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Unrelated medical issues can hurt your case

Don't let defense counsel use unrelated medical issues to distract the jury and embarrass your client

By Eustace de St. Phalle with Andrew Clay
The Veen Firm, PC

A personal injury case is usually built on the medicine. The plaintiff must prove that he or she has bodily injuries that were caused by defendant's negligent conduct. Evidence of the plaintiff's injuries appears in the plaintiff's medical records. However, there are typically some marginally related or unrelated medical issues in these records. These can include injuries to other parts of the body, or injuries to the same body part that healed long ago.

Allowing unrelated or marginal medical issues to emerge in discovery or at trial can be damaging to plaintiff's case. First, defendants will try to find any other medical conditions, either pre-existing or occurring after the incident, that will act as alternative explanations for the plaintiff's current medical conditions, pain, mental state, diminished functional capacity, employability, etc. The defendant will try to deflect blame from itself wherever it can, and other potential causes are helpful to get the jury thinking that something other than defendant is to blame.

Second, some marginally related medical issues may arise that are embarrassing to the plaintiff. Some medical conditions may have been caused by your client's habits or behavior. Also, plaintiff's psychological issues, particularly any discussions with therapists, will reveal extremely personal materials. Such ancillary issues distract from the theme of your case, and at worst may shame the plaintiff, reducing sympathy from the jury.

It is important that we as plaintiffs' attorneys protect our clients from attacks based on unrelated or barely-related medical issues. The law provides significant protection of plaintiff's medical and mental privacy, barring discovery or admission of protected information unless it is directly relevant to the plaintiff's claims.

Privacy protections for medical information and records

The two main legal mainstays for the protection of plaintiff's medical information are the Constitutional right of privacy (Cal Const. Art. I §1) and the physician-patient privilege (Evid. Code, § 992). California recognizes a Constitutional right of privacy protecting discovery of a person's medical information. The courts have emphasized that a patient's medical conditions constitute "a quintessential zone of human privacy." (*Pettus v. Cole* (1996) 49 Cal.App.4th 402, 441.) Privacy protection extends to protection of information about one's medical conditions and medical history, as well as to any medical records.

Additionally, a patient's communications with her physician are confidential and privileged. These communications include "information obtained by an examination of the patient, transmitted between a patient and his physician in the course of that relationship," for "the purpose for which the physician is consulted, and includes a diagnosis made and the advice given by the physician in the course of that relationship . . ." (Evid. Code § 992) "The patient-physician privilege 'creates a zone of privacy' . . ." (*Binder v. Superior Court* (1987) 196 Cal.App.3d 893, 899.)

The two levels of protection – Constitutional right of privacy and statutory physician-patient privilege – are independent and overlapping. As stated by the Supreme Court, "The patient-physician privilege and the right of privacy are closely related protections against public disclosure of private information." (*Binder, supra,* 196 Cal.App.3d at 899.) Because they are independent, one form of protection may exist where the other is waived. Even where the right of privacy has been waived, "the codes provide a variety of protections that remain available to aid in safeguarding the privacy of the patient." (*In re Lifschutz, supra,* 2 Cal.3d at p. 437.) Conversely, "Notwithstanding waiver of a statutory privilege, a patient retains the more general right to privacy protected by the state and federal Constitutions." (*San Diego Trolley, Inc. v. Superior Court (Kinder)* (2001) 87 Cal.App.4th 1083, 1092 [admission of being under psychiatric care did not waive right to privacy of psychiatric records].)

The limited waiver of medical privacy in personal injury cases

When a patient makes a claim for personal injuries, the right of privacy regarding "an issue concerning the

condition of the patient" is waived "if such issue has been tendered by the patient" by filing suit for related injuries. (Evid. Code, § 996 [the "patient-litigant exception"].) However, a "patient-litigant" does not waive automatically all medical privacy. "Plaintiff is not compelled, as a condition to entering the courtroom, to discard entirely her mantle of privacy." (*Vinson v. Superior Court* (1987) 43 Cal.3d 833, 841-842.) Rather, only those issues that have been *directly put at issue* are waived. "[T]he scope of the inquiry permitted depends upon the nature of the injuries which the patient-litigant himself has brought before the court." *In re Lifschutz* (1970) 2 Cal.3d 415, 435.)

When a plaintiff's medical conditions are not put directly at issue by the case, courts interpret California's right of privacy to protect such information from disclosure. (*Britt v. Superior Court* (1978) 20 Cal.3d 844, 862-864.) In *Britt,* plaintiffs objected to the trial court's unlimited order which required them to supply information related to all past medical conditions, without regard to whether such conditions have any bearing on the present litigation. The California Supreme Court held that the trial court's order was improperly broad:

> [P]laintiffs are 'not obligated to sacrifice all privacy to seek redress for a specific (physical,) mental or emotional injury'; while they may not withhold information which relates to any physical or mental condition which they have put in issue by bringing this lawsuit, they are entitled to retain the confidentiality of all unrelated medical or psychotherapeutic treatment they may have undergone in the past.

(*Britt v. Superior Court, supra*, 20 Cal.3d 844, 864.)

Privacy protection for mental and emotional conditions

The law also provides protection for plaintiff's mental and emotional conditions. The California Supreme Court has affirmed that mental states are protected by the Constitutional right of privacy: "If there is a quintessential zone of human privacy it is the mind. Our ability to exclude others from our mental processes is intrinsic to the human personality." (*Long Beach City Employees Ass'n v. City of Long Beach* (1986) 41 Cal.3d 937, 944.) There is parallel protection for a patient's communications with psychotherapists (Evid. Code, §, 1014); again, this is independent of the Constitutional right of privacy and provides overlapping protection.

Where a plaintiff makes no separate claim for mental or emotional distress, a personal injury action seeking damages for (*inter alia*) noneconomic damages does *not* place plaintiff's psychiatric conditions at issue. Plaintiff's right to privacy in his or her psychotherapeutic records outweighs any need for discovery thereof. (*Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1016; see Weil & Brown, Cal. Prac. Guide, Civ. Proc. Bef. Trial §§ 8:305-8:305.3.) A plaintiff who seeks damages for personal injuries, including pain and suffering, does not thereby surrender the right to privacy in post-injury psychotherapeutic records. (*Davis, supra,* 7 Cal.App.4th at 1017.) If the defendant seeks a mental examination in a personal injury case, the plaintiff can make a statutory stipulation that "no claim is being made for mental and emotional distress over and above that usually associated with the physical injuries claimed" (Code Civ. Proc., § 2032.320), which will block the mental exam.

Even where an emotional distress claim is made, the constitutional right of privacy protects any issue that is not directly relevant to the litigation. (*Vinson, supra,* 43 Cal.3d 833, 841-842 [in sexual harassment case with emotional distress claim, plaintiff was not required to submit to extensive questioning about her sexual history].)

Blocking discovery of unrelated medical conditions

Because of the right to privacy, discovery of even *related* medical conditions is limited. The ordinary broad ambit of discovery, permitting fishing trips, is not applicable; the protected information must be "directly relevant": "It is not enough the [private medical] information may lead to relevant evidence." (*Binder, supra,* 196 Cal.App.3d 893 at 901.) Direct relevance means that the protected information is *essential* to determining the truth of the matters in dispute. (*Harris v. Sup. Ct.* (*Smets*) (1992) 3 Cal.App.4th 661, 665.) Importantly, "[m]ere speculation as to the possibility that some portion of the records might be relevant to some substantive issue does not suffice." (*Davis v. Superior Ct*. (1992) 7 Cal.App.4th 1008, 1018.) The party seeking access to constitutionally protected information has the burden of proving the *direct relevance* of the information sought. (*Id.* at 1017.)

Further, the court must not simply "open the doors" even when it agrees a medical issue is relevant. "[E]ven when discovery of private information is found directly relevant to the issues of ongoing litigation, it will not be automatically allowed; there must then be a 'careful balancing' of the 'compelling public need' for discovery against the 'fundamental right of privacy.'" (*Board of Trustees v. Superior Court of Santa Clara County* (1981) 119 Cal.App.3d 516, 525.)

> Even where the balance, because of a 'compelling state purpose,' weighs in favor of disclosure of private information, the scope of such disclosure will be narrowly circumscribed; such an invasion of the right of privacy 'must be drawn with narrow specificity.' [Citation.] . . . In balancing the respective interests, it is also the rule that 'if state scrutiny is to be allowed, it must be by the least intrusive manner.'

(*Binder v. Superior Court*, 196 Cal.App.3d 893, 900-901, *citing, Board of Medical Quality Assurance v. Gherardini* (1979) 93 Cal.App.3d 669, 680.)

In general, a medical condition is "put at issue" in a personal injury case when it relates to the same part of the body claimed to be injured by defendant's negligence. Judicial Council Form

Interrogatory nos. 10.1 and 10.3 inquire into "complaints or injuries that involved the same part of your body claimed to have been injured in the INCIDENT." This question may in fact be overbroad in some cases where, for example, a different area of the "body part" was affected, or the injury was remote in time from the incident.

It is important for plaintiff to resist improper or overbroad discovery into plaintiff's unrelated medical conditions. Where defendant propounds discovery requests, or asks questions at deposition that delve into unrelated conditions, the request or question should be objected to. A standard objection should cite the Constitutional right of medical privacy and Evidence Code section 992 as well as the lead case *Britt v. Superior Court.* Answers to questions and production of documents should be limited to information on relevant medical issues. Usually an objection suffices to assert these protections, since the propounding party must make a motion to compel discovery. However, if a certain issue comes up consistently in the medical records, it may be prudent to seek a protective order to limit discovery into such issues. (Code Civ. Proc., § 2025.420 (re depositions); § 2030.090 (interrogatories); § 2031.060 (requests for production).)

Where a defendant subpoenas medical records from plaintiff's current or past health care providers where no treatment of relevant body parts occurred, the plaintiff should move promptly to quash the records subpoena under Code of Civil Procedure section 1987.1. In quashing the subpoena, plaintiff should emphasize that it is the *burden of defendant to justify discovery* by showing both the *direct relevance* of the information (*Britt*, *supra,* 20 Cal.3d at 855-856) and the proper limitation of the requested scope of disclosure (*Board of Trustees, supra*, 119 Cal.App.3d 516, 526).

Blocking introduction of unrelated or marginal conditions at trial

Evidence of a prior accident is admissible to show that a present physical condition has a cause antecedent to the accident being litigated. (*Johnson v. Matson Navigation Co.* (1958) 163 Cal.App.2d 336). However, if the plaintiff is not claiming injury to the same body part, then evidence of a prior medical condition has no probative value and it is error to admit it. (*Downing v. Barrett Mobile Home Transp*., 38 Cal.App.3d 519, 525.) In *Downing,* an auto accident case, the defense counsel cross examined plaintiff regarding a kidney condition (kidney stone) that occurred as the result of a previous accident. The Court of Appeal found this to be an improper inquiry, as "there was no reason to admit such evidence; it had no probative value as plaintiff was not claiming kidney damage as a result of this accident." (*Ibid*.)

Plaintiffs should be prepared to make a motion in limine to preclude any unrelated medical information or medical records. The motion should assert the Constitutional right of privacy as well as relevant statutes protecting physician-patient communications (Evid. Code § 992) and/or therapist-patient communications (Evid. Code, §, 1014), and applicable case law. Additionally, plaintiff should argue that the information should be precluded as prejudicial, remote, and/or unduly time-consuming. (Evid. Code, § 352; see *People v. Cargenas* (1982) 31 Cal.3d 897, 904 (if prejudicial effect of admitting evidence outweighs the probative value, trial court should exclude the evidence). If possible, argue that discussion of the marginal medical issue will be a big distraction that will waste time and resources in an already lengthy trial. Medical records may be redacted to protect privacy.

Conclusion

Your client's private medical conditions are at risk for exposure during discovery and trial. It is imperative to stand up for plaintiff's privacy rights and prevent distracting and embarrassing issues from clouding the case. The law provides significant protections which should be employed to keep out extraneous material and keep the jury focused on the substantive causation and damage issues in your case.

Please contact the authors if you would like a sample motion in limine to exclude unrelated medical conditions.


de Saint Phalle

Eustace de Saint Phalle is an attorney with The Veen Firm P.C. *in San Francisco. He focuses his practice on civil litigation in a variety of areas, including industrial accidents, product liability, exceptions to workers' compensation, premises liability, professional malpractice, medical malpractice, auto accidents, maritime accidents, as well as business disputes and copyright violations. He will provide additional materials for briefs or motions in limine upon request.*

Assisting in the preparation of this article was Andrew Clay, a litigation paralegal at The Veen Firm, P.C. *since 2003. He has worked on a variety of civil litigation cases including personal injury, product liability, auto accident, employment law, Social Security disability, and landlord-tenant.*
He works on all aspects of case development, focusing on drafting discovery, motions, and other pleadings.