for the purpose of another treatment, payment, and health care operation activity under § 164.506(c)(1). A few examples will illustrate the point. Health care providers can use and disclose protected health information for treatment activities. 45 C.F.R. § 164.506(c)(1). Co-defendants in a medical malpractice lawsuit likely will have exchanged protected health information during the course of treating a patient based on the HIPAA treatment exception. Generally, when a health care provider obtains health information from other providers, that information becomes a part of that provider's original medical record. Under § 164.506(c)(1), a provider can use that information to defend civil lawsuits.

A covered entity may also disclose protected health information for the payment activities of another covered entity. 45 C.F.R. § 164.508(c)(3) ("A covered entity may disclose protected health information to another covered entity or a health care provider for the payment activities of the entity that receives the information."). Incidents that result in civil litigation often create payment issues with third-party reimbursement sources. The medical information that health care providers must assemble to analyze those issues will overlap with and may be identical to the information that will relate to

the personal injury lawsuit. If a disclosure is for the purpose of payment activities of any covered entity, it would be permitted under 45 C.F.R. §§ 164.506(c)(3) and the entity that receives it would likely incorporate that material into the applicable record. The receiving covered entity would also be able to use the information for its own health care operations which could include legal services. 45 C.F.R. § 164.506(c)(1).

For example, government and private payors may prohibit providers from billing or may refuse to pay for care when certain unexpected events occur during the course of treatment. *See, e.g.,* Centers for Medicare and Medicaid Services, Press Release, *Medicare and Medicaid Move Aggressively to Encourage Greater Patient Safety in Hospitals and Reduce Never Events* (July 31, 2008) (available at http://www.cms.gov/apps/media/press_releases.asp; last visited April 28, 2010) (noting three new additions to CMS's list of hospital-acquired conditions – so called "never events" – for which Medicare will not pay); 13 C.S.R. 70-15.200 (identifying preventable medical errors in hospitals for which Medicaid will deny reimbursement). Accordingly, when those unexpected events occur, health care providers may need to assemble information from other covered entities to determine whether an "error" occurred, whether it was "preventable," and other issues that affect their ability to seek reimbursement for the claim. That medical information is the same information that would need to be assembled to address a negligence claim arising out of the same incident.

As another example, as part of the Medicare and Medicaid certification process, Missouri nursing facilities like Delmar Gardens and MHCA member facilities may

receive deficiency citations when certain events are found to have occurred in their facilities. Those citations may be appealed through an informal dispute resolution process that the state maintains as required by federal regulation. § 198.545, RSMo Supp. 2009. That administrative process is a non-contested case. The parties and the state agency do not generally have authority to subpoena records or otherwise compel the disclosure of information. Deficiency citations, however, may affect a facility's ability to participate in the Medicare and Medicaid programs and are therefore related to its payment and health care operation activities. For incidents that may provide a basis for both a personal injury suit and administrative liability, all of those exceptions must be considered to determine whether disclosure is authorized.

Finally, in professional licensing cases that affect the physician and dentist members of MDA, MRS, and ACR, licensees are often offered the opportunity to meet with the licensing boards and discuss their cases before formal administrative actions are filed. While disclosures to those boards are authorized by the health oversight activities exception, uses or disclosures to the professional by other covered entities for the purpose of preparing for that meeting may require separate authorization. 45 C.F.R. § 164.512(d).

As these examples demonstrate, the payment, treatment, and health care operations provisions will often authorize disclosure of information that is also needed to defend a personal injury lawsuit. In their brief, the Relators argue disclosure is permitted only if the individual authorizes it or the litigation exception applies. Relators' Br. 25. In its opinion, the Court of Appeals stated that the litigation exception and individual authorizations were the only potentially applicable provisions authorizing disclosures.

Slip op. 9 n.2. This misunderstanding of the law led the Court of Appeals to suggest in strident terms that discussions of a patient's health information without individual authorizations were likely illegal and unethical. Slip op. at 25-27. The opinion raised the ominous spectre of fines of up to $50,000, imprisonment, and "a host of other legal ramifications for disclosures that are made without individual authorization." *Id.* at 26-27. But Relators and the Court of Appeals overlooked the fact that disclosures for treatment, payment, and health care operation activities do not require individual authorizations. An initial question always exists whether disclosure is authorized under 45 C.F.R. § 164.506.

2. Individual authorizations

Covered entities may disclose protected health information if the individual has authorized the disclosure. 45 C.F.R. § 164.508. In *Beaty v. St. Luke's Hospital of Kansas City*, the plaintiff executed a release that authorized the defendants to obtain information from a physician group. 298 S.W.3d 554, 558-59 & n.1 (Mo. App. 2009). That group included a physician who had treated the plaintiff and who testified on behalf of defendants at trial. *Id.* On appeal, the plaintiff contended that the authorization did not justify ex parte contacts with his treating physician. *Id.* at 558. The Court of Appeals found there was no evidence that protected health information had actually been disclosed by the treating provider. *Id.* To the extent that the information had been disclosed to the treating provider, those disclosures were authorized by the medical authorizations that the plaintiff had executed. *Id.* at 559 & n.1.

3. Disclosures for judicial and administrative proceedings

The HIPAA privacy regulations also include a provision permitting covered entities to disclose protected health information in civil or administrative litigation. 45 C.F.R. § 164.512(e). This section does not establish a federal evidentiary privilege. *Northwestern Memorial Hosp.*, 362 F.3d at 925. Instead, it establishes a process under which parties and fact witnesses involved may obtain assurance that a disclosure is within the scope of the litigation. Disclosure is permitted after the parties obtain a court or administrative order, obtain or request "a qualified protective order," or notify the patient of the request:

> A covered entity may disclose protected health information in the course of any judicial or administrative proceeding;
>
> (i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or
>
> (ii) In response to a subpoena, discovery request, or other lawful process, there is not accompanied by an order of a court, or an administrative tribunal, if [certain notice and procedural protections have been afforded].

45 C.F.R. § 164.512(e)(1).

In general, the subsection (ii) procedures require the covered entity to notify the person that is the subject of the protected health information *or* to obtain or request a

"qualified protective order." A protective order is "qualified" if it prohibits parties from using the information for purposes other than the litigation and requires the information to be returned or destroyed at the end of the litigation. 45 C.F.R. § 164.512(e)(1)(v).

In the Explanation and Justification for the regulation, the Secretary noted that the litigation exception was not intended to displace state laws *requiring* plaintiffs to consent to the disclosure of health information as a condition of maintaining a lawsuit:

> The provisions in this paragraph are not intended to disrupt current practice whereby an individual who is a party to a proceeding and has put his or her medical condition at issue will not prevail without consenting to the production of his or her protected health information. In such cases, we presume that parties will have ample notice and an opportunity to object in the context of the proceeding in which the individual is a party.

65 Fed. Reg. at 82530.

Thus, consistent with the HIPAA litigation exception, Missouri courts could require patients to execute authorizations as a condition of maintaining a personal injury lawsuit.

Respondent's order complies with the court order portion of the HIPAA litigation exception (subsection i). First, it notes that treating health care providers are "authorized" to discuss the patient's protected health information since the plaintiff has waived the privilege. *Compare Petition, Ex. H. with* 45 C.F.R. §164.512(e)(1)(i) (disclosure of information as "authorized" by an order is permitted). Second, while

HIPAA would permit a court to require the execution of an authorization, the trial court's order does not go that far. It is consistent with Missouri law and only notifies the fact witnesses that they are permitted, but not required, to engage in those discussions. *Compare Petition, Ex. H with* 65 Fed. Reg. at 82530. Third, though not required, the trial court's order is also a qualified protective order because it limits use of the protected health information for the purpose of the lawsuit and requires the information to be destroyed or returned at the end of the lawsuit. In that respect, the order provides even greater protection than would be required by subsection (i). Moreover, courts have held that ex parte disclosures are separately justified by subsection (ii) if a qualified protective order has been entered. *Bayne v. Provost,* 359 F.Supp.2d 234, 241, 243 (N.D. N.Y. 2006); *Luna v. Kennett HMA, Inc.*, 2007 WL 4468693, *2 (E.D. Mo. 2007).

C. Missouri law does not conflict with HIPAA.

Missouri law and HIPAA are consistent and not in conflict. The trial judge's order provides effective guidance to the parties and fact witnesses regarding their respective rights and obligations. Numerous federal and state courts have held that ex parte contacts are consistent with HIPAA, if a qualified protective order has been entered or health care providers are informed by court order or in a patient authorization that they are permitted but not required to engage in such discussions. *In re Collins,* 286 S.W.3d 911, 920 (Tex. 2009); *Arons v. Jutkowitz,* 880 N.E.2d 831, 842-43 (N.Y. 2007); *Holmes v. Nightingale,* 158 P.3d 1039, 1041 (Okla. 2007); *Smith v. American Home Products Corp.,* 855 A.2d 608, 624, 626 (N.J. Sup. Ct. Law Div. 2003); *Bayne*, 359 F. Supp. 2d at 242-43; *Pratt v. Petelin,* 2010 WL 446474, *7 (D. Kan. 2010); *Sforza v. City of New*

York¸ 2008 WL 4701313, *3 (S.D. N.Y. 2008); *Croskey v. BMW of North America*, 2005 WL 4704767, *5 (E.D. Mich. 2005); *Luna*, 2007 WL 4468693, *2; *Weiss v. Astellas Pharma, US, Inc.*, 2007 WL 2137782, *5 (E.D. Ky. 2007). *See also Law v. Zuckerman*, 307 F. Supp. 2d 705, 711 (D. Md. 2004) (noting that "counsel may obtain a court order which allows the health care provider to disclose 'only the protected health information expressly authorized by such order'" to comply with HIPAA); *Holman v. Rasak*, 761 N.W.2d 391, 395 (Mich. Ct. App. 2008) (holding that informal discussions are permitted pursuant to a qualified protective order), *appeal granted*, 764 N.W.2d 573 (Mich. 2009).

In arguing against that result, the Relators and Court of Appeals equate a trial court order addressing the scope of the waiver with an order compelling her to execute an authorization. Relators' Br. 18, 24, 33; Slip op. 25-26. But that conclusion is in conflict with previous Missouri cases holding a waiver is a less intrusive procedural response than requiring an authorization. *Woytus*, 773 S.W.2d at 393, 394; *Brandt II*, 856 S.W.2d at 674. An order notifying fact witnesses that a waiver has occurred is not any different.

The Relators and Court of Appeals would treat ex parte discussions with a plaintiff's health care providers the same as disclosures that were made in the absence of a pending lawsuit. Relators' Br. 37; Slip op. 19-27 (opining that "informal discovery" cannot be authorized pursuant to 45 C.F.R. § 164.512(e)(1)(i)). That conclusion fails to recognize that the filing of a lawsuit effects a fundamental change in the physician-patient confidentiality relationship. The Secretary's Explanation and Justification for § 164.512 expressly recognizes that fundamental change when it notes that states may still *require* patients to execute authorizations as a condition of maintaining lawsuits. 65

Fed. Reg. at 82530. If compelled authorizations do not offend HIPAA, Missouri's more lenient practice is also acceptable.

Finally, if HIPAA's litigation exception only permitted formal discovery disclosures as the Relators contend, subsection (i) of § 164.512(c) would be superfluous. That subsection is not limited to formal discovery but permits disclosures in response to a court or agency order with or without a formal discovery request.

At heart, Relators are trying to exploit the complexity of HIPAA to their advantage. Prior to HIPAA, a court order was not a necessary part of the disclosure process in Missouri litigation. HIPAA interposes a *procedural* requirement to obtain an order to ensure that there is an adequate process for addressing the privilege issue in state and administrative proceedings. Relators attempt to characterize this procedural provision as a change in the *substantive* rules of what information may be disclosed. But the litigation exception is not a substantive privilege, and Respondent's order does not mandate disclosure or otherwise expand on Missouri's substantive law. Instead, it notifies parties and fact witnesses of disclosures that are and are not permissible under Missouri law.

Trial judges have broad authority to manage cases and pre-trial discovery. Rule 56.01(c); *McNutt*, 432 S.W.2d at 602. Entering an order putting the parties and fact witnesses on notice of the scope of the patient's waiver is an appropriate use of that authority. Missouri law and HIPAA are not in conflict and pre-emption is not at issue.

D. Respondent's order appropriately and fairly addresses the disclosure issues presented in this case.

Respondent's order is fair and just. It is consistent with existing Missouri law, maintains a level playing field, and reflects an appropriate sensitivity to the relationship between HIPAA's complex provisions and the state law of privilege.

1. Respondent's order is fair.

Neither party to the litigation obtains an unfair advantage under the order. By way of contrast, the Relators argue for a rule that is fundamentally unfair and would create an unlevel playing field. Under their formulation, patients will have unlimited access to their health information. They can informally confer with fact witnesses and selectively choose those witnesses from which they want to develop favorable testimony. By withholding authorization, they could also prevent their adversaries from learning the same information except through costly and time-consuming formal discovery. *Brandt II*, 856 S.W.2d at 674. The disadvantage is not limited to resources, but will affect fundamental trial strategy.

The ability to prepare for a deposition by discussing the issues with the witness before the deposition is critical. Medical issues are scientific and technical and attorneys who have access to the witnesses beforehand will be in a better position to elicit favorable testimony and avoid unfavorable testimony in their questioning. *Id.* ("[S]ince the physician's testimony is usually technical and scientific in nature, it is particularly important that the attorney who expects to elicit testimony from a physician have an opportunity to review with the witness the questions to be asked and the answers to be

given."). Moreover, many witnesses are never deposed before trial. Defense counsel would be required to depose them at significant cost to all parties or to question them at trial without any prior discussion.

Formal discovery carries additional risks for defense counsel. Under the 2002 revision to the Missouri Civil Rule of Procedure 57.07, any testimony elicited by a defendant during a deposition will be admissible as evidence. Rule 57.07 (a). *See also* Rule 57.01(f) (interrogatory answers may be used at trial.) But the attorneys for the patient can meet with fact witnesses off the record and determine what their testimony is likely to be. If they receive an unfavorable response, they know to avoid pursuing a line of inquiry on the record. The attorneys for defendants must ask their questions on the record without the benefit of a pre-deposition interview and at risk of an unfavorable answer being used against them at trial. Neither Missouri nor federal law permits such a fundamentally unfair system.

While litigants frequently try to use privileges offensively for self-serving reasons, this Court has long emphasized the importance of maintaining a level playing field:

> A litigant should not be allowed to pick and choose in binding and loosing. He may bind or he may loose. If he binds, well and good; but if he looses as to one of his physicians, the seal of secrecy is gone – the spell of this charm is broken as to all. May one cry secrecy! secrecy! professional confidence! when there is no secrecy and no professional confidence? As well cry peace, peace, when there is not peace. Jeremiah vi 14 q.v.

> To hold so leaves a travesty on justice at the whimsical beck and call of a litigant.

Brandt II, 856 S.W.2d at 672 (quoting *Smart v. Kansas City*, 105 S.W. 709, 722 (Mo. banc. 1907) (Lamm, J., sep. opinion)). Thus, in *Brandt II*, the Court noted the "strong role" that the fairness rationale had played in its privilege jurisprudence. *Brandt II*, 856 S.W.2d at 674. Respondent's order appropriately complies with that transcendent concern.

And even if this Court re-evaluates its past holdings in light of HIPAA, the solution would not be to tilt the scales to favor patients. Rather, the Court should revisit its previous holdings to establish an even-handed procedure that gives the parties equal access to non-privileged information of fact witnesses and complies with HIPAA. In *State ex rel. Collins v. Roldan*, the Court of Appeals specifically noted that the prohibition against courts ordering patients to execute authorizations was "anachronistic in a post-HIPAA world, where disclosures of protected health information to third parties require relatively formal, explicit authorization." 289 S.W.3d 780, 784 (Mo. App. 2009). The logical solution would be to require plaintiffs to execute authorizations consistent with the scope of the litigation waiver and to authorize dismissal of their causes of action if they refuse to do so. *See McNutt*, 432 S.W.2d at 602 (noting that an order requiring the plaintiffs to execute authorizations to make records available is an appropriate method to effectuate discovery).

That procedure complies with the HIPAA litigation exception. 65 Fed. Reg. at 82530. It is commonly used by other courts where a third party possesses relevant, non-

privileged information and cannot disclose it without the plaintiff's consent. *See, e.g.*, *Arons*, 880 N.E.2d at 842 (after they waived privilege by filing suit, "there was no basis for [plaintiffs'] refusal to furnish the requested HIPAA-compliant authorizations"); *In re Collins*, 286 S.W.3d 911, 920 (Tex. 2009) (noting plaintiffs may be required to execute authorizations that comply with 45 C.F.R. § 164.508); *Barnette v. Adams Brothers Logging, Inc.*, 586 S.E.2d 572, 595 (S.C. 2003) (affirming the dismissal of a case where the plaintiff refused to sign a medical authorization form); *Wade-Lemee v. Bd. of Educ. for the City of St. Louis*, 2009 WL 1851090 (E.D. Mo. June 26, 2009) (dismissing a cause of action after the plaintiff repeatedly failed to comply with a court order requiring her to execute medical authorizations). Requiring plaintiffs to execute authorizations would allow patients to choose whether they still want to proceed with their lawsuit once they know the scope of disclosure that will be required. *Brandt II*, 856 S.W.2d at 674 ("A trial under our system is a public event; it is not unreasonable to require a plaintiff who is asserting a claim against a defendant in which the plaintiff's physical condition is at issue to forego the confidentiality that would otherwise prevent the disclosure of this information."). Most importantly, it would also keep the privilege from being used as a sword against other litigants. *Id.* at 672-73.

2. Respondent followed an appropriate procedure to address complicated patient privacy issues.

The rules for handling patient information have become much more complicated in recent years. The rules vary between different state and administrative tribunals. Different HIPAA provisions apply depending on the purposes for which the information

is being sought. State privilege issues also arise. Each presents unique challenges. Given this variation, it is important that flexible processes exist which allow trial courts and administrative tribunals to tailor their responses to different situations.

Trial court orders such as the one entered by Respondent facilitate an orderly and timely resolution of those issues in civil litigation. All parties receive notice by way of a motion that the court is being asked to enter an order that will outline their respective obligations and rights. The parties may then argue their sides to the trial court. Patients may argue for subject matter, time, and other limitations on the scope of the waiver to ensure that it does not exceed the issues that they put an issue in the lawsuit. In fact, Relators have made those arguments in this case. Relators' Br. 40-44. Limits on redisclosure and provisions requiring the information to be destroyed or returned can also be included. The request for an order thus serves as a procedural vehicle that allows the parties to resolve their disputes at the outset.

Litigation requires a level playing field. Without access to relevant and material information and fact witnesses on even terms, the search for the "truth, the whole truth, and nothing but the truth" is undermined. *Brandt II*, 856 S.W.2d at 673 ("a trial is a search for the truth and the primary obligation that the treating physician or any other witness owes in a trial is to tell the truth"). Respondent correctly interpreted this Court's past decisions, followed the HIPAA process, and entered an order that correctly notifies parties and fact witnesses of the scope of permissible disclosure. The preliminary order should be quashed. In the alternative, if this Court holds that HIPAA prohibits Missouri's existing practice of permitting but not requiring health care providers to

discuss a plaintiff's treatment and medical conditions, then it should level the playing field by requiring plaintiffs to execute an authorization to disclose protected health information that is consistent with the scope of the waiver that they have effected by filing their lawsuit.

II. The trial court order is not overbroad.

The overbreadth issue has been addressed in previous cases. *See, e.g., Jones*, 936 S.W.2d at 808; *Stecher*, 912 S.W.2d at 464. The scope of the waiver is defined by the medical conditions that the plaintiff voluntarily chooses to put at issue in the lawsuit. In this case, Respondent's order is broad, but it matches the breadth of the plaintiff's petition in the underlying lawsuit. The plaintiff seeks damages for permanent loss of her ability to walk normally, secondary injuries from blood loss, unknown secondary injuries, physical and mental anguish, loss of the ability to lead a normal life, loss of enjoyment of life, risks from other complications including risks associated with the receipt of blood products, and permanent injuries and disabilities. *Petition, Ex. A, ¶ 23*. Since the plaintiff has put a broad range of injuries at issue, the waiver is also broad.

The Respondent trial judge limited the waiver to events occurring after 1994, directed it to her health care providers, prohibited defendants from using the information for any other purpose, and required them to return it to the covered entities or destroy it at the end of the litigation. *Petition, Ex. H*. While the plaintiff claims it is overbroad to include information related to HIV, she has specifically alleged increased risk from the receipt of blood products which would apparently include increased risk of contracting a

blood-borne disease like HIV. Respondent appropriately limited the order given the breadth of the plaintiff's injury allegations.

More generally, the overbreadth issue emphasizes the need for a process in which parties can present their arguments regarding the scope of the waiver directly to the trial court and obtain a ruling that puts the parties and fact witnesses on notice of the scope of the waiver (subject to appellant court review). It is an efficient and transparent way to handle waiver issues. If such orders cannot be used to provide certainty, parties will be less likely to seek them. Health care providers may be more inclined to rely on their own analysis of the applicability of other HIPAA exceptions (like treatment, payment, and health care operations) and the scope of the patient's waiver rather than to seek a judicial ruling. Missouri law should not deprive trial courts of a useful tool in managing and limiting disputes over the scope of a waiver. It would be costly, burdensome, and fundamentally unfair.

CONCLUSION

Accordingly, this Court should quash the preliminary order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(g)

The undersigned certifies:

1. That this Brief complies with Rule 84.06(g) of this Court; and

   that this Brief contains 7,100 words according to the word count feature of Microsoft Office Word 2003 SP-3 software with which it was prepared.

2. That the disks accompanying this Brief have been scanned for viruses, and to the best of his knowledge are virus-free.

3. That this Brief meets the standards set out in Mo. Civil Rule 55.03.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing Brief and a diskette with the text of the Brief were served on this 3rd day of May, 2010, by United States mail, postage prepaid to the following individuals:

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